

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 December 2014

Public Authority: The Local Government Ombudsman
Address: The Oaks
No 2 Westwood Way
Westwood Business Park
Coventry
CV4 8JB

Decision (including any steps ordered)

1. The complainant has requested the source of two statements made by the Local Government Ombudsman (LGO) in a draft report produced in response to a complaint about a local authority. The LGO responded initially stating that the information was subject to a statutory prohibition and applied section 44. In its review the LGO stated that it had destroyed the information but sought to provide some details of the source of the information which led to the statements through directly answering the complainant's questions. It could not however provide any copies of documents as that information was no longer held.
2. The Commissioner's decision is that the LGO was correct to apply section 44 to the information. As this is the case he has not needed to consider the subsequent destruction of the relevant information.
 - The Commissioner does not require the authority to take any steps.

Request and response

3. On 3 June 2013 the complainant wrote to LGO and requested information in the following terms:

"Will you please supply me with the source of your claim that I have been offered compensation by Stockton Borough Council and that a bath was fitted for me free of charge....

Will you also please tell me the source of your information regarding the problems with the baths that was included in your correspondence of 15th November 2012 which we received in May 2013."

4. The LGO responded on 24 June 2013. It stated that the information was exempt under section 44 of the Act (statutory prohibition on disclosure).

5. The complainant wrote back to the authority on 3 July 2013. He said:

"Will you not dispose of my complaints file in November 2013 as stated in your letter as we are considering an appeal.

I have still not received the source of your information requested in my letter of 3rd June regarding the fitting of the baths. I have highlighted these items in orange on the enclosed copy of the Ombudsman's' Final Decision,

You have also not supplied me with the source of your claim that I have been offered compensation by Stockton Council which was in your interim report."

6. The LGO initially did not respond to the request as it treated the request as an application to review the Ombudsman's decision rather than a request under either FOIA or the Data Protection Act (the 'DPA'). However following the Commissioner's intervention it carried out an internal review and wrote to the complainant on 21 March 2014. It said however that in reviewing the request it had discovered that the requested information had now been destroyed. It said that the information had been held as part of a paper file, rather than on the electronic copy of its records, and that the paper file had been destroyed as part of its normal records management procedures. It did try to answer the questions of the complainant however and said that the source of the information had been interviews it had carried out with the complainant and his wife as part of its investigations.

Scope of the case

7. The complainant initially contacted the Commissioner on 28 August 2013 to complain about the way his request for information had been handled. Following the final response of the LGO the complainant wrote to the Commissioner on 7 April 2014 outlining the reasons why he remained unhappy with the LGO's response

8. The complainant considers that the LGO's response is inadequate because it destroyed copies of the information after he had requested it and specifically asked it not to destroy it. He is also unhappy that the LGO initially exempted the relevant information under section 44 of the Act.

Reasons for decision

Initial considerations

9. There are two separate elements to this complaint, the initial refusal under section 44 and the subsequent admission that the relevant information had been destroyed by the LGO.
10. The Commissioner notes that if the initial application of section 44 was correct then the subsequent destruction of the information is, insofar as compliance with FOIA is concerned, immaterial, as the complainant would not have been entitled to receive that information from the LGO even if it had been kept. As the act of destruction would not have affected the outcome, there would be no requirement for the Commissioner to consider the issue further.
11. The Commissioner has therefore considered the application of section 44 in the first instance.

Section 44

12. Section 44 provides that

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—

(a) is prohibited by or under any enactment,

(b) is incompatible with any EU obligation, or

(c) would constitute or be punishable as a contempt of court.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

13. Section 44(1)(a) therefore provides that information is exempt if disclosure is prohibited by any enactment. In this case the Commissioner must therefore consider whether the disclosure of the

information requested by the complainant is prohibited from disclosure by statute. If this is the case then the exemption will apply.

14. The LGO says that disclosure of the information in question was prevented by section 32(2) of the Local Government Act 1974 (the LGA). This provides that information obtained by the LGO in the course of, or for the purposes of, an investigation carried out by the LGO shall not be disclosed, unless certain exceptions apply. The Commissioner must therefore decide whether
- a) the information was obtained by the LGO
 - b) whether the information was obtained as part of, or for the purposes of an investigation under Part III of the LGA, and
 - c) whether any of the exceptions to the prohibition on disclosure apply in this case.

Has the information requested been obtained by the LGO?

15. The requested information is the source of information which led to the LGO's statements on two matters which the complainant does not regard as factually correct.
16. If the information was held by the LGO, the Commissioner accepts that it would have been obtained by the LGO for the purposes of or in the course of its investigation. The source would most likely be either the local authority under investigation or the complainant.
17. The Commissioner notes that the LGO does not dispute that it did hold the requested information and he accepts that the LGO would have no other reason for holding such information.

Was the information obtained in the course of, or for the purposes of, an investigation under Part III of the LGA?

18. Part III of the LGA covers investigations by the LGO into complaints about maladministration in local government. In order for section 32(2) of the LGA to apply, the information must have been obtained in relation to such an investigation.
19. The Commissioner notes that the investigation in this case related to a complaint of potential maladministration by a council. The complaint related to work carried out by a private contractor under the supervision of the council at the complainant's home. The LGO investigated the complaint and wrote a draft report on her findings. Following the LGO's normal procedures she then provided a copy to the complainant to comment upon. The complainant considered some statements in the

draft report to be factually incorrect; hence his request for information to the LGO for the source of the incorrect statements.

20. The Commissioner therefore considers that the information was obtained during the course of, or for the purposes of an investigation under part III of the LGA.

Would any of the exceptions from section 32(2) of the LGA apply?

21. Sections 32(2)(a) to (c) of the LGA set out the specific situations where the prohibition on disclosure does not apply. The Commissioner accepts that none of those exceptions applies in this case.

Conclusions

22. The Commissioner is therefore satisfied that the requested information in this case was subject to a statutory prohibition on disclosure, provided in section 32(2) of the LGA. Therefore it is exempt from disclosure under FOIA by virtue of the absolute exemption at section 44.
23. The initial response to the complainant's request for information was correct in law and the complainant was not therefore entitled to receive the information which he had requested. Although the subsequent destruction of the information after the request for review should not have occurred, this does not affect the outcome in terms of the complainant's rights under FOIA. The error which led to the destruction of the relevant information in this case does not alter the fact that the complainant was not entitled to that information as it was exempt under section 44.
24. There is therefore no requirement for the Commissioner to consider this aspect of the complaint further in this instance, although he would point out the importance of adherence by all public authorities to their records management policies and the fact that the deliberate destruction of information in order to avoid compliance with an information request might constitute an offence under section 77 of FOIA. The Commissioner wishes to emphasise that there is no suggestion that this is what occurred in this case.

Right of appeal

25. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

26. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
27. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF