

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 12 February 2013

**Public Authority:** Kirklees Metropolitan Council

**Address:** Civic Centre 3  
Market Street  
Huddersfield  
HD1 2TG

#### **Decision (including any steps ordered)**

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1. The complainant requested a full copy of the Shannon Matthews Serious Case Review, suitably redacted, from Kirklees Metropolitan Council (the 'Council') together with associated copies of recorded communications between the Council and the Department for Education ('DfE') and/or Kirklees Safeguarding Children Board ('KSCB') on the issue of full publication of the report and communications regarding publication. The Council refused the request on the basis that it did not hold a copy of the report or recorded communications as outlined for the purposes of FOIA, but disclosed some correspondence during the investigation.
2. The Information Commissioner (the 'Commissioner') has investigated and has concluded that the Council was entitled to say that it did not hold a copy of the requested report. It correctly withheld a letter and related emails on the basis of the exemption contained in section 40(2) (personal information) of FOIA.
3. The Commissioner does not accept that communications between the Council and the KSCB are not held by the Council. He requires the public authority to take the following steps to ensure compliance with the legislation.
  - Conduct searches for any communications between it and the KSCB on the issue of full publication since the government decision to publish in full in June 2010 and either disclose these communications to the complainant or issue a valid refusal notice.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Background**

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5. Serious case reviews are commissioned by the Director of the Local Safeguarding Children Board (LSCB) under Regulation 5 of the Local Safeguarding Children Board Regulations 2006.
6. According to the LSCB Regulations, a serious case is one where abuse or neglect of a child is known or suspected; either the child has died or the child has been seriously harmed; and there is cause for concern as to the way in which the authority, their Board partners or other relevant persons have worked together to safeguard the child.
7. Statutory guidance indicates that on approval of the final Serious Case Review ('SCR'), the LSCB should publish only the SCR executive summary.
8. The SCR executive summary was produced dated March 2010 and has been published. In this case there is an interim ex-parte Injunction which prohibits publication of the SCR overview report. The Injunction was discharged on 22 May 2012 on the basis the parties agreed not to publish the SCR overview report until associated High Court proceedings, which stand adjourned, are concluded. As at the time of writing this notice the Commissioner understands that the proceedings before the High Court are not concluded.
9. Aside from the ongoing High Court proceedings the Council advised both the Commissioner and the complainant that there is a worldwide reporting restriction, by Order of the High Court, which was made on 2 December 2009 and applies in respect of the four children of Karen Matthews who were living with her at the time her daughter Shannon went missing. This Order has effect until 9 September 2021 and also gives protection to the key adults, which include Karen Matthews, her former partner and the fathers of the children, to the extent that information was not in the public domain at the date of the Order.
10. On 10 June 2010, the Parliamentary Under Secretary of State for Children and Families announced that, in addition to the executive summary, LSCBs should publish overview reports of all new SCRs initiated on or after 10 June 2010 unless there are compelling reasons relating to the welfare of any children directly concerned in the case for this not to happen.

## Request and response

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11. On 27 January 2012 the complainant wrote to the Council and requested information in the following terms:

*"I would like to ask for a suitably redacted copy of the Shannon Matthews serious case review (overview report) held by Kirklees Council.*

*I would also like copies of recorded communications between the council and the DfE and/or Kirklees Safeguarding Children Board on the issue of full publication since the government decision to publish in full in June 2010.*

*I would also like the recorded information held by the council relating to those communications regarding publication.*

*In both cases, redactions of any information of the kind redacted on the published Peter Connelly and Khyra Ishaq full SCRs is acceptable.*

*I do think it is unlikely that all the information contained in letters, emails and other records on the specific issue of publication would be subject to redaction.*

*If you need to discuss or clarify any of the above, please contact me."*

12. The Council responded on 27 February 2012. It stated that it did not hold any of the requested information.
13. The complainant requested an internal review on 27 February 2012. On 23 April 2012 the Council wrote to the complainant and confirmed that since 10 April 2012 there had been a High Court Injunction in place prohibiting publication of the redacted overview report of the SCR pending a full hearing and that in those circumstances the Council would hold the internal review in abeyance pending the conclusion of those proceedings.
14. On 10 August 2012 the Council provided its internal review result. It maintained its position that it did not hold the SCR overview report nor did it hold communications between the KSCB and the DfE for the purposes of FOIA.
15. The Council did, however, disclose two letters to the complainant at this point that it regarded as held by it for the purposes of FOIA (details outlined in paragraph 40 of this notice).

16. The delay in the Council's handling of the internal review in this case is dealt with under the '*Other Matters*' section.

### **Scope of the case**

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17. The complainant contacted the Commissioner on 24 April 2012 to complain about the way his request for information had been handled. He asked the Information Commissioner to consider his view that the Council had made no attempts to provide "*any explanation at all as to why the information requested – which extends beyond the report itself – has not been provided.*"
18. At the start of his investigation the Commissioner contacted the Council with a view to clarifying the status of the Injunction. The Council explained that; although the Injunction restraining publication of the SCR overview report had been lifted on 22 May 2012, it was on the basis of assurances given by the parties to the proceedings that they would not publish the SCR overview report pending the trial. The Council said it was of the view that, due to the ongoing court proceedings in this case, even placing a redacted version of the SCR overview report in the public domain would constitute a contempt of court. The Council advised that it intended to write back to the complainant to this effect.
19. Additionally, the Council said that it was not in a position to respond to the Commissioner's pending investigation for the same reasons. He therefore issued an Information Notice on 17 July 2012 which required the Council to respond to his investigation questions and which asked for some more information about the High Court Injunction, together with evidence of the Council's claim that the Kirklees Safeguarding Children Board is a separate body to the Council and is not a public authority in its own right for the purposes of FOIA.
20. The Council provided its response to the Information Notice on 10 August 2012 which also included details of the searches it had undertaken for the requested information, and explained why it did not hold the requested information. In addition the Council sent the complainant a copy of its response to the Information Notice, together with the outcome of its internal review.
21. In relation to the report and recorded communications between the Council and the KSCB, the Commissioner has considered whether, on the balance of probabilities, any information within the scope of the request was held by the Council at the time of the request, and whether any such information is held for the Council's own purposes.

22. He has also considered whether the Council is entitled to rely on section 40(2) in relation to withholding a letter and related emails about the impact on third parties of publication of a redacted overview report.

### **Reasons for decision**

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23. In reaching his decision in this case, the Commissioner has considered a previous case about a similar request for information, involving Doncaster Metropolitan Borough Council. The Commissioner issued a decision notice in that case (*reference FS50368110*) which held that the Doncaster SCR overview report was not held for Doncaster Council's own purposes. Doncaster Safeguarding Children Board is a statutory body in its own right distinct from the Council and is not a public authority for the purposes of the FOIA in its own right.
24. That decision was appealed to the First-tier Tribunal (Information Rights) (*EA/2011/0201*). The Tribunal, during the appeal, decided as a preliminary issue that the Council did not hold a copy of the report falling within the scope of the request. The DfE published a copy of the report on 29 March 2012. In light of the publication the appellant withdrew his appeal.

### **Is the requested information held by the Council for the purposes of the Act?**

25. Section 1(1) provides that:

*"Any person making a request for information to a public authority is entitled –*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if that is the case, to have that information communicated to him."*

26. Section 3(2) provides that:

*"For the purposes of this Act, information is held by a public authority if –*

*(a) it is held by the authority, otherwise than on behalf of another person, or*

*(b) it is held by another person on behalf of the authority."*

***Serious case review overview report***

27. The Commissioner must first determine whether the report is held by the Council for the purposes of FOIA.
28. Where information is held by a public authority *to any extent* for its own purposes, then it holds that information otherwise than on behalf of another person. That information is, therefore, held by the public authority for the purposes of FOIA.
29. The only circumstance in which information physically in its possession would not be held by a public authority by virtue of section 3(2)(a) would be where information is only held on behalf of another person, and is not held at all for that public authority's own purposes.
30. In relation to this request, the Council argued that the information was not held for its own purposes and was therefore not held for the purposes of FOIA by virtue of section 3(2)(a). In support it explained that there is a clear distinction between Kirklees Safeguarding Children Board ('KSCB'), which is a statutory body in its own right, and the Council which is a statutory member of the KSCB. The Council argued that because it is a statutory member of the KSCB it does not follow that it is in possession or control of the relevant documents.
31. The Council explained that the KSCB is a statutory body under Section 13 of the Children Act 2004 and that its functions are set out in Sections 13-16 of the 2004 Act and in the Local Safeguarding Children Board Regulations ('LSCB') 2006. It said that Serious Case Reviews ('SCRs') are commissioned by the KSCB under Regulation 5 of the LSCB Regulations 2006 and that the Council is bound by the 2006 regulations under S16(2) of the 2004 Act.
32. The Council also provided arguments in support of KSCB's independence from it. As part of its submissions the Council explained that the KSCB operates very tight document control in that written numbered copies of SCR reports are hand delivered two days before meetings and signed for by board members. Papers are then retrieved at the end of the meeting by the KSCB and destroyed as appropriate.
33. The Council explained:

*"The Serious Case Review (overview report) is not 'held' by the Council for the purposes of the FOIA. The report was commissioned and owned by Kirklees Safeguarding Children Board ('KSCB') pursuant to Local Safeguarding Children Board Regulations 2006. KSCB is a separate statutory entity from the Council. The Council was required to set up a Local Safeguarding*

*Children Board pursuant to Section 13 of the Children Act 2004. The Board must include representative(s) of the Council which set it up by virtue of Section 13(2) of the Children Act 2004, and regulation 3 of the Local Safeguarding Children Board Regulations 2006 (S1 2006/90). The report is held by the KSCB which is not subject to FOIA 2000. Any physical copies of the SCR overview report in possession of the Council are held solely on behalf of the KSCB and not held by the Council itself for FOIA. The SCR overview report is provided to the Council in confidence as part of Kirklees Council's statutory requirement to be a member of KSCB but is then subject to the usual obligations of confidentiality and data protection. The recommendations of the SCR are carried forward into the Executive Summary which has been published. This is used as a basis to draw up action plans to implement any lessons learned. There is no business purpose for which the SCR overview report or communications requested should be held by the Council."*

34. The Council confirmed to the Commissioner that it had not received a copy of the final Serious Case Review (SCR) overview report in its own right. It explained that the SCR was delivered to the Director of Children and Young People Services and the legal advisor to the KSCB, and that the legal advisor has retained a physical copy but that this is held on behalf of the KSCB.
35. In case reference *FS50368110* the Information Commissioner held that Doncaster Safeguarding Children Board is a statutory body in its own right, distinct from that Council. The Commissioner is satisfied that that the KSCB fulfils the same statutory functions and that it is subject to the same government statutory guidance as the Doncaster Safeguarding Children Board.
36. In that case the Commissioner also held that in the case of the Doncaster SCR overview report the information was not held for Doncaster MBC's own purposes. Having considered the evidence in this case, the Commissioner is satisfied that the requested report is not held for Kirklees Council's own purposes. He has therefore concluded that the Council was correct to say that the requested information is not held for the purposes of FOIA. The Commissioner has noted that the KSCB is not a public authority for the purposes of FOIA.
37. The Commissioner notes that, while maintaining that the information was not held for the purposes of FOIA, the Council also provided him with its arguments for the exemptions in section 44 (prohibition on disclosure), section 41 (information provided in confidence) and section 40 (personal information) with respect to withholding the requested information in this case. As the Commissioner has concluded that the

information is not held for the purposes of FOIA, he has not found it necessary to consider these exemptions any further in any detail, although he is satisfied that some or all of them would apply to the information if it were held by a public authority for the purposes of FOIA.

*Conclusion*

38. Having considered this complaint in the light of his previous relevant decision notice on this subject, the Commissioner has concluded that the Council does not hold the SCR overview report for the purposes of FOIA. Even if it did, given the yet to be concluded court proceedings and the High Court Order, such information would be exempt from disclosure under section 44 of FOIA. It is likely that section 41 (information provided in confidence) and section 40(2) (personal information) would also apply.

***Communications between the Council and the KSCB and/or between the Council and DfE/information held by the Council on the issue of full publication***

39. In this case the complainant also requested copies of recorded communications between the Council and the DfE and/or the KSCB on the issue of full publication since the government decision to publish in full in June 2010, and any recorded information held by the Council relating to those communications regarding publication.
40. On 10 August 2012, as part of its internal review, the Council disclosed two pieces of correspondence to the complainant. One letter dated 11 June 2012 was sent by the Director of the Safeguarding Group at the DfE to the Council's Director of Children's Services and to the independent chair of the KSCB. The Council said because this letter was addressed to a Council officer in their capacity as a statutory director (as opposed to their role as a member of the KSCB) and relates to the publication of the overview report, it had taken the view that it is held by the Council for the purposes of FOIA. It also disclosed a copy of a letter from Tim Loughton MP, then Parliamentary Under Secretary of State for Children and Families, dated 10 June 2012 addressed to Directors of Children Services.
41. The complainant has questioned whether all the relevant information has been disclosed to him. In cases such as this, where there is some dispute as to whether a public authority holds information falling within the scope of the request, the Commissioner has been guided in his approach by a number of Tribunal decisions which have used the civil standard of the balance of probabilities, ie whether on the balance of probabilities the Commissioner is satisfied that no further information is

held. In deciding where this balance lies the Commissioner will take into account the scope, quality, thoroughness and results of the searches carried out by the public authority, as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.

42. The Council confirmed that its IT Service Desk restored a copy of the mailbox for its Director of Children & Young People Services on 25 June 2012, with the oldest restore date being 1 January 2012. This enabled the Director to retrieve deleted emails from the beginning of December 2011. Searches were carried out against her only point of contact at the DfE.
43. The Council confirmed that no searches were conducted for communications with the KSCB because the KSCB is not subject to FOIA and, in the Council's view, any communications between it and the KSCB are not held by the Council for the purposes of FOIA. The Commissioner does not agree that this is a valid argument in relation to correspondence between the Council and the KSCB. He considers that any such correspondence, which is a written exchange between the two parties, would be held for the purposes of FOIA. He has, therefore, ordered a step for the Council to conduct searches for any such recorded information and to either provide it to the complainant or issue a valid refusal notice.
44. The Council advised that the bulk of emails were between the DfE and the KSCB, some of which were copied to the Director in her capacity as a statutory member of the KSCB. The Council confirmed that the Director routinely deletes emails in accordance with the Council's policy, and whilst only a snapshot of her email box was restored, she was not aware of any recorded information relevant to the complainant's request which had been deleted and was not recoverable.
45. The Council stated there would be no statutory or business reasons for it to retain communications regarding publication.
46. Having partially restored the deleted emails the Council also identified an email from the KSCB to Council officers enclosing a letter dated 24 January 2011 from the KSCB to a named individual at the DfE about the impact of a redacted overview report on third parties. The Council accepted that it held this letter and related emails for the purposes of FOIA but withheld them on the basis of section 40(2), because disclosure would breach the First Data Protection Principle, namely:

*"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-*

- a) *at least one of the conditions in Schedule 2 of the DPA is met, and*
- b) *in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."*

47. In reaching its conclusion the Council balanced the legitimate interests of the public in having access to the information against the interests of the third parties referred to in these documents, and, considered whether it would be unfair to disclose the information given they would have had a reasonable expectation of confidentiality. These documents, by their nature, contain a mass of personal data, much of which is sensitive personal data.
48. The Council considered whether it would be fair in all the circumstances to identify any third parties. As much of the data is sensitive personal data, it considered the conditions set out on Schedule 3 to the DPA and concluded that none of them would be met in this case. Accordingly disclosure of this information would not be fair and lawful processing and is exempt from disclosure under section 40(2) of FOIA. The Council advised, for the avoidance of doubt, that this kind of information would never be included in an overview report started after June 2010 for the reasons set out above.
49. The Commissioner has viewed the withheld information and agrees with the Council that section 40(2) applies.

### *Conclusion*

50. The Commissioner has concluded that the Council was incorrect in its view that communications between it and the KSCB are not held for the purposes of FOIA. As the Council has not conducted any searches to determine whether it holds such information, the Commissioner is unable to determine whether the Council has located all the information it holds relevant to this part of the request. He now requires the Council to carry out such searches. The Commissioner has determined that the Council has properly applied section 40(2) to the identified information which it has withheld.

### **Other matters**

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51. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his '*Good Practice Guidance No 5*', the Commissioner considers that these internal reviews should be completed

as promptly as possible. While no explicit timescale is laid down by FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. In this case the Commissioner is concerned that it took over 115 working days for an internal review to be completed, despite the publication of his guidance on the matter. He does however concede that the circumstances in this particular case are unusual to the extent that some of the withheld information was the subject of ongoing legal proceedings.

## Right of appeal

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52. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

53. 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.
54. 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**