

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 April 2024

Public Authority: Local Government Association
Address: 18 Smith Square
London
SW1P 3HZ

Decision (including any steps ordered)

1. The complainant has requested information about the recruitment for two roles by Sandwell Metropolitan Borough Council ("SMBC"). The Local Government Association ("the LGA"), which was involved in facilitating the recruitment, disclosed information subject to some redactions under sections 40(2) (personal information), 41(1) (information provided in confidence), and 43(2) (commercial interests) of FOIA.
2. The Commissioner's decision is that, in respect of sections 40(2) and 41(1) the LGA is entitled to withhold the information, but in respect of section 43(2) the LGA is not entitled to withhold the information. The Commissioner is also satisfied that all relevant information has been identified in respect of the request. However, the Council breached section 10(1) and section 17(1) by failing to respond to the request within the statutory period.
3. The Commissioner requires the LGA to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under section 43(2).
4. The LGA must take these steps within 30 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.

Request and response

5. On 21 June 2023, the complainant wrote to the LGA and requested information in the following terms:

"The LGA was directly involved in securing the position as Interim Chief Executive of Kim Bromley Derry and the position of Imogen Walker as Head of the Leader's Office – both at Sandwell Metropolitan Borough Council (SMBC).

Please disclose all records relating to these appointments excluding purely personal communications with Bromley-Derry and Walker. Obviously all records passing between the LGA and SMBC/Individual Councillors must be disclosed as should records of communications with third parties involved in these appointments.

'Records' include correspondence, emails, telephone attendance notes, WhatsApp/other social records, and all records of whatsoever nature created for the purpose of securing the said individuals in the respective posts."

6. The LGA responded on 16 August 2023. It stated that information was held. It disclosed this information subject to redactions under sections 40(2), 41(1), and 43(2).
7. On 21 August 2023, the complainant wrote to the LGA and sought an internal review, on the basis that they disagreed with the withholding of information, and further, that not all information had been identified.
8. Following an internal review the LGA wrote to the complainant on 19 September 2023. It stated that no further information had been identified. It also maintained the application of sections 40(2), 41, and 43(2), but provided some advice and assistance about the parties in correspondence.

Reasons for decision

Section 40(2) – Personal information

9. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
10. Section 3(2) of the Data Protection Act 2018 defines personal data as:

“any information relating to an identified or identifiable living individual.”

11. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
12. In this case the LGA withheld the names of individuals, email addresses, and telephone numbers within email and WhatsApp communications. The Commissioner is satisfied that this information will represent personal data.
13. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”
14. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
15. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.
16. The Commissioner considers that the complainant is pursuing a legitimate interest - transparency around communications that the LGA has entered into about recruitment - and that disclosure of the requested information is necessary to meet that legitimate interest.
17. However, the Commissioner also recognises that the request seeks the identities and contact details of officers within the LGA, and also third parties who are officers of other public authorities – including SMBC and Hertfordshire County Council - who have engaged, or otherwise been copied into, correspondence with the LGA. The Commissioner notes that there is significant caselaw relating to such information, and which has consistently found that the rights and freedoms of those individuals must be protected save only in occasional situations where the legitimate interest is significant and overriding. This caselaw is reflected in the Commissioner’s guidance on section 40(2), and the decision

notices that the Commissioner regularly issues in such cases (e.g., IC-174200-P5G01¹, IC-208893-Y8N2²).

18. In the circumstances of this case, the Commissioner does not consider that any significant and overriding basis has been evidenced for the disclosure of the individuals' personal data. Whilst these individuals have been involved in communications on behalf of the LGA, or other public authorities, in respect of recruitment, this does not provide a default justification for their identities to become a matter of public record.
19. The Commissioner is also aware that the LGA has otherwise disclosed the requested information, subject to redactions. The Commissioner considers that this disclosure - including substantive parts of correspondence from the Interim Director for Human Resources at SMBC to the LGA - provides transparency about the nature of the correspondence, and that this addresses the legitimate interest being pursued by the requester.
20. The Commissioner has therefore determined that there is insufficient legitimate interest to outweigh the fundamental rights and freedoms of the individuals. Therefore, he considers that there is no legal basis for the LGA to disclose the information and to do so would be in breach of principle a.
21. The Commissioner's decision is that the LGA is entitled to rely on section 40(2) of FOIA to refuse to provide the information.

Section 41 – Information provided in confidence

22. Section 41(1) of FOIA states that information is exempt from disclosure if the information was obtained by the public authority from any other person and the disclosure of the information to the public would constitute an actionable breach of confidence.
23. In order for section 41 to be engaged, the following criteria must be fulfilled:
 - the authority must have obtained the information from another person,

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024465/ic-174200-p5g0.pdf>

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4025357/ic-208893-y8n2.pdf>

- its disclosure must constitute a breach of confidence,
- a legal person must be able to bring an action for the breach of confidence to court, and
- that court action must be likely to succeed.

Was the withheld information obtained from another person?

24. In this case, the LGA has relied on section 41(1) to withhold parts of correspondence relating to the recruitment of an interim Chief Executive, and Head of Leader's Office. The LGA considers the correspondence to represent information that has been obtained from another person, as it represents information that was only provided to the LGA by the two subsequently successful candidates for the purposes of recruitment.
25. The Commissioner has viewed the withheld information. The Commissioner is satisfied that the information relates to the recruitment of the two individuals. He also considers that as the information contains discussion of the individuals and their contact with the LGA for the purposes of recruitment, its disclosure would reveal the content of these discussions. Therefore, the Commissioner considers the information to have been obtained from another individual and so this requirement of section 41(1) is met.

Would disclosure constitute an actionable breach of confidence?

26. For section 41(1)(b) to be met, disclosure of the withheld information must constitute an actionable breach of confidence. In the Commissioner's view a breach will generally be actionable if:
- The information has the necessary quality of confidence.
 - The information was communicated in circumstances importing an obligation of confidence.
 - Unauthorised disclosure would cause detriment to either the party which provided it or any other party.
27. In order for the withheld information to have the necessary quality of confidence, it must be more than trivial and not otherwise accessible. The Commissioner is satisfied that the withheld information is not trivial as it relates to the recruitment of two individuals into senior posts, and represents early discussions entered into by those individuals about being recruited. Furthermore, the LGA has confirmed that only a limited number of people within the LGA have access to the withheld information and so the withheld information is not otherwise accessible.

Therefore, the Commissioner considers the withheld information to have the necessary quality of confidence.

28. The Commissioner understands that the information was provided by the two individuals in the context of recruitment. The Commissioner therefore considers that the individuals would reasonably expect those circumstances to import an obligation of confidence.
29. The Commissioner also considers that disclosure of the withheld information would cause detriment to the individuals, as it would reveal detail about their personal circumstances that was only provided by them for the purposes of recruitment. Therefore, the Commissioner is satisfied that the three tests are met and so is also satisfied that disclosure would constitute an actionable breach of confidence.

Would an actionable breach of confidence succeed?

30. The exemption at section 41 is not subject to the public interest test at section 2(2) of FOIA. However, the Commissioner is mindful that an action for breach of confidence will fail if there is a public interest defence to disclosure.
31. With regards to the public interest, in its response to the Commissioner, the LGA acknowledged the public interest in the recruitment to two senior roles. However, the LGA argues that there is already public transparency about this - including through the disclosure of information to this request - and that it also considers that there is a strong public interest in protecting an individual's right to privacy when they enter candid conversations about their potential recruitment.
32. The Commissioner recognises that there is a public interest in the disclosure of the withheld information as the information relates to the recruitment of senior staff at a local authority. However, he also recognises that there is a need to protect the integrity of the recruitment process, and the ability for potential candidates to enter into candid discussions in the context of recruitment.
33. Furthermore, the Commissioner considers that disclosure of the withheld information may damage the LGA's ability to facilitate the recruitment of individuals in the future, as it would discourage other individuals from entering into candid discussions if they felt that their privacy would be infringed upon, and the information provided would be made public. The Commissioner does not consider that this would be in the public interest.
34. The Commissioner considers that in this case, the public interest lies in maintaining the obligation of confidence. Therefore, he finds that the LGA is entitled to rely on section 41(1) of FOIA to refuse to provide the withheld information.

Section 43(2) – Commercial interests

35. Information can be withheld under section 42(3) of FOIA if disclosure would prejudice the commercial interests of any person, including the public authority holding it.
36. The LGA has applied this exemption to a single paragraph contained within an email. The LGA has explained that this information relates to working pattern and day rates.
37. The LGA explained to the Commissioner that it considers disclosure of the information would prejudice the commercial interests of one of the individuals being recruited, as well as SMBC.
38. The LGA explained that this is because it considers that disclosure of the information could potentially harm “competitive advantage, commercial strategies, or ongoing contractual and financial negotiations”.
39. The Commissioner notes that the LGA has provided very limited submissions, despite being advised of the specific evidence the Commissioner invites in respect of section 43(2). The LGA has not provided any evidence for the claimed prejudice, nor has it provided any evidence that it has consulted with the third parties, or that its argument is based on a prior knowledge of their concerns.
40. In the absence of any evidence provided by the LGA, the Commissioner cannot conclude that the exemption is engaged.
41. Therefore, he finds that the LGA is not entitled to rely on section 43(2) of FOIA to refuse to provide the withheld information.

Section 1 – General right of access to information

42. Under section 1(1) of FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b), to have the information communicated to them if it is held and is not exempt information.
43. The request in this case relates to discussions held between the LGA and SMBC about the recruitment of two individuals.
44. The LGA has informed the Commissioner that, in response to this request, it has consulted with the two LGA officers involved in this matter. No other officers or teams within the LGA are known to have been involved, and therefore no information is expected to be held by them.

45. These two officers have conducted searches on Microsoft Outlook, Mimecast, WhatsApp, and Microsoft Teams for relevant information. These searches have used the search terms "sandwell.gov.uk". "Interim Chief Executive". "Head of the Leader's Office", and the names of the individuals named by the request.
46. The LGA has clarified that some of the information redacted from the disclosed information has been redacted because it does not fall within the scope of the request, that is, it does not relate to the recruitment of the two individuals named by the request. The Commissioner has viewed that information which has been redacted and is satisfied that it does not fall within the scope of the request.
47. The Commissioner has considered the LGA's position, and notes that searches have been undertaken on the relevant part of the LGA's network. The searches have retrieved no information besides that already disclosed, or otherwise considered by the Commissioner in this decision. There is no evidence available to the Commissioner that indicates that the LGA's searches have been deficient.
48. Having considered all the circumstances, the Commissioner therefore accepts the LGA's position that it does not hold further information. As such, the Commissioner has decided that the LGA has complied with section 1(1) of FOIA.

Procedural matters

49. The Council failed to disclose held information in response to the request within the statutory time period, the Commissioner has therefore found a breach of 10(1) of FOIA.
50. The Council failed to issue a refusal notice in response to the request within the statutory time period, the Commissioner has therefore found a breach of 17(1) of FOIA.

Right of appeal

51. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

52. 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.
53. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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