

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 February 2017

Public Authority: South Hams District Council

Address: Follaton House
Plymouth Road
Totnes
Devon
TQ9 5NE

Decision (including any steps ordered)

1. The complainant has requested complaints information including details of a specific concern he had. South Hams District Council ("SHDC") provided some information but argued that the remainder was exempt under section 31(1)(g) and 31(2)(b) (Law enforcement exemptions). After internal review, SHDC upheld its position but during the course of the Commissioner's investigation it disclosed some of the withheld information but continued to withhold the remainder citing section 31(1)(g) and 31(2)(b) as its basis for doing so.
2. The Commissioner's decision is that, as far as the remainder is concerned, SHDC is entitled to refuse to confirm or deny whether it holds this information on the basis of section 40(5) and section 31(3).
3. No steps are required.

Request and response

4. On 10 December 2015 the complainant requested information of the following description:

"I would be grateful if you could supply the following information by email:

1. How many complaints made against Parish/ Town Councillors have been upheld by the Monitoring Officer, South Hams District Council for the years 2015, 2014, 2013, 2012 and 2011. I would like this information by total number of complaints made, number upheld and number dismissed.
2. I would like a copy of the statements made by [named Councillors] in answer to complaints made against them by myself. The Standard Complaints reference number is [reference number supplied].
3. In relation to 3 above I would like a copy of the Independent Person's comments on these complaints."
5. On 11 February 2016, SHDC responded. It provided the information it held within the scope of Request 1 but argued that the information caught by the scope of Requests 2 and 3 was exempt under sections 31(1)(g) and 31(2)(b).
6. The complainant requested an internal review on 12 February 2016. He chased a response on 11 March 2016 and 22 March 2016. SHDC sent him the outcome of its internal review on 30 March 2016. It upheld its original position although apologised for the delay in its response.
7. There was a further exchange of correspondence between the parties during which time further information was disclosed. However, it upheld its refusal with regard to request 2 of 10 December 2015.

Scope of the case

8. The complainant contacted the Commissioner on 30 March 2016 to complain about the way his request for information had been handled.
9. As noted above, there was a further disclosure. The Commissioner has therefore considered whether SHDC has handled his request 2 in accordance with the requirements of FOIA. Specifically, whether it is entitled to rely on the provisions of section 31 cited.
10. As part of her deliberations, the Commissioner has also considered whether and to what extent any of the information described constitutes the complainant's personal data and, as such, whether the relevant provisions of section 40 should be applied.

Reasons for decision

11. For ease of future reference, the Commissioner will now refer to the complainant as the "requester". This is because the scope of his request concerns a complaint which is not a complaint under FOIA section 50. The Commissioner considers it important to draw a distinction between an FOIA section 50 complaint and any other complaint.
12. In the Commissioner's view, the wording of request 2 is very specific. It is about information related to a complaint that the requester says he has made regarding two named councillors.
13. Disclosure under FOIA is disclosure to the world at large and not to individuals. Except in rare circumstances, such as the use of section 14 (repeated or vexatious request), a public authority must be applicant blind in its handling of a request. The Commissioner would encourage public authorities and requesters to resolve information access disputes informally (and she notes that efforts were made by both parties in this regard). However, when an FOIA matter cannot be resolved and the Commissioner is required to serve a decision notice, she must look at the strict application of FOIA to the outstanding matter. It is obvious that the requester has detailed and specific knowledge about the extent of and substance of his correspondence with SHDC. However, the Commissioner must put that to one side when considering what SHDC's proper response should be to this request following a strict reading of the FOIA and where all attempts to resolve the matter informally have failed.
14. In this case and because FOIA is applicant blind, the Commissioner must, in effect, strip out the first person aspect of request 2 and consider it as a request for information of the following description: "a copy of the statements made by [named Councillors] in answer to complaints made against them by [name of requester]. The Standard Complaints reference number is [reference number supplied]."
15. Were anybody to make such a request, SHDC should, quite correctly be circumspect about giving out any information about whether or not the requester had made a complaint. Had the requester put the fact of his complaint into the public domain, SHDC may consider it appropriate to confirm the fact of his complaint. That said, the Commissioner, herself, does not publish the names of those who make FOIA section 50 complaints to her even if an individual may put the fact of their FOIA section 50 complaint into the public domain themselves.

16. Section 1 of FOIA is in two parts. The first part is the obligation to provide confirmation or denial as to whether requested information is held (section 1(1)(a) refers). The second part is to provide that information if held (section 1(1)(b) refers). Exemptions can apply to either part. For example, if an exemption applies, a public authority does not have to comply with its obligation under FOIA section 1(1)(a) and can refuse to provide confirmation or denial as to whether requested information is held.
17. In the Commissioner's view, the correct approach in this case under FOIA is for SHDC to neither confirm nor deny ("NCND") whether it holds information within the scope of the request. The question of whether or not the requester has made a complaint to it about named councillors is not for public consumption even if the requester obviously knows the answer himself.
18. Most FOIA exemptions include a provision which relate to the use of NCND. The Commissioner has concluded that two NCND exemptions (or, rather, "exclusions" using FOIA terminology about NCND) are applicable in this case. Firstly, the Commissioner considers that SHDC can rely on section 40(5)(a). This NCND exclusion applies where providing confirmation or denial gives the public information about whether it holds the requester's personal data. The Commissioner also considers that SHDC can rely on section 31(3). This NCND exclusion applies, in this case, where providing confirmation or denial would prejudice SHDC's ability to investigate an allegation of improper conduct.
19. In reaching this view, the Commissioner has had regard for her own guidance.^{1 2 3}

Section 40(5) - The duty to confirm or deny/personal data exemption

20. Section 40(5) states the following:

"The duty to confirm or deny—

¹ https://ico.org.uk/media/for-organisations/documents/1166/when_to_refuse_to_confirm_or_deny_section_1_foia.pdf

² <https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf>

³ https://ico.org.uk/media/for-organisations/documents/1206/neither_confirm_nor_deny_in_relation_to_personal_data_and_regulation_foi_eir.pdf

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)⁴, and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

21. In this case, it is necessary to look at whether the information described in the request could include the requester's personal data (see Note 4).
22. Personal data is information which relates to a living identifiable individual and which is biographically significant about them. It is regularly the case (particularly where the information arises from a complaint by one party against another or others) that information can be the personal data of more than one party. Following a number of decisions of the First-tier Tribunal (Information Rights), where the requested information constitutes the personal data of more than one individual, then both individuals are data subjects for the purposes of section 40 as there is no basis for suggesting that the individual whose data is more extensive or significant is the only data subject.⁵
23. The request is for "a copy of the statements made by [named Councillors] in answer to complaints made against them by [name of requester]. The Standard Complaints reference number is [reference number supplied]". In the Commissioner's view, this request includes a description of the requester's personal data. At the very least, this is whether or not the requester has made such a complaint. In the

⁴ This refers to section 40(1) which states: "Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

⁵ Fenney vs the Commissioner and Avon and Somerset Constabulary EA/2008/0001 (para 13) <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i117/Fenney.pdf>

Commissioner's view, such information, if held, would relate to the requester and would be biographically significant about him. Therefore, if SHDC holds any information within the scope of the request, this may well include the requester's personal data.

Section 40(5)(a) - Conclusion

24. Given that the information described in the request would, if held, include the requester's personal data, SHDC should have relied on section 40(5)(a) as a basis for refusing to confirm or deny whether it holds the requested information.
25. You can make a request for your own personal data via section 7 of the Data Protection Act (DPA) and an organisation is obliged to give you all the personal data to which you are entitled under the DPA. Further comment is made about that in the Other Matters section of this Notice.
26. That does not mean that all the information described in this request is (or would be, if held) the requester's personal data. For example, any statement made following a complaint made may well include information which does not relate to the person who made the complaint.

Section 31(3) – neither confirm nor deny/law enforcement

27. In the circumstances of this case, the Commissioner also considers that SHDC could rely on section 31(3) as a basis for refusing to confirm or deny whether it holds any information within the scope of the request.
28. The important point to note here is that for an NCND approach to work effectively, it should be applied consistently. It cannot be the case that a public authority would only refuse to confirm or deny it held information when it did, in fact, hold it. That is not to say that a public authority may not, in certain circumstances, provide confirmation or denial. It may consider it appropriate to do so, for example, where the subject matter has received considerable press coverage and it would do negligible further harm to the investigation process to provide confirmation or denial. Confirmation or denial in such a case would not, necessarily, set a precedent.
29. Returning to the detail of the NCND exclusion in section 31(3), this provision states that:

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1)."

30. The matters referred to in section 31(1) include (at (g)) "the exercise by any public authority of its functions for any of the purposes specified in subsection (2)".
31. The purpose in question here is at section 31(2)(b). This describes "the purpose of ascertaining whether any person is responsible for any conduct which is improper".
32. In other words, SHDC says that one of its functions includes the investigation of allegations that councillors have conducted themselves improperly.
33. In order for prejudice based exemptions such as those contained within sections 31(1)(g) and 31(2)(b) to be engaged, the Commissioner considers that three criteria must be met.
 - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, the Commissioner considers that this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
34. In its submissions to the Commissioner, SHDC reiterated its explanation about its investigatory role as follow:

“Legislation regarding the way in which complaints regarding councillors were to be investigated was introduced in the Localism Act 2011. It sought to streamline the process which was found to be lengthy and burdensome. It gave more responsibility to the Monitoring Officer, speeded up the inquiry and introduced the role of the Independent person.”⁶

35. SHDC had explained that complying with its obligations under section 1 of the FOIA would have a detrimental effect on its ability to investigate complaints of improper conduct. SHDC also spelt out the detail of which provisions of the Localism Act were applicable (specifically section 27 and section 28 of the Localism Act).⁷

Commissioner's findings

36. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the public authority clearly relates to the interests which the exemptions cited above are designed to protect.
37. The Commissioner is satisfied that the prejudice alleged by the public authority is real and of substance, and there is a causal relationship between providing confirmation or denial in this case and the prejudice which the exemptions are designed to protect. However, the Commissioner must establish whether confirmation or denial would be likely to result in the prejudice alleged (ie the third criterion).
38. The Commissioner recognises that it may not be prejudicial to SHDC's investigation process to, at least, confirm or deny whether it has received a complaint against a named councillor that their conduct has been improper. This is particularly the case if the time of the request is a considerable time after the time of the alleged complaint and the matter has been reported widely.
39. Councillors are public figures and, if they have been the subject of a complaint, this fact, of itself, may very well not prejudice the investigation progress. Similarly, denial that they have been the subject

⁶ <http://www.southhams.gov.uk/article/3245/Complaints-Procedure>

(see also)
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5959/1896534.pdf (page 5;

⁷ <http://www.legislation.gov.uk/ukpga/2011/20/section/27/enacted>

of a complaint may very well not prejudice the investigation process. That said, it is possible to envisage circumstances when confirmation or denial could, of itself, prejudice the investigation process, particularly if the matter in question is still live.

40. However, the Commissioner recognises that individuals may be reluctant to come forward with a complaint if their names are to be made public. Confirmation or denial under FOIA is confirmation or denial to the world and not just to individuals. Confirmation or denial in this case would make the requester's name public and it would provide information about whether he had made a complaint to SHDC.
41. In addition to this likely prejudicial outcome, the Commissioner notes a likely further harm to the investigation process where confirmation or denial is provided. While it may not always be unfair to a public figure, such as a councillor, to make public the fact that they have been the subject of a complaint, it may inhibit the provision of full and frank information during an investigation of a complaint. It may not foster confidence in the confidentiality of the process if SHDC were to confirm or deny that a councillor was under investigation for improper conduct, regardless of whether that relates to a criminal matter or not.
42. Therefore, in the circumstances, the Commissioner considers that providing confirmation or denial would be likely to pose a real and significant risk of prejudice to SHDC's investigation process. She consequently finds that the public authority would be entitled to rely on section 31(3) by virtue of sections 31(1)(g) and 31(2)(b).

Public interest test

43. The exemptions are however subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner has therefore also considered whether in all the circumstances of the case, the public interest in maintaining the exclusion from the duty to provide confirmation or denial outweighs the public interest in providing that confirmation or denial.

Public interest arguments in favour of disclosing the withheld information

44. The Council recognised that there was a public interest in transparency on this subject.

45. *The complainant is sceptical that he has been dealt with fairly and impartially and argues that greater transparency by SHDC would be in the public interest.*

Public interest arguments in favour of maintaining the exemption

46. SHDC stressed the importance of maintaining a confidential process and in not delaying the investigative process by having every stage subject to public comment. It also explained the importance of timing when considering transparency and accepted that, with the passage of time, sensitivity may reduce. However, it did not feel that was applicable here.
47. It also argued that any delay to the process was contrary to the aim of the Localism Act. Debates as to the merits or otherwise of the complaint would be conducted, in effect, as a public hearing. This would make the whole process slower and less effective which was contrary to the public interest.
48. It also argued that if such matters are conducted in public, fewer people would be willing to stand for public office which is not in the public interest. The Commissioner would comment that this point has little relevance in respect of section 31 and is sceptical as to its merits in any event.

Balance of the public interest arguments

49. The Commissioner recognises that there is some merit in making public whether or not an elected official Councillor has been subject to a complaint against them. There is also some public interest in providing reassurance to the public that the process of investigating complaints against elected officials is handled promptly and impartially. The provision of confirmation or denial could serve that interest in this case. However, the Commissioner recognises that there is limited public interest in undermining the investigative process through confirmation or denial. In reaching this view, she has had particular regard to the importance of protecting the confidentiality of the process for those considering making a complaint.
50. The Commissioner accepts that with the passage of time, a complaint matter can become less controversial but that is not always the case. The public interest in protecting the confidentiality of the investigation process carries considerable weight even after the complaint has been investigated.

Section 31 - Conclusion

51. In light of the above, the Commissioner is satisfied that, in the circumstances of this case, the public interest in maintaining the exclusion from the duty to provide confirmation or denial outweighs the public interest in disclosure. In reaching this view the Commissioner has given particular weight to the public interest in protecting the confidentiality of the investigation process.
52. The Commissioner has set out further detail of her reasoning in a Confidential Annex to this notice. She has also made further comment about the right of subject access in the Other Matters section of this Notice.

Other matters

53. Under DPA section 7, an individual can access any of their personal data held by an organisation (called a "data controller" in DPA) to which they are entitled. More information about the duties of a data controller and the rights of individuals to access their own personal data can be found on the Commissioner's website.⁸
54. The Commissioner expects the Council to now consider its duties towards the complainant under DPA section 7 with particular regard to her reasoning in the Confidential Annex to this Notice. For the avoidance of doubt, the complainant's request of 10 December 2015 includes a request for information that is his own personal data. If the complainant is dissatisfied with the Council's response, the Commissioner's website (see Note 8) gives more information at how he can pursue this.

⁸ <https://ico.org.uk/>

Right of appeal

55. 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

56. 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.
57. 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

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