

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 23 May 2012

**Public Authority:** London Borough of Sutton  
**Address:** Civic Offices  
St Nicholas Way  
Sutton  
SM1 1EA

### Decision (including any steps ordered)

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1. The complainant requested information from the London Borough of Sutton ("the council") relating to a named individual. The council originally said that the information was exempt under section 40(2) of the Freedom of Information Act 2000 ("the FOIA"), the exemption relating to personal data. It subsequently clarified that as the individual concerned was employed by an agency rather than directly by the council, the information was not held.
2. The Commissioner's decision is that on the balance of probabilities, the council did not hold the requested information. He found that the council had breached section 1(1)(a) and 10(1) of the FOIA because of its failure to state that it did not hold the information.
3. The Commissioner does not require any steps to be taken.

### Request and response

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4. On 2 November 2011, the complainant requested information from the London Borough of Sutton ("the council") in the following terms:

*"Please can you provide me with:*

- 1) *A CV or professional biographical information about [name] that outlines his experience in traffic engineering, achievements, and membership of relevant professional bodies etc.*

- 2) *Details of how much [name] is paid by LBS and of any of other remunerative work, if at all, such as consultancy etc. that he may have declared to LBS.*
- 3) *Confirmation that [name] does in fact live in this borough".*
5. The council replied on 7 November 2011. The council responded to point 3 above but refused to supply points 1 and 2 on the basis that the information was exempt under section 40(2) of the Freedom of Information Act 2000 ("the FOIA").
6. The complainant requested an internal review on 21 November 2011.
7. The council completed its internal review on 19 December 2011 and said that it wished to maintain its position.

### **Scope of the case**

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8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the council was correct to refuse to provide the information on the basis that it was exempt under section 40(2).
9. During the Commissioner's investigation, the council wrote to the Commissioner and clarified that its position was in fact that it did not hold the requested information.
10. Following the above clarification, the complainant remained dissatisfied. He complained that the authority should have told him that the information was not held. He also questioned whether this was actually the case, in particular, the complainant alleged that the individual may have been employed by the council at the time of his request.
11. For clarity, the complainant raised more general concerns that the council had misled him about the employment status of the individual concerned. Such concerns do not fall within the remit of the Commissioner's office and have not therefore been addressed.

### **Reasons for decision**

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12. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description

specified in the request, and if that is the case, to have that information communicated to him.

13. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. He will also consider the actions taken by the authority to check that the information was not held and he will consider if the authority is able to explain why the information was not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held. He is only required to make a judgement on whether the information was held "on the balance of probabilities".<sup>1</sup>
14. In this case, the council confirmed that the individual concerned was employed by an agency at the time of the request. There was no evidence to support the allegation made by the complainant that this may not have always been the case and that the council was trying to avoid, deliberately, its obligations under the FOIA.
15. In relation to part 1 of the request, the council explained to the Commissioner that as part of the recruitment process in 2008, several candidates were put forward by the agency concerned, and their CVs were posted on the agency's password protected website for the council to view and print if needed. The council confirmed to the Commissioner that it had printed off the CVs of the short-listed candidates, including that of the individual who is the subject of this request. It said that the CVs were kept for about a year and were subsequently destroyed at the beginning of the following financial year. When questioned about its records management policy as regards such information, the council said that although the local authority has a firm policy on holding, safeguarding and destroying information about its permanent staff there is no written policy on keeping and destroying information concerning agency staff. The council explained that in general agency staff records are kept for a short period of time and then destroyed once it serves its purpose. No record of the destruction is made.
16. In relation to request 2, the council explained that it does not pay the staff member concerned directly. It pays the agency, and the agency then makes the relevant payments. The council explained that agency staff members submit timesheets on the agency system and the relevant manager within the council approves those timesheets. The

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<sup>1</sup> This approach is supported by the Information Tribunal's findings in Linda Bromley and Others / Environment Agency (31 August 2007) EA/2006/0072

council said that records of payments for the staff member concerned are shown on the weekly aggregated invoices received from the agency. The invoices contain a line for each of the agency workers, but this is the charge made to the council, not the amount paid to the individual. In view of this explanation, the Commissioner agrees with the council that it did not hold the actual information requested because the staff member concerned is not employed by the authority and is not paid directly by it. Even if the Commissioner was to consider that the information was held, he would be satisfied in any event that disclosing the precise details of the payments to the relevant staff member would not be fair. There is nothing about the circumstances of this particular case that would make such a disclosure proportionate and the information would therefore be exempt under section 40(2) of the FOIA in line with the Commissioner's published guidance here:

[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Practical\\_application/SALARY\\_DISCLOSURE.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Practical_application/SALARY_DISCLOSURE.ashx)

17. The council also confirmed that it had never held any details of any other remunerative work that the relevant staff member had declared. The council does not have a policy to acquire any information about any remunerative work that an agency member might be engaged in and it does not form part of the recruitment process.
18. The council confirmed that it had undertaken a thorough search of all relevant paper and electronic records to check that the information was not held. It said that it had consulted its recruitment manager and the Human Resources Manager about the request, as well as the staff member's line manager. The council confirmed that the line manager had checked the file he holds about all agency staff as well as his email folders.

### **Procedural Issues**

19. The council failed to state that the information was not held by it until the complaint had progressed to the Commissioner, following an internal review. This was a breach of the council's obligations under section 1(1)(a) and section 10(1) to state whether recorded information is held within 20 working days.

## Right of appeal

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20. 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)

21. 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.
22. 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** .....

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**