

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 05 May 2011

**Public Authority:** Portsmouth City Council  
**Address:** Civic Offices  
Guildhall Square  
Portsmouth  
Hampshire  
PO1 2BG

### Summary

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The complainant submitted a request to Portsmouth City Council ("the Council") for evidence of the provenance of a specific document. The Council provided some information which, in its view, proved the provenance but the complainant remained dissatisfied. The Commissioner has decided that, on the balance of probabilities, the Council holds no further information and has therefore complied with the provisions of the Act.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. On 26 October 2010 the complainant contacted the Council and requested the following:

*"In a recent FOI request I made to you (REF:FOI2010428), a document was provided by the Legal Services Department. There was no date on the document. I wish for the provenance of this document to be proven under the Freedom of Information Act. The Legal Services Officer responsible for this document, states:*

*'I prepared a report dated 12<sup>th</sup> June, which I submitted to colleagues for comment.....the final draft was prepared by me on 9<sup>th</sup> July.'*

*Provenance can be proven by providing copies of registry entries that show the circulation of this document and dates of circulation, to whom it was circulated and when it was finalised, the date it was placed on file. Any other method of proving the provenance of this document is also acceptable".*

3. The Council responded to the complainant on 27 October 2010 and stated that it had made enquiries about the document in question with the legal adviser who had prepared it. The Council provided the complainant with the following statements from its legal adviser:

*"I prepared a report dated 12<sup>th</sup> June, which I submitted to colleagues for comment. It seems from how I keep my file order, that the final draft sent to colleagues was prepared by me on 9<sup>th</sup> July".*

*"When I held the cursor over the document in the file directory, it showed up the dates 12<sup>th</sup> June and 9<sup>th</sup> July respectively".*

4. The complainant wrote to the Council on 27 October 2010 asking it to provide evidence to support the above statements.
5. The Council responded on 8 November 2010 and provided a number of screenshots of the "properties" attached to the document in question. The Council also stated that, whilst it accepted that the "properties" were not conclusive evidence of provenance, it considered that the word of its legal adviser should be treated as conclusive evidence of the provenance of the document.
6. The complainant wrote to the Council on 8 November 2010 and stated that the "properties" along with the word of the legal adviser were not satisfactory in proving the provenance of the document. The complainant maintained that, as the document was circulated to various Council departments, it would have passed through different registries and been logged in and out as it entered and left each department. The complainant again requested evidence of the provenance of the document in question on this basis.
7. On 8 November 2010, the Council wrote to the complainant and stated that it considered the request to be manifestly unreasonable but did not seek to rely on this in any subsequent correspondence with the complainant.
8. On 10 November 2010 the complainant wrote to the Council and asked it to carry out an internal review of its handling of his information request.

9. On 15 November 2010 the Council responded to the complainant. It maintained that it was unable to provide entries in departmental registers as these did not exist for electronic communications. The Council provided the complainant with emails from one of the recipients of the document showing the dates on which the report was received and acknowledged.
10. On 22 November 2010 the complainant wrote to the Council to request an internal review of its handling of his request for the second time.
11. The Council provided its internal review response on 3 December 2010. The Council stated that, in its view, the complainant had been provided with all information held by the Council that showed provenance of the document in question. The Council stated, for the first time, it had considered the request under the Environmental Information Regulations 2004 (the "EIR").

## **The Investigation**

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### **Scope of the case**

12. On 9 December 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether further information proving the provenance of the document in question was held by the Council. The complainant stated that he considered the emails released by the Council on 15 November 2010 to be fabricated, and that he did not consider the information released to date by the Council to sufficiently prove provenance of the document in question.
13. The Commissioner's role in this case is not to make any comment on the provenance of the document, but to consider whether the Council holds any further information relevant to this matter. This notice, therefore, does not comment on the complainant's claims that information has been fabricated by the Council, but instead focuses on whether the Council holds any additional information that demonstrates the provenance of the document.

## Analysis

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### Substantive Procedural Matters

#### Access regime

14. During the course of its handling of the information request, the Council did not make it clear which access regime it had considered the request under. In its internal review response of 3 December 2010, the Council stated that the request had been considered under the EIR. The Council did not provide its reasons for considering the request under the EIR.
15. The Commissioner has determined that the requested information would not fall under the definition of environmental information set out at regulation 2 of the EIR. The document which formed the basis of the complainant's information request related to planning and was prepared by a planning specialist legal adviser. However, the information request which is the subject of this notice related to the provenance (i.e. conclusive proof of the creation date and subsequent circulation dates) of this document.
16. The Commissioner's view is that, on the whole, planning applications and the planning approval process constitute administrative measures likely to affect the elements and factors listed in regulations 2(1)(a) and (b), as defined by regulation 2(1)(c) of the EIR which provides that:

*“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on-*

*(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements”*
17. In coming to his view that the requested information is not environmental, the Commissioner is mindful of the Council Directive 2003/4/EC which is implemented into UK law through the EIR. A principal intention of the Directive is to allow the participation of the public in environmental matters. The Commissioner therefore considers that the term “any information...on” in the definition of environmental information contained in regulation 2 should be interpreted widely. It will usually include information concerning, about or relating to measures, activities and factors likely to affect the state of the elements of the environment. In other words information that would inform the public about the element, measure etc under consideration and would

therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.

18. Whilst the Commissioner considers that the legal document is clearly information "on" a measure likely to affect the elements and factors referred to in regulations 2(1)(a) and (b), he considers that the requested information is not "on" a measure likely to affect these elements and factors. The information requested is the provenance of the document in question, i.e. electronic and other records which prove when the document was created, modified and circulated.
19. Therefore the Commissioner does not consider that the information in question falls within the definition of environmental information as provided in regulation 2(1)(c) of the EIR. He therefore considers that the information request should have been considered under the Act.

### **Is further information held?**

20. Section 1(1) of the Act creates a general right of access to information held by public authorities. Section 1(1) of the Act states:

*"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".*

21. In this case the Commissioner has had to consider whether the Council holds further information to prove the provenance of the document in question.
22. In approaching cases such as this, where the fundamental question is whether a public authority holds information, the Commissioner is guided by the views of the Information Tribunal in *Bromley & others v ICO & Environment Agency* [EA/2006/0072], which stated that in cases such as this:

*"The standard of proof to be applied in that process is the normal civil standard, namely the balance of probabilities<sup>1</sup>".*

23. Further to this, the Tribunal also went on to state that:

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<sup>1</sup> EA/2006/0072, para 10

*"[...] there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority<sup>2</sup>".*

24. In deciding where the balance of probabilities lies in cases such as this one, where the complainant has asked him to consider the public authority's response with regard to whether or not further information relevant to the request is held, the Commissioner will look at:
- (a) The scope, quality, thoroughness and results of the searches; and
  - (b) Other explanations offered as to why the information is not held.

*The scope, quality, thoroughness and results of the searches*

25. Due to the nature of the information requested, it was not necessary for the Council to conduct extensive searches for relevant information. The Council has explained that, when dealing with electronic documents, it does not hold registry records of the type referred to by the complainant. The Council therefore considered the other information available to prove when the document in question was created, modified and circulated. The sources of such information were limited to electronic records that showed when the document had been created and circulated.
26. In the Commissioner's view, it is clear from the information provided to the complainant that the Council undertook searches for information relevant to the request; for example, despite there being no requirement under the Act for the Council to create information in order to respond to the request, the Council provided a statement from the legal adviser who had prepared the document. The Council also provided the complainant with several screenshots showing the "properties" of the document in question. Finally, the Council provided emails demonstrating receipt and acknowledgment of the report by one of the recipients.
27. Whilst the Council maintained that it did not hold the information specifically requested by the complainant (i.e. registry entries) to prove provenance, the Commissioner considers that the Council went to some lengths to provide the complainant relevant information in order to satisfy his request.

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<sup>2</sup> EA/2006/0072, para 13

28. Having considered the evidence put before him, the Commissioner is satisfied with the scope and thoroughness of the searches undertaken.

*Other explanations offered as to why the information is not held*

29. The complainant's concerns focus on the fact that the Council is unable to prove the document's provenance in a way that he considers to be conclusive. The complainant specifically appears to be seeking access to registry entries which correspond with the evidence already provided by the Council.
30. Whilst the complainant stated in his initial information request that "*any other method of proving the provenance of this document is also acceptable*", during the course of the investigation it became evident that the complainant would only be satisfied by the production of registry entries. Even though the Council stated on several occasions that such entries were not held, the complainant continued to request this specific information. However, the complainant has not provided any evidence to demonstrate why such records should be in existence, and therefore the Commissioner has no reason to doubt the Council's assertion that electronic information is not held in this manner, or that registry entries are not held for electronic documents.
31. The Council has maintained from the outset that it has released all information held which proves the provenance of the document, and that "departmental registers" as specifically requested by the complainant are not held for electronic documents or for documents circulated by email.
32. The complainant is dissatisfied with the information supplied by the Council so far, maintaining that some of this evidence is fabricated and that the information in any case does not prove the provenance of the document in question. However, this does not mean that the specific information to which the complainant is seeking access is held by the public authority. The complainant has not provided any evidence to show that any further information relevant to his request is held by the Council or to dispute the Council's claim that the registry entries requested are not held.
33. The Commissioner has decided that there is no evidence that the Council holds any further information relevant to the request. The Commissioner is satisfied with the scope and thoroughness of the searches conducted by the Council, and with the other explanations provided as to why further information is not held. The Commissioner therefore concludes that, on the balance of probabilities, the Council does not hold any further information falling within the complainant's request.

## **The Decision**

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34. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## **Steps Required**

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35. The Commissioner requires no steps to be taken.



## Right of Appeal

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36. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

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

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

37. 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.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 5th day of May 2011**

**Signed .....**

**Anne Jones  
Assistant Commissioner  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

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### General Right of Access

#### **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."