

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 January 2013

Public Authority: East Riding of Yorkshire Council
Address: County Hall
Beverley
East Riding of Yorkshire
HU17 9BA

Decision (including any steps ordered)

1. The complainant has requested information relating to a decision made by the Standards Committee Assessment Sub-Committee regarding a complaint he had submitted. The Commissioner's decision is that East Riding of Yorkshire Council, on the balance of probabilities, does not hold the requested information. The Commissioner does not require any steps to be taken.

Background

2. The complainant made a complaint to the Monitoring Officer on 11 February 2012 regarding statements made by councillors and their actions at a meeting of the council's cabinet in 2010 at which the remuneration package to be granted to a then Director was discussed. The complainant made an earlier request for information relating to the same officer's remuneration package and early retirement which was the subject of decision notice FS50318078. In that case, the Commissioner decided that some of the information had been correctly withheld using section 40(2) and section 42(1) however he considered that the council should have disclosed two reports in their entirety along with the majority of another report and the majority of some notes written by the Chief Executive.

Request and response

3. On 24 March 2012, the complainant wrote to East Riding of Yorkshire Council ('the council') and requested information in the following terms:

"Because I was excluded from the Committee deliberations, on whatever grounds I would be pleased to receive copies of
 - (1) All briefing notes prepared for the Committee by whosoever.
 - (2) All notes of the Committee's deliberations.
 - (3) A full list of all Officers present during Committee deliberations.
 - (4) Any other material which would assist me in understanding the decisions arrived at, which should contain the legislation which prevented a personal appearance at the Committee hearing."
4. The council responded on 23 April 2012 providing some narrative information, stating that some information is not recorded and applying the exemptions at section 21 and section 44 of the FOIA.
5. The complainant requested an internal review on 27 April 2012. The council responded on 23 May 2012 in which it provided some information which was previously withheld under section 21 of the FOIA but maintained its decision in all other respects.

Scope of the case

6. The complainant wrote to the Commissioner on 3 June 2012 to complain about the way his request for information had been handled. The original complaint was closed due to insufficient evidence as the Commissioner had not received either the request for information or the council's initial response. This complaint was then opened on 13 August 2012 following the complainant's correspondence dated 7 August 2012 enclosing further details.
7. The Commissioner wrote to the complainant on 21 November 2012 requesting clarification of the complaint as it was unclear whether the complaint was in relation to all, or part of, the council's response. The Commissioner summarised the council's position after the internal review and requested that the complainant confirm which aspects of the response he is unhappy with as detailed below:
 - (1) "Section 21 applied to the 'meeting agenda' as the information is available from the council's website and archive service. Are you disputing the application of section 21, i.e. do you dispute that the

information is accessible elsewhere? Section 44 applied to the 'covering report' attached to your letter of complaint due to the provisions of Section 63 of the Local Government Act 2000. Are you disputing the application of section 44, i.e. do you dispute that disclosure of the information is prohibited by the Local Government Act 2000? Also, the council appear to state that you provided a copy of the 'covering report' and it therefore follows that you already have the information. Can you please confirm whether this is the case?

- (2) Section 21 applied to the 'Decision Notice' as the information was sent to you on 14 March 2012. Are you disputing the application of section 21, i.e. do you dispute that the information is accessible elsewhere?
 - (3) No recorded information held. Are you disputing that there is no record of officers present during committee deliberations?
 - (4) Section 21 applied to the legislation governing the current Code of Conduct and the processes for complaints and guidance, as the information is available from the Standards for England website. Section 21 applied to the procedures adopted locally by the Standards Committee as the information is available on the council's website and archive service. Are you disputing the application of section 21, i.e. do you dispute that the information is accessible elsewhere?"
8. The complainant provided clarification of his complaint on 23 November 2012 as follows:
- (1) It was not disputed that the information was available elsewhere but the complainants issue was that he had requested copies of the information not directions to a website. It was stated that if the 'covering report' was the 'incomplete notes' taken at the meeting in question by the Chief Executive Officer then the application of section 44 is disputed.
 - (2) It was not disputed that the information was available elsewhere but the complainants issue was that he had requested copies of the information not directions to a website.
 - (3) The complainant disputed that no recorded information is held.
 - (4) It was not disputed that the information was available elsewhere. However, the complainant stated that he is unclear as to what current Code of Conduct is referred to as Standards for England was closed on 31 January 2012. This is addressed below under 'Other matters'.

9. For clarity, the Commissioner has only considered whether the information requested at point (3) is held by the council.
10. In relation to the complainants issue was that he requested copies of the information rather than directions to a website, the Commissioner notes that section 21 is an absolute exemption and therefore, by virtue of section 2(2)(a), there is no obligation to communicate the information and it therefore follows that there cannot be any provision for the means by which a communication is to be made.
11. In relation to the 'covering report' referred to in response to point (1), the council stated that having reread its original response it could see how it may possibly have been misleading and clarified that the covering report did not come from the complainant but was prepared for the Standards Committee Assessment Sub-Committee and was attached to the complainant's letter of complaint for consideration by that committee. As this report is not the 'incomplete notes' taken at the meeting in question by the Chief Executive Officer, the Commissioner has not considered the application of section 44, as per the clarification provided by the complainant referenced in paragraph 8 (1).

Reasons for decision

Section 1 – Is the information held?

12. Section 1 of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds the information and if so, 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 is not held and he will consider if the authority is able to explain why the information is 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 civil standard of the balance of probabilities.
14. The complainant has stated that as officers were present at the meeting and gave the Committee advice which resulted in a senior retiring officer receiving a pension pot of £364,000 of public money, one would expect it to be mandatory that these officers be formally identified. The Commissioner notes that the request subject to this decision notice was

for information relating to the complaint regarding councillors' statements and actions, which was referred to the Standards Committee Assessment Sub Committee, rather than for information relating to the meeting of the council's cabinet in 2010 at which the remuneration package was discussed. Therefore, the Commissioner does not view the complainant's argument as relevant to whether information is held in this case.

15. The Commissioner enquired as to whether the information has ever been held and the scope, quality, thoroughness and results of the searches carried out by the council. The council explained that the standard practise with this sub-committee is that a Committee Manager will be in attendance who will take notes of the committee's deliberation and decisions. These notes are then used to create the draft minute and it is standard practise to destroy the notes immediately after the minute is created. The only place that the names of officers in attendance could possibly be is within those notes. It stated that a check was made with the relevant Committee Manager who confirmed that the notes were destroyed after the creation of the minute as per the standard practise. It further stated that the notes made by the Committee Manager may have recorded officers present indirectly for example to record what an officer has said but as has been explained above these notes were destroyed. The council could not be precise as to when the notes were destroyed and does not have a record of the document destruction but confirmed that they will have been destroyed prior to 14 March 2012 as this was when the draft minute and decision notices were produced.
16. The Commissioner also enquired as to what the council's record management policy says about records of this type. The council stated that the formal Records Management Policy does not say anything about records of this type but explained that the notes are not meant to be kept for any longer than is necessary in order to create the minute and that they are therefore by their nature, documents that are never intended to be kept for longer than a week, or so.
17. In reaching a decision as to whether the requested information is held, the Commissioner has also considered whether there was any legal requirement or business need for the council to hold the information. The council stated that there is no statutory requirement to record or retain the requested information. It also stated that there is no business purpose for which the requested information should be held. To be absolutely clear, it explained that the council does record officers in attendance with regard to some of its committees, and enclosed a copy of the minutes of an Overview and Scrutiny Sub-Committee of 18 January 2012 as an example, but stated that it has never been the practise of the council to record the names of officers at the meetings of the Standards Committee Assessment Sub Committee.

18. The Commissioner also considered whether the council had any reason or motive to conceal the requested information but he has not seen any evidence of this.
19. In the circumstances, the Commissioner does not consider that there is any evidence that would justify refusing to accept the council's position that it does not hold any information relevant to this request. The Commissioner is therefore satisfied that on the balance of probabilities, the information is not held by the council. Accordingly, he does not consider that there was any evidence of a breach of section 1 of the FOIA.
20. In response to the Commissioner's enquiries, the council has stated that, if it will assist, it has no issue with the Commissioner informing the complainant of the names of the officers present from the recollection of one of those officers. The complainant has been provided with these names in the covering letter to this decision notice.

Other matters

21. In relation to the information requested at point (4), the complainant stated that he is unclear as to what current Code of Conduct is referred to as Standards for England was closed on 31 January 2012. The council explained to the Commissioner that the complainant has never raised this query with it before and had he done so it would have confirmed that the Code of Conduct referred to was the Code of Conduct current at the time of the complaint submitted to the Monitoring Officer on 11 February 2012 and when the response was made to this request for information. This was the model Code of Conduct 2007 which the complainant alleged certain Councillors had breached. The council further explained that although Standards for England closed on 31 January 2012, the 2007 Code remained in force until 1 July 2012.

Right of appeal

22. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

23. 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.
24. 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
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