

Freedom of Information Act 2000 ('FOIA')

Decision notice

Date: 8 October 2013

Public Authority: North Norfolk District Council
Address: Holt Road
Cromer
Norfolk
NR27 9EN

Decision (including any steps ordered)

1. The complainant has requested copies of all emails between a named individual and four specified email addresses. North Norfolk District Council ('the council') disclosed some emails but contended that the remainder were private emails and not subject to the FOIA. The Commissioner's decision is that the withheld emails are not held by the council under section 1(1)(a) of the FOIA as under section 3(2)(a) the information is only held on behalf of another person. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 10 September 2012, the complainant wrote to the council and requested information in the following terms:

"This is a request under the Freedom of Information Act.

Please let me have an electronic copy of all emails you hold, together with their attachments, if any, which are:

(1) To [named employee] (email address: [redacted]) from any of the following email addresses:

[redacted]

[redacted]

[redacted]

[redacted]

Also any which you hold which are:-

(2) From [named employee], email address above, to any of the above email addresses.

Please supply only those which you hold which date from after July 1 2010."

3. The council responded on 17 September 2012 and confirmed it held information relevant to the request but stated it is not held for the for the purposes/interests of the council, nor created by a member of staff in the course of their duties and subsequently it is not information subject to the FOIA.
4. The complainant requested an internal review on 17 September 2012 which the council responded to on 25 October 2012. The council revised its position to disclose some information but maintained that the remainder were private emails sent in a personal capacity and not subject to the FOIA.

Background

5. The complainant directed the Commissioner to Hickling Parish Council's Chairman's report to the annual parish meeting¹ to provide background to the issue. The following information is contained within that report:

"Village Hall

I would now like to update you, as much as I am able to, on the current situation regarding the village hall.

Most of you are aware of the background, but for benefit of new parishioners, I will summarise the events.

¹ <http://hicklingparishcouncil.files.wordpress.com/2011/05/chair-report.pdf>

- Until 28th February 2011, Hickling Parish Council was the Corporate Trustee of Hickling Playing Field & Recreation Ground Charity ("The Charity")
- On the 28th February 2011, the previous Parish Council first appointed ten of eleven councillors and the Clerk, and three others as personal trustees of the Charity, without informing parishioners.
- The previous Parish Council then transferred all the assets of the village to the Charity
- The Parish Councillors then signed a contract with themselves without sufficient money to meet the terms of the contract.

The current Parish Council's solicitor has stated that this action, including the previous parish councillors appointing themselves as personal trustees, constitutes a breach of trust, and therefore the appointment and the contract is invalid.

As a result, our solicitor has advised us not to make any further payments.

Nine trustees have sued the village for the third stage payment and professional fees totalling £111,000. The Parish Council has counterclaimed, which is the normal proceedings when being sued.

As a result of our solicitor's advice we approached the Charity's solicitor and both sides agreed a professional mediator.

Both sides had to provide documents relevant to the case. This disclosure process has been very laborious...

The Parish Council still believes mediation is the right course of action; but for mediation to succeed you have to have full disclosure."

6. The complainant explained that the individual named in the request is a former Hickling Parish Councillor as well as a Director for North Norfolk District Council.
7. The complainant explained that he has not been able to access the information via Hickling Parish Council as the requested emails had already been deleted from the Hickling Parish Council PC.

Scope of the case

8. The complainant contacted the Commissioner on 28 November 2012 to complain about the way his request for information had been handled. He stated that;

"The question the ICO needs to ask is whether the refusal of [named employees] correspondence is based on an impartial view which NNDC has taken, that the requested correspondence is not disclosable, or on the fact that the correspondence, if disclosed, may be inconvenient. What appears to the author to have occurred is that colleagues of the two NNDC staff and former Parish Councillors have been placed in a position of conflict of interest and have improperly refused to disclose documentation which is properly due under FOI."

9. The complainant has also alleged that there has been an unauthorised programme of email deletions and that North Norfolk District Council, as Hickling Parish Council's monitoring authority must be compelled to produce copies of these improperly deleted emails, if it holds them.
10. The Commissioner has considered whether any of the information within the scope of the request is held by the council as a public authority for the purposes of the FOIA.
11. The Commissioner has not considered the allegation in relation to unauthorised email deletions. There has been no suggestion that the deletions were made after a request under the FOIA was made, which, in certain specified circumstances, could constitute an offence under section 77 of the FOIA. It is not within the Commissioner's remit to decide whether a programme of email deletions unrelated to the receipt of a request under the FOIA was improper or unlawful.

Reasons for decision

Section 1(1) and 3(2)

12. Section 1(1) of the Act states 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."

13. Section 3(2) states that –

"For the purposes of this Act, information is held by a public authority if-

- (a) it is held by the authority, otherwise than on behalf of another person, or
- (b) it is held by another person on behalf of the authority.”
14. The Commissioner’s guidance, ‘Information held by a public authority for the purposes of the Freedom of Information Act’², states that when a public authority holds information solely on behalf of another person it is not held for the purposes of the FOIA and that each case needs to be considered according to the specific circumstances.
15. The complainant has argued that all the requested emails were written or received by someone in an official position; all are from or to a clerk of a parish council. He gave examples of the content of the emails such as how it is appropriate for the parish council to conduct business and how financial information should be presented to the new parish council after the local government elections of May 2011. He has stated that almost of the emails are connected with parish council business.
16. The complainant also stated that because the named individual is a senior member of staff of the monitoring authority of the parish council, when he writes to the parish clerk on council matters, his views are not those of a private individual and are not received as such. He contends that within the emails, the named employee speaks in his capacity as a senior manager in the monitoring authority and that his correspondence, unless specifically sent from personal email accounts, must be considered North Norfolk District Council business. He gave the example that if the named individual was a senior member of South Norfolk District Council then he would have no official role in regards to Hickling and the argument that his membership of the parish council was purely personal would carry considerable weight. He also stated that had the named employee not wanted to lend the weight of his official position to his correspondence, he would have used other email addresses.
17. The Commissioner asked the council to explain on what basis it concluded that although it physically holds the information of the nature requested it does not hold it for the purpose of the FOIA, bearing in mind the content of the emails, as alleged by the complainant, and the

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/information_held_by_a_public_authority_for_purposes_of_foia.ashx

weight they would carry being signed using the individual's official North Norfolk District Council title.

18. The council stated that it had had regard to the Commissioner's guidance, 'When is information caught by the Freedom of Information Act?'³ and asserted, in the strongest terms, that the emails were not sent or received in the named individual's capacity as an employee. It said that the content of the undisclosed emails does not relate to a North Norfolk District Council function and the matters and discussion which the correspondence relates are not matters undertaken by the named employee as part of his contractual duties at North Norfolk District Council and were therefore not generated by the individual in his capacity as a North Norfolk District Council employee.
19. In relation to the subject matter of the emails, the council explained that it has no connection to the business of North Norfolk District Council but relates to private correspondence between a member of staff and persons with no connection to North Norfolk District Council. It confirmed that it has no interest or knowledge of the matters discussed in the private emails and stated that the information within the emails is not information the council would be in a position to deal with enquiries about, or act upon. It also stated that it gave no financial support or payments and has no control over the issues discussed. Having viewed the withheld emails, the Commissioner considers that it relates to Hickling Parish Council business.
20. The council stated that it would be manifestly wrong to suggest that the business of North Norfolk District Council and Hickling Parish Council are connected. It explained that the two councils are completely separate legal entities but parish councils may contact the district council periodically for general advice and the district council may become involved where there is a statutory obligation to do so, such as the district council being assigned by the Monitoring Officer to investigate complaints against parish councillors. The Commissioner understands that this interpretation of the relationship between the two councils is in accordance with usual practice. The council also confirmed that it is not, and was not at the relevant time, a charity trustee relating to any asset of Hickling Parish Council.

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_12_INFO_CAUGHT_BY_FOI_ACT.ashx

21. In relation to the named employee using his North Norfolk District Council email address to correspond on the matter, the council explained that it does permit individual employees to send and receive private emails via council computers to persons outside of the council. It provided the Commissioner with a copy of its policy on ICT which allows for the personal use of email.
22. Having spoken to the named employee, the council also explained that the sender/recipient of the emails contacted him on his work email address because it was convenient, knowing that emails would be regularly reviewed and not because it was related to his office. It explained that the sender/recipient knew his work email address and his position at the council before the period that the complainant requests emails to be disclosed because, as well as both having a connection to Hickling Parish Council and the charitable trust, they both live in the same small rural village and know each other on a social level. The named employee also sent emails from his North Norfolk District Council address for reasons of convenience because he is regularly logged onto the work email, both when he is in the office and working remotely, and sending and picking up emails from his work email address is more convenient than logging in and out of a secure website. The council also explained that the named employee has no control over which email address other people contact him on and he does frequently receive private emails at his work email address. He considers that his work email address is generally understood to be where he is most easily and readily contactable.
23. The Commissioner considers that it is entirely possible for correspondents to send an email about a private matter to a council email address and that does not make the email any less private, nor any more subject to the FOIA, than it would have been if it had been sent to a private email address.
24. In relation to the issue of weight being placed on the content of the emails due to the named individual's position at the council, the council strongly disputed that this would have occurred. It stated that the named individual did not use his employed role to influence the sender/recipient and does not express a council view in the withheld emails. It confirmed that the named individual's involvement with Hickling Parish Council and the charitable trust is entirely separate from his work at North Norfolk District Council and that the only connection to North Norfolk District Council is that the emails have been sent to or from his work email address.
25. The Commissioner's aforementioned guidance on whether information is held for the purposes of the FOIA mentions various factors that would indicate whether information is solely held on behalf of another person.

In relation to these, the council stated that the email correspondence is not generally accessible by other members of the council without the specific authority of the named individual. It is the individual member of staff who controls access and the emails cannot be accessed independently without lawful authority or other legitimate cause. The council does not control who has access to this information and does not take any considered action as to whether the emails should be retained, altered or deleted. No specific costs are apportioned to the information being held on the computer system. The council does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information within the emails but the emails are merely stored on its electronic system as a matter of course. The Commissioner considers that these factors indicate that the withheld information in this case is held solely on behalf of another person.

26. The council drew the Commissioners attention to a number of relevant decision notices regarding section 1(1)(a) and 3(2)(a) of the FOIA⁴ and stated that it expected this decision, though considered on its own merits, would be consistent. In particular, it quoted paragraph 21 of FS50245527:

“The Commissioner is also mindful of a previous decision notice issued on case reference FS5082767. In this case the Commissioner concluded that correspondence between a named employee and another individual was not held by the public authority as the public authority had no interest in, or control over the information as it considered it to be private correspondence. The Commissioner accepted that in common with some of the named employee’s other non-business related personal papers and correspondence, it was purely a matter of circumstance that the requested information was in the possession of the public authority.”

It stated that this is the established approach by the Commissioner and rigorously asserted that it reflects the situation in this case.

27. The council also quoted paragraph 12 of FS5042800 as containing principles applicable to this case:

“Whether or not the use of a council email address for non council business is appropriate is not a matter for the Commissioner to determine. It seems to him that there is no obvious reason why such

⁴ FS50245527; FS50254399; FS50243060 and FS50422800.

arrangements may not be agreed by mutual consent, or established custom and practice, between councillors and councils.”

28. The Commissioner considers that as the council and the named employee are of the belief that the named employee was acting in a private capacity, outside of any employment with the council, and as the council has confirmed that it has no interest in or control over the requested information, he sees no reason to deviate from previous similar decisions and can only conclude that the information is not held under section 1(1)(a) of the FOIA as under section 3(2)(a) the information is only held on behalf of another person by virtue of being hosted on the council's email system.

Right of appeal

29. 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

30. 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.
31. 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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