

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 16 July 2013

**Public Authority:** Thanet District Council  
**Address:** PO Box 9  
Cecil Street  
Margate  
Kent  
CT9 1XZ

#### Decision (including any steps ordered)

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1. The complainant has asked Thanet District Council (the "Council") for a copy of a letter regarding a tree that is subject to a tree protection order. This correspondence was between the Council and the complainant's contractor.
2. The Commissioner's decision is that the Council does not hold the requested information.

#### Request and response

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3. On 28 August 2012 the complainant requested information in the following terms:

*"Currently the case between [named individual] and my-self has come before a Judge at the County Court. Recently, I was made aware that you had corresponded with my contractor [named individual] regarding the contentious Holm Oak TPO/8(2010).*

*Please could you forward to me a copy of this letter so that I can keep the Judge fully apprised of the situation."*

4. On 28 August 2012 the council explained that this enforcement case is closed and that it no longer has a copy of this correspondence.
5. On 3 September 2012 the complainant's MP requested the same information and added:

*"Given that this is an on-going case you will appreciate that it would have been wholly improper for the council to have destroyed any such correspondence and failure to provide it will lead to a referral both to the Information Commissioner and to the Local Government Ombudsman".*

6. On 14 September 2012 the Council confirmed that it did not hold the requested information.

7. On 20 September 2012 the complainant asked the Council to continue its investigation and added:

*"1. Unfortunately it would appear that the file has been closed prematurely, please could you broaden your search for the letter to include the basement archives.*

*2. If the letter has been deleted from the computer, please could you authorise the computer technical team to retrieve a copy from the hard drive".*

8. On 29 October 2012 the Council provided an internal review. It confirmed that the requested information no longer exists in its email system or records.

### **Scope of the case**

9. The complainant contacted the Commissioner to complain about the way her request for information has been handled.

10. She is dissatisfied that her request has not been answered. Her complaint is that the Council has not completed a further search of its "outside server" for the requested information. She accepts that the information has been deleted but she does not believe that the Council are unable to retrieve it from its server.

11. The scope of the Commissioner's investigation was to determine whether the Council holds the requested information.

### **Reasons for decision**

12. Section 1(1)(a) and (1)(1)(b) 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 her.

13. In considering cases such as this, the Commissioner will consider whether on the balance of probabilities the requested information is held. In order to make a decision on this, the Commissioner will ask the public authority in question detailed questions as to the nature of the requested information and the searches it has carried out. He will then consider the context of the case, and nature of the requested information, the authority's responses, the arguments provided by the complainant and any evidence to suggest that the information in question is held.

14. The Commissioner's questions to the Council and its responses are detailed below:

- (1) What searches were carried out for the requested letter and why would these searches have been likely to retrieve it? Please outline what manual searches and what electronic searches have been conducted.

*"Firstly, to confirm that the Council examined the e-mail account of the case officer to include her Outlook in-box, sent items folder and deleted items folders. A number of relevant search terms were employed including the contractor and the complainant. However as previously advised, this failed to reveal a copy of the requested letter."*

- (2) For example, have you performed an email search of the accounts of individuals who may have held this letter?

*"Secondly, that no other officer would have been expected to have control over this information other than the [named officer]."*

- (3) Please clarify which departments and/or individuals were asked for information regarding this request.

*"Thirdly, the Council examined the relevant Planning Department manual files to which the requested letter might conceivably have been copied including the enforcement and application files relating to the protected tree and the miscellaneous file where private pre-application correspondence is kept. However, this also failed to reveal a copy of the requested letter."*

- (4) If searches included electronic data, please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.

*"Fourthly, the Council's retention schedules specify that application files in respect of protected trees are kept permanently as are protected tree enforcement files that result in enforcement action."*

*Further, pre-application files are also kept permanently. As mentioned above all the relevant files were inspected but did not reveal a copy of the requested letter."*

- (5) If searches included electronic data, which search terms were used?

*"Fifthly, it was not essential to the proper exercise of the Council's enforcement powers that the requested letter was placed on the enforcement file."*

- (6) Was the requested letter ever held but deleted/destroyed? If so, when?

*"Sixthly, the Council may well hold a copy of the requested information on a back-up tape but that these are retained by the Council for disaster recovery purposes only, not as an archive."*

15. The Council did explain to the complainant that it may be technically possible to recover the correspondence in question, from its backup server/tapes. However the Council has also explained that, in accordance with the ICO guidance, it does not consider that information on backup tapes is held for the purposes of the FOIA. It confirmed that its backup tape is retained for disaster recovery purposes only, not as an archive.
16. The Commissioner has considered the complainant's and in particular he notes her argument that the Council should have searched its backup server/tapes.
17. The central argument in this case is whether the Council should have searched its backup server/tapes for the information in question.
18. The Commissioner has previously published guidance on this issue, and in considering this case he has referred to this guidance.<sup>1</sup> This guidance states that a public authority is not expected to retrieve data from backup tapes to respond to a FOIA request, unless the backup is effectively used as an archive by the authority. In this case the Council has confirmed that its backup tapes are used for disaster recovery only and not as an archive.

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[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Practical\\_application/retention-and-destruction-of-requested-information.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Practical_application/retention-and-destruction-of-requested-information.ashx)

19. Therefore, having considered the Council's arguments as to why the requested information is not held, the Commissioner considers that they are reasonable and persuasive. He also notes that the complainant has, herself, accepted that the information in question has been deleted. Instead she has argued that the Council should have conducted searches of its backup tapes. However, the Commissioner is satisfied that the Council's backup tapes are used for disaster recovery purposes only, rather than as an archive. Therefore, for the reasons given above, the Commissioner considers that the Council was not obliged to search its backup tapes for the information in question.
20. Therefore the Commissioner is satisfied that the Council does not hold the requested information in this case.

## Right of appeal

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21. 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)

22. 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.
23. 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 .....**

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