

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 March 2015

Public Authority: City of York Council
Address: West Office,
Station Rise, York, YO1 6GA

Decision (including any steps ordered)

1. The complainant has requested information relating to the 'Galtres Festival' and the possible use of Rawcliffe Country Park for this event, along with information about the Kaboom fireworks event.
2. The Commissioner's decision is that City of York Council has correctly applied sections 40(1), 40(2) and 21 to some information. However, he also finds that City of York Council failed to issue a response covering all of the information that it held.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response in accordance with the requirements of FOIA with regard to the new information it found during the course of this investigation that falls within the scope of the requests. If any of this information meets the definition of environmental information found at regulation 2(1) of the Environmental Information Regulations 2004 (the EIR), then the response in relation to this information should be issued in accordance with the requirements of the EIR.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 17 August 2013, the complainant wrote to City of York Council (the council) and requested information in the following terms:

- a. *"I would like all the communication both internal and external relating to the Galtres festival that the council was considering as a possible use of Rawcliffe Country Park for the Bank Holiday 2013*

The communications would on my reckoning have begun somewhere around September? 2012 and certainly much was under discussion early this year in January February as I and a number of people corresponded about the matter with [redacted] in particular.

Dave Meigh Charlie Cross James Alexander Sonia Crisp and ward cllrs Cunningham- Cross, McIlveen, Watt and parish councils would have been involved

However I presume that an FOI request would of necessity involve all these people and of course [redacted] organiser of the festival.

Please advise me of how to phrase the request if I have omitted any key phrases as I would like to see all the communications.

I have spoken to [redacted] about twitter tweets in particular some that came was from [redacted] so I hope tweets are also included under all communications?

- b. *Similarly I would like to see all the communication internal and external between [redacted] organiser of Kaboom fireworks and the council regarding the firework event which he organised last year and I believe will be holding again this year.*

(I am aware for example that there was a review of last year's event held at Rawcliffe Country Park by the council but again I assume that by requesting all the correspondence internal and external that this would naturally fall into this FOI request)."

6. The council acknowledged the request on 20 August 2013. The complainant requested an internal review on 27 September 2013. However, the council did not issue a response until 1 October 2013. It stated:

"Your email, in which you complain that you have had no reply to two requests for information, has been forwarded to me. On 27 September

you wrote that "I submitted two FOI requests over 20 working days ago concerning Galtres Festival and Kaboom.....I believe now that the 20 day deadline has passed". You did not repeat the questions or state the dates but my colleagues have identified two enquiries from you, as follows.

CF4792 about the Galtres festival. This is indeed late and my colleagues will reply to you very shortly.

CF3505 about Kaboom, of 19 March 2013. A reply was sent to you on 8 April 2013 and is currently on the council website (see http://www.york.gov.uk/downloads/download/2439/foi_requests_week_commencing_8_april_2013). If it is not complete, or is unsatisfactory in some way please can you explain what is wrong? It would be helpful if you could use the same address as before – foi@york.gov.uk "

7. Following correspondence with the Commissioner, the council provided a further response to the complainant on 7 April 2014. It stated:

a) "Please see attached a copy of the communication. I would like to advise that information sent in tweets, is not held by the council and therefore is not included in this request.

I have not included correspondence which has already been sent to or from you, because this information is considered exempt under section 40 of the Freedom of Information Act, because it is your personal information and section 21, because it is considered already reasonably accessible to you. However if you still require this information please let me know and I will be pleased to provide it under the Subject Access to records procedure.

Some additional information has also been withheld, under section 40 of the Freedom of Information Act, because it is considered to be other people's personal information and not in the public interest to disclose.

b) Please see above for all correspondence related to the event at Rawcliffe Country Park.

I am also aware that you have received additional information about the Kaboom firework events in previous correspondence and a previous FoI response.

This information is considered exempt under section 21 of the Freedom of Information Act, because it is considered already reasonably accessible to you and can be found at:

http://www.york.gov.uk/downloads/download/2439/foi_requests_week_commencing_8_april_2013"

8. Following this response, the complainant wrote to the Commissioner again stating:

"the information I have received from CYC concerning my FOI still does not answer the request I sent in originally.

More so there seem to be missing emails and it appears having spent some hours on it to date that they have in effect sent the material originally from FOI CF2505.

Also there is nothing at all between his request 29 March CF2505 and my request in August 20th, even though I note emails from the Galtres organiser inviting CYC staff to attend the event at the end of the CF2505.

Even if there were no further discussions comments re the failure of the event to take place in York I would expect at least one person to reply accepting Galtres organiser's invitation or declining it.

A meeting took place November 7th between Galtres and Gill Cooper and Charlie Croft.

Later email shows that they advised Galtres organise not to speak to parish councils before speaking to labour hierarchy.

Between 7th and 29th November there is no email traffic it appears i.e. some are missing.

On 29th Charlie Croft informs Parish and Ward Cllrs that CYC Sonia Crisp has not met Galtres organiser and if she feels it is worthy to go ahead then he will inform parish and Ward Cllrs

In the email of 27 May 2014 I clearly noted that I was expecting email correspondence, at the very least, between CYC and Kaboom, namely Dave Meigh officer CYC (May I please draw to your attention at this point, prior to your reply, that there was as a part of my request clear request for emails between Dave Meigh and Mark Brayshaw who runs Kaboom) [sic]

This has not appeared and the reference to another Kaboom fireworks FOI Cath Murray gives does not contain the answer as it related to the events manual and has no email traffic re Kaboom fireworks display."

Scope of the case

9. The complainant first contacted the Commissioner on 20 November 2013 to complain about the way his request for information had been handled.
10. During the course of the Commissioner's investigation the council disclosed further information to the complainant, but the complainant maintained that still further emails must be held.
11. The Commissioner therefore considers the scope of this case to be to determine:
 - whether the council has correctly applied the exemptions it has cited to the information it has withheld, and
 - whether the council has provided a response covering all the information, falling within the scope of the two requests, that it holds.

Reasons for decision

Has the council correctly applied the exemptions it has cited?

Request 1- information about the Galtres Festival

Section 40(1)

12. The council explained that some of the information falling within the scope of this request was emails from the complainant. The council withheld this information under section 40(1).

13. Section 40(1) provides that:

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

14. The Commissioner accepts that this information is the personal data of the complainant and therefore finds that it has been correctly withheld under section 40(1) of the Act.

Section 40 (2)

15. The council explained that some of the information falling within the scope of this request was correspondence between the council and

another requestor, made in relation an earlier freedom of information request. The Council withheld the name and email address of this third party under section 40(2).

16. In order for this exemption to apply, the information being requested must constitute personal data as defined by section 1 of the DPA.

17. Section 40(2) provides that:

"Any information to which a request for information relates is also exempt information if–

- (a) it constitutes personal data which do not fall within subsection (1), and*
- (b) either the first or the second condition below is satisfied."*

Section 40(3) provides that:

"The first condition is–

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene–

- (i) any of the data protection principles..."*

Is the withheld information personal data?

18. Personal data is defined by section 1 of the Data Protection Act 1998 (DPA) as:

"...data which relate to a living individual who can be identified–

- (a) from those data, or*
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the data controller or any person in respect of the individual..."*

19. The Commissioner has reviewed the withheld information and is satisfied that it relates to a living individual who can be identified from that data.

Would disclosure breach the data protection principles?

20. The Commissioner has next gone on to consider if disclosure would breach the data protection principles. The data protection principles are

set out in schedule 1 of the DPA. The Commissioner considers that the first data protection principle is most relevant in this case. The first principle states that personal data should only be disclosed in fair and lawful circumstances, the conditions of which are set out in schedule 2 of the DPA.

21. The Commissioner's considerations have focused on the issues of fairness in relation to the first principle. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the data subject and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.
22. Although the information provided to the Commissioner indicates that the complainant is aware of the identity of the other requestor, this does not necessarily mean that the requestor would expect his identity to be disclosed to the public.
23. The Commissioner's view is that when considering what information individuals should expect to have disclosed about them a distinction should be drawn as to whether the information relates to the individual's public or private life. In this case the information relates to the individual(s) private life and so the expectation of privacy is higher.
24. The Commissioner finds that it would be reasonable for the requestor to expect his name and email address to be withheld from any published information relating to the request and that it would be unfair, and in breach of the first principle of the DPA to disclose this information.
25. The council has confirmed to the Commissioner that the complainant has been provided with copies of the correspondence with the third party, apart from their name and email address.
26. The Commissioner is satisfied that the name and email address of the third party is exempt by virtue of section 40(2).

Section 21

27. The council has also claimed that section 21 applies to part of the requested information.
28. Section 21 of the FOIA states that:

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

29. The council advised that as some of the information was the complainant's own correspondence that this was already reasonably accessible to him. In addition, it claimed some of information was already available on its website and provided a link to this.
30. The Commissioner has reviewed all the information within the scope of the request along with the information provided in previous responses, including that which is available on the council's website. The Commissioner finds that the council has correctly cited section 21 as this withheld information is reasonably accessible to the complainant, either because it is his own correspondence, or because it is available on the council's website.

Request 2 – information about the Kaboom fireworks display

Section 21

31. The Council explained that it had claimed section 21 in relation to request 2 because it had already provided the information that had been requested in response to an earlier freedom of information request.
32. The complainant disputed this and said that the information provided in relation to the earlier request was different information from that which he had asked for. He explained that the information provided in response to the earlier request was a health and safety manual, rather than email correspondence between the organiser of the Kaboom display and the council.
33. The Commissioner agrees with the complainant, and finds that the information withheld by the council under section 21 does not fall within the scope of this request.

Has a response been issued in relation to all the information that the council holds?

Request 1 and 2

34. In order to establish whether the council held any further relevant information, the Commissioner asked the council to respond to a number of points such as explaining any searches it had conducted in order to identify any relevant information.
35. The council confirmed that relevant officers were asked to answer the request. They will have used their personal knowledge and memory to search email and electronic folders and other relevant locations
36. It went on to explain that as above, the officers concerned would have conducted electronic searches if necessary. However it was not usual

practice within the council to save information locally in this way. Most of the information is in the form of email which is stored on central servers.

37. The council then explained that if any of them used electronic search facilities there is no record of what terms they used. However this would have been a minor feature of their searches. There had been no centralised search of council servers by the IT department, as it would be very difficult to devise suitable search terms.
38. The council confirmed that it was possible the information could be held both electronically or manually, although paper records are now unusual, especially when the subject is the discussion of a proposal for an event.
39. In addition it confirmed it was very likely that information held relevant to the scope of the complainant's request had been held but deleted/destroyed. The council stated that at least two of the officers concerned routinely delete emails after three months.
40. The council did not have a record of the destruction of any such information. It explained that in theory a forensic examination of emergency back-up records would be possible, but there is no direct record.
41. The council confirmed that its formal records management policy identifies 'ephemeral' records and emails, a category which would include records of an event, the plans for which were abandoned so quickly.
42. The council also confirmed that there are no universal email archives. All servers have emergency back-ups which would include emails deleted less than a year ago, but these would not be searched for FOI purposes.
43. The council provided evidence that at least one council officer routinely deletes emails after three months.
44. The Commissioner considers that the council's arguments raise two issues. Firstly whether the council should have searched its email archives and back-up systems to retrieve any information that had been deleted prior to the receipt of the complainant's request. And secondly whether the searches it carried out of its 'live' or current records were adequate.

45. In relation to the first question, following a recent Tribunal decision¹ the Commissioner has reconsidered his previous guidance on the question of deleted information and information held on back-ups. At paragraphs 15 and 16 of the decision, the Tribunal discusses the issue of information held on backup servers/tapes.

"They appear to have accepted that the email is likely to be held on a "back-up" tape or that it may be recoverable from its server (if that is different). For his part the Commissioner accepts that if the only purpose for which the back-up tapes are kept is "disaster recovery" and not as an archive then in accordance with his guidance he does not consider that information on such tapes is "held"...We are afraid that we strongly disagree with the Commissioner on this point. We do not think the intention of the public authority is of any relevance to the question whether as a matter of fact they "hold" information. If requested information is in (or on) back-up tapes which are themselves held by the public authority or is in some way still stored on the public authority's server, we consider that it is clearly "held" by the public authority"

46. In light of the above comments the Commissioner now accepts that if information has been deleted but not overwritten or is only held in back-up tapes then as a matter of fact the information is held.
47. In this case the council has stated that it held emergency back-up which would include emails deleted less than a year ago. The information dates back to around September 2012 and the request was received in August 2013 so on a balance of probabilities the Commissioner considers that deleted emails would still have been held in the back-up at the time of the request.
48. Although the Commissioner accepts that the emails were still held at the date of the request, section 1(4) of the FOIA states:

" The information-

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or

¹ Whitehead v Information Commissioner EA/2013/0262

deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

49. It is clear from 1(4) that information that is held but due for deletion within the time for statutory compliance does not have to be provided in response to a request. The Commissioner considers that it would be contradictory to this provision to find that information that has already been deleted has to be provided. In other words, if information that is due to be deleted isn't subject to FOIA then it would be perverse to find that information that has already been deleted is.
50. The Commissioner therefore accepts that the council were not obliged to search their back-up systems in order retrieve any information that had been deleted prior to the receipt of the complainant's request.
51. In relation to the second question the Commissioner does not consider that it would have been very difficult for the council to devise suitable search terms for a centralised search of the council's IT servers. He considers that searches of the term 'Galtres Festival', 'Rawcliffe Park', 'Rawcliffe Country Park' and 'Kaboom' may have generated further information and that these terms at least, should have been used. Neither does the Commissioner accept the Council's argument that it was only possible for it to use single word search terms (such as 'Galtres' or 'festival') which would return a large volume of irrelevant information. The Commissioner considers that it would have been possible for the council to use search terms comprising more than one word (such as 'Galtres festival').
52. The Commissioner therefore asked the council to carry out further searches of its live IT system relating to the Galtres Festival and the Kaboom Fireworks event.
53. The council did this and indicated that it had discovered a number of new items that fell within the scope of the request. As these had not previously been considered for disclosure the council needed to review these to see if any were exempt.
54. In light of the above the Commissioner finds that the council did not issue a response to the complainant in relation to all the information that it held for requests 1 and 2. He therefore orders the council to comply with the steps set out at paragraph 3 of this notice.

Other matters

55. As well as the findings above the Commissioner would also note here his concern at the severity of this delay, which he considers to have been grossly excessive. This has been compounded by the apparent failure of the council to offer any explanation to the complainant for this delay.
56. In addition, he notes that the responses to him were also unclear and not of the standard expected, and consequently further clarification was required.
57. The Commissioner has made a record of this delay and this issue may be revisited in any future action.

Right of appeal

58. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

59. 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.
60. 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

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