

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 17 August 2017

**Public Authority:** City and County of Swansea  
**Address:** Civic Centre  
Oystermouth Road  
Swansea  
SA1 3SN

#### Decision (including any steps ordered)

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1. The complainant has requested all information in respect of a Community alarm service provided to her late father from the date of the installation of the new machine to 13 August 2016. The City and County of Swansea ('the Council') provided a significant amount of information to the complainant, but were not able to provide a copy of the contractor's quality plan as it did not hold a copy of the requested information and concluded that the outside party did not hold it on its behalf.
2. The Commissioner's decision is the Council is correct to have stated that it does not hold this information for the purposes of the FOIA, as it does not fall within the definition of section 3(2)(b) of the FOIA. However, in failing to provide a response within the required timescale for a request, the Council has breached section 10(1) of the FOIA. Additionally, the Council's failure to provide an explanation of the key terms of technical information originally provided to the complainant, represents a breach of section 16 of the FOIA.
3. The Commissioner does not require the public authority to take any steps.

#### Request and response

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4. On 12 August 2016, the complainant wrote to the Council and requested the following information:

*"Please supply all information, in all formats (electronic and paper) relating to the Careline Community Alarm Service ...from the date of*

*installation of the new machine to 13 August 2016, including but not limited to emails, phone call records etc. This should include all information relating to the investigation of the service failure undertaken by ABM University Health Board..."*

5. The Council responded on 14 October 2016 in a letter addressing both the FOIA request and the on-going complaint which had been submitted to the Council. In respect of the FOIA request, the Council provided the Careline Call History, the Unit Record and the Tunstall Engineer Report (Tunstall being the contractor).
6. The Council sent a further FOIA response dated 27 October 2016 apologising for the delay and enclosing various information under the headings of items A to G with the letter. A supplementary covering letter was sent dated 1 November 2016, enclosing further information as previously promised.
7. On 22 December 2016, the Council sent the complainant a further letter outlining its duties under the FOIA and containing explanations of key terms. The Commissioner notes that the letter appears to have been prompted by a request for clarification of these terms in correspondence sent directly to the stage two complainant investigator, and was not therefore sent as an internal review, but as an extension to the Council's original responses.
8. On 8 January 2017, the complainant requested an internal review of the Council's FOIA response, stating that she considered the explanation of its FOIA duties contained in its letter of 22 December 2016 as seriously flawed. She added that having sought advice from a legal expert in FOI, a public authority has a legal obligation to provide the information to the requester, irrespective of whether this information is held by the public authority or a private company contracted by the public authority. She added that it is the duty of the public authority to obtain this information for the requester, not for the requester to request it directly from the third party.
9. Following the internal review the Council wrote to the complainant on 3 February 2017. The review contained a summary of the chronology of correspondence between both parties in the months since the complainant's FOIA request and this date. It also contained clarification of a number of key terms and acronyms contained within the information previously provided to the complainant, whilst acknowledging that its failure to do so at the time of its initial response represented a breach of section 16 of the FOIA which requires a public authority to provide advice and assistance.

10. In respect of the complainant's comments that it is the duty of the Council to obtain any information held by third parties acting on its behalf the Council accepted that:

*"I would agree that information relating to factory settings and the quality assurance testing of units to be used in the homes of service users should be information that the Authority is entitled to see. I am given to understand that this information has indeed been requested from Tunstall and I have again asked for responses from Tunstall to the information previously requested..."*

11. The Council also informed the complainant that Tunstall considered that the documents which the complainant had referred to are its confidential information and intellectual property and that they are exempt from disclosure under sections 43(1) and 43(2) of the FOIA.
12. Finally the Council accepted that its responses were not provided as quickly as they should have been, and that reasonable explanations of key terms should have been provided to accompany the information at the time of its original response.

### **Scope of the case**

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13. The complainant contacted the Commissioner on 12 January 2017 to complain about the way her request for information had been handled. Specifically, the complainant asked the Commissioner to do everything within her remit to ensure her requests were met in full, and as a matter of priority. She also considered the service from the Council merited a penalty payment for the continued distress it was causing both herself and her family.
14. Following the Council's internal review of 3 February 2017, the complainant confirmed to the Commissioner on 19 March 2017, that the key issues to investigate were as follows:
  - Concern that the Council has on a number of occasions attempted to avoid its FOIA obligations by saying it does not have information held by its suppliers, and indeed asking her to contact them directly.
  - The Council has no arrangements in place with Tunstall under the FOIA making it in breach of its obligations under the FOIA.
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- Tunstall is attempting to avoid providing key information by claiming exemptions under Intellectual Property rights and commercial considerations.
15. The complainant also referred to concerns outlined directly to the Council in correspondence dated 5 March 2017, which had previously been provided to the Commissioner.
  16. During the course of the Commissioner's investigation the complainant asked the Commissioner to consider the following additional concerns:
    - Although the amended contract with Tunstall for the supply of Careline equipment is now part of National Procurement Service Framework Agreement (FA), the Council has confirmed that it post-dates the supply of the equipment installed in her father's house. The complainant considers that the Council remains in breach of its legal obligations under the FOIA and asked the Commissioner to confirm that the Council will be prosecuted for this breach as she considered its actions were not a complete remedy under the FOIA.
    - The Council have also confirmed that it will be reviewing all additional contracts held with Tunstall related to other services. However, the complainant expressed concern that it is entirely possible that it remains in breach of the FOIA for other contracts, and considers that as the Council have known about this particular FOIA breach since November 2016, it is not taking it sufficiently seriously.
  17. Before commenting on the scope of her investigation, the Commissioner would like to express her sincere sympathy to the complainant and her family for the very sad and distressing circumstances which gave rise to this information request.
  18. In her consideration of the scope of her investigation, the Commissioner considers that her main focus must be whether the outstanding information is held by Tunstall on behalf of the Council or whether the Council is correct to maintain that it does not hold this information for the purposes of FOIA, as the response to many of the complainant's other concerns is dependent on this one issue.
  19. Additionally, the Commissioner will also consider the Council's general handling of this FOIA request and whether it has complied with its

obligations in respect of timeliness provided for under section 10(1) and its duty to provide advice and assistance as required under section 16 of the FOIA.

20. However, the Commissioner would point out, that regardless of the findings, her remit does not extend to instructing a public authority to make a penalty payment to the complainant for any distress. Neither does it extend to prosecuting the Council for inadequate contracts with third parties.

## Reasons for decision

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21. Section 1 of the FOIA states that any person making a request for information is entitled to be told whether the public authority holds the information requested and, if held, to be provided with it (unless an exemption applies).

22. Section 3(2) sets out two legal principles that establish whether the information is held for the purposes of the FOIA:

*"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."*

23. The key question therefore in this case, is whether the outstanding information held by Tunstall is held by the third party for its own purposes, or on behalf of the Council.
24. In her consideration of this point, the Commissioner has had regard for her own guidance "*Information held by a public authority for the purposes of the Freedom of Information Act*"

[https://ico.org.uk/media/for-organisations/documents/1148/information\\_held\\_by\\_a\\_public\\_authority\\_for\\_purposes\\_of\\_foia.pdf](https://ico.org.uk/media/for-organisations/documents/1148/information_held_by_a_public_authority_for_purposes_of_foia.pdf)

25. The guidance outlines a number of factors that would indicate that the information is held solely on behalf of another person, which include:
  - *"the authority has no access to, use for, or interest in the information;*

- *access to the information is controlled by the other person;*
  - *the authority does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information; or*
  - *the authority is merely providing storage facilities, whether physical or electronic."*
26. The Council has informed the Commissioner that it has no access to the information, that it would be of no use to it, and that it would have no reason to hold it in the usual course of business. Its interest in the information extends only in so far as confirmation that the equipment and its supplier meet the industry standards.
27. The Council has further confirmed that the information is held physically by Tunstall, and does not consider that Tunstall holds it on the Council's behalf. It has further confirmed that there is no assistance provided to Tunstall or any other third party, that it is not involved in the quality assurance, testing or other aspects of the units prior to them leaving the factory for storage awaiting commercial distribution and sale, and that it does not provide storage facilities for Tunstall.
28. As countervailing factors, the guidance also states:
- "Factors that would indicate that the information is also held by the public authority include:*
- *the authority provides clerical and administrative support for the other person, whether legally required to or not;*
  - *the authority controls access to the information;*
  - *the authority itself decides what information is retained, altered or deleted;*
  - *the authority deals with enquiries about the information; or*
  - *costs arising from holding the information are included in the authority's overall budget."*
29. The Council has confirmed to the Commissioner that it provides no support and assistance to Tunstall, clerical, administrative or otherwise. It has further confirmed that it has not had sight of, access to or physically held a copy of the record requested. Moreover, it has no control over how the information is held, or regarding any changes to, or disposal of the information when no longer required.
30. The Commissioner also notes the Council's comments that the information sought is very specific and beyond that which would be

routinely requested by an individual. The Council's staff have limited or no knowledge about the highly technical aspects of the equipment and testing plans to ever be able to be in a position to answer queries about the information. It has also confirmed that no cost over and above the initial purchase cost are accounted for within its budgets.

31. Having considered the response from the Council, the Commissioner has concluded that Tunstall does not hold this information on behalf of the Council, as defined by section 3(2)(b) of the FOIA, and that the Council's assertion that it does not hold this information for the purposes of FOIA is correct. In reaching this conclusion, the Commissioner is aware that the complainant disagrees strongly with her findings and has taken the opportunity to provide further clarification.
32. The Commissioner can confirm, that where a third party is found to be holding information on behalf of a public authority, the authority is obliged to provide this information (unless an exemption applies), directly to the applicant as opposed to directing him or her to the third party.
33. However, where a public authority has correctly stated that it does not hold the information for the purposes of FOIA, it is not required to obtain this information.
34. Additionally, where a public authority is deemed to hold information for the purposes of FOIA, and it has either originated from the third party or is held by a third party on behalf of the public authority, the authority, is expected to have made adequate provision for this within the contract between the two parties.
35. However, it is beyond the remit of the Commissioner to investigate or comment on an existing contract where the information is not held for the purposes of FOIA, even if it is deemed by other parties as inadequate to require the third party to co-operate with a formal complaints process.

### **Section 10(1) – time for compliance with request**

36. Section 10 of the FOIA states that, subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
37. The Commissioner notes the complainant submitted her request on 12 August 2016. However, the Council did not provide its full FOIA

responses until 27 October and 1 November 2016. Having exceeded the 20 working day timescale for responding to the request, the Commissioner has recorded a breach of section 10(1) of the FOIA in relation to the Council's handling of this request.

### **Section 16 – advice and assistance**

38. Section 16(1) of the FOIA provides that a public authority should give advice and assistance to any person making an information request.
39. However, the complainant did not understand the technical terms contained within the Council's response and needed to request an explanation.
40. By failing to give appropriate advice and assistance in relation to the key technical terms provided in response to the request, the Council breached section 16(1) of the FOIA. However, the Commissioner notes that this was subsequently provided as stated in paragraph 9 of this notice.



## Right of appeal

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41. 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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

42. 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.
43. 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 .....**

**David Teague**  
**Regional Manager (Wales)**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**