

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 February 2019

Public Authority: Folkestone and Hythe District Council
Address: Civic Centre
Castle Hill Avenue
Folkestone
Kent
CT20 2QY

Decision (including any steps ordered)

1. The complainant has requested information regarding sexual harassment and misconduct allegations about a specific employee and details about any related settlement agreements.
2. The complainant believed that Folkestone and Hythe District Council must hold further information relevant to his request after the council had said that no information was held.
3. The Commissioner's decision is that, on the balance of probabilities, Folkestone and Hythe District Council has provided the complainant with all of the information which it holds falling within the scope of the request. However, it did not issue a response within 20 working days and therefore breached section 10 of the FOIA.
4. The Commissioner does not require the council to take any steps.

Request and response

5. On 9 May 2018, the complainant wrote to Folkestone and Hythe District Council ('the council') and requested information in the following terms:

"How many allegations of sexual harassment / misconduct - which led to "settlement agreements" were made against the former Corporate Director of Strategic Operations, between 1 Jan 2013 - to present. Please could you set out the number of allegations per year and the amount for any settlement agreement" paid for each year."

6. The council responded on 8 June 2018 and refused to confirm or deny that the requested information was held, citing section 17(4) of the FOIA.
7. The complainant requested an internal review on 10 June 2018.
8. Following an internal review the council wrote to the complainant on 5 July. It maintained its position, and further explained: *"The information that engaged s17(4) was exempted under s40(5)(b)(i)."*
9. Following on from the Commissioner's enquiries, the council sought further advice on its position and concluded that *"the Council's initial response was overzealous in terms of balancing the protection of personal data (confirmation of details about an employee's disciplinary file) against legitimate public interest factors favouring disclosure (the seniority of the employee and the perception of wrongdoing)*. It therefore amended its response to the complainant.
10. On 3 January 2019 the council provided the following response to the complainant:

"Number of allegations per year:

•2013: 0.

•2014: 0.

•2015: 0.

•2016: 0.

•2017: 0.

•2018: 0.

Amount paid in settlement agreements due to the above:

- 2013: 0.
- 2014: 0.
- 2015: 0.
- 2016: 0.
- 2017: 0.
- 2018: 0.”

Scope of the case

11. Initially the complainant contacted the Commissioner regarding the council's refusal to confirm or deny that it held information. However following the response of 3 January 2019, the complainant stated his position to be that records of allegations and settlement agreements must be held and asked the Commissioner to further investigate.
12. The Commissioner therefore considers the scope of the case is to establish if the council complied with section 1 of the FOIA and whether, on the balance of probabilities, the council holds further information in-scope of the request.

Reasons for decision

Section 1 of the FOIA – general right of access

13. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information within the scope of the request, and if so, to have that information communicated to him.
14. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
15. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public

authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.

The complainant's position

16. The complainant stated to the Commissioner that the council's initial position of neither confirming nor denying *"weakens public trust in agencies and public authorities. Most crucially, it also risks undermining basic individual rights and the rule of law. The NCND response by the Council is a mechanism to protect sensitive information in the public interest."*
17. The complainant stated that there are allegations in the public domain claiming a redundancy pay-out to the former director was actually a settlement agreement. He maintains that in response to these allegations *"NO legal action has been taken by the former employee or the Council."*
18. Following the council's update of 3 January 2019, the complainant spoke to the Commissioner, stating that the council's response must be untrue as he holds evidence from council ex-employees to the contrary.
19. The complainant also made a further claim regarding a regulatory disciplinary decision, for which the Commissioner has been provided no evidence nor found any evidence in the public domain. As such it is not documented here.

The council's position

20. The council keeps records of complaints and allegations submitted by employees in a number of electronically stored spreadsheets. The spreadsheets hold various items of data, including the name of the employee the allegation or complaint is made against. The spreadsheets date back to 2012 when the council's Human Resources ('HR') function was moved back *"in house"*. Records are not held prior to 2012. No manual records are held.
21. The council confirmed it *"conducted a manual search of the entirety of the data contained within these spreadsheets for any accusations made against [former director]. No relevant information was located from this search."*

22. The council advised that its HR policy outlines that allegations should be reported to HR or a manager. Managers must notify HR if an employee wishes it to be formally pursued, and that HR would record details of the investigation. Complaints can also be raised through the whistleblowing procedure. It confirmed *"On this basis, the Council has conducted its search by examining all held complaints records possessed by HR."*
23. The council keeps the data held in the spreadsheets indefinitely, which is in accordance with its retention policy. The council advised *"there is no indication that any relevant data has been previously held, or deleted in accordance with the Council's retention policy."*
24. The council confirmed to the Commissioner that it had interpreted the request in the in the *"broadest possible terms in order to ensure the widest range of potential data would be returned. Consequently the request was interpreted as:*
 - (1) *Provide details of all allegations made against [former director].*
 - 2) *Provide details of settlement agreements signed in regards to [former director].*
25. In response to the Commissioner's questions, the council advised that anonymous complaints *"are generally extremely difficult to investigate, and may result in no further action being taken if they cannot be substantiated or reasonably investigated (for example if the anonymous complaint does not name the victim of an alleged behaviour)."* It advised that such complaints would however be recorded on the HR spreadsheets, as previously referred and searched.
26. The council advised that it had undertaken its own external search on the internet to review any allegations made against the former director *"Unfortunately, we have not been able to locate any details that would inform an additional search of our records, as the only allegations we have been able to locate were made on [the complainant's] blog. The articles in question do not contain any specific information regarding the allegations, other than making general statements about their existence."*
27. The council confirmed that it was unaware of any other regulatory disciplinary action however it did not expect to be informed about an ex-employee unless it was contacted for information and evidence. The council confirmed that it had received no such contact.
28. The council concluded *"If [the complainant] has obtained any information in respect of the above that evidences misconduct by [the*

former director] *while an employee of the Council, we would encourage him to provide this so an appropriate review could be conducted. I note that [the complainant] initially raised a similar point during a Q&A in the January 2018 meeting of the Full Council. No further information or evidence has been provided since that point which might facilitate any further investigation or examination of our records."*

The Commissioner's conclusion

29. It is not within the Commissioner's remit to arbitrate on the asserted allegations against the former director. Nonetheless, any details behind such allegations would lend weight to the complainant's argument that further information must be held. However in this case the information in the public domain, to which the complainant refers, provides no evidence regarding a pay-out or its purpose.
30. The council has provided a clear explanation of how information in-scope of the request is held, and the searches which underlay its responses. No evidence is available to the Commissioner which would indicate that the council's searches were insufficient, or that it holds further recorded information falling within the scope of the request, or that information has been destroyed.
31. The Commissioner is satisfied, on the balance of probabilities, that the council holds no information in-scope of the request.
32. The Commissioner therefore finds that the council complied with section 1 of the FOIA.
33. In light of the above finding, the Commissioner does not require the Council to take any steps.

Section 10(1) – Time for compliance with request

34. Section 10(1) of the FOIA provides 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.*"
35. The complainant made his request for information on 9 May 2018. The council provided its response, following the Commissioner's investigation, on 3 January 2019. This falls outside of the 20 working day period required by the FOIA.
36. The Commissioner's decision is therefore that the Council did not comply with the requirements of section 10(1) in this instance.

Right of appeal

37. 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

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

38. 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.
39. 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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Wycliffe House
Water Lane
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