

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 February 2019

Public Authority: Kent County Council
Address: County Hall
Sessions House
Maidstone
Kent
ME14 1XQ

Decision (including any steps ordered)

1. The complainant has requested information from Kent County Council ("the Council") regarding the staff and consultant pay, pension and other details for both the Council and companies that it has a financial interest in. The Council initially answered the request regarding its own figures but could not answer all of the complainant's questions relating to the other companies he asked about. Later, in its internal review, the Council confirmed that the companies the complainant seemed to be interested in were separate legal entities and public authorities in their own right.
2. The Commissioner's decision is that the Council has provided all the information it holds falling within the scope of the request but she finds that the Council has not complied with section 16 of the FOIA in providing appropriate advice and assistance to the complainant. Also, by failing to respond to the request within the statutory timescale of 20 working days, the Commissioner finds that the Council has breached section 10 (time for compliance) and section 17 (refusal notice) of the FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - provide further advice and assistance to provide the contact details of the LATCs and clarify which companies are of interest.

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 27 February 2018, the complainant wrote to the Council and requested information in the following terms:

"Dear Kent County Council,

*For the 12 month period between 1 April to 31 March for the years:
2013/14,
2014/15,
2015/16,
2016/17, I would like the following information:*

- 1. The total number of employees on the Kent County Council payroll system who, as part of their pay, received a contribution to the Kent County Council pension scheme*
- 2 The total number of full-time employees working for companies or trading vehicles in which Kent County Council has a financial/legal/governance interest (please show figures for each of the operations (eg Legal Services, Edukent etc)*
- 3 For each of the companies or trading vehicles, the number of consultants/interims/contractors/temporary staff*
- 4 For each of the companies or trading vehicles, the total number of hours worked by each consultant/interim/contractor/temporary staff (if the consultant/interim/contractor/temporary staff was employed on a daily/weekly/ rate, please give the daily rate and the number of hours the person was contracted to work each day/week)*
- 5 For each of the companies or trading vehicles, the total amount that was paid to each consultant/interim/contractor/temporary staff (if the consultant/interim/contractor/temporary staff was employed on a daily/weekly/ rate, please give the daily rate and the number of hours the person was contracted to work each day/week)*
- 6 For each of the companies or trading vehicles, the description of the role for each consultant/interim/contractor/temporary staff*
- 7 For each of the companies or trading vehicles, the number of consultants/interims/contractors/*

*temporary staff paid outside IR 35
8 For each of the companies or trading vehicles,, the number of
consultants/interims/contractors/
temporary staff paid via a company that provided the
consultant/interim/contractor/
temporary staff"*

6. The Council responded on 10 April 2018. It provided some of the information the complainant requested, but stated that it could not answer some of the questions he listed due to it exceeding the appropriate cost limit and quoted section 12 of the FOIA.
7. Following an internal review, the Council wrote to the complainant on 11 June 2018 to change its position. It stated that the part of the initial response he appeared to be dissatisfied with is the part that was answered by one of the Council's Local Authority Trading Companies ("LATCs"). The Council stated that although it wholly owned the LATC, it was a separate legal entity and therefore the Council did not hold the specific information he was requesting. However, the information may be held by the LATCs that most of his initial request referred to but as they are separate public bodies and would be subject to the FOIA in their own right, the request would need to be directed to each LATC separately.

Scope of the case

8. The complainant contacted the Commissioner on 12 August 2018 to complain about the way his request for information had been handled.
9. The Commissioner contacted the complainant for clarification on what he was dissatisfied with as she had noted the Council had sent a response on 17 August 2018 to his further request for an internal review. In this response, the Council explained that although the complainant referred to the Council not revealing information about its own temporary staff in his request for an internal review and the contact he made after the Council completed its internal review, this was not what he asked for in the initial request.
10. The complainant responded to the Commissioner, informing her that he remained dissatisfied with the Council's explanation in its internal review response and also the response it provided on 17 August 2018. He advised that there were parts of the request still outstanding relating to the companies or trading vehicles that the Council had a financial, legal or governance interest. He also detailed his dissatisfaction with the Council's response to his questions about temporary staff.

11. As the Council had changed its position on questions two to eight of the request from that it would be too costly to provide the information to that it does not hold the information, the Commissioner has therefore not found it necessary to consider the application of section 12 it made to the request within this decision notice.
12. The Commissioner considers that the scope of this case is to determine whether the Council handled the request in accordance with the FOIA and whether the Council was correct in stating that it does not hold the information the complainant requested on 27 February 2018.

Reasons for decision

Section 1 of the FOIA – Information held/not held

13. Section 1 of FOIA 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 within the scope of the request, and

(b) if that is the case, to have that information communicated to him."

14. The Council argues that it has provided the complainant with all of the information it holds which falls within the scope of his request. The complainant considers that further information must be held.
15. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request).
16. The Commissioner asked the Council to explain what searches were carried out for relevant information to which it replied to advise that it does not hold the information as the complainant was asking for information relating to other separate companies.
17. The Commissioner had also made some enquiries to the Council asking it to explain the nature of the relationship between the Council and the third parties which may physically hold the requested information in order to determine whether this information is held on behalf of the Council.

18. The Council responded to say that while the complainant's request asked for details about staff pay, benefits and pension details for LATCs that it wholly owns, it cannot provide the information as the companies are separate legal entities.
19. Within the complainant's request for an internal review, he told the Council that he was dissatisfied with the information that it provided not only about the LATCs but for the Council's staff figures too. However, the initial request contained eight questions and only the first question related to the Council, which it answered in the initial response on 10 April 2018. The Council also explained on 17 August 2018 that the figures it provided and are on the Council website were not only for permanent staff but for temporary staff too.
20. In the Council's response to the Commissioner, it explained that it initially attempted to provide some of the information that the complainant requested by asking some of the LATCs he mentioned in the initial request. These LATCs quoted section 12 in their answers, therefore the Council changed its approach in the internal review response and advised the complainant that he would need to direct his requests to each of the LATCs he enquired about, as it does not hold the information he required.
21. The Commissioner is satisfied with the Council's explanation and the searches it performed. Therefore, the Commissioner finds that the Council does not hold the specific information requested by the complainant and should the complainant require the information from the LATCs, he would need to contact them separately to request the information.

Section 3 – Public authorities

22. To explain the above, section 3(1) of the FOIA states:

"In this Act "public authority" means—

(a) subject to section 4(4), any body which, any other person who, or the holder of any office which—

(i) is listed in Schedule 1, or

(ii) is designated by order under section 5, or

(b) a publicly-owned company as defined by section 6."

23. Section 3(2) of the FOIA states:

"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."

24. While the Council wholly owns the LATCs, these companies do not hold the information on behalf of the Council, as they are public authorities in their own right as outlined in section 3(1)(b) and defined below in section 6(1)(b).

Section 6 – Publicly owned companies

25. Section 6(1) of the FOIA states:

"A company is a "publicly-owned company" for the purposes of section 3(1)(b) if—

- (a) it is wholly owned by the Crown, or*
- (b) it is wholly owned by any public authority listed in Schedule 1 other than—*
 - (i) a government department, or*
 - (ii) any authority which is listed only in relation to particular information."*

26. The Commissioner has researched a number of the LATCs the complainant quoted in his correspondence and can see that the LATCs are wholly owned by the Council, therefore if information is required from the companies, they are subject to the FOIA.

Section 10(1) – Time for compliance with a request

27. Section 10(1) of the FOIA states:

"(1) 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."

28. As set out above, the Council received the request on 27 February 2018 and sent its initial response, providing some of the requested information to the complainant on 10 April 2018. While the Council did not confirm it held some of the requested information within the statutory timeframe, the Commissioner considers that it has breached section 10(1) of the FOIA.

Section 17 – Refusal notices

29. Section 17(1) of the FOIA provides that:

"(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim

that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

30. As the Council did not provide the complainant with its refusal notice within the statutory timeframe, it has breached section 17(1) of the FOIA.

Section 16 – Duty to provide advice and assistance

31. Section 16 of FOIA states:

“(1) It shall be the duty of a public authority to provide advice and assistance, so far as would be reasonable to expect the authority to do so, to persons to propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.”

32. The Commissioner understands that in the Council's initial response to the request it had attempted to gain the information from the LATCs itself. However, within its internal review it decided that the best way forward would be for the complainant to send the request to each LATC separately.
33. The Commissioner considers it reasonable to allow the requestor to make their own representations to the relevant public authorities once it is clear that information is likely to be withheld. There may well be areas of compromise that allow a request to be modified to fall within the available costs limits and it is not for another party to determine what it thinks might be of use or interest to the requestor.
34. However, as the Council was aware within its internal review response that it did not hold the information requested and that other public authorities did hold the information, it would have been helpful to follow

the section 45 Code of Practice¹. The Commissioner finds that the Council did not comply with section 16 of the FOIA, as it appears that more could have been done to assist the complainant. For example, it could have followed Part III of the Code of Practice and aided the transfer of the complainant's request. Alternatively, the complainant could have been provided with contact details for the LATCs he was interested in.

35. In addition, when answering the Commissioner's enquiries, the Council did acknowledge that it assumed what the complainant meant by "*companies or trading vehicles in which Kent County Council has a financial/legal/governance interest*" and confirmed that it could have clarified this as it could have meant what the Council wholly owns or it could have meant something else. If this was the case, it would have been more difficult to determine which companies the complainant required the information from. This being so, the ambiguity could have readily been addressed with further correspondence with the complainant.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/235286/0033.pdf

Right of appeal

36. 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

37. 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.
38. 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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