

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 February 2019

Public Authority: Shropshire Council
Address: Shirehall
Abbey Foregate
Shrewsbury
Shropshire
SY2 6ND

Decision (including any steps ordered)

1. The complainant has requested information about costs incurred by Shropshire Council ('the Council') in dealing with a public inquiry. The Council disclosed some information, but said that it did not hold information about the costs of work done by staff in the course of their day to day duties.
2. The Commissioner's decision is that on the balance of probabilities the Council does not hold the requested information.
3. The Commissioner requires no steps to be taken as a result of this decision notice.

Request and response

4. On 10 August 2018, the complainant wrote to the Council and requested information in the following terms:

"Please could you supply details of all external legal services employed by Shropshire Council in relation to the Public Inquiry held in November 2017 regarding the planning application - Land adjacent to Sainsbury's Supermarket - APP/L3245/V/17/3174452. Please could you detail all legal costs incurred by the Council. Please could you provide copy invoices relating to these costs where possible."

5. The Council responded on 19 September 2018. It disclosed the amount paid for external legal services. It said that it was unable to provide other legal and staffing costs as they were not recorded in a way that identified the work carried out on the public inquiry. It said that the invoices were exempt from disclosure by virtue of section 43 (commercial interests) of the FOIA.
6. Following an internal review, the Council wrote to the complainant on 19 October 2018. It corrected the external legal costs figure that it had previously provided, and clarified that this had been paid to a single barrister's chambers, which it named. Otherwise, it upheld its decision in respect of the request.

Scope of the case

7. The complainant contacted the Commissioner on 26 October 2018 to complain about the way his request for information had been handled.
8. The complainant disputed the application of section 43, and said that the Council had given different figures for the external legal costs at varying times. He felt that disclosure of the actual invoice to the barrister was necessary in order for him to verify the true figure.
9. During the course of the Commissioner's investigation, the Council disclosed that invoice to the complainant. The complainant registered his dissatisfaction that the amount shown on the invoice did not mirror figures that it had disclosed on other occasions. While noting the complainant's overall disappointment with the Council's handling of his request, the Commissioner was satisfied that the provision of the name of its external legal service, and the invoice for services provided, satisfied his request for information about external legal services employed by the Council.
10. The complainant also disputed the Council's claim not to hold further information about the legal costs incurred by the Council. However, in the event that it didn't, he asked the Commissioner to consider whether in fact it should.
11. When dealing with a complaint to her under the FOIA, it is not the Commissioner's role to make a ruling on how a public authority deploys its resources, on how it chooses to hold its information, or the decisions it makes to hold some, but not other, information. Rather, in a case such as this, the Commissioner's role is simply to decide whether or not, on the balance of probabilities, the public authority holds the requested information.

12. For the avoidance of doubt, the Commissioner has considered in this decision notice whether, on the civil standard of the balance of probabilities, the Council holds information about legal costs incurred in respect of work done by its own staff on the public inquiry.

Reasons for decision

Section 1 – general right of access

13. Section 1 of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds that information and, if so, to have that information communicated to him.
14. In this case, the complainant suspects that the Council holds information from which it could calculate the cost of work done by its staff on the public inquiry. The Council's position is that it does not.
15. 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.
16. 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

17. The complainant explained to the Commissioner that he wished to establish the total costs incurred by the Council in dealing with the public inquiry. He said that the Council had presented four staff as expert witnesses, all of whom had compiled considerable evidence, and that other members of staff had been involved in administering the case. He believed the internal legal costs incurred by the Council must therefore be substantial. He found it hard to believe that the Council did not hold information about the time they spent working on the matter.

The Council's position

18. The Council explained that, having disclosed the external legal costs, all remaining legal costs associated with the public inquiry related to work done by internal staff as part of their ordinary, day to day, salaried activities. It explained that time spent by them on tasks pertaining to the public inquiry was not routinely recorded. Time recording only takes place where a specific business or regulatory need to do so has been identified. The Council said that, at the outset of the public inquiry, it had not been expected to be a large one, and so it was not proposed that tracking be done of the time spent by the staff working on it.
19. The Council further explained that, at the time of the public inquiry, it did not have a system in place for time recording. In the event that the Council expected to seek reimbursement of its costs, time would need to be specifically, manually recorded contemporaneously with the work being done. It explained that, generally speaking, costs would usually only be applied for in court litigation. There was no suggestion that the Council would be seeking to claim costs from any party in this matter and so there was no business need for recording the costs.
20. As to whether the information could be constructed from other sources, the Council explained that the staff involved are salaried, and that dealing with the public inquiry was only part of their duties. There is no separate budget for staff time spent dealing with public inquiries, mainly because they are reactive issues and the Council is not in control of the number and nature of appeals it deals with. Instead, those costs are part of the global budget for staffing costs for both planning and legal staff. Dealing with the public inquiry did not therefore cost the Council any more in its own staffing costs than it was obliged to pay in its usual staff salaries.

The Commissioner's conclusion

21. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in paragraphs 15 and 16, above, the Commissioner is required to make a finding on the balance of probabilities.
22. The Commissioner is satisfied that the Council has provided a detailed and cogent explanation for believing that it does not hold the requested information. It has explained that staff are paid on a salaried basis to perform a range of tasks and that, realistically, there was no way of separating out the time spent on public inquiry-related work from their other work. It has explained that no business need had been identified

for conducting time recording at the outset of work on the public inquiry and so separate records of the work done were not kept.

23. The Commissioner is satisfied in this case that the Council has demonstrated that it has reasonable grounds for considering that it does not hold the requested information, and therefore that it has complied with the requirements of section 1 of the FOIA in this case.

Other matters

24. The complainant suggested that in the event the Commissioner determined that, on the balance of probabilities, the information was not held, the Council should instead try to provide an estimate of the costs incurred.
25. The FOIA gives an individual the right to access recorded information held by public authorities. It does not require public authorities to create new information in order to answer requests. Thus, the Council is not required by the FOIA to take the complainant's suggested course of action.
26. Nevertheless, the Commissioner asked the Council whether it considered this would be feasible to do and if so, whether it would be prepared to do so outside of the FOIA, on a 'normal course of business' basis.
27. The Council explained that the complainant's suggestion was not feasible, due to the fact that time spent on public inquiry related work had not been recorded separately from other duties, and the Council had no way to identify it.

Right of appeal

28. 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

29. 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.

30. 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

Samantha Bracegirdle
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