

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 March 2020

Public Authority: Essex County Council
Address: County Hall
Chelmsford
CM1 1QH

Decision (including any steps ordered)

1. The complainant has requested information about joint-funded care packages. Essex County Council ("the Council") provided some information and stated it had provided all the information it held.
2. The Commissioner's decision is that, on the balance of probabilities, the Council has provided all the information it held within the scope of the request. However, she also considers that the Council failed to identify all the information it did hold within 20 working days and it thus breached section 10 of the FOIA.
3. The Commissioner does not require further steps.

Request and response

4. On 22 February 2019, the complainant wrote to the Council and requested information in the following terms:

"Would you please supply any information you hold that covers the protocols and local agreements with the CCG and a Local Authority for the joint funding of care e.g. as defined in (but not exclusively) the NHS England guidance for the use of the Decision Support Tool. Please also include copies of any directives or instructions relating to the joint funding of care that are given to any staff involved in the decision making in relation to the assessment and/or the funding of continuing healthcare."
5. The Council responded on 27 February 2020. It stated that it held no information within the scope of the request.

6. The complainant requested an internal review of the Council's response on 3 June 2019. He drew the Council's attention to an agreement that it was party to, along with the five Clinical Commissioning Groups (CCGs) which operated within the County and therefore argued that the Council should hold some information.
7. Following an internal review the Council wrote to the complainant on 28 August 2019. It stated that it did not consider that the document the complainant had highlighted would fall within the scope of the request and therefore reiterated that it held no further relevant information – although it did provide an earlier copy of the agreement.

Scope of the case

8. The complainant contacted the Commissioner on 27 August 2019 to complain about the way his request for information had been handled.
9. When the Commissioner opened her formal investigation in November 2019, the complainant provided information which he had obtained under Subject Access and which, he argued, demonstrated that the Council was deliberately concealing information within the scope of his request.
10. The complaint was referred to the Commissioner's criminal investigations team who considered that there was insufficient evidence to substantiate a criminal offence under section 77 of the FOIA.
11. The Commissioner considers that the scope of her investigation is to determine, on the balance of probabilities, whether the Council holds further information within the scope of the request.

Reasons for decision

12. Section 1(1) of the 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 of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

13. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request,

the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, she will consider any reason why it is inherently likely or unlikely that information is not held.

14. 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 the balance of probabilities.

The complainant's position

15. The complainant explained to the Commissioner that his request had arisen out of a battle to obtain funding for his mother's care. He had been advised that the Council was legally obliged to have a protocol in place to deal with situations involving joint care packages.
16. Furthermore, he pointed to references within internal Council emails he had obtained via a Subject Access Request (SAR) which make reference to joint funding arrangements and which, he believed, point towards information being held.

The Council's position

17. The Council argued that it did not have such documents as it had no business or statutory need to possess them.
18. The Council explained to the Commissioner that a Continuing Health Care (CHC) package would be arranged where an individual had both health (ie. medical) and social care (ie. they need help looking after themselves) needs. In such circumstances, the health care would be funded by the NHS, but the social care element would be funded by the Council.
19. Where disputes arose between the Council and a CCG (which would be the budget holder for the NHS funding), there was now a Disputes protocol in place to allow the two public authorities to reach an agreement or, if necessary, an arbitrated settlement.
20. There is national, published, guidance in place which covers the assessment of an individual's needs, such as the NHS Decision Support Tool. The Council thus argued that it had no need for its own local policies or guidance as the assessment of needs could be made based on the national guidance already available.

21. Referring to the references within the SAR correspondence, the Council argued that the quotes had been lifted out of their context and that, when read in their proper context, they referred to either the complainant's SAR or to documents specific to his mother's care – rather than general policies of the Council.
22. Whilst the Council argued that it did not need the requested information, it nevertheless confirmed that it had consulted its Senior Operational Policy Advisor, a Director of Local Delivery and Service Manager within Adult Social Care – none of whom had been able to suggest any further relevant information. It also noted that it had a single "designated practice library" to store documents of such a type and that this had also been searched without success.

The Commissioner's view

23. The Commissioner considers that, on the balance of probabilities, the Council holds no further information within the scope of the complainant's request.
24. When investigating such cases, it is important to note that it is rarely possible for the Commissioner to prove definitively that a public authority does or does not hold further information to that which has been provided. The Commissioner can only confirm that a public authority has carried out reasonable searches to establish what information is held and challenge the public authority to counter any reasonable explanations that would suggest further information is held. Based on these answers, the Commissioner then reaches a judgement, based on the civil standard of "balance of probabilities", as to whether the public authority has provided all the information which it holds.
25. It is also not the Commissioner's role to determine what information a public authority *ought* to hold. Only what information the public authority *does*, as a matter of fact, hold.
26. The Council has explained that its process for funding CHC packages is one which is set out in national guidance and in legislation. Costs are determined based on the national formulas and these are attributed to either the Council or the CCG in line with national guidance. The Commissioner therefore agrees that there is no obvious need for the Council to hold its own "local" policy.
27. It is inevitable that there will occasionally be disagreements between the Council and a CCG as to which party should fund which elements of a person's care. In such circumstances, the Council has explained that it follows the Disputes Protocol and has provided the version of the Protocol which was in place at the time of the request. The

Commissioner is not therefore persuaded that there would be a need for other documents to exist.

28. Furthermore, the Commissioner considers that the documents released under SAR do not persuade her that further information is held. When read in context, some do appear to refer to documents pertaining to the complainant's mother's care. She also notes that some of the emails express frustration on behalf of Council staff that the Council does not appear to have a policy such as the one which the complainant believes is held.
29. The Commissioner is therefore satisfied that, on the balance of probabilities, the Council holds no further information.

Procedural matters

30. The Commissioner notes that the Council provided the complainant with a document as part of its internal review. That document being the version of the Disputes Protocol which was in force at the time of the request.
31. The Commissioner considers that this document plainly fell within the scope of the original request which was for "*any information you hold that covers the protocols and local agreements with the CCG and a Local Authority for the joint funding of care.*" Whilst the Protocol might be thought of as an "agreement on how to resolve disagreements about joint funding" rather than an agreement itself, the Commissioner still considers that it was covered by the request.
32. As the Council failed to identify that this document was within scope when it first responded to the request, it failed to comply with its duty under section 1(1)(a) of the FOIA when responding.
33. Given that the Council failed to comply with its section 1(1)(a) duty within 20 working days, the Commissioner therefore finds that the Council breached section 10 of the FOIA.

Other matters

Correspondence with the Commissioner

34. The Commissioner's investigation of this case has regrettably been delayed because of difficulties in sending emails to the Council. In the interests of transparency the Commissioner sets out the chain of events below:

- 16 September 2019 - Email confirming that complaint had been accepted sent to the "YourRight.toKnow" (YRTK) and "transparencyteam" (TT) email addresses. No response received.
- 15 November 2019 – Email setting out scope of investigation sent to YRTK email address. No response received.
- 9 December 2019 – Chaser email sent to YRTK email address seeking response within five working days.
- 9 December 2019 – Phone call between ICO and Council. Council claimed that it had not received either piece of correspondence. This was followed by an exchange of emails between an officer at the Council and the ICO case officer. The outcome of that exchange was that the Council was given until 9 January 2020 to provide its submission.
- 20 December 2019 – Council provides its submission.
- 8 January 2020 – Commissioner sends further letter to Council by email asking it to clarify some of its responses. Email was sent to the TT email address and also copied to an information governance manager who had provided the submission. No response received.
- 23 January 2020 – Chaser email sent to YRTK email address asking the Council to respond within five working days or risk an Information Notice. Email was copied to the same manager as the email of 8 January 2020. No response received.
- 5 February 2020 – Commissioner serves information notice on the Council requiring it to respond within 30 calendar days. The notice was sent to the YRTK email address, but copied to the TT address, the manager and the Council's Data Protection Officer. The email was acknowledged from the YRTK inbox. Manager responds separately.

- 2 March 2020 – Council submits its final response to the Commissioner.
35. The Council claims that it never received the emails it did not respond to. It is not clear to the Commissioner what went wrong, although it seems odd that some emails appear to have been received and others not.
36. The Council was unhappy that the Commissioner chose to serve an information notice when it had never received the original correspondence. The Commissioner notes that she considers that the information notice was served properly – but agreed to record the Council's objection. The information notice itself will be published on the Commissioner's website in due course.

Interpreting requests for information

37. Whilst the Commissioner considers that the Council has provided all the information it holds within the scope of the complainant's request, some of its responses have given the Commissioner cause to wonder whether it always understood the scope of the request.
38. The Commissioner draws attention to her published guidance on interpreting requests for information which states that:¹
- "The authority must answer a request based on what the requester has actually asked for, and not on what it thinks they would like, should have asked for or would be of most use to them."*
39. If a public authority believes a requestor is only interested in a particular document, despite having submitted a broad request, it is entitled to seek clarification from the requestor but, in the absence of clarification it should focus on the exact wording of the request.

¹ <https://ico.org.uk/media/for-organisations/documents/1162/interpreting-and-clarifying-a-request-foia-eir-guidance.pdf>

Right of appeal

40. 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@justice.gov.uk

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

41. 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.
42. 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

Phillip Angell
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