

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 November 2020

Public Authority: Woking Borough Council
Address: Civic Offices
Gloucester Square
Woking
Surrey
GU21 6YL

Decision (including any steps ordered)

1. The complainant requested a copy of a court order relating to Brookwood Cemetery Ltd. Woking Borough Council (the Council) stated that it did not hold the requested information.
2. The Commissioner's decision is that, on the balance of probabilities, the Council did not hold the requested information.
3. The Commissioner does not require the Council to take any steps as a result of this decision notice.

Request and response

4. On 12 November 2019, the complainant wrote to the Council to request the following information:

"I understand from the Court of Appeal decision below that an order was made by Judge Kushner QC in or around November 2011 dealing with the assets of BCL. Please could you send me a copy of the order (and any schedules, appendices, attachments and the like)? As the order was made following a hearing in open court, I imagine it should not be necessary to make a formal FOIA request.

[Musa & Ors v Holliday & Ors \[2012\] EWCA Civ 1268 \(15 October 2012\)](#)"

5. As the complainant had not received any response, he wrote to the Council again on 18 November 2019 and confirmed that he was now making a request for information under the FOIA. Specifically, he stated:

"In the absence of any reply from [name redacted] (not even an acknowledgement), please treat the request in my e-mail of 12 November below as a request under FOIA."

6. The Council responded on 12 December 2019. It stated that it did not hold the requested information.
7. On 12 December 2019 the complainant requested an internal review. He argued that the information was held as the Council had referred to the details of the court order, which was the subject of his request, in an email dated 9 May 2018.
8. The Council acknowledged the internal review request on 20 December 2019. However, despite the Commissioner's intervention, the Council failed to conduct an internal review.

Scope of the case

9. The complainant initially contacted the Commissioner on 30 January 2020 to complain about the Council's failure to provide a response to his request for an internal review.
10. The Commissioner contacted the Council on 14 February 2020 to remind it of its responsibilities and asked it to provide the outcome of its internal review to the complainant within 10 working days.
11. The complainant contacted the Commissioner again on 3 March 2020 to confirm that, despite the Commissioner's intervention, the Council had still not provided the outcome of its review. He asked the Commissioner to order disclosure of the information. The Commissioner responded on 4 March 2020 to explain that the next appropriate step was to investigate whether or not the Council held the requested information.
12. The scope of this case and the following analysis is to consider whether, on the balance of probabilities, the Council held the requested information.

Reasons for decision

Section 1 – general right of access to information held by public authorities

13. 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.”

14. In scenarios where there is some dispute between the public authority and the complainant about the amount of information that may be held, following the lead of a number of First-tier Tribunal (Information Rights) decisions, the Commissioner applies the civil standard of the balance of probabilities.

15. For clarity, the Commissioner is not expected to prove categorically whether the information is held; she is only required to make a judgement whether on the balance of probabilities a public authority holds any information within the scope of the request.

The Council's view

16. In her correspondence to the Council the Commissioner explained her approach to investigating cases where there was a dispute about the amount of information held by a public authority. She asked the Council to provide detailed representations in support of its position. In line with her standard approach the Commissioner asked the Council various questions, including questions regarding the searches it undertook to locate the information. The Commissioner also asked the Council to respond to the complainant's argument that the court order must be held as the Council had referred to it in an email dated 9 May 2018.

17. The Council confirmed that the reference to a court order in the email of 9 May 2018 was incorrect. It explained that the document which was being referred to in that email was, in fact, a deed which was entered into between the parties as opposed to an order of the court. The Council went on to state that subject to redaction of third party personal information the deed could be made available to the complainant and the Commissioner understands that the complainant has now made a separate request for a copy of the deed.

18. The Council told the Commissioner that during the course of the Commissioner's investigation, it became clear to the Council that the document that the complainant sought was the deed, as this was the document which outlined how to deal with off-site interests. It stated that the court proceedings were in relation to an inheritance claim and as such, except for the deed, they were not relevant to the day to day running of the cemetery.

19. With regard to the searches it undertook the Council stated:

"A thorough search was undertaken of the paper and electronic records held by the Council's Legal Services Team for the Court Order. At the time of the search, I had not realised that the document in question was in fact the Deed so a search was undertaken to locate a Court Order. It should be noted that there has historically been a significant amount of litigation in respect of the Cemetery predating the Council's ownership. Therefore at the time of the request it would be reasonable to consider that the request was for a Court Order. The documents searched were mostly those provided to the Council as part of the due diligence exercise undertaken when the Council purchased the Companies in December 2014. The Council was not a party to the proceedings which predated its ownership of the Cemetery and as such would only hold a copy if it was provided to the Council as part of the due diligence process when it purchased the Cemetery or in any subsequent dealings. The court case itself was in respect of an inheritance matter and as such is not relevant to the day to day running of the Cemetery. The only relevance being the offsite interests which are dealt with in accordance with the Deed.

A manual search was undertaken of the paper files. This involved an officer physically checking each document held within the archived boxes of documents. A search was undertaken of the legal case management system. This involved searching through the case file firstly by title of the document and secondly by running a search using key words as follows: Court Order, Musa & Ors v Holliday & Ors, Judge Kushner , EWCA and 2012. Neither of these exercises resulted in the document being found."

The Commissioner's decision

20. The Commissioner's role is to make a decision based on whether recorded information was held by the Council.
21. The Commissioner is satisfied that the Council has provided a detailed explanation of its position. The Commissioner considers that the Council has carried out adequate and appropriately-targeted searches which

would have located the requested information. She notes that the relevant archived paper files were searched and a variety of suitable electronic search terms were used to search the legal case management system. The Commissioner's view is that such searches would have located information within the scope of the request, if it was held.

22. The Commissioner accepts the Council explanation regarding the incorrect reference to the court order in the email dated 9 May 2018. She understands that there is no business purpose for the Council to hold the court order, and that it was the deed which was of relevance to the Council.
23. The Commissioner does not consider that there is any evidence that would justify refusing to accept the Council's position that it does not hold the requested information.
24. The Commissioner is satisfied that, on the balance of probabilities, the Council does not hold the requested information and it has, therefore, complied with the requirements of section 1 of the FOIA in this case.

Other matters

Internal reviews

25. The Commissioner is concerned about the Council's failure to conduct an internal review in this case.
26. There is no formal requirement for public authorities to carry out internal reviews under the FOIA, but it is a matter of good practice, as specified in the section 45 Code of Practice¹. The Commissioner's view is that a reasonable time for completing an internal review is 20 working days, or 40 working days in more complex cases.
27. The Commissioner understands that the Council intends to review its processes to ensure internal reviews receive a timely response.
28. The Commissioner considers that if an internal review had been undertaken it may have been possible to resolve the matter without the Commissioner's intervention, as the Council would have had the

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

opportunity to consider and respond to the complainant's arguments regarding the 9 May 2018 email.

Right of appeal

29. 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

30. 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.
31. 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

Ben Tomes
Team Manager
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