

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 July 2022

Public Authority: Rotherham Metropolitan Borough Council

Address: accesstoinformation@rotherham.gov.uk

Decision (including any steps ordered)

1. The complainant requested various information in relation to changes to Rotherham Metropolitan Borough Council's (the Council) Constitution regarding citizens questions and petitions. The Council provided responses to each item of the request, however the complainant believes the Council holds additional information relevant to items two, three and four of their request. The complainant subsequently requested additional information not within the scope of their original request which the Council has not responded too.
2. The Commissioner's decision is that Rotherham Metropolitan Borough Council has complied with its obligations under section 1(1) FOIA in respect of items two and three of the original request. However, in failing to confirm to the complainant that it did not hold the requested information in respect of item four by the completion of its internal review, the Commissioner finds that the Council breached section 1(1) FOIA. In addition, in failing to advise the complainant that the requested information was not held within the statutory time limit, the Commissioner also finds that the Council breached section 10(1) FOIA. As the complainant will now be aware of this information, he does not require the Council to take any steps in relation to this request. The Commissioner has also recorded a further breach of section 1(1) and section 10(1) in respect of the Council's failure to respond to the complainant's related, but additional request for information.
3. The Commissioner requires the Council to take the following steps in relation to the request for information dated 10 December 2020 to ensure compliance with the legislation.
 - provide a substantive response to the request dated 10 December 2020 in accordance with its obligations under FOIA.
4. The Council 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 10 November 2020¹, the complainant wrote to the Council and requested the following information:

"1. Please disclose the current members of the Constitution Working Group.

2. As applied to 11.11.2020, please disclose who instructed that the constitution be changed with respect to amendments to be made to Council Procedure Rule 12 (which deals with public questions).

3. Why was the constitution to be changed in respect of citizens' questions?"

[Text below relates to question 4]

"On 22 May 2019 the constitution was changed in respect of petitions:

Clause 8b: Define vexatious petitions and how a petition will be deemed vexatious by the Monitoring Officer.

Appendix 4, emphasis point 5: Clarifications of matters excluded under the Council's petition scheme, where clause 3.1.6 includes:

"A petition will be deemed to be vexatious where, for example but not exclusively, it is manifestly unjustified, inappropriate or improper use of a formal procedure."

4. Please provide the criteria that the monitoring officer must apply before determining whether a petition is accepted and (4.1) the level of evidence required to justify exclusion of a petition.

It is noted that the above quote comes from Dransfield v FOIA.

¹ The Commissioner queried why the date in question two was the day after the date the request was submitted. The Council informed the Commissioner that its meeting papers would have been published five clear working days ahead of the meeting taking place and would have been publicly available.

5. Who proposed changing the constitution in this regard, and why?
6. The Council responded on 8 December 2020. It provided a response to each item of the request which will be discussed in more detail later in this notice.
7. The complainant contacted the Council on 10 December 2020 expressing dissatisfaction with its response to items two, three and four of their request and made a new request for additional information which was not within the scope of their original request.
8. Following an internal review, the Council wrote to the complainant on 30 April 2021. It upheld its original response, and informed the complainant that a requester may not extend the ambit of the original request by seeking to expand the scope of the original questions.
9. To date, the Council has not responded to the new request dated 10 December 2020.

Scope of the case

10. The complainant contacted the Commissioner on 3 May 2021 to complain about the way their request for information had been handled. They do not believe that the Council has answered their questions and believe the constitution's rules were changed because the answers to the questions being asked were politically embarrassing. The complainant also considers the actions of the Council constitute a wilful breach of section 77 FOIA.
11. The Commissioner would point out that his remit does not extend to a consideration of the reasons why a particular decision was made, and is limited to whether the public authority has complied with its obligations under FOIA.
12. Additionally, the Commissioner has also considered the complainant's allegation in respect of a possible section 77 offence and could find no evidence to substantiate this allegation. A discussion of this has been included in the 'Other matters' section of this notice.

The scope of the Commissioner's investigation is therefore to consider whether the Council has complied with its obligations under section 1(1) FOIA in respect of items two, three and four of the original request, and section 1(1) and section 10(1) in respect of the subsequent request.

Reasons for decision

Section 1 – General right of access to information held

13. Under section 1(1) of the FOIA, in response to a request for information a public authority is only required to provide recorded information it holds and is not therefore required to create new information in order to respond to a request.
14. In scenarios where there is some dispute between the amount of information located 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 Information Tribunal decisions, applies the civil standard of the balance of probabilities.
15. The Commissioner's judgement in such cases is based on the complainant's arguments and the public authority's submissions and where relevant, details of any searches undertaken. The Commissioner expects the public authority to conduct a reasonable and proportionate search in all cases.
16. In this particular case, the complainant does not accept that the Council has provided all relevant information in respect of items two, three and four of their request. The Commissioner will therefore consider each item separately to make a judgement.

Item two

17. Item two asked who instructed that the constitution be changed with respect of Council Procedure Rule 12 (public questions).
18. The Commissioner notes that in its original response, the Council informed the complainant that following a periodic review of its constitution by the Constitution Working Group (CWG), a number of proposed amendments were recommended to Council including the one in relation to Rule 12. It also provided a link to a report from Council dated 11 November 2020.
19. The complainant was not satisfied with this response and asked the Council to provide the name of the individual who brought the agenda item for discussion, and to provide the minutes of that meeting that discussed Rule 12.
20. The Council's internal review concluded that the information sought by the complainant in respect of this item was provided. It added that the CWG exercise collective authority and therefore all are responsible for the recommendations included in the Group's report. It further stated

that a requestor may not extend the ambit of the original request by extending the scope of the original question.

21. The Commissioner considers that an objective reading of this request would suggest that the complainant was looking for the name of an individual “who instructed the constitution be changed”. It would not however include the name of an individual who brought the agenda item or the minutes of the meeting that discussed Rule 12 as requested in the complainant’s subsequent correspondence. In the interests of completeness, the Commissioner asked the Council to confirm whether it holds the name of an individual who instructed the constitution be changed.
22. The Council informed the Commissioner that no single individual can be said to have instructed constitutional change and the matters which were ultimately reported to Council for voting on emerged from collective debate of the Members present.
23. The Commissioner considers that this is a reasonable answer to item two of the request and that on the balance of probabilities, the Council does not hold any additional information in respect of this item. He therefore finds that the Council has complied with its obligations under section 1(1) FOIA in respect of this part of the request.

Item three

24. As specified in paragraph 5, item three asked why the constitution was changed in respect of citizen’s questions.
25. The Council’s response to this question referred the complainant to items 2.12 to 2.14 of the report that went to Council on 11 November 2020. Paragraph 2.13 has been reproduced below for clarity:

“2.13 These provisions have not been amended for some time and the practice of recent years has it is suggested the spirit of the rules has been stretched beyond what would be considered reasonable or workable”²

26.

² The Commissioner would point out that this is reproduced directly from the relevant section of the report.

27. In their correspondence dated 10 December 2020, the complainant asked the Council to provide the supporting evidence that the rules had been stretched, asking which rules this was referring to.
28. In respect of the above, the Council informed the complainant in its internal review that it considered the original item three (why Rule 12 of the constitution was changed) was answered by referring to the relevant paragraphs of the CWG's report to Council, and that they did not request additional information.
29. The Commissioner asked the Council whether further information in respect of this item is held and if not, for details of its searches. The Council confirmed that appropriate checks and searches have been undertaken to identify any information which is held that would be relevant to this request. This involved engaging with the relevant services and officers who would hold this information and / or be able to advise. The Council added that it was primarily Democratic Services and Legal, who are the services which administer the relevant functions.
30. The Commissioner has considered item three of the request and the Council's response which referred to paragraphs 2.12 to 2.14 of the CWG report and considers that it has provided the relevant recorded information. Additionally, having considered the Council's description of its searches, in his view, consulting primarily with its Democratic Services and Legal services is both reasonable and proportionate for information in respect of a change to the Council's constitution. He therefore accepts that on the balance of probabilities, no further information relevant to this question is held and that the Council has therefore complied with its obligations under section 1(1) FOIA in relation to this part of the request.

Item four section 1(1) and section 10 (time for compliance)

31. The requirements of section 1(1) FOIA have already been specified in paragraph 14 of this notice. Section 10 however states:

"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."
32. As stated in paragraph 5 of this notice, item 4 quoted various sections of the constitution in respect of petitions and then requested the criteria the monitoring officer must apply before determining whether a petition is accepted. Item 4.1 asked for the level of evidence required to justify exclusion of a petition.

33. The Council's original response repeated the quotation used by the complainant above item 4 of their request, (see paragraph 5) with the addition of the following information:

"The Local Authorities (Referendums) (Petitions) (England) Regulations 2011"

which appears to be the source of the quotation.

34. The complainant expressed dissatisfaction with this response stating that they had requested the criteria that a petition will be deemed vexatious, whereas the Council provided a policy quote that referenced vexatiousness. They again asked the Council to provide the criteria for accepting or rejecting petitions.
35. In its internal review, the Council confirmed that "vexatiousness is the criteria" and concluded that the information requested in question 4 has been provided. It again stated that the complainant was attempting to debate issues they have previously attempted to raise, as well as extending the ambit of the original request.
36. The Commissioner asked the Council to confirm whether the Monitoring Officer has a list of criteria that is followed when determining whether a petition is accepted or deemed vexatious other than the definition of vexatious itself, whether this must be based on evidence, and if so, what evidence would be necessary.
37. The Council confirmed the following:
- "No, the Monitoring Officer does not have a list of criteria, and the decision is not based on evidence other than the wording of the petition itself."
38. The Commissioner has considered the Council's response to the complainant and the searches undertaken as outlined in paragraph 30 of this notice, (which apply to the request as a whole). He has concluded that, based on these searches and the Council's statement that the Monitoring Officer does not have a list of criteria, that no information is held.
39. It was only after the Commissioner commenced his investigation therefore, that the Council confirmed that the Monitoring Officer did not have a list of criteria and that the decision of whether to deem a petition vexatious is not based on evidence other than the wording of the request itself.

From the facts of this case, the Commissioner finds that the Council breached section 1(1)(a) in failing to confirm to the complainant that it did not hold the requested information. In addition, in failing to advise the complainant that the requested information was not held within the statutory time limit, the Commissioner also finds that the Council breached section 10(1) of the FOIA. Since the complainant will now be aware of this, the Commissioner does not require the Council to provide this confirmation separately.

Request dated 10 December 2020

40. The Commissioner notes that in their correspondence of 10 December 2020, the complainant asked for the following additional information which was not within the scope of their original request:

In relation to item two

- the minutes of the meeting that discussed Rule 12.

In relation to item three

- Supporting evidence why Rule 12 was changed.
- Evidence that the rules had been 'stretched', stating which rules.
- Where in the RMBC policy or procedure documents does it state that if the answer to a citizen's question does not provide the information required, the Council (presumably via the Lord Mayor) can direct that a proper answer be given?

41. The Council has not responded to these requests other than to inform the complainant:

"that a requester cannot extend the ambit of the original request by seeking to expand the scope of the original question."

42. Although the Commissioner accepts that a request may not be extended in scope after it is initially received, where new information such as this is subsequently requested by an individual, the council should treat this as a new request for information and consider it accordingly.

43. The Commissioner has therefore recorded a breach of sections 1 and 10(1) FOIA in respect of this further request for information. Section 10 of the FOIA states 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.

Other matters

Section 77 allegation

44. Section 77 concerns the offence of altering records with intent to prevent disclosure. Section 77(1) states:

“Where-

- (a) a request for information has been made to a public authority,
- (b) under section 1 of this Act ...the applicant would have been entitled ...to communication of any information in accordance with that section,

any person to whom this subsection applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communication of which the applicant would have been entitled.”

45. The Commissioner notes that the complainant believes the Council holds more information relevant to their request than it has disclosed and has specifically alleged that this constitutes an offence contrary to section 77 FOIA.
46. The Commissioner has investigated this allegation and could find no evidence to substantiate it which is further supported by his conclusions in respect of section 1(1) discussed in the main body of this notice. He would wish to highlight that being dissatisfied with the volume of information provided by a public authority in respect of a request, does not automatically constitute an offence under section 77 FOIA.

Right of appeal

47. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

48. 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.
49. 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

**Catherine Dickenson
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**