

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 July 2022

Public Authority: Brentwood Borough Council
Address: Town Hall
Ingrave Road
Brentwood
Essex
CM15 8AY

Decision (including any steps ordered)

1. The complainant has requested statistical information relating to ethnic and cultural diversity at Brentwood Borough Council (the Council). The Council refused the information under section 40(2) of FOIA, before amending its position to state that the information was not held.
2. The Commissioner's decision is that, on the balance of probabilities, the Council did not hold the requested information at the time of the request. However, he has recorded a procedural breach of section 1 and section 10 of FOIA, as the Council initially failed to respond to the request and also failed to confirm that it did not hold the requested information within 20 working days of receipt.
3. The Commissioner does not require any further steps to be taken as a result of this decision notice.

Request and response

4. On 8 September 2020, the complainant wrote to the Council and made the following request for information:

"I request the statistics for Ethnic and cultural diversity of Brentwood Borough council and if possible specifically the Environmental Health department."
5. On 25 October 2020, the complainant wrote to the Council again and made the following request for information:

"Under the Act I request the statistics for ethnic and cultural diversity within Brentwood Borough Council Planning and Environmental Health departments."

6. The Council responded on 10 December 2020 stating:

"The Council has an arrangement with another authority to support it with regard to collecting of data required under the Equalities Act 2010 regarding diversity within its work force. The Council must collect and process this data under the principles of the Data Protection Act 2018 and General Data Protection Regulations 2016/676, this type of data is classed as special category data and has additional checks and balances that must be applied prior to the data being processed. Whilst anonymised data may be provided for statistical purposes, it would be difficult to do so in this instance. The Council can refuse to provide the information if it amounts to personal information Section 40(2). Due to the size of the Council and in particular that area, to disclose the information would reveal special category data, under Article 9 of the GDPR there is no lawful basis for the Council to process the information to respond to this specific request."

7. The complainant wrote to the Council on 28 December 2020 requesting an internal review of its decision to withhold the requested information.
8. Following an internal review the Council wrote to the complainant on 3 February 2021, maintaining its position to withhold the requested information under section 40(2) of FOIA. It also stated that it was relying on section 22 (information intended for future publication) as a basis for refusing to provide the requested information.

Scope of the case

9. The complainant contacted the Commissioner on the 30 March 2021 to complain about the way their request for information had been handled.
10. Since accepting this complaint for investigation, the complainant provided the Commissioner with a further email from the Council (as part of the Council's response to a separate subject access request that the complainant had made under data protection law), in which the Council stated that it did not hold the requested information.
11. The Commissioner will therefore consider whether the Council held the requested information at the time of the request and, if so, he will then go on to consider whether the Council was entitled to rely on section 40(2) and/or section 22 of FOIA to withhold any of that information.

Reasons for decision

Section 1 – general right of access

12. Section 1(1) of FOIA says that an individual who asks for information from a public authority is entitled to
 - a. be informed whether the authority holds the information and
 - b. if the information is held, and is not exempt from disclosure, to have that information communicated to them.
13. Where there is a dispute between the amount of information the public authority states it holds, and the amount of information the complainant believes might be held, the Commissioner, in accordance with a number of First-Tier Tribunal decisions, applies the civil standard of the “balance of probabilities”.
14. The Commissioner initially asked the Council to double check whether it held the requested information.
15. The Council explained that it was of the view that, at the time of the request, it did not hold the requested information. It stated that this was because it was in the process of transferring its Human Resources function from an external provider to inhouse.
16. The Commissioner responded to the Council stating that, under section 3(2) of FOIA, information held by the public authority includes information “held by another person on behalf of the authority”. This means that there may be information within the scope of an FOIA request that a public authority does not physically hold, either in hard copies or electronic files on its systems but that a contractor or external provider holds on a public authority’s behalf.
17. The Council has now confirmed that the external provider did not hold the requested information at the time of the request.
18. The Council has also confirmed that, at the time of the request, it did not collect ethnic and cultural diversity data from its employees.
19. The Commissioner is satisfied that, on the balance of probabilities, the Council did not hold the requested information at the time of the request.
20. The Commissioner appreciates that the complainant may believe that the Council should hold the requested information. However, FOIA is to do with transparency of information held by public authorities. It gives

an individual the right to access recorded information held by public authorities at the time the request for that information is made. FOIA does not cover whether public authorities should hold information - it only provides access where information is held.

21. In making his decision, the Commissioner has accepted the Council's position that it did not hold the requested information at the time of the request. He has therefore not gone on to consider the application of sections 40(2) and 22.

Procedural matters

Section 10 – Time for compliance

22. Section 10(1) of the FOIA states that a public authority shall respond to information requests promptly and, in any event, no later than 20 working days from receipt.
23. The complainant submitted their initial request to the Council on 8 September 2020 and a follow up request on the 25 October 2020. The Council provided a response on 10 December 2020. The Commissioner notes that the total time taken by the Council to respond to the requests for information exceeded 20 working days.
24. Furthermore, the Commissioner notes that the Council did not inform the complainant that it did not hold the requested information and the complainant only became aware of this as part of the Council's disclosure in response to their separate subject access request.
25. By failing to advise the complainant that it did not hold the requested information within the required timescales, the Council has breached sections 1(1) and 10(1) of FOIA.

Other matters

26. The Commissioner notes that the Council does not appear to have checked whether it, or its external provider, held the requested information before responding to the request nor when it reviewed its handling of the request. He would remind the Council to ensure that it carries out thorough searches to check whether it holds the information that has been requested and clearly informs requesters whether it holds information when requested, including where this information is held on the Council's behalf by an external provider.

27. Only once a public authority has clearly established whether it holds information should it then consider whether any exemption under FOIA apply to that information.

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk <mailto: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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF