

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 April 2023

Public Authority: Mid & East Antrim Borough Council
Address: The Braid (Council Headquarters)
1-29 Bridge Street
Ballymena
BT43 5EJ

Decision (including any steps ordered)

1. The complainant has requested from Mid & East Antrim Borough Council (the Council) the final terms of reference of a review into a sudden death. Initially the Council refused to provide the information, citing section 30 of FOIA but, after an internal review, stated that it did not hold the information.
2. The Commissioner's decision is that the Council, on the balance of probability, does not hold the requested information.
3. The Council does not need to take any steps.

Request and response

4. On 7 September 2022 the complainant wrote to the Council and requested information in the following terms:

"I hereby make application under the Freedom of Information Act (2000), for the following information:

Having noted the information provided to Council in the recorded minutes of the public meeting of [date and time redacted] stating that terms of reference were being finalised for the internal review of the sudden death of [redacted name], I request a copy of the

agreed finalised terms of reference of the review launched by MEA Council as per to be conducted by nominated auditors or designated external company or any other persons, regarding the fatality of [redacted name] at [redacted named place and date]...”

5. The Council responded on 21 September 2022 and refused the requested information, citing section 30 of FOIA – investigations and proceedings.
6. On 27 September 2022, the complainant asked for an internal review.

Scope of the case

7. The complainant contacted the Commissioner in January 2023 to complain about the way their request for information had been handled. At that time the Commissioner understood that the Council would not be carrying out an internal review.
8. However, the Council did subsequently carry out an internal review on 26 January 2023 and withdrew its reliance on section 30, stating that the requested information was not in fact held. It explained that the request had been based on an error and that clarification should have been sought at the time of the original response. What it had considered “was not in fact an internal review of the sudden death of [named individual]”.
9. After he had received a submission from the Council, the Commissioner wrote to the complainant on 24 February 2023 outlining the Council’s reasons for asserting that the information was not held.
10. The complainant did not accept this view and the Commissioner wrote again to the Council on 28 February 2023 and asked further questions about how it had established that it did not hold the requested information.
11. The Council provided a second submission on 7 March 2023 repeating that it did not hold information falling within the scope of the request.
12. Finally, the Commissioner asked to see the information that the Council had referred to in the internal review and had determined was out of scope. This was provided to him on 3 April 2023.
13. The determination the Commissioner made having seen this information is set out below and consequently his view about whether, on the

balance of probability, the Council held any information falling within the scope of this request at the time it was made.

Reasons for decision

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

14. 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.

15. In cases where there is a dispute over the amount of information held, the Commissioner applies the civil test of the balance of probabilities in making his determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held (and, if so, whether all of the information held has been provided). The Commissioner is not expected to prove categorically whether the information is held.

The complainant’s view

16. The complainant does not accept the Council’s assertion that it does not hold the requested information. He sent the Commissioner an audio recording of an interview on BBC Radio Ulster (that had led from a newspaper article) “explaining the leaked report that the terms of reference that I requested refer to”. The Commissioner has listened to this recording which refers to the named individual, a leaked report, and serious matters that are beyond his remit, other than to investigate whether the Council complied with the complainant’s information rights under the FOIA.

17. The complainant also referred the Commissioner to the recorded minutes on the Council’s website where the Director of Communities said that the Council had “started an internal review” and that it was “finalising terms of reference” with regard to the fatal incident. This was what prompted the complainant to make the request.

18. The complainant refuted the Council's statement that "there is a slight difference in what I requested as to what the terms of reference contains". He contends that he was "very specific" in what he had requested and had "quoted the terms of reference that the Director of Community referred to in the Council recording of her address to Council". The complainant is concerned that the Council referred to background information outlining the fact that they have made several requests and complaints over two years. The Commissioner notes that this matter is not being considered here.
19. The complainant did not accept the use of section 30 of FOIA and does not accept the Council's view that it does not hold the terms of reference:

"...as referred to by Council, I specifically drew attention to this meeting and the terms of reference concerned, and as Council specifically stated that the terms of reference were in connection to the tragic incident – which is the death of [named individual], Council are fully aware of the terms of reference requested".

Essentially the complainant queries the Council's view that their request was based on an inaccuracy in their request, an 'error' which they believe has been shifted onto themselves when their request "was based directly on the oral statement given by the Director of Communities. The complainant considers this to be "disingenuous" and that "there is no doubt as to the terms of reference sought..."

20. They argue that the terms of reference are held and that they have,

"...been reported on by the Council (sic) own commissioned barrister and his report is in circulation amongst Councillors. If the terms of reference do not exist, how has the report been concluded and disseminated".

The complainant suggests that "the Council are attempting to confuse the nature of the request by stating after they have looked at the terms of reference, these may include wider considerations..."

The Council's view

21. The Council explained to the Commissioner that it appreciates that the complainant had made his request based on an excerpt from Council minutes.
22. The Council took the Commissioner through the request process. The request was registered in the normal way and a department request was sent to the Director of Community. After examination of the material,

"it became apparent to Council's legal team and its senior management that any material held by Council was not relevant to this specific request...due to human error, the Director of Community had made a general statement which has led the complainant to the belief that there was a Council-led investigation being conducted into [named individual's] death."

23. The Council explained that it was considered that information would be exempt from disclosure due to legal professional privilege and ongoing legal proceedings. The internal review report was looked at for accuracy and the conclusion reached was that the Council did not hold "terms of reference for an investigation into the death of [named individual] as this investigation is being carried out by the PSNI/Coroner's Office".
24. In answer to the Commissioner's questions, the Council stated that, if any information was held it would be electronic. However, it had not considered it necessary to carry out searches for information - "as it became apparent upon examination of the request that it related to work being carried out by other public authorities" and therefore was outside the scope of the Council. The Council's solicitor had advised "as to the correct position in respect of what reports and investigations existed and therefore there was no requirement to conduct any searches". The Council categorically stated that no recorded information ever held was relevant to the scope of the complainant's request which meant that it could not have been deleted or destroyed.

The Commissioner's view

25. The Commissioner was not convinced from this response that the Council did not hold any information falling within scope of the request. His doubt was due to the contradictory statements in the Council's responses. It is worth repeating that the internal review stated the following:

"Having reviewed the relevant terms of reference, the investigation in question is not specifically in relation of (sic) the accidental death that occurred...

Therefore, Section 30 of FOIA would not be the appropriate exemption to apply and instead Council should have responded to notify the requester that the information sought is not held by Council as no such investigation is being undertaken by Council."

26. In its response to the Commissioner, the Council said the following:

"...that it was considered that information would be exempt from disclosure due to legal professional privilege and ongoing legal

proceedings. The Council considered that "it would be grossly inappropriate for Council to share documents...which were 'the next best thing'."

The Council appeared to be saying that any information it may hold is outside the scope of the request but that it would be exempt from disclosure in any case.

27. The Commissioner notes that the same 'error' the complainant fell into was repeated in various newspapers in the summer of 2022 which reported on a Council investigation into the death of the named individual. In January 2023 a newspaper published an article referring to the deceased individual and the manner of their death, followed by its assertion that the Council had commissioned a report that detailed its legal liability position concerning constructions on its land. It seems that the newspapers considered the review/report to be either about this tragic incident or a catalyst for a review/report.
28. The Commissioner understands why the complainant is convinced that their request covers information held by the Council. Having now had sight of the information the Council has stated is out-of-scope, the Commissioner accepts that it does not fall within the scope of the request.

Other matters

29. The Council neither asked the complainant for clarification nor carried out any searches at the time of the request, despite having cited an exemption for information it proved eventually not to hold. The original error was caused by the Council and not the complainant and clarification at the time of the request was not sought that may have led to a swifter conclusion. In future the Council should ensure it is clear on the scope of a request at the outset and engage with requesters where there is any ambiguity to ensure fewer complications. In view of the delays and misunderstandings involved in this request, the Commissioner expects the Council to bear this history in mind regarding any future information requests related to this matter.

Internal review

30. The code of practice issued under section 45 of FOIA (the "code") recommends that internal reviews should normally be completed within

20 working days of receipt¹. The Commissioner considers that 40 working days is the maximum time that should be taken. In this case the Council failed to meet this timeframe by several months.

31. The Commissioner expects that, in its future handling of internal reviews, the Council's practice will conform to the recommendations of the code.

¹ [CoP FOI Code of Practice - Minor Amendments 20180926 .pdf \(publishing.service.gov.uk\)](#)

Right of appeal

32. 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

33. 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.
34. 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

Janine Gregory
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF