

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 13 August 2018

**Public Authority:** Brighton and Hove City Council

**Address:** Hove Town Hall  
Norton Road  
Hove  
BN3 3BQ

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to savings which the council said that it had made following the introduction of a new gas servicing and maintenance contract. The council provided an explanation of the savings it had made but the complainant argues that it has not supplied information which demonstrates how the savings stated by the council have been obtained from the introduction of the new contract. The council argues that it holds no further information falling within the scope of the complainant's request.
2. The Commissioner's decision is that the council has provided all of the information it holds falling within the scope of the request, and that it has therefore complied with the requirements of section 1(1)(b) of the Act. She has however decided that the council did not comply with the requirements of section 10(1) of the Act in that it did not provide a copy of all of the relevant information it holds to the complainant within 20 working days.
3. The Commissioner does not require the council to take any steps.

## Request and response

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4. On 13 May 2017, the complainant wrote to council and requested information in the following terms:

*"The Policy, Resources & Growth Committee of the Council met on the 4th May 2017. One of the documents considered was "Targeted Budget Management (TBM) Provisional Outturn 2016/17"*

*It was reported that savings of £626,000 had been made under "Gas servicing and maintenance". These were referred to as "Contract efficiency savings relating to new gas contract which commenced on 1 April 2016."*

*In March 2016 B&HCC said the new contract included savings of £90,000 per annum*

*On 9 January 2017 it was stated that "The new contract is projected to make a significant budget saving in the first year of over £450,000". At the time you were unable to provide any information as to how these savings had been made.*

*Now that it is reported that £626,000 has been saved over 12 months could you provide information that explains how?*

*Do these reported savings take into account costs of, and associated with, the additional post to monitor the gas servicing & maintenance contract in the Property & Investment Team?*

*It was also reported that there has been an underspend of £309,000 in Utility costs*

*Will this be reflected in service charges to tenants?"*

5. The council responded on 15 June 2018. It provided an explanation of where saving had been made and answered other parts of the complainant's request. However the complainant wrote back to the council on 19 June 2017 asking the council to respond to his initial question:

*"Now that it is reported that £626,000 has been saved over 12 months could you provide information that explains how?"*

*You have agreed that the saving is £596,000 not £626,000 but have still not provided information that explains how."*

6. The council wrote back on 21 June 2017 and said that if he was dissatisfied with its response he should request an internal review. At

this point the complainant made his initial complaint to the Commissioner. The Commissioner however pointed out that his internal review request had not specified how the complainant was dissatisfied with the information disclosed by the council in his complaint to the council. She therefore asked the complainant to remake his request for internal review in order to clarify this point to the council. The complainant did so on 1 August 2017:

*"With apologies for repeating certain points already mentioned in the period since my initial request 3 months ago. I must emphasise the following reasons for my dissatisfaction:*

- 1. On 4 May 2017 it was claimed that £626,000 had been saved since 1.4.16. I asked how this saving had been made - no information provided*
- 2. Various reports to committee (details recorded in the FOI requests) had given figures of £90,000 and £450,00 prior to the £626,000 figure. I asked why these savings had changed - no information provided*
- 3. I can only repeat my request of 19 June, " I must ask that you respond to my initial question, " Now that it is reported that £626,000 has been saved over 12 months could you provide information that explains how?"*
- 4. I accept that you have agreed that the saving is £596,000 not £626,000."*
7. He received an automated response from the council that his request for review had been received, however no further response was received. He therefore wrote back to the council on 1 January 2018 asking the council to provide a response to his review request. The council responded on 2 January 2018 stating that it had not located the request for review but said that it would now carry out the review.
8. Following the internal review the council wrote to the complainant on 5 February 2018. It provided a further explanation as to how savings had been made which it considered contributed to the statement it had made.
9. On 24 February 2018 the complainant wrote to the Commissioner and said he remained unhappy with the council's response and believed that it had still not provided an answer to how the savings identified by the council had been made; *"It does contain new information and although reiterating the "savings" there is, again, no attempt to explain how these savings are made. The actual request for specific information is ignored."*

## Scope of the case

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10. As noted above the complainant initially contacted the Commissioner on 22 June 2017 to complain about the way his request for information had been handled. His complaint was that the council had failed to respond to his request and provide the information he had asked for. This was clarified further by the complainant's email to the Commissioner of 24 February 2018.
11. The Commissioner considers that the complaint is that the council has not provided all of the information which the complainant requested which demonstrates how it has made savings from the gas servicing and maintenance contract.
12. During the course of the Commissioner's investigation further information was provided to the complainant on 6 August 2018.

## Reasons for decision

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13. Section 1 of FOIA provides 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. The council argues that it has provided the complainant with all of the information which it holds which falls within the scope of his request. The complainant considers that further information must be held. His argument is effectively that the council has made statements about the savings made through the introduction of the new contract, and so information must be held which demonstrates how those savings have been made.
15. 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 argument. 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. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held, she is only

required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.

16. The Commissioner wrote to the complainant on 21 June 2018. She pointed out that the council had provided an explanation for the savings it had made, which appeared to respond to the complainant's request. He had not asked for any specific documents which might include that information, but asked for information as to how the savings which the council had identified had been made. Hence an explanation of the savings would include figures extracted from various sources such as the new contract and the councils accounts, but may not include copies of those documents themselves. The council's explanation appeared that it might provide a response to the request.

17. The complainant responded on 22 June 2018 stating:

*"The key point of the request for information made on 13 May 2017 concerned the gas servicing & maintenance contract. Various figures have been mentioned but the most recent is £596,000 as acknowledged in response to my query concerning the cost of the additional post required to monitor the contract. Other references are made to "savings" as a result of the costs per unit of gas that do not relate in any way to the new servicing & maintenance contract. No information has been provided as to how the contract enables £596,000 in costs - for example; pay and conditions of employees, regularity of inspections, transport costs, reduction in profit margins, etc. The only difference between the previous contract and the "new" one is extra expenditure on a new post to monitor implementation."*

18. On 22 June 2018 the Commissioner wrote to the council asking the following questions regarding the searches which the council had carried out:

- What searches have been carried out to check no further information was held within the scope of the request and why would these searches have been likely to retrieve any relevant information?
- Please describe thoroughly any searches of relevant paper/electronic records and include details of any staff consultations.
- If searches included electronic data, which search terms were used and please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.

- If no or inadequate searches were done at the time, please rectify this now and let me know what you have done
  - If the information were held would it be held as manual or electronic records?
  - Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?
  - If recorded information was held but is no longer held, when did the council cease to retain this information?
  - Does the council have a record of the document's destruction?
  - What does the council's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the council describe the way in which it has handled comparable records of a similar age?
  - If the information is electronic data which has been deleted, might copies have been made and held in other locations?
  - Is there a business purpose for which the requested information should be held? If so what is this purpose?
  - Are there any statutory requirements upon the council to retain the requested information?
19. She also provided the council with the clarification which the complainant had provided to her regarding the information which he believed should have been disclosed in response to the request.
20. The council responded to the Commissioner on 2 August 2018. It said that it had located further information which fell within the scope of the complainant's request and offered to disclose this to the complainant. The council then disclosed this on 6 August 2018. It said however that it had not located any further information beyond this.
21. The complainant responded to the disclosure of 6 August 2018 by asking further questions of the council however these do not fall to be considered as part of this decision notice.
22. In response to the Commissioner's questions outlined above the council said that due to the specific scope of the request, there are only a limited range of relevant searches it needed to carry out to identify whether relevant information is held. The searches undertaken were within budget documents, committee reports, contract management documents and end of financial year budget reconciliation records.

23. It said that all relevant information is held digitally, so there was no hardcopy source available for search. The searches which were made included the finance business system, the IDOX document management system and the Interplan Committee System.
24. It said that its policy was that, corporate data and documents are not stored locally on computer hard drives, and that this is enforced through technical controls. It added that the policy is in place to ensure the availability of information for business purposes.
25. It clarified that all searches were done with reference to the contract number, supplier name and unique supplier reference.
26. It confirmed that if information were held it would be held in electronic format, as electronic structured data and digital documents.
27. It also confirmed that no information was ever held which has subsequently been destroyed or deleted. It confirmed that all information relevant to the request is still within the scope of the retention period set out in the council's standard financial procedures.
28. The Council confirmed that it has a retention schedule attached to the Standard Financial Procedures. Under this schedule, contract records are held for 6 years following expiry of contract and for 12 years in cases of contracts under seal. This is in alignment with the National Archives guidance on retention of contract records and based on sections 2 and 8 of the Limitation Act 1980.
29. Records of expenditure are retained for 7 years following the end of the financial year in which the expenditure is incurred. This is in alignment with the Taxes Management Act 1970. It also confirmed that it retains committee reports permanently on its website.

Conclusions as to whether further information is held

30. In reaching her decision the Commissioner has considered what information she would expect the council to hold and whether there is any evidence that the information was ever held. In doing so the Commissioner has taken into account the responses provided by the council to the questions posed by her during the course of her investigation, and has also taken into account its responses to the complainant.
31. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)* in which it was stated that "*there can seldom be absolute certainty that information relevant to a request does not*

*remain undiscovered somewhere within a public authority's records". It clarified that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test the Commissioner will apply in this case.*

32. In discussing the application of the balance of probabilities test, the Tribunal stated that, *"We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."* The Commissioner has therefore taken the above factors into account in determining whether or not the requested information is held on the balance of probabilities.
33. In coming to a decision in this case the Commissioner has considered the arguments provided to her by the complainant in support of his submission that the requested information is held.
34. The Commissioner notes the specific wording of the complainant's request for information. The request was in the form of a specific question asked of the council, and the council has sought to explain the costs savings it has identified in its responses to the complainant.
35. During the course of the Commissioner's investigation the council disclosed further information which identifies where some savings were made, however it confirmed to the Commissioner that it had identified no further information falling within the scope of the complainant's request beyond that which it provided in its initial response and in its internal review of the request.
36. The Commissioner notes the complainant's argument that the council has stated that it has made savings from the introduction of the new contract. It is not however within her remit however to make a judgement as to whether the information which has been disclosed justifies those claims.
37. The council has been clear on the searches which it has carried out, and in its clarification as to why those searches would locate any information falling within the scope of the request. Where it has located relevant



information it has disclosed this to the complainant without applying any exemptions.

38. Based upon the council's responses and the searches it has carried out the Commissioner has come to the conclusion that on a balance of probabilities the council does not hold any further information falling within the scope of the request. Therefore it complied with section 1(1) in providing the information which it held to the complainant.

### Section 10(1)

39. Section 10(1) of the Act provides 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.*"
40. In other words, when it has received a request a public authority must communicate whether it holds relevant information, and provide a copy of that information to the complainant within 20 working days where no exemption is applicable.
41. The complainant made his request for information on 13 May 2017. The council provided further information to the complainant in response to his request on 6 August 2018. This falls outside of the 20 working day period required by the Act.
42. The Commissioner's decision is therefore that the council did not comply with the requirements of section 10(1) in this instance.

### **Other matters**

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- (a) The complainant made his request to the council to carry out an internal review of its decision on 1 August 2017. He received an automated response from the council indicating that it had received his request on the same date.
- (b) Having received no response from his request he then contracted the council again on 1 January 2018 to ask why. The council indicated that it had not located his request for review but said that it would therefore carry this out.

- (c) The council then replied to the complainant's request for review on 5 February 2018.
- (d) Although there is no statutory time set out in the Act within which public authorities must complete a review, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review, and in no case should the total time taken exceed 40 working days.
- (e) The Commissioner monitors significant or repeated unreasonable delays in responding by authorities, and where appropriate further action may be taken.

## Right of appeal

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43. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

44. 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.
45. 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 .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**