

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 July 2018

Public Authority: London Borough of Merton

Address: Civic Centre
London Rd
Morden
SM4 5DX

Decision (including any steps ordered)

1. The complainant has requested Information from the London Borough of Merton (Merton) about the number of Health and Safety (H&S) representatives at a particular location. The London Borough of Merton has stated that it does not hold the requested information.
2. The Commissioner's decision is that the London Borough of Merton does not, on the balance of probabilities, hold information falling within the scope of the request.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 19 May 2017, the complainant wrote to Merton and requested information in the following terms:

*"1. How many Health and Safety representatives, if at all, were there at Merton Council's Waste Depot site based in Garth Road, PRIOR to 2010?
2. How many Health and Safety representatives, if at all, were there at Merton Council's Waste Depot site based in Garth Road, AFTER 2010?"*
5. On 15 June 2017, Merton sought clarification of the request particularly in relation to the timeframe set out in the request.

6. Clarification of the complainant's request was made on 20 July 2017 in an email where he stated that if the answer did not reflect the statement of a former H&S rep, and his own position that there were zero officially qualified H&S reps based at the particular portacabins during the years 2003 to 2010 then it would be clear that fraud had occurred.

7. This clarification, with the complainant's emphasis, set out the following:

*"1. How many OFFICIALLY QUALIFIED Health and Safety representatives, were there at Merton Council's Waste Depot site **(WHERE I WAS BASED IE IN THE TWO WASTE DEPARTMENT PORTACABINS)** In Garth Road, **PRIOR** to 2010 but no earlier than 2003 when I started at Merton?*

*2. How many OFFICIALLY QUALIFIED Health and Safety representatives, were there at Merton Council's Waste Depot site **(WHERE I WAS BASED, IE IN THE TWO WASTE DEPARTMENT PORTACABINS)** in Garth Road, **AFTER** 2010 and up to the end of 2014 when I finished at Merton?"*

8. On 9 August 2017 Merton wrote to the complainant. This letter appears to have been issued following telephone communication, the content of which is not known to the Commissioner. The response set out that the answer to each part of the request was the same, three;

Person A - recorded on a health and safety poster.

Person B- recorded in a particular Employment Tribunal judgement

Person C - recorded in personnel records.

9. On 15 August 2017 the complainant wrote to Merton expressing concern following the response. He set out that the response did not address the question of the particular location detailed and that his request related only to the two portacabins based at that site. He set out clearly that he had used bold capitals so as to ensure that Merton did not consider the entire depot. He went on to suggest that any further response from Merton which did not accurately address his concerns would look like it was "undoubtedly trying to either alter, block, destroy or conceal information which is against Section 77 of the FOI Act."

10. On 19 September 2017, Merton responded setting out that it was satisfied that it had complied with the request by disclosing the

information held on record and that no other records are held. It further detailed that where no records exist, there is no duty on a public authority to create information. It set out additionally that in relation to other concerns about the FOIA request, it had provided responses across four separate letters.

11. Merton further set out that reference to witness statements remained a separate matter and that under FOIA it could neither comment nor speculate on evidence that was given in any legal proceedings.
12. During the course of the Commissioner's investigation, Merton reviewed its position and wrote to the complainant advising that the requested information was not held.

Scope of the case

13. The complainant contacted the Commissioner on 12 October 2017 to complain about the way his request for information had been handled. In addition to his complaint about the handling of his request for information, the complainant asserted that Merton had committed an offence under section 77 of the FOIA.
14. The Commissioner wrote to the complainant setting out that there was no evidence of an offence under section 77 and she would not be considering that aspect further.
15. The Commissioner considers the scope of her investigation is to determine whether or not, on the balance of probabilities, Merton holds information falling within the scope of the request.

Reasons for decision

16. 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."*

17. In scenarios where there is some dispute between the public authority and a complainant as to whether the information requested is held by

the public authority, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of proof - i.e. on the balance of probabilities in determining whether the information is held.

18. In other words, in order to determine such complaints, the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
19. The Commissioner considers that the wording of the request is crucial in this case. She notes that the request is specific insofar as it asks about H&S representatives who were "*officially qualified*" as such and who were based specifically at two portacabins at Merton's Garth Road site.
20. When he submitted his complaint to the Commissioner, the complainant provided a copy of a witness statement which had been produced at an earlier Tribunal Hearing. The witness statement, dated 26 June 2017, describes the author's role as the Training & Road Safety Officer. The author states that "*I did not take over from any other Health and Safety Officer/Representative at the time of starting there, as I was the first Health and Safety representative to be based there.*" He describes himself as having been based there from mid-2013. Merton also holds a copy of that statement.
21. The complainant submitted this statement to the Commissioner in order to support his position that there were no H&S representatives based at the portacabins until the author of the witness statement was posted there.
22. In its submission, Merton has explained to the Commissioner that in determining what appropriate searches it should undertake, it contacted a variety of staff from different departments including but not limited to, Human Resources, Organisational Development, HR Strategy, Information Governance and Environmental health.
23. Merton has set out that in line with the Health and Safety (Consultation with Employees) Regulations 1996 it should retain records of H&S representatives but it did not appear that this had been the case at Merton.
24. As part of its search for information falling within the scope of this request, Merton also set out that it had contacted the branch secretary of the General, Municipal and Boilermakers (GMB) union but acknowledged that any information held by the union would not be held for the purposes of a request made to a council under FOIA. The Branch

Secretary confirmed that it held no records containing information within the scope of this request.

25. Merton confirmed that it had carried out an intranet search for "health and safety representatives" but it produced only Merton's own H&S policy.
26. It is Merton's position that it does not appear that information falling within the scope of the request has ever been held.
27. The Commissioner asked Merton whether the author of the witness statement, referenced at paragraph 20, was an H&S rep during either of the time frames set out in the request. Merton advised that he was not an H&S representative, he was a Training and Road Safety officer.
28. In response to further questions from the Commissioner, Merton advised that it has not located any recorded information which shows that the author of the statement was a qualified H&S representative but has acknowledged that it may be the case that there are old certificates (pre 2013) which are held in storage but had not, at that stage, been searched.
29. Merton has provided the Commissioner with an extract from the job application, the training record and the job description of the individual who wrote the statement; this dates back to 2008. It is acknowledged by Merton that these documents relate to H&S generally but it is the view of Merton that it does not amount to recorded information that the individual was ever a qualified H&S representative.
30. However, Merton has gone on to point out to the Commissioner that H&S was an inherent theme running through his job as Training and Road Safety officer and Merton has concluded that it is *"fair to say, [named individual] was in a way a health and safety representative even if he was not formally qualified."*
31. In its submission, Merton has gone on to state that the individual may have seen himself as a health and safety representative, even if technically he was not. It is Merton's position that the individual concerned may have gained a qualification via a trade union sponsored H&S course but that it would not necessarily be aware of this fact.
32. The Commissioner sought Merton's views on the veracity of the witness statement and it set out that it did not accept that the statement was wholly accurate but that it had no reason to think that the author of the statement was being dishonest.

33. In a further submission to the Commissioner, Merton explained that its policy was to have one H&S representative for the Waste Operations service and that reference to meeting minutes show that a named 'Waste Operations Service' H&S representative was in place until 3 February 2011 and that he was then replaced by a different named H&S representative. Neither of these named individuals was based at the portacabins at Garth Road although they were based at Garth Road.
34. It also set out that a search of the stored documents in relation to the author of the witness statement did not locate any information of that individual being either an official or a Trade Union H&S representative.
35. Merton has provided the Commissioner with copies of internal emails it had sent and received in relation to her request for a submission in this case and she is satisfied that these demonstrate that Merton has conducted appropriate searches in this case.
36. Given the requirements detailed in H&S regulations, and as set out at paragraph 23 of this notice, the Commissioner had asked Merton to explain its position regarding 'information not held'. Specifically she asked if information was not held because Merton had no H&S representatives or it was not held because there were no records of the H&S representatives it did have.
37. In its submission, Merton has set out that all Trade Union stewards act as H&S representatives and that although there is no single list of individuals named as H&S representatives, Merton, it appears, simply treats the list of trade union representatives as a list of H&S representatives. It is Merton's position that although somewhat convoluted, this means that Merton meets its requirements under H&S regulations.
38. It is not for the Commissioner to consider or to comment on whether Merton complies with the requirements of the Health and Safety (Consultation with Employees) Regulations 1996, her remit is solely to determine whether or not, on the balance of probabilities, information within the scope of the request is held.
39. In considering this, the Commissioner has carefully considered the wording of the request as clarified by the complainant on 20 July 2017. She considers that the complainant specifically wanted information about 'officially qualified' H&S representatives based only at the portacabins where he was previously employed. The Commissioner considers that it is clear from the submissions provided by Merton that on the balance of probabilities, it does not hold recorded information falling within the scope of the request.

40. It is the Commissioner's position that this request, and the responses to it, appear to have become somewhat convoluted and she has considered whether this could have been avoided by the provision of advice and assistance by Merton.
41. Section 16 of the FOIA places a duty upon a public authority to provide advice and assistance, as far as it would be reasonable to do so, to persons who have made or propose to make requests for information to it.
42. She considers that the initial response stating that there were three H&S representatives was at best misleading and served to increase the complainant's concerns about the response.
43. Had Merton considered the particularly narrow scope of the request at that point, it could perhaps have set out to the complainant its position regarding representatives for the Garth Road site and could have asked the complainant if he wished to request information about the site generally rather than be specific about the portacabins. It could also have set out its position regarding official H&S qualifications which could potentially have allowed the complainant to consider a refined request for information.
44. However, the Commissioner considers it appropriate to note also that there has been a breakdown in the relationship between the complainant and Merton and that it is apparent from the complainant's correspondence with Merton that his request had been deliberately phrased to relate to only the portacabins where he was based. It is clear that his position is that prior to 2013 there were no H&S representatives based at the portacabins and that this was the answer he wanted from Merton with nothing short of this answer being satisfactory.
45. In these circumstances, the Commissioner considers that the provision of advice and assistance in this case could have caused further confusion and may even have been viewed as obstructive given the complainant's position set out in his correspondence dated 20 July 2017 and 15 August 2017. Accordingly, she does not consider there has been a breach of section 16 of the FOIA.

Right of appeal

46. 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 7395836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

47. 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.

48. 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

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