

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 November 2019

Public Authority: Hampshire County Council
Address: The Castle
Winchester
SO23 8UJ

Decision (including any steps ordered)

1. The complainant has requested information regarding complaints about the Children's Services department of Hampshire County Council.
2. The Commissioner's decision is that, on the balance of probabilities, Hampshire County Council does not hold any information in scope of the request.
3. However, she finds that it contravened its obligations under section 10 of the FOIA in failing to respond in a timely manner in accordance with the legislation.
4. The Commissioner considers that the council did not provide the complainant with adequate advice and assistance and therefore breached its section 16 duty. However, as information has been provided as a result of subsequent requests no further action is required.
5. The Commissioner considers that the council breached section 17(1) of the FOIA by not issuing a valid refusal notice within 20 working days of the request which stated that the requested information is not held.
6. The Commissioner does not require any steps

Request and response

7. On 13 March 2019, the complainant wrote to Hampshire County Council ('the council') and requested information in the following terms:

"Dear Childrens Services Complaints

Could you provide answers to the following Freedom of Information requests?

- 1. How many complaints do you currently have being investigated at Stage Three?*
 - 2. What is the longest time that a current complaint has been waiting to complete a Stage Three?*
 - 3. What is the average time delay for a Stage Three to complete for each year for the last three years?*
 - 4. Information that shows that the current delays in Stage Two and Stage Threes have been brought to the attention of the Chief Executive of Hampshire County Council.*
 - 5. Information that shows how the Chief Executive intends to address the issue to ensure Hampshire County Council complies with the law."*
8. The complainant pursued a response from the council on 11 April 2019, 1 May 2019 and 7 May 2019.
9. The council responded on 9 May 2019. In relation to each request item it:
1. Omitted the answer from the response letter. However, in response to a query from the complainant, this was corrected later that day and the requested information was provided.
 2. Provided the requested information.
 3. Provided the requested information.
 4. Stated *"The Freedom of Information Act does not require the Local Authority to provide opinions or explanations."*
 5. Stated *"The Freedom of Information Act does not require the Local Authority to provide opinions or explanations."*
10. Following an internal review the council wrote to the complainant on 18 June 2019. In relation to [4] and [5] it stated:
4. *"This information is not recorded, verbal discussions take place as part of line management supervision meetings. Therefore, information not held. A formal report on complaint reporting to the Local Government Ombudsman is presented to the elected*

members of Hampshire County Council as part of the County Council's annual performance reporting. This is in accordance with the Ombudsman requirements."

5. *"The Freedom of Information Act is a privileged right to the public to access recorded information from Local Authorities. The information you have requested is for future intentions and therefore falls outside the scope of the Act."*

Scope of the case

11. The complainant contacted the Commissioner on 23 May 2019 to complain about the way his request for information had been handled. Specifically regarding the response to questions [4] and [5] stating that that *"HCC have a duty under the Children's Act 1989 to monitor and report on such information and it should be inconceivable that they do not hold recorded information."* The complainant also raised concerns regarding whether the council had made procedural breaches of the FOIA.
12. The Commissioner considers that the scope of this case is to establish whether, on the balance of probabilities, the council holds any information in scope of the request items [4] and [5]. Furthermore she will consider whether the council incurred any procedural breaches of the FOIA.

Reasons for decision

Section 1 general right of access

13. Section 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."

14. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of

First Tier Tribunal decisions, applies the civil standard of the balance of probabilities.

15. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
16. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the searches carried out by the council and other information or explanation offered by the council which is relevant to her determination.

The Complainants view

17. The complainant states that "*HCC have a duty under the Children's Act 1989 to monitor and report on such information and it should be inconceivable that they do not hold recorded information. It is clear that HCC do not wish to comply with this request from the way they have changed their excuse in the internal review.*"

The Council's response

18. In response to the Commissioner's questions regarding its statutory responsibilities, the council advised that the Children Act 1989 Representations Procedure (England) Regulations 2006¹ states the following about the statutory complaints procedure:

Monitoring of operation of procedure under section 26

13.—

(1) Every local authority must monitor the arrangements that they have made with a view to ensuring that they comply with these Regulations in so far as they regulate the procedure for the consideration of representations under section 26 of the Act.

(2) Local authorities must monitor those arrangements by keeping a record of—

(a) each representation under section 26 received;

(b) the outcome of each such representation; and

¹ <http://www.legislation.gov.uk/uksi/2006/1738/part/3/made>

(c) whether there was compliance with the time limits specified in these Regulations.

(3) For the purposes of such monitoring every local authority must as soon as possible after the end of each financial year compile a report on the operation in that year of the procedure set out in these Regulations.

(4) In this paragraph "financial year" means—

(a) the period beginning with the 1st September 2006 and ending with 31st March 2007; and

(b) each successive period of 12 months ending with 31st March.

19. The Commissioner asked the council to answer the complainants point of view that the council have a duty "under the Children's Act 1989 to monitor and report on such information", it stated:

- *"The legislation does not require any such monitoring to be provided to the Chief Executive in person.*
- *Evidence that the Director of Children's Services was aware of the issues has since been disclosed to [the complainant]; this was not available until after [the complainant] had received his initial response.*
- *Information provided to [the complainant] on 12 August 2019 in response to a different FOI consisted of correspondence between the Local Government and Social Care Ombudsman and the Director of Children's Services.*
- *Although the Chief Executive of Hampshire County Council has overall management responsibility, responsibility for Children's Services is delegated to the Director of Children's Services, who is a statutory Chief Officer.*
- *Any issues of this nature will be escalated to the Director of Children's Services, rather than the Chief Executive, and no information is held that falls within the scope of the complainant's request.*
- *There is also a duty on the monitoring office to report to the Authority / Executive on matters including maladministration or injustice under Section 5 and Section 5A of the Local Government and Housing Act 1989. The County Council meets that obligation by reporting to Elected Councillors annually as part of the Serving Hampshire Performance report. The last occasion being to the Cabinet on 17 June 2019."*

20. The Commissioner asked further questions regarding whether the Chief Executive had been briefed on "current delays." The council reiterated that the last annual report (being the Serving Hampshire Performance Report) had been presented to the Cabinet on 17 June 2019.

21. It advised that informal meetings and discussions will take place as required by the Senior Officers involved however there is no set date for reporting this information to the Chief Executive as it is not a statutory

requirement. It advised that the next annual report will be issued in June 2020.

22. The Commissioner asked whether the council holds recorded information regarding any plans to address the "current delays". The council advised that *"There are plans in place, and the County Council has been in correspondence with the Local Government and Social Care Ombudsman on this matter. In a subsequent Freedom of Information request from [the Complainant], a letter sent from the Director of Children's Services to the Local Government and Social Care Ombudsman, and the response, was disclosed. These documents and this response provide evidence of the Director of Children's Services being aware of the issues and the associated action plan. This information was not available when the original request was responded to. The response from the Local Government and Social Care Ombudsman is a matter of public record², and was published on 24 July 2019.*
23. The Council advised that that are not any business purposes nor statutory requirement for holding records of informal discussions.
24. The Commissioner asked for details of searches undertaken to locate further information in scope of the request. The council advised *"The Customer Relations and Complaints Manager and the Data Information Manager within Children's Services were approached for information. These members of staff are instrumental in the handling of complaints and reporting any information to the appropriate senior managers...The appropriate staff were contacted to determine whether information was held. As they were able to confirm that no records were held, no further searches were undertaken"*
25. The council confirmed that no information in scope of the request had been deleted or destroyed.
26. The Commissioner asked about retention periods for information that would fall in scope of the request. The council stated *"There is no set retention for informal discussions. Published annual reports are held permanently for purposes of historical interest."*

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<https://www.lgo.org.uk/documents/councilperformance/2019/hampshire%20county%20council.pdf>

Conclusion

27. The Commissioner has considered the council's responses in respect of the complainant's case that that further information should be held in-scope of items [4] and [5].
28. The Commissioner notes that the yearly reporting, undertaken by the council, is in line with the statutory legislation which states that "*For the purposes of such monitoring every local authority must as soon as possible after the end of each financial year compile a report.*" The Commissioner has no basis upon which to refute that information is only recorded, to brief the Chief Executive on complaint delays, as part of that yearly process. She notes that at the time of the request the yearly reporting had not occurred.
29. The Commissioner understands that the issues regarding stage 2 and stage 3 complaints are delegated to the Director of Children's Services, rather than the Chief Executive.
30. The Commissioner considers that the correspondence exchanged between the Director of Children's Services (as the Chief Executive's delegate) and Local Government and Social Care Ombudsman could have been deemed within the scope of the request, if it was available at the time of the request. However, it was created after the request date and therefore does not fall within the scope. The Commissioner notes that this information was subsequently provided following a separate request from the complainant.
31. The Commissioner considers it reasonable to assume that discussions would have been held during the course of the year, within the council's senior leadership team, regarding delays and potential actions to resolve. If the information is held in recorded form then it must be considered, however the FOIA does not stipulate what information public authorities should record.
32. In the absence of any evidence to the contrary, the Commissioner accepts the council's position that it approached the appropriate teams to find information in scope of the request; that no further information is required from a statutory or business prospective; and that no information was destroyed or deleted. She concurs that it is consistent, in this situation, for the council not to require to undertake any further searches to locate information.
33. The Commissioner understands the purpose of the request, from the complainant's perspective, will be to ensure that complaints are being escalated and dealt with appropriately in the council. However, the

FOIA is limited to giving the public the right to access information that is held, rather than any determination of what information *should* be held.

34. The Commissioner appreciates that the council's explanations regarding its yearly process for reporting, and the statement that it does not record informal discussions, may not satisfy the complainants view that further information '*must*' be held. However she considers that it does provide an adequate explanation of why no information is held in scope of request questions [4] and [5].
35. Having considered the council's response, and on the basis of the evidence provided to her, the Commissioner is satisfied that, on the balance of probabilities, the council did not hold information within the scope of the request questions [4] and [5].
36. The Commissioner therefore considers that the Council complied with its obligations under section 1(1) of the FOIA.

Procedural Matters

37. The complainant asked the Commissioner to consider whether the council breached sections 10, 16 and 17 of the FOIA.

Section 10 – Timeliness

38. Section 10 of the FOIA states that responses to requests made under the Act must be provided "*promptly and in any event not later than the twentieth working day following the date of receipt.*"
39. The request was made on 13 March 2019 and the response was provided 8 weeks later on 9 May 2019. The Commissioner therefore finds that the council has breached section 10(1) of the FOIA by failing to respond to the request within 20 working days. However, as the response was issued, no steps are required.

Section 16 Advice and Assistance

40. Section 16 of the FOIA requires a public authority to provide "*reasonable advice and assistance*" to those making or wishing to make a request.
41. Where a request is unclear or potentially has more than one objective reading, the Commissioner considers that this duty extends to making reasonable attempts to seek clarification of the request.
42. The Commissioner considers that the council's initial response to request items [4] and [5] was obtuse. Further information regarding its reporting arrangements and delegation of duties could have been made

at that point, to enable the complainant to submit a more meaningful or focused request.

43. Although the council partly rectified the position in the review response with regard to item [4], the Commissioner considers that the council did not make sufficient effort to aid the complainant.
44. The Commissioner therefore considers that the Council failed to discharge its section 16 duty in responding to this request.
45. No steps are required as information has been provided to the complainant as a result of subsequent information requests.

Section 17: Refusal notice

46. Section 17(1) of the Act states:

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies".

47. The council incorrectly identified requests [4] and [5] as invalid. The Commissioner considers that they were in fact requests regarding the existence of information monitor and act upon complaints about the Children's Services department. As such an appropriate response would have been to issue refusal notice stating that the information is not held.
48. In the review the council partly rectified this issue for request [4], albeit outside of the statutory time period, however it maintained its position for request [5].
49. The Commissioner therefore finds that the council breached section 17(1) of the FOIA.
50. No steps are required as the issue has been resolved in this decision notice.

Right of appeal

51. 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@justice.gov.uk

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

52. 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.
53. 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