

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 January 2022

Public Authority: Irby upon Humber Parish Council
Address: clerk.irbyparish@gmail.com

Decision (including any steps ordered)

1. The complainant requested information which he considered should have been included within the council's disclosure required in a step ordered in Decision Notice IC-48031-M7Y5. The council had initially responded saying that it did not hold any further pertinent information. During the course of the Commissioner's investigation, the council accepted that it does hold some further information. It argued that the complainant had already obtained a copy of specific council minutes via the ICO. This, however, was not a correct assumption.
2. The Commissioner's decision is that the council was not correct to withhold the draft minutes of the meeting of 23 September 2019. In doing so, it failed to comply with the requirements of sections 1(1)(a) and (b) of FOIA.
3. She has also decided that, whilst she is unable to say that the council does hold further information falling within the scope of the request, the council has not provided sufficient evidence to support a conclusion that, on a balance of probabilities, it does not hold further information falling within the scope of the request.
4. The Commissioner therefore requires the council to take the following steps to ensure compliance with the legislation.
 - To disclose to the complainant a copy of the draft minutes of 23 September 2019.

- To carry out further, sufficiently detailed searches for the requested information, and following this, to make a fresh response to the complainant's FOI request as required by section 1(1) of FOIA, without relying upon section 14 of the Act.
5. The council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 17 October 2019, the complainant wrote to the council and requested information in the following terms:

"In light of the Parish Council's response surrounding my data protection concerns, it appears your organisation have since entered into a written contract with [name redacted] or IG Compliance Ltd, which sets out the understanding of controller and processor responsibilities and liabilities etc. I would be grateful if a full and complete copy of this written contract, together with full and complete copies of any pertinent background papers, are provided to me.

The Parish Council also state:

"Steps are in place to mitigate any future incidents of this nature."

I would be grateful if full and complete copies of the information pertaining to these steps, together with full and complete copies of any pertinent background papers, are provided to me.

The Parish Council are aware that any complaint they receive can only be processed by them at a properly convened meeting of either the full council or of a committee tasked with investigating the matter. I would be grateful if full and complete copies of the meeting minutes and agenda of the meeting which took place in respect of my complaint are provided to me.

The Parish Council are also aware that a complainant will be invited to attend the meeting at which the complaint would be considered, and be offered the opportunity to be accompanied by a representative, if required. I would also be grateful if the Parish

Council could provide me with a full and complete copy of their

reasoning behind their decision not to invite me to that meeting along with the names of the members who made that particular decision.

The Parish Council are also aware they will provide the complainant with copies of any documentation upon which it wishes to rely at the meeting and shall do so promptly, allowing the opportunity to read all material in good time for the meeting.

I would also be grateful if full and complete copies of this documentation is provided to me."

7. The council initially claimed that the request was vexatious under section 14. However, as it provided no evidence to the Commissioner to support the application of this exemption the Commissioner issued a decision notice (IC-48031-M7Y5¹), on 12 August 2020, requiring the council to issue a fresh response to the request that did not rely on section 14. The council issued the fresh response on 18 September 2020. It provided a link to a copy of a contract relevant to the request, but it said to the complainant that no other pertinent information was held.
8. The complainant, however, believes that the council does hold further information falling within the scope of his original request for information.

Scope of the case

9. The complainant contacted the Commissioner on 11 December 2020 to complain about the way his request for information had been handled.
10. He argued that the council holds further information falling within the scope of his request. He highlighted to the Commissioner that the ICO had told him that information was held during correspondence with him over a different case. The ICO had said to him to that it had received information from the council as evidence during its investigation.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2020/2618154/ic-48031-m7y5.pdf>

11. The complainant's assertion is correct. The information in question is a set of draft minutes from a council meeting dated 23 September 2019.
12. During the course of the Commissioner's investigation the Commissioner highlighted to the council that she was aware that these minutes had been held by it previously, and that they fell within the scope of the complainant's request for information. She therefore asked the council to consider these minutes for disclosure to the complainant in response to his FOI request.
13. She also asked the council to clarify what searches it had done to establish its position that no further information is held falling within the scope of the request.
14. The council responded by sending the information it considers it holds which falls within the scope of the request to the Commissioner. The information consists of a copy of the contract which was disclosed to the complainant in response to decision notice IC-48031-M7Y5, together with a copy of the draft minutes of 23 September 2019.
15. The council said that it understood that a copy of the draft minutes had been disclosed to the complainant by the ICO in response to an information access request made to the ICO on a previous case. This understanding was not correct, however.
16. The following analysis therefore relates to whether the council was correct to withhold the draft minutes of 23 September 2019 from disclosure.
17. The Commissioner will also analyse whether the council was correct to state that it holds no other information falling within the scope of the request for information.

Reasons for decision

18. Section 1(1) 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."

Council minutes dated 23 September 2019

19. As noted, the council said that it believed that the ICO has previously disclosed a copy of the minutes to the complainant in response to an information access request he had made to it under the Data Protection Act 2018. The council is not correct in this assumption; the ICO has not disclosed this information to the complainant. Even if that had been the case, the council was required to respond to the request under section 1(1)(a) confirming that it holds relevant information, and to disclose the information or apply an applicable exemption in order to withhold it. Instead, in response to the step within decision notice IC-48031-M7Y5, it simply said that no other pertinent information was held.
20. The council therefore failed to confirm to the complainant that it holds further relevant information. It therefore failed to comply with the requirements of section 1(1)(a).
21. As the council has not claimed any further exemptions to exempt the information from disclosure, it also failed to disclose a copy of that information to the complainant, as required by section 1(1)(b).
22. The Commissioner is therefore satisfied that the council failed to comply with the requirements of section 1(1)(b) of FOIA.
23. She therefore requires the council to respond to the complainant again, and to disclose a copy of the minutes dated 23 September 2019.

Is further information held by the council?

24. The complainant argues that he is aware that further information is held by the council which has not been disclosed to him in response to his request. He argues that in addition to the minutes, he would expect to see an agenda and correspondence associated with the meeting.
25. 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.
26. 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.

27. 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 public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, she will consider any other information or explanation offered by the public authority (and/or the complainant) which is relevant to her determination.
28. During the course of her investigation, the Commissioner asked the council to describe the searches it carried out for information falling within the scope of the request, and the search terms used. She also asked other questions, as is her usual practice, relating to how it established whether it held further information within the scope of the request.
29. She also pointed out that as the council holds minutes which it had not identified as falling within the scope of the request, it may also hold an agenda and correspondence between the clerk and councillors informing them of the meeting, as well as other background information to the meeting.

The council's position

30. The council did not respond to the questions asked by the Commissioner, despite being asked on multiple occasions to do so. The Commissioner sent an information notice under section 51 of the FOIA requiring the council to respond to her investigatory enquiries, but its response to this notice only referred to the draft minutes and the contract as the information it held falling within the scope of the request. It provided the Commissioner with a copy of these documents, but it did not specify the searches it had carried out in order to determine whether it holds any further information falling within the scope of the complainant's request, and it did not respond to the Commissioner's further correspondence asking it to do so.

The Commissioner's analysis

31. As the council did not respond to the questions regarding the searches it carried out, the Commissioner is not in a position to determine whether, on the balance of probabilities, the council holds any further information falling within the scope of the request for information.
32. Whilst the Commissioner's position is not that she is aware of any evidence that any further information within the scope of the request is

held, in this case the responses she has received from the council provides insufficient evidence to support a balance of probabilities conclusion that no further information falling within the scope of the

request was held by the Council. The Commissioner's approach is similar to that taken by the First-tier Tribunal in the case of *Abdullah and Information Commissioner* (EA/2020/0105), in which the judgement at paragraph 53 stated:

"We make it clear that we are not deciding that the MoD does hold the information requested but that in this case there was insufficient evidence to support the conclusion that it was more likely than not that the MoD did not hold the information requested."

33. Given this, the Commissioner's decision is to include a step within this decision notice requiring the council to respond to the complainant's request for information again, as required by section 1(1) of the FOIA. The council is required to do so after carrying out robust and appropriate searches in order to determine whether it does hold any further relevant information.
34. The Commissioner recommends that the council follows the Commissioner's questions in its letter to it of 17 June 2021 as a guide to the searches she considers necessary in order to make an appropriate and robust decision as to whether further information is held.

Other matters

35. The council argues that it did not respond to the complainant initially because it had placed him on a restricted contact list due, it argues, to his vexatious behaviour.
 36. The Commissioner wishes the council to note that any internal procedures it has in place to address vexatious behaviour do not override rights provided to individuals by the FOI Act, and by other information access legislation.
 37. If the council believes that an information request is vexatious, it may wish to consult the Commissioner's guidance on section 14(1) of the FOIA². If considering applying section 14(1), the council should be
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² <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

mindful that this section applies to vexatious requests, rather than to the party making the request.

Right of appeal

38. 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

39. 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.
40. 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

Ben Tomes
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