

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 March 2012

Public Authority: Portsmouth City Council
Address: Civic Offices
Guildhall
Portsmouth
PO1 2PX

Decision (including any steps ordered)

1. The complainant requested the council to disclose copies of the minutes and notes taken at two committee hearings which were held to consider his complaint about the conduct of a named councillor. The council responded and informed the complainant that this information is not held. The Commissioner's decision in this case is that on the balance of probabilities the requested information is not held and therefore the council responded appropriately to this request. The Commissioner requires no further action to be taken.

Request and response

2. The complainant wrote to Portsmouth City Council ('the council') on 19 March, 14 June and 21 July 2011 to request information held relating to a complaint he had made against a councillor to be released under the Act. The remaining elements of the requests being considered in this notice are:
 1. The complainant's request for a complete copy of an email the councillor provided to the council in her defence dated 30 November 2010.
 2. The complainant's request for any notes or minutes taken at the two committee hearings that were held to consider his complaint.
3. In relation to bullet point 1, the council first informed the complainant on 29 March 2011 that the information was not held. The council then

issued a further response on 20 June 2011 confirming that the information was in fact held but that it was unwilling to release it, as it considered the information was exempt from disclosure under section 44 of the Act. The council did not address bullet point 2 in these responses.

4. The complainant complained about the way his requests had been handled on 21 July 2011. Specifically, the complainant alleged that the email (bullet point 1) should be released to him in full and reminded the council that he had also requested all notes and minutes held to be disclosed as well.
5. The council carried out an internal review and informed the complainant of the outcome on 18 August 2011. It released a redacted version of the email to the complainant but refused to disclose the remaining sections under section 40 of the Act. Again the council did not address bullet point 2.
6. Bullet point 2 was addressed by the council in a further response it issued on 21 September 2011. It informed the complainant that the requested information is not held.

Scope of the case

7. The Commissioner accepted the complainant's complaint for formal investigation on 27 September 2011. On 26 October 2011 the Commissioner wrote to the complainant to confirm the scope of his complaint and to inform the complainant that his investigation would be limited to bullet points 1 and 2 of paragraph 2 above.
8. The complainant's request for the information detailed in bullet point 1 of paragraph 2 above was first considered under the Data Protection Act ('the DPA'). The council and the complainant received the Commissioner's assessment under the DPA and following this the council decided to release an unredacted version of the email to the complainant. As the complainant is now in receipt of this information, this element of his request will not be addressed in this notice.
9. The notice will only address bullet point 2 of paragraph 2 above and whether the Commissioner considers on the balance of probabilities the requested information is or is not held.
10. The complainant has also raised other issues within his correspondence to the Commissioner, for example, his concerns with council's conduct in respect of its investigation into his complaint about a named councillor. The Commissioner cannot consider or indeed comment on these issues,

as they are not within his remit. He can only consider the matters he has outlined in paragraph 9.

Reasons for decision

Is this information held?

11. The complainant confirmed that he believes the council must hold notes or minutes of the two committee meetings that were held to address his complaint. He stated that he was advised during a meeting with another councillor that minutes would be taken and that he should make a formal request under the FOIA to see this information. He also considered the procedures laid down by the Standards Board for England dictate that minutes of such meetings should be kept.
12. The complainant also referred the Commissioner to a document headed 'Notice of Meeting', which he received from the council ahead of the committee meetings that were held. He confirmed that this document clearly states that:

"This Agenda should be retained for future reference with the Minutes of this meeting".
13. In addition, the complainant explained that he feels he has been continuously misled and lied to by the council with regards to his requests and the complaints he made. Referring to item 1 of paragraph 2 above, the complainant stated that he was first informed by the council that this information was not held. When he made a further request for this information and pursued this issue with the council it was later found that the information was in fact held.
14. The Commissioner requested the council to address these points and to explain in more detail why it considers this information is not held. He also asked the council to explain what searches it has undertaken of its records to ensure this information is in fact not held.
15. In its response to the Commissioner the council reiterated that it does not hold any minutes or notes of the meetings that took place. It confirmed that it only recorded the date, time, the names of the panel members and the decisions that were reached for each meeting that was held. No minutes or notes were taken at either meeting.
16. The council explained that a complaint of this nature must meet one of the following three initial tests before it is formally assessed:

- 1) It is a complaint against one or more named members of the authority or an authority covered by the standards committee.
 - 2) The named member was in office at the time of the alleged conduct and the Code of Conduct was in place at that time.
 - 3) The complaint, if proven, would be a breach of the Code under which the member was operating at the time of the alleged misconduct.
17. The council confirmed that both the first and second meeting concluded that the complaint did not meet one of the above initial tests. The complaint therefore did not progress to the assessment stage.
18. The council first stated that the assessment panel only received a copy of the complaint at this stage and no further information. However, it later clarified that in this case the assessment panel received a copy of the complaint it had received and a copy of an email it had received from the named councillor in defence of the complaint that had been made.
19. With regards to the Standards Board of England's procedures, the council confirmed that the guidance in place from the Standards Board of England makes no reference to the keeping of minutes should a complaint not meet the initial tests. It stated again that the complaint did not meet the initial tests outlined in paragraph 16 above so there was no requirement to take or retain minutes of the committee hearings that were held.
20. In respect of the meeting the complainant attended with another councillor, the council confirmed that this councillor was not a member of the Standards Committee and the councillor had therefore not attended any assessment panel of this nature. The council asked the councillor for his recollections of this discussion. The councillor confirmed that he may well have advised the complainant to ask for the minutes but that this comment was made without seeking any prior clarification or advice.
21. In terms of searches, the council confirmed that it had checked the files held by the council's monitoring officer and the senior local democracy officer and all associated correspondence to ensure that the requested information is not held. It stated that despite the complainant's belief that minutes or notes were taken they were not and this was in accordance with the usual process that they follow. Only a record of the decision reached is held. It stated that it appreciated that the complainant had received a document from the council which stated that minutes are taken. However, it referred the Commissioner to a letter the

complainant also received from the chief executive dated 21 September 2011 which explained to him that this sentence was included in this document in error and had since been removed. With regards to the complainant's statement that he has received misleading information in the past about whether information is held or not the council accepted that he had. However, it explained that this was the result of the monitoring officer not making proper checks of the council's records when the request was received. It was later identified that the city solicitor held the information the complainant requested.

22. The Commissioner has given this matter careful consideration. In cases such as this the Commissioner applies the normal standard of proof when determining whether a public authority holds the recorded information which is the civil standard of the balance of probabilities.
23. In deciding where the balance lies, the Commissioner considers the scope, quality and thoroughness of searches conducted by the public authority together with any reasons offered by the public authority or the complainant as to why the information is not held or should be held, where appropriate.
24. The Commissioner's approach was supported by the Information Tribunal in the recent hearing of *Thompson and Dyke v Information Commissioner EA/2011/0164 and 0165*. The tribunal stated that the Commissioner is:

"entitled to accept the public authority's word and not to investigate further in circumstances where there is no evidence as to an inadequate search, any reluctance to carry out a proper search and any grounds for believing there is a motive to withhold information actually in its possession."

The tribunal referred to the Commissioner's national remit and limited resources and that to act otherwise might require a full scale investigation to be carried out in every case where a public authority is:

"...simply not believed."

25. The Commissioner is satisfied in this case that the council has carried out adequate searches of the locations this information would be stored if it was held and identified that it is not. There is no evidence of an inadequate search in this case or a reluctance to carry out one. It has explained where the information would be held if it existed and it has checked these files thoroughly.
26. Although the complainant may not agree, there is also no convincing evidence that the council is attempting to say that the information is not held when in fact it is in its possession. In relation to bullet point one of

the complainant's request, the council has explained why he was informed initially that this information was not held and later rectified the situation. It has also explained why one document supplied to the complainant suggested in error that this information would be held. The complainant received a letter from the chief executive explaining the error made and that the relevant sentence would be removed from all future versions of this document. The Commissioner considers these matters highlight an administrative error and an initial inadequate search for some of the information the complainant requested. He does not consider these matters constitute convincing evidence that the council has motive to withhold information which actually exists.

27. For the above reasons the Commissioner has concluded in this case that on the balance of probabilities the requested information is not held.

Right of appeal

28. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

29. 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.
30. 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

Rachael Cragg
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