

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 August 2014

Public Authority: Guildford Borough Council

Address: Millmead House
Millmead
Guildford
Surrey
GU2 4BB

Decision (including any steps ordered)

1. The complainant has requested information relating to an investigation into a Councillor. Guildford Borough Council provided some of the requested information and withheld other information under the exemption for prejudice to commercial interests (section 43(2) of the FOIA).
2. The Commissioner's decision is that Guildford Borough Council disclosed all the relevant information that it holds and that it complied with section 1(1) of the FOIA.
3. The Commissioner does not require the public authority to take any steps.

Background

4. The request relates to an investigation and subsequent report into a complaint about a councillor. The essence of the complaint is that the councillor claimed to be a barrister when they were not a practising barrister who had been called to the Bar.
5. The council engaged Robin Hooper, a former local authority chief executive, to carry out an investigation. The resulting report, which has

been published, concluded that there was no wrongdoing on the part of the councillor¹.

6. Subsequently, the Bar Council confirmed that information given to the investigation, saying it was not illegal to claim to be a barrister when not fully qualified, was incorrect. The suggestion is, therefore, that the report's conclusions are based on false premises².
7. It is within this context that the request was made.

Request and response

8. On 22 January 2014, the complainant wrote to the council and requested information in the following terms:

"Apropos the investigation by Mr Robin Hooper into the conduct of Cllr Juneja. Please provide any recorded information/answers to questions under the FOIA/EIR, as follows:

- a. On what basis and by whom was Mr Hooper selected for the role? Was he for example one of several potential Providers? What were his terms of reference?*
 - b. Who has Mr Hooper met with in his investigation – when and for how long?*
 - c. Has Mr Hooper or his firm/associates provided services to GBC in the past – if so please specify and any fee amounts £ earned from GBC.*
 - d. Is Mr Hooper on any Panel/List or similar of potential providers to GBC?"*
9. The council responded on 18 February 2014. It disclosed some information, confirmed that other information was not held and, in relation to part 'c' of the request, confirmed that the information was being withheld under section 43(2) of the FOIA.
 10. Following an internal review the council wrote to the complainant on 13 March 2014. It stated that it was maintaining its position.

¹ http://www.guildford.gov.uk/media/16329/Cllr-Monika-Juneja---independent-report/pdf/Guildford_Borough_Council_Report.pdf

² See, for example: <http://www.getsurrey.co.uk/news/surrey-news/bar-council-admits-error-councillor-6848721>

Scope of the case

11. On 21 March 2014 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
12. During the Commissioner's investigation the council withdrew its reliance on the exemption in section 43(2) of the FOIA and disclosed the information requested in part 'c' of the request.
13. The Commissioner confirmed with the complainant that his investigation would consider whether the council had disclosed all the relevant information it holds.

Reasons for decision

Section 1 – duty to provide information

14. Section 1 of the FOIA requires a public authority to confirm or deny whether the information specified in a request is held and, where it is, to provide it to a requester.
15. The complainant has raised concerns that the council has not provided all the relevant information it holds.
16. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
17. In other words, in order to determine such complaints the ICO 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).
18. The Commissioner has considered below, in relation to the parts of the request of concern to the complainant, whether the council has correctly confirmed that no further information is held.
 - "a. *On what basis and by whom was Mr Hooper selected for the role? Was he for example one of several potential Providers? What were his terms of reference?"*
19. The complainant raised concerns that the council failed to provide the terms of reference, at least not in any detail. They suggested that this

might take the form of a briefing given to Dr Hooper or a formal contract for services provided.

20. The council has explained that Dr Hooper was appointed by its Monitoring Officer and that the terms of reference were agreed verbally in a telephone conversation. The council explained that such practice was not unusual where the issue is urgent and the objective of the engagement is relatively straightforward. The council confirmed that the matter to be investigated in this case was relatively straightforward, namely, a specific complaint against an individual councillor.
 21. Having confirmed that the absence of written terms of reference were in keeping with its normal procedures, the council went on to explain that the report itself, which is in the public domain, sets out the scope of the investigation³.
 22. Having considered the relevant evidence the Commissioner is satisfied that, on the balance of probabilities, the council has correctly confirmed that it does not hold any additional information in relation to this part of the request.
- "b. Who has Mr Hooper met with in his investigation – when and for how long?"*
23. The council's originally response to this part of the request stated that the information was not held because the relevant investigation file was held by Dr Hooper.
 24. The complainant has suggested that, as the investigation was conducted on the council's behalf, it appears strange that it did not hold this information.
 25. During the Commissioner's investigation the council confirmed that it contacted Dr Hooper to establish whether he kept a record of the individuals he spoke with during his investigation. The council stated that Dr Hooper confirmed that he did not keep records of the people he engaged with as part of his investigation. The council confirmed to the Commissioner that it did not require Dr Hooper to keep such records as there was no business or statutory requirement for him to do so.

³ http://www.guildford.gov.uk/media/16329/Cllr-Monika-Juneja---independent-report/pdf/Guildford_Borough_Council_Report.pdf

26. The Commissioner is mindful that, not unreasonably, the complainant considers that the council should have retained this information. The code of practice issued under section 46 of the FOIA contains recommendations for public authorities as to good practice in relation to record keeping and the establishment of audit trails in order to explain or justify decisions is identified as desirable practice⁴.
 27. The Commissioner accepts that the FOIA is not prescriptive about the types of information which public authorities should record and retain. He also acknowledges that it is for public authorities to establish their own procedures for investigations and any practice in this regard falls outside his remit as regulator of the FOIA.
 28. Having considered the relevant evidence the Commissioner has concluded that the council has correctly confirmed that it does not hold the information requested in part 'b' of the request. The complainant's concern that the obligations that practicing solicitors are under (as Dr Hooper appears to be) to keep records of their work have not been met are not ones that the Commissioner can consider.
- "d. Is Mr Hooper on any Panel/List or similar of potential providers to GBC?"*
29. The complainant has argued that the council's confirmation that it does not hold a list of potential providers is not credible. In suggesting this, the complainant pointed to the council's original request response which states "...the Monitoring Officer consulted the Managing Director regarding the choice of contractor and others were considered."
 30. The council explained to the Commissioner that the appointment of an Investigating Officer is at the discretion of its Monitoring Officer. It confirmed that the Monitoring Officer may appoint a member of staff or, where appropriate (as it was deemed in this case), a person who is not an employee of the council.
 31. The council explained that if the requested information was held, it would be held by the Monitoring Officer. It confirmed that, having discussed the matter with the Monitoring Officer, there is no record of any panel or list of potential investigators. The council stated that there are no business or statutory requirements for the information to be held.

⁴ <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section-46-code-of-practice.pdf>

32. Having considered the council's explanations the Commissioner is satisfied that, on the balance of probabilities, it has correctly confirmed that the requested information is not held.

Conclusion

33. In reaching a determination in this case, whilst he has taken into account the complainant's expectations, the Commissioner is mindful that it is for public authorities to determine what records should be kept in order to satisfy corporate needs. The Commissioner acknowledges that, to a layperson it might appear improbable that relevant information is not held by the council. However, in reaching a decision as to the balance of probabilities, the Commissioner must have regard for the relevant evidence.
34. In this case the Commissioner has not been provided with any evidence which directly contradicts the council's position so he has concluded that, in relation to each part of the request identified in the complaint, the council correctly confirmed that further information is not held and, in doing so it, complied with section 1(1) of the FOIA.

Right of appeal

35. 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: GRC@hmcts.gsi.gov.uk

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

36. 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.
37. 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
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