

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 August 2019

Public Authority: Oldham Metropolitan Borough Council

Address: Civic Center
West Street
Oldham
OL1 1UT

Decision (including any steps ordered)

1. The complainant has requested information relating to a proposed new Saddleworth school.
 2. The Commissioner's decision is that Oldham Metropolitan Borough Council has disclosed all the relevant information it holds and complied with section 1(1) but that in failing to do so in time it breached section 10(1).
 3. The Commissioner does not require the public authority to take any steps.
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Request and response

4. On 7 August 2017, the complainant wrote to Oldham Metropolitan Borough Council (the "council") and requested information in the following terms:

"I would like to request that Oldham Council forward all correspondence between the EFA/ESFA and Oldham Council (OMBC), relating to the proposed new Saddleworth school, from December 2016 to the present date (8th July 2017). Please could you forward to me ALL the correspondence that has taken place during this time period between the EFA/ESFA and any Officer or Executive of Oldham Council and any elected Councillor or cabinet member of Oldham Council.

Related to the above - I would like to request that Oldham Council forward all correspondence relating to the recent Judicial Review case centered on the location of Saddleworth School [Lucas (Save Diggle Action Group)), R (On the Application Of) v Oldham Metropolitan Borough Council] that has taken place between the EFA/ESFA and Oldham Council between December 2016 to the present date (8th July 2017). Please could you forward to me ALL the correspondence that has taken place during this time period between the EFA/ESFA and any Officer or Executive of Oldham Council and any elected Councillor or cabinet member of Oldham Council.

Please could you also forward copies of all correspondence that has taken place between Oldham Council and Debbie Abrahams MP or Jim McMahon MP relating to the new Saddleworth school and relating to the recent Judicial Review case in the time period December 2016 to the present date (8th July 2017).

Lastly - can Oldham Council confirm what meetings have taken place between Oldham Council (officers, executives or elected Councillors) + the EFA/ESFA regarding the proposed new school build in the time period December 2016 to the present date (8th July 2017)."

5. The council responded on 9 September 2017 and disclosed some information. It withheld other information under the exemption for Legal Professional Privilege – section 42 of the FOIA.
6. Following an internal review the council wrote to the complainant on 1 November 2018. It stated that it was maintaining its position.

Scope of the case

7. On 15 November 2018 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. During the course of the Commissioner's investigation the council disclosed information previously withheld under section 42 to the complainant. The complainant asked the Commissioner to determine whether all relevant held information had been disclosed. The complainant also confirmed that they had been able to access information falling within the scope of the request from a different public authority. They raised concerns that, as it was likely that this was information which would have been held by the council, the council might have intentionally concealed this fact and, in doing so, may have committed an offence under section 77 of the FOIA. The Commissioner has set out her conclusions in these regards below.

Reasons for decision

Section 1 – duty to provide information held

9. Section 1(1) of the FOIA provides that any person making a request for information to a public authority is entitled to be told whether the information is held and, where it is, to have it communicated to them.
10. Section 10(1) of the FOIA requires public authorities to comply with section 1(1) within 20 working days of the date of receipt of a request.
11. In this case, the council disclosed additional information to the complainant in March 2019, during the Commissioner's investigation after dropping its reliance on the exemption in section 42.
12. Following this, the complainant provided the Commissioner with correspondence received from the Education & Skills Funding Agency (ESFA) in response to a request for information. The correspondence comprised email correspondence between the council and the ESFA from March 2017 which, on the face of it, seemed it would have been likely to be held by the council at the time he request was made. Further evidence for this is provided by the council's internal review which identifies a 'summary judgement report' being referred to in emails dated 2 March and 8 March 2017. Whilst the council subsequently disclosed the summary judgement report to the complainant, it did not disclose the emails, despite appearing to confirm that these were held.

13. 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.
14. 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). The Commissioner approached the council with standard questions in relation to general searches it conducted and in relation to apparent discrepancies in its position in relation to the March 2017 emails. The questions and summaries of the council's responses (in italics) are set out below.
15. What searches have been carried out to check no information was held within the scope of the request and why would these searches have been likely to retrieve any relevant information? Please describe thoroughly any searches of relevant paper/electronic records and include details of any staff consultations. If searches included electronic data, which search terms were used and please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.

The council explained that the officers involved in responding to the initial FOI request in 2017 no longer lead on the proposed new development and as such, their involvement in the matter is largely peripheral. It clarified that the officers faced additional challenges as it was unclear where the email had originated from because of several internal personnel changes and the fact that the lead senior office of project for a substantial period had not worked for the council for some time. The council confirmed that, in any event, each officer carried out searches on their email accounts, electronic files and paper records to identify the email and retrieve a copy but they were unable to do so.

16. If no or inadequate searches were done at the time, please rectify this now and let me know what you have done
17. *The council confirmed that searches, at the time, were considered adequate but were likely hampered by the time that had elapsed since responding to the original request on 7 August 2017 and the complaint, that initiated an internal review, on 16 July 2018. The council explained that, at this point the internal review focused on the emails exchanged with the EFSA on 2 March 2017 and 8 March 2017 to which was attached the "summary judgement report" following the judicial review of Saddleworth School. The Council maintained its position that it would*

not be prepared to release this document at this stage. It explained that, once the complainant raised her concerns with the ICO in December 2018, the summary judgement report was disclosed 29 March 2019. However, it explained that it had become evident that its focus was on the "summary judgement report" and unfortunately no considerations were made to the withheld email which was the focus of the further enquiry from ICO on 9 April 2019. The council confirmed that, due to the limited information for the search criteria the email was not located and the complainant was advised, that in this instance, we could only assume that the correspondence exchange referred to was no longer held as it was no longer relevant or was produced by someone who had left the authority. However, the council explained that, the complainant's final challenge to the council and the ICO on 22 May 2019 indicated that they had obtained a copy of the email from another source and provided additional information. The council confirmed that this additional information enabled the council's Information Management Team to request a forensic search be carried by the council's IT provider and a copy of the email was located in the council's email archive system.

18. If the information were held would it be held as manual or electronic records?

The council explained that, as the complainant was requesting a copy of an email this was expected to be in an electronic format only.

19. What does the council's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the council describe the way in which it has handled comparable records of a similar age? Is there a business purpose for which the requested information should be held? If so, what is this purpose? Are there any statutory requirements?

The council explained that the requirements for the local planning authority to maintain a register of documents associated with planning and related applications is presently set out in Part 9 of the Town and Country Planning (Development Management Procedure) (England) Order 2015. The council confirmed that this involves application forms, plans, decision notices, associated legal and appeal documents being retained. It stated that there is no specified time limitation on this requirement.

20. In relation to the specific allegation that it had blocked access to or concealed the information in question with the intention of preventing disclosure to the complainant and, in doing so, committed an offence under section 77 of the FOIA, the council explained that the

the school applications in question were the subject of a successful Judicial Review (JR) by objectors. It confirmed that the JR failed on one ground – the failure to compare the proposed (Diggle) site with the existing (Uppermill) site during the site selection process. It clarified that the email in question was written just after the result of the JR was announced and the note in question discusses the JR's outcomes and the actions the EFSA (as applicant) and the council (as Education Authority) were considering moving the matter forward.

21. The council explained that, in view of the above, it considered that the email was exempt from disclosure under section 42 as it related to a legal fallout from the JR and the position the parties were considering taking in relation to dealing with the issue that was the subject of the successful JR going forward. The council stated that it acknowledged that email should have been assessed for disclosure at the internal review stage and when responding to the original complaint to the Commissioner. It confirmed that, had it undertaken this, it was likely the information would have been provided to the complainant along with the summary judgement report. The council confirmed that it was never its intention to conceal or destroy the information.

Conclusions

22. In relation to the section 77 allegation the Commissioner does not have sufficient evidence to demonstrate that the council concealed or blocked access to the March 2017 emails in question with the intention of preventing disclosure to the complainant.
23. The Commissioner notes that the council has now, after being further prompted by the Commissioner, disclosed the information in question to the complainant. However, she has concerns about the council's practice in relation to the handling of requests, particularly in relation to the location and retrieval of requested information and the retention of relevant held information after a request has been received. The Commissioner considers that in future, in order to avoid being exposed to potential allegations of a section 77 offence, it should ensure that thorough searches are conducted for requested information and, where any information is being withheld, ensure that this is retained in the event that it becomes the subject of a complainant to the Commissioner.
24. In conclusion, the Commissioner considers that, on the balance of probabilities, the council has disclosed all the relevant information it holds. However, in failing to do this within twenty working days, the council breached section 10(1) of the FOIA.

Right of appeal

25. 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

26. 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.
27. 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
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Wycliffe House
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SK9 5AF