

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 July 2019

Public Authority: Old Somerby Parish Council

Address: Rimini
School Lane
Old Somerby
Grantham
Lincolnshire
NG33 4AG

Decision (including any steps ordered)

1. The complainant has asked Old Somerby Parish Council for a copy of records which relate to his concerns about the accuracy of council minutes. The complainant seeks emails which have passed between the Council's Clerk and councillors, which were generated between 27 November 2017 and 24 April 2018. The complainant also asked the Council to provide him with a copy of an audio recording of the Parish Council meeting of 10 January 2018.
2. The Commissioner's decision is that Old Somerby Parish Council breached section 1 of the FOIA by failing to provide the complainant with a copy of the recording he has asked for, or by failing to issue an appropriate refusal notice under section 17 of the FOIA. The Commissioner likewise finds that the Council breached section 1 by failing to provide the complainant with a copy of the emails which relate to the accuracy of Council minutes generated from 27 November 2017 and 24 April 2018. The Council's recent disclosure to the complainant has now, on the balance of probability, met the requirements of section 1 of the Act, However, because the Council's disclosure was made on 24 June 2019, the Commissioner must also record a breach of section 10 of the FOIA.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. On 24 April 2018, the complainant submitted the following request for information to Old Somerby Parish Council:

"The accuracy of the minutes of Parish Council meetings continues to be of concern.

Please supply a copy of records relating to this matter including emails between / among Parish Councillors and yourself (including those who have recently resigned) which have been generated since my request for the same information as made on 27 November 2017. Included in this will be a copy of the audio recording which you made of the Parish Council meeting of 10 January 2018 which you will have retained in order to be able to confirm the content of your draft minutes of that meeting."

5. Later the same day, the Council wrote to the complainant to advise him that, "The matter regarding the accuracy of the minutes November 2017 will be addressed when new parish councillors have been elected and co-opted". The Council added, "the audio recording is no longer available as once the minutes have been signed off this is erased. This is in line with the guidance provided by LALC. There is no requirement to keep such recording". The Council then advised the complainant that it would send him copies of emails sent to Councillors by the Clerk but it would not be able to send him emails between Councillors where the Clerk had not been copied into those emails.
6. The information which the Council sent to the complainant was:
 - A copy of the draft minutes for the Council's meeting of 8 November 2017
 - The Council's reply to the complainant's request for information which he made on 27 November 2017
 - The Council's response to the complainant's request for a review of his request of 27 November 2017
 - An email of 2 December 2017 from the Council's then Chairperson to the Clerk, suggesting a form of words the Clerk might use in its internal review response to the complainant
 - A copy of an email of 4 December 2017 responding to the complainant's email of 2 December 2017
7. On 30 April 2018, the complainant wrote to the Council and asked it to review of its handling of his request for information. The complainant made the following points:

"My request includes the audio recording of the 10 January 2018 PC

meeting, draft minutes for which have not yet been signed off and which presumably has not yet been erased. You have not provided a copy of this recording.

I have previously asked you [...] to provide the LALC and ICO references in accordance with which you have claimed audio recordings of PC meetings are not for the public. You have not so far done this. Please now provide those references.

You say the audio recording of the 8 November 2017 PC meeting is no longer available, however it remains of interest as regards the discussion that took place at that meeting. Please confirm whether it has been erased and if more than one copy has been made, whether all copies have been erased, i.e. please confirm if any copies currently exist.

... I request independently of my FOI request that you provide a copy of your recording of the 10 January 2018 meeting... Please identify in it the point at which you say in your draft minutes that Nigel Ord proposed and Tony Pearson seconded a motion to hold back publication of the minutes of the 8 November meeting for one week."

8. The Council sent its response to the complainant on 30 April 2018. The Council advised him that it could not undertake a review of his request on the grounds that the Council was no longer quorate.
9. The Council provided the complainant with a quote written by the author of *Arnold-Baker on Local Council Administration*:

"I do not think recordings are public documents or information covered either by the FOI Act 2000 or the Small Authorities Transparency Code. They are private recordings by the clerk to aid the preparation of minutes. In my view, the clerk does not have to keep the recordings nor provide a copy to any councillor".

10. The Council advised the complainant that the motion to hold back the minutes is recorded in the public forum section.
11. On 2 May 2018, the complainant wrote to the Council to make a number of points relevant to its response to his request for information. The complainant told the Council that, "There are those who do not recognise the motion contained in your draft minutes for the 10 January meeting, which relates to the signing of the draft minutes for the previous meeting on 8 November". He went on to repeat his request that the Council confirms whether any of its recordings of the 8 November meeting exist and for the Council to provide a copy of that recording.

12. In addition to the above, the complainant asked the Council to provide him with a copy of the recording made at its 10 January 2018 meeting and for the Council to identify in that recording where the motion to hold back publication of the 8 November meeting was proposed and seconded. He then questioned the validity of the quotation relied on by the Council when it informed him that audio recordings of PC meetings are not for disclosure to the public.
13. On 3 May 2018, the Council wrote to the complainant to inform him that the minutes of its 8 November meeting had not been signed off.
14. The Council's email prompted the complainant to write to the Council to advise it that he takes its response to be a refusal to supply information which it knows to be in the public interest in the forthcoming elections, as its release is likely to affect its outcome.
15. On 4 May 2018, the Council wrote to the complainant to reassert that the recordings had been deleted and to object to his allegations regarding the Clerk's integrity.
16. On 8 May 2018, the complainant wrote to the Council asking it to confirm when the recordings for each of the 8 November and 10 January Council meetings were deleted.

Scope of the case

17. The complainant contacted the Commissioner on 10 September 2018 to complain about the way his request for information had been handled.
18. The Commissioner advised the complainant that the focus of her investigation would be to determine whether Old Somerby Parish Council holds the information he asked for in his request of 24 April 2018 and therefore whether the Council has complied with section 1 of the FOIA – general right of access to information held by public authorities.

Reasons for decision

Section 1 of the FOIA

19. Section 1 of the FOIA states that
“(1) 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.

20. The Commissioner has sought to determine whether the Council holds the information which the complainant has asked for in his request of 24 April 2018. To make this determination the Commissioner applies the civil test which requires her to consider the question in terms of 'the balance of probabilities'. This is the test applied by the Information Rights Tribunal when it has considered whether information is held in past cases.
21. The Commissioner has investigated whether the Council holds recorded information relevant to the complainant's request by asking the Council questions about the searches it has made to locate the information which the complainant seeks and questions about the possible deletion/destruction of information which might be relevant to the complainant's request.

The Council's representations

22. The Council explained that it has carried out thorough searches of all of its existing paper sources and electronic records for information which concerns the period 27 November 2017 and 24 April 2018. These searches located a number of emails which have been copied and sent to the complainant.
23. The Council has assured the Commissioner that its searches located no other records or emails other than the ones now disclosed to the complainant. The Council has told the Commissioner that "any relevant information would have been kept in the sources searched".
24. Searches were made of folders containing Parish Council paperwork and the Council's emails were searched to locate any relevant electronic records, i.e. emails received and sent during the appropriate period.
25. Current Parish Councillors were informed of the Clerk's searches. Those councillors were elected after the dates referred to in the complainant's request and they have confirmed to the Clerk that they hold no other relevant documents or emails.
26. The Clerk searched all emails between 27 November 2017 and 24 April 2018 using these dates as search terms and the Council has assured the Commissioner that its email address is where all council business is located which is not paper-based.

27. The Council does not own or use a laptop computer.
28. Any information held by the Council which meets the terms of the complainant's request would either have been stored in paper form or on-line within the Council's email address. This is a continuation of the practice of the Council's previous clerk.
29. The Clerk says that the Council is not aware of any information relevant to the scope of the complainant's request having been deleted from its paper-based records or from its email folders. The Council has no record of any information having been deleted or destroyed.
30. The Council does not have a formal records management policy but it expects the practice of its previous clerks to be followed by the current Clerk.
31. Files are retained which relate to various activities and purposes of the Council, i.e. correspondence, invoices, bank statements, complaints, asset management. Policies and procedures and for agenda and minutes of meetings.
32. The Council recognises that information falling within the scope of the complainant's request might have been held by former councillors. Nonetheless, the Council understands that, from previous enquiries, the practice was to delete Council-related business once councillor had left office.
33. The Council understands that information of the type requested by the complainant should be retained in the event of it being the subject of a request under the FOIA and for the purpose of the Transparency Code.
34. The Council has a policy for the purpose of recording its meetings. This was adopted on 21 January 2019. That said, the Council does not currently record its meetings.
35. In addition to assuring the Commissioner that it has disclosed the information it has located, the Council also assures the Commissioner that there are no other documents or emails that fall within the scope of the request. Both assurances are given on the basis of the thorough searches the Council has been carried out.
36. The Commissioner noted the Council's representations made no specific mention of the audio recording made at the Council meeting on 10 January 2018. The Commissioner therefore spoke with the Clerk to ask how the Council had determined that it does not hold that recording.
37. The Clerk assured the Commissioner that any recording made by the former Clerk has been destroyed. He said there is no reason to believe otherwise. The Clerk advised the Commissioner that no recordings

were found in the files which were searched and, given that the Council does not use a laptop, the recording which the complainant seeks would likely have been made on the former Clerk's personal recording device.

The Commissioner's decision

38. The Commissioner has considered the representations made by the Council together with those made by the complainant. She accepts that the Council has carried out appropriate and reasonable searches for the information which the complainant seeks. She further accepts that the Council has now located all the information it holds which is relevant to the complainant's request.
39. On the balance of probability, the Commissioner has decided the Council does not hold a recording of its meeting of 10 January 2018.
40. In the Commissioner's opinion, the recording was likely to have been held at the time complainant made his request. This opinion is inferred from the Council's response to the complainant of On 3 May 2018, which informed the complainant that the minutes of its 8 November meeting had not been signed off, and the apparently entrenched position adopted by the former clerk in terms of the public not being entitled to a disclosure of that recording.
41. The Commissioner has therefore concluded that the Council breached section 1 of the FOIA by failing to provide the complainant with a copy of the recording it held at the time it received his request. Alternatively, the Council should have issued an appropriate refusal notice under section 17 of the FOIA.
42. The Commissioner has also decided the Council breached section 1 of the FOIA by failing to provide the complainant with a copy of the emails which relate to the accuracy of Council minutes generated from 27 November 2017 and 24 April 2018.
43. In making its recent disclosure to the complainant, the Council has now, on the balance of probability complied with section 1 of the FOIA. The Commissioner is satisfied that the Council has in all likelihood located all of the information it holds which is relevant to the complainant's request. The Council's recent disclosure indicates that it has breached section 10 of the FOIA. This is because the disclosure should have been made within twenty working days of the Council's receipt of the complainant's request.
44. The Commissioner cannot ascertain when the Council deleted or destroyed the recording of its meeting of 10 January 2018. This action appears to have occurred after the complainant made his request.

45. The Commissioner is not able to ascertain whether the Council's former Clerk deleted or destroyed this recording in accordance with his normal practice. The former Clerk's statement of 24 April 2018, suggests that his practice was to erase the recording once the minutes have been signed off.
46. The Commissioner is unable to determine whether the Council committed an offence under section 77 of the FOIA. This is because there is no evidence that the Council deleted its recording with the intention of preventing its disclosure to the complainant, where the complainant would be entitled to that disclosure.
47. The offence under section 77 is triable only in the magistrate's court. Section 127(1) of the Magistrates Court Act 1980, requires proceedings under section 77 of the FOIA to be brought within 6 months of the offence occurring.
48. The Commissioner is obliged to correct the position relied on by the former Clerk in respect of audio recordings of meetings. She must make clear to the Council that the provisions of the FOIA are applicable to all forms of recorded information held by public authorities at the time a request is received. That includes audio and audio visual recordings. The Council's reliance on the quotation given above at paragraph 10 is not correct.

Right of appeal

- 49. 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

- 50. 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.
- 51. 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
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