

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 July 2013

**Public Authority:** Thanet District Council  
**Address:** Hawley Square  
Margate  
Kent  
CT9 1NY

### Decision (including any steps ordered)

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1. The complainant has requested communications between Thanet District Council Officials, including Councillors and Mary Portas and/or her PR firm, Yellow Door. Thanet District Council (the "Council") initially asserted that it held information within the scope of this request but needed further time to consider the public interest in disclosure. The Council changed this position at internal review. It then asserted that it did not hold the requested information.
2. The Commissioner's decision is that, on the balance of probabilities, the Council does not hold the requested information and that it provided adequate advice and assistance to the complainant. However, it failed to tell the complainant that it did not hold the requested information within 20 working days of receiving the request. In doing so, it contravened the requirements of section 10(1) of the Act.
3. No steps are required.

## Request and response

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4. On 30 October 2012, the complainant requested information of the following description:

"I'd like all communication between Thanet District Council Officials, including Councillors and Mary Portas and/or her PR firm Yellow Door between February 1st 2012 and October 29th 2012.

Our preferred format to receive this information is by electronic means. If one part of this request can be answered sooner than others, please send that information first followed by any subsequent data. If you need any clarification of this request please feel free to email me. If FOI requests of a similar nature have already been asked could you please include your responses to those requests".

5. Following a request for clarification from the Council, the complainant explained on the same day that she sought information from the following areas at the Council:

"I would like all communications from:  
Regeneration  
Community Services  
Planning  
Communications  
[named Councillor]".

6. When acknowledging her request on 31 October 2012, the Council advised that for "Community Services" it believed the most appropriate department to be "Community Development". Later on 31 October 2012, the Council advised that it did not have access to [named Councillor's] communications. However, the complainant drew to the Council's attention to guidance that the Commissioner had produced on the subject of councillors' communications and the FOIA.
7. On 27 November 2012, the Council responded. It confirmed that it held information within the scope of the request but said that it needed further time to consider the balance of public interest in relation to disclosure. However, it did not state which exemption this consideration applied to as required by section 17 of the FOIA.
8. On the same day, the complainant asked the Council for an internal review of its handling of her request and asked why it had not explained the reason why it needed further time to consider the balance of public interest.

9. On 17 December 2012, the Council then wrote to advise that it did not hold the information she had requested in contrast to what it had told her on 27 November 2012.
10. On 2 January 2013, the complainant wrote to the Council asking it to review its response. In the same letter she drew attention to the inconsistency between its letter of 27 November 2012 and its letter of 17 December 2012.
11. On 16 January 2013, the Council sent her the outcome of its internal review. It upheld its position that it did not hold the information she requested. It also stated that it was not required under FOIA to explain the inconsistency.

### **Scope of the case**

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12. The complainant contacted the Commissioner on 11 February 2013 to complain about the way her request for information had been handled. She complained about the inconsistency in the Council's response and the delays that had arisen. She also disputed the Council's assertion that it did not hold the requested information.
13. The Commissioner has therefore considered the following points:
  - i. whether the Council holds the requested information;
  - ii. whether the Council provided adequate advice and assistance; and
  - iii. whether the Council contravened the FOIA's requirements regarding timeliness of response.

### **Background**

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14. Margate was chosen as part of a government-supported exercise to regenerate the retail sector on high streets across the country. Mary Portas previously gained national prominence for her television series "Mary, Queen of Shops". This series had followed Ms Portas' efforts to improve the profile of a number of high street shops across the country that were not part of national chains. More recently, she had conducted an independent review (commissioned by the government) into the

current state of the UK high street. Following this, Ms Portas was asked to become involved in the government initiative "Improving high streets and town centres".<sup>1</sup> Film crews went to the towns involved, including Margate, to record Ms Portas' involvement. The complainant has a particular interest in this initiative as it operates in Margate and has drawn the Commissioner's attention to apparent controversy in the town about the project.<sup>2</sup> Margate falls within the administrative area covered by the Council.

## Reasons for decision

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15. Section 1 of the FOIA states that any person making a request for information is entitled to be told whether the public authority holds the information requested and, if held, to be provided with it. Section 10(1) of the FOIA states that this should be supplied within 20 working days.
16. In this case, the Council asserted that it held the information in its initial response and then contradicted this after conducting an internal review.
17. The Council has argued that its initial response was a genuine mistake on its part. It explained that, at the same time, it was dealing with a parallel request from the complainant regarding communications between itself and another organisation connected with Mary Portas. It explained that it did hold information in relation to that other request and had simply mixed up the two when preparing its response on the request at issue in this case. However, the complainant suggests this unclear handling of her request adds weight to her concerns that the requested information is, in fact, held.
18. This notice will focus first on the substantive question of whether the requested information is held. It will then address the procedural concerns that the complainant has raised regarding the timeliness of the Council's response and the extent to which it provide adequate advice and assistance.
19. The Commissioner asked the Council a series of questions to establish whether it held the requested information.

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<sup>1</sup> <https://www.gov.uk/government/policies/improving-high-streets-and-town-centres>

<sup>2</sup> <http://www.thegrocer.co.uk/topics/property-and-planning/portas-pilot-descends-into-farce-as-margate-bosses-quit-en-masse/231973.article>

20. The Council explained that it contacted all the officers and the named councillor listed in the request to ask if they held relevant information in manual or electronic form. It said that officers were asked to check manual records and to search their respective e- mail In-Box, Sent Items and Deleted items folders. It added that it searched the official "Council" email account of the councillor in question and the same councillor was also asked to review her private e-mail account. It said that the search terms used included 'Yellow Door' and 'Mary Portas'. It explained that these searches had not yielded any relevant information.
21. It said that it had no recorded contact with Yellow Door or Mary Portas but that any contact, if it had been held would "probably [be] a combination of electronic and manual records". However, it was satisfied that it did not hold such records. It added that it had no record of having held them previously.
22. It also explained that all its contact on this issue had been with a company called Optomen. This company, it explained, was the public relations company for Ms Portas.<sup>3</sup> Access to communications with that company had been the subject of a related request made by the complainant to the Council which is referred to above.
23. When considering whether information is held, the Commissioner considers the question to the civil standard of proof, that is, on the balance of probabilities. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches; and, or other explanations offered as to why the information is not held.
24. When querying the nature of the Council's searches, the Commissioner had also sent the Council a number of links to his published guidance regarding the issues arising in this case including a note which covers official information held in private email accounts.<sup>4</sup> This is an updated version of the guidance that the complainant referred to in her request for internal review. The Commissioner is satisfied that the Council has had regard for this in preparing its response.

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<sup>3</sup> The Commissioner understands that it is, in fact, the television production company which made the television programmes associated with this exercise: <http://www.optomen.com/international/show.aspx?program=2411>. He does not consider that this inaccuracy on the Council's part is significant.

<sup>4</sup>

[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/official\\_information\\_held\\_in\\_private\\_email\\_accounts.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/official_information_held_in_private_email_accounts.ashx)

25. Having considered the Council's response, he is satisfied that it conducted sufficiently thorough searches which yielded no positive result. In the absence of any evidence to the contrary, he also accepts the Council's assertion that its communications regarding Ms Portas' involvement with the regeneration of Margate High Street were with Optomen Television and not with Yellow Door or Ms Portas herself.
26. The Council gave the complainant a misleading impression in its initial response. The Commissioner accepts that the Council made a genuine mistake in its initial response which it corrected at internal review. He is therefore satisfied that the Council does not hold information within the scope of the complainant's request.
27. However, in failing to deny that it held the requested information within 20 working days, it contravened the requirements of section 10(1) of the Act.
28. The Council's initial response was also flawed in that, if it were seeking to rely on an exemption, it should have explained to the complainant which exemption that was in accordance with section 17 of the FOIA. Even if the Council had complied with its section 17 obligations in relation to information which it thought it held within 20 working days of the request, this does not mean that it complied with its obligations under section 10. The Commissioner accepts that the Council does not hold the requested information but considers that it was obliged to convey this to the complainant within 20 working days. As shown above, it failed to do so in this case.
29. Furthermore, given that the Commissioner has found that the Council's amended position at internal review was the correct one, he has not made a formal finding on the Council's failure to comply with its obligations under section 17 of the Act in its initial response. Further comment about the initial response is set out in Other Matters.

## **Section 16 – Advice and Assistance**

30. Section 16(1) of FOIA requires public authorities to provide advice and assistance, as far as it would reasonable, to individuals who propose to make or have made requests for information. Section 16(2) explains that any public authority will have complied with the requirements of section 16(1) if it has conformed with the Code of practice issued under section 45 of FOIA.<sup>5</sup> The Code explicitly states in paragraphs 7 and 10

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<sup>5</sup> <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

that the lists of examples given are not exhaustive and that public authorities should be “flexible in offering advice and assistance most appropriate to the circumstances of the applicant.” If an explicit statement had been made to the effect that Part II of the Code, or the whole of the Code was not exhaustive, then it could be argued that, to comply with section 16, a public authority must be flexible in its general provision of advice and assistance and that situations other than those detailed in the Code might lead to a s16 breach.

31. The Council has argued that it was not obliged under the FOIA to explain to the complainant why it had given a response in its initial refusal which contradicted the response it gave at internal review.
32. The Commissioner accepts that this is the case. Paragraph 7 of the Code promotes flexibility where a person is unable to frame their request in writing, and paragraph 10 promotes flexibility when there is a need to clarify a request (as detailed under the heading Clarifying Requests above). With the above in mind, the Commissioner finds that the public authority did not contravene its obligations under section 16 when it failed to explain the inconsistencies in its initial response. Providing such an explanation would not assist the complainant in clarifying or reframing her request and she did not seek this when querying the inconsistency.
33. That said, the Commissioner encourages public authorities to be flexible and helpful in a more general manner. More comment on this is set out in Other Matters below. However failure to follow such good practice is not a breach of section 16.

## Conclusion

34. The Commissioner has therefore concluded that the Council does not hold the requested information but that in failing to advise the complainant of this within 20 working days, it contravened its obligations under section 10(1) of the Act. The Commissioner also finds that it did not contravene the requirements of section 16 in its handling of the response.

## Other matters

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35. While the Commissioner has found that the Council did not contravene its obligations under section 16 in failing to explain its initial errors, he considers that it was extremely poor practice on the Council’s part not to provide this explanation. It may have dispelled some of the complainant’s genuine concerns had it done so.

36. The Commissioner has not made any findings on section 17 because the Council amended its position correctly at internal review. However, its initial refusal notice should have provided more detail about what exemption it thought was relevant. Failure to do so made it more difficult for the complainant to understand the Council's position and, understandably, raised her suspicions when there was an unexplained reversal of this position.



## Right of appeal

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37. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

38. 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.
39. 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 .....**

**Alexander Ganotis**  
**Group Manager – Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**