

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 05 August 2013

Public Authority: London Borough of Hackney

Address: Town Hall
Mare Street
London E8 1EA

Decision (including any steps ordered)

1. The complainant requested information relating to the provision of goods and services to the London Borough of Hackney (the Council) by a named company. The Council provided some information, cited the section 43 exemption (commercial interests) in respect of other information it holds that falls within the scope of the request, and denied holding the remainder.
2. During the course of the Commissioner's investigation, the Council confirmed that it had located additional information that falls within the scope of the request.
3. The Commissioner's decision is that, on the balance of probabilities, the Council does not hold any further relevant information. However, the Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - disclose to the complainant the information marked 'A' and 'B' in the Council's correspondence with the Commissioner of 5 April 2013; and
 - disclose to the complainant the information marked 1-4 in the Council's correspondence with the Commissioner of 11 July 2013.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 9 October 2011 the complainant wrote to London Borough of Hackney (the Council) and requested information in the following terms:

"The full Gerda file which shall include;

- 1. Copies of all emails and correspondence between Hackney Council "HC" – Hackney Homes "HH" and Gerda*
- 2. Details of any hospitality given by Gerda to any employee or person representing HC or HH.*
- 3. Transcripts of all telephone recordings between HC, HH and Gerda*
- 4. Minutes of meetings between HC, HH and Gerda*
- 5. Copy of the Gerda contract*
- 6. Cost per door*
- 7. Details of any other manufacturers or suppliers of security doors approached by HC, HH, prior to entering into the Gerda contract.*
- 8. Details of any other complaints made in relation to Gerda doors and actions taken by HC, HH."*

6. The Council responded on 17 November 2011 - although it appears that the complainant did not receive that correspondence until 8 December 2011. The Council denied holding some of the requested information but confirmed it held the remainder. It provided some of that information but refused to provide the rest.

7. With respect to the information requested at parts (1) and (4) of the request, the Council did not provide that information. It told the complainant:

"I can confirm that we do hold this information but, unfortunately, it is not in an easily retrievable format nor is there an automated mechanism that would allow us to easily collate the required data".

8. With respect to part (5) of the request, it provided some information, telling the complainant:

"Please see attached a copy of the expired contract documents... Please note these documents do not contain any tender prices as these are commercially sensitive".

9. The complainant requested an internal review on 12 December 2011 in relation to parts (1), (4), (5) and (8) of the request. With respect to the information requested at part (5) of the request, the complainant told the Council that a copy of the contract was not attached to the letter. He also clarified that he was seeking a *"copy of the Gerda contract including tender prices"*.
10. The Council ultimately sent him the outcome of its internal review on 16 November 2012. It revised its position as follows.
 - It denied holding information within the scope of parts (1) and (4) of the request, telling the complainant that:

"the Council has conducted an internal review of the original decision and upon review has, to its embarrassment, found that the information requested does not exist in the various files and folders which it was believed [name redacted] had archived before his departure from Hackney Homes".
 - It provided a partial copy of the contract between Gerda and the Council dated 26 April 2006. It apologised for failing to enclose that information in its previous response. It cited section 43(2) (commercial interests) as its basis for withholding Section 5 of the contract. It clarified its response about part (8).

Scope of the case

11. Following earlier correspondence with the Commissioner about the Council's handling of his request for information, the complainant contacted the Commissioner on 19 November 2012. He told the Commissioner:

"I have now received their reply but remain dissatisfied since much of the information requested was not provided".
12. The Commissioner initially considered the scope of his investigation to be:
 - the Council's application of section 43 to the information requested at point (5) of the request;
 - whether the Council is correct when it says that it does not hold the information requested at points (1) and (4) of the request - that information is described by the complainant as 'communication records' between Hackney Homes, Hackney Council and Gerda.

13. The Commissioner wrote to the Council on 24 January 2013, as is his practice, giving the Council the opportunity to finalise its position. He asked it to revisit the request, to provide him with a copy of the withheld information and to provide detailed explanations for the parts of the FOIA it was relying on with respect to parts (1), (4) and (5) of the request.
14. His various attempts to contact the Council having failed to elicit a response, the Commissioner found it necessary to issue an Information Notice on 19 March 2013 in order to progress his investigation. That Notice required the Council to provide him with the information he needed to make his determination in this case.
15. The Council responded on 5 April 2013. In its response, the Council provided the Commissioner with a copy of the information it was withholding by virtue of section 43, and its submissions in respect of that exemption. It also told the Commissioner:

"Please note that the Council's housing managing agent, Hackney Homes, believe it prudent to undertake one final search for documents relating to the contract between Gerda and the Council and I will revert to you regarding the same as soon as the search has been completed".
16. Having been unable to establish further contact with the Council about its response, the Commissioner found it necessary to issue a second Information Notice on 22 May 2013. That Notice required the Council to furnish the Commissioner with details of the further search referred to in its response to his Information Notice of 19 March 2013, including the outcome of that search.
17. In response to his second Information Notice, the Council provided the Commissioner with information comprising a number of documents that had been located during the further search that had been conducted. It also told him that it no longer considered that section 43 applied.
18. As a result of that correspondence, the Commissioner considers the scope of his investigation to be whether, on the balance of probabilities, the Council holds any further information within the scope of points (1), (4) and (5) of the request.

Reasons for decision

Section 1 general right of access

19. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request, and if that is the case, to have that information communicated to him.
20. The Commissioner is concerned to note that the Council has clearly had difficulty in determining whether it holds relevant information. However, the Commissioner is satisfied that the Council does hold information that falls within the scope of the request. During the course of his investigation, the Council provided the Commissioner with the information it considers relevant to the disputed parts of the request:
 - items marked 'A' and 'B' in its correspondence with the Commissioner of 5 April 2013; and
 - items marked 1-4 in its correspondence with the Commissioner of 11 July 2013.
21. With respect to the former, the Council told the Commissioner:

"The Council is not relying on any exemption in respect of the above documents as it does not believe that the commercial interests of Gerda or itself would be prejudiced now by their disclosure following the completion of the tender process for door suppliers/installers".
22. With respect to the latter, it said:

"The Council is not withholding the above documents following the completion of the tender process and has sent copies of the documents to [the complainant] today".
23. The Council said that it had sent the complainant copies of the information it had provided to the Commissioner on 5 April 2013 *"for the same reason"*.
24. Despite stating that it had sent the information to the complainant, it was subsequently found to be the case that nothing had been sent to him.
25. The Commissioner is concerned to note the poor level of engagement shown by the Council – both with the complainant and with the ICO - in

relation to this request for information. He also notes the Council's failure to send the complainant the information identified as disclosable during the course of his investigation. It follows that the Commissioner requires the Council to provide the complainant with a copy of that information.

26. With respect to whether any further relevant information is held, during the course of his investigation the Commissioner asked the Council to explain:
 - the searches it carried out for information falling within the scope of the request and the search terms used;
 - whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails;
 - whether any recorded information relevant to the scope of the complainant's request had ever been held but had been deleted/destroyed;
 - whether the Council has a business purpose for which the requested information should be held; and
 - whether there are any statutory requirements on the Council to retain the requested information.
27. In the Council's substantive response it provided information in support of its view that it does not hold further information within the scope of the request. This included providing the Commissioner with information about the nature of the searches conducted, including examples of the search terms used to locate relevant electronic records.
28. The Commissioner has considered the nature of the searches that have been conducted. He has also considered the Council's reasons for saying that no further information is held.
29. On the basis of the evidence provided to him, the Commissioner is satisfied that the Council does not hold any further relevant information.

Other matters

30. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
31. Although there is no power of compulsory audit for FOIA, public authorities are expected to co-operate with the ICO's enquiries. In the unlikely event that an authority refuses to do so, the ICO will issue an Information Notice (section 51) in order to obtain the information it requires.

32. In this case, the Commissioner is concerned that he found it necessary to issue not one, but two, Information Notices in order to progress his investigation.
33. With respect to the information requested at parts (1) and (4) of the request, the Council initially told the complainant that it held the information; it then told him that it did not exist.
34. During the course of the Commissioner's investigation, the public authority identified further information falling within the scope of the request. The authority's failure to identify this information when providing its initial response to the request or during its internal review suggests that, prior to the Commissioner's involvement, adequate searches may not have been made.
35. Where public authorities experience difficulty establishing whether information relevant to a request is held, this might also indicate records management problems.
36. The code of practice issued under section 46 of the FOIA (the 'section 46 code') set out the practices which public authorities should follow in relation to the creation, keeping, management and destruction of their records.
37. The Commissioner expects that, in future, the Council's records management practice will conform to the recommendations of the section 46 code.

Right of appeal

38. 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

39. 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.
40. 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

Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF