

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 October 2014

Public Authority: Southwark Council

Address: PO Box 64529

London

SE1P 5LX

Decision (including any steps ordered)

1. The complainant has requested from Southwark Council ("the Council") a copy of appendices relating to a grant agreement.
2. The Commissioner's decision is that the Council does not hold the requested information.
3. The Commissioner requires the public authority to take no steps.

Request and response

4. On 13 October 2013, the complainant wrote to the Council and requested information in the following terms:

"Would you kindly release to me under the Freedom of Information Act, the 'appendices' as referred to in P.1.1.2(3) on page 2 of Fusions EXECUTIVE SUMMARY of the business proposal that was part of the Grant Agreement dated 7.4.2000 between Southwark Council and Fusion, the provider of the leisure facilities for the Council".

5. The Council responded on 9 December 2013. It stated:

"Following a search of our records, and having been advised by Fusion, and external solicitors involved in the variation of the original contract, we can confirm that no information is held pertaining to the Appendices that form part of the grant agreement of the original contract".

6. Following an internal review the Council wrote to the complainant on 6 February 2014. It upheld its previous decision. It explained:

"I have carried out a review of both the methodology used for the document search and also spoken to those who were involved, including physically reviewing the available documentation and archive files and searching for cross references to the appendices".

7. It subsequently explained that the Council does not hold a copy of the appendices referred to in the request. It concluded:

"Should the appendices have formed part of the agreement and have been included to provide supplemental and supportive information I would have expected them to be referred to elsewhere. The reference in the executive summary is the only such reference, and therefore appears to be erroneous".

Scope of the case

8. The complainant contacted the Commissioner 30 March 2014 to complain about the way his request for information had been handled. Specifically he argued that the requested information would be held.
9. The Commissioner has had to consider whether any of the requested information is held.

Reasons for decision

10. Section 1(1) of FOIA states that:

"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".

11. 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.

12. 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).
13. The complainant disputed the Council's claim that the appendices were not held. To support his position he provided the Commissioner with a list of 32 references to appendices throughout the contract.
14. The Commissioner presented this list to the Council. The Council returned to the Commissioner and explained that it had discussed the complainant's points with the officers involved and reviewed the evidence. It further explained:

"I also broadly support the points he made (the 32 as outlined in your letter) that references are made to an appendix and supporting documents in the executive summary".

15. It further explained:

"However, I am satisfied that a thorough and robust search process was used, and that every effort was made to locate the files requested by [name], including a physical search of archives, requests to Fusion, and requests to the original external contract lawyers to search for copies or cross references. No copies or evidence was found".

16. To support its position, the Commissioner asked the Council to provide evidence that it had contacted Fusion and its external lawyers for a copy of the requested information.
17. Upon receipt of the evidence, the Commissioner reviewed it. In the correspondence the Council had with its external lawyers, the lawyers confirmed that it did not hold a copy of the appendices.
18. Fusion also confirmed that it did not hold a copy of the appendices. Specifically it explained:

"We have all had sight of the original bound Grant Agreement (or electronic copy thereof) entered into between the parties which does not contain these Appendices. It is our view that this is simply an error that the contents page of the Grant Agreement was not updated after the Business Plan itself was updated after Appendices removed as being no longer required by the Council as irrelevant to the project".

19. To conclude, the Council explained:

"I am unable to explain why a copy is not held and yet is referred to in the executive summary (as detailed by [name]) but I have reached a

similar conclusion as the last reviewer: on the balance of probabilities the appendices were either not provided to the Council in the first instance or did not exist – I am unable to ascertain which is true, but a copy of the requested information cannot be located and provided to the requestor”.

20. The Commissioner does consider that in the circumstances it is unusual that the requested information is not held. It is unclear as to whether the appendices did exist, however the key question in this case is whether the requested information is held.
21. In his view and bearing in mind the evidence provided by the Council, the Commissioner has determined that on the balance of probabilities, the requested information is not held.

Right of appeal

22. 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 7395836

Email: GRC@hmcts.gsi.gov.uk

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

23. 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.
24. 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

Rachael Cragg
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