

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 September 2014

Public Authority: Cheshire West and Chester Council
Address: Floor 2, HQ Building
58 Nicholas Street
Chester
CH1 2NP

Decision (including any steps ordered)

1. The complainant has requested information in relation to actions taken and decisions made about the treatment of a debt that was written off by Cheshire West and Chester Council (the council). The complainant is not satisfied with the council's response as he considers they do hold information relevant to his request.
2. The Commissioner's decision is that the council, on the civil standard of the balance of probabilities, does not hold any information relevant to the requests made.
3. However, the Commissioner has found that the council has breached section 10(1) of the FOIA in regards to this information request and how long it took to respond.
4. The Commissioner does not require the council to take any steps to ensure compliance with the legislation.

Request and response

5. On 02 January 2014, the complainant wrote to the council and requested information in the following terms:

"I have read the Council's response to the FOI ref 1511854. It is worded in such a way as to strongly suggest that the only reason for refusing to release the identity of the debtor is the protection

of the Commercial interests of that debtor, as quoted below:-

'9.3 In conducting the Review, the Council agrees that the exemption within s43(2) is engaged, in that, the Limited Company, who is named as the debtor, has commercial interests at stake which would be likely to be prejudiced by the release of the information.

It carries out commercial activities in the open and competitive market and as such has competitors who may use the information to their advantage and to the disadvantage of the Company. Also, there is a real risk that the reputation of the Company could be damaged or it could create a lack of business confidence in dealing with the Company. It is clear that it is the interests of the Company which are affected. The Council considers that there is a real and significant risk of prejudice and harm being caused to the commercial interests of the Company by releasing the name.'

Part of this judgement is based, in Para 9.4, 'Factors in favour of disclosure', on an assessment that the 'Public interest in the Company's transactions with other persons is only MEDIUM.' No indication is given as to why this assessment is not rated more highly. This is public money that is being written off without exhausting the normal legal processes and members of the public who may consider employing this organisation would be assisted by knowing how they treat their creditors. Of course, if the company has ceased trading, then there is no logical reason not to name it.

I wish therefore to raise a NEW FOI request in which I would ask you to address the following specific points:-

a) It is clear from the Guidance issued by the MOJ (Freedom of Information exemptions guidance May 2012, Section 43: commercial interests) that the Council should be 'alert to the differences between using this exemption to protect the interests of a third party and using it to defend a public authority's own interests'. All the evidence in your reply suggests that it is the third party that is being protected. Whilst the MOJ guidance correctly identifies issues of patents, trade secrets, commercial planning etc where it would be acceptable to protect the third party, nowhere does it suggest protection for debtors. Please advise specifically what part of the guidance you are using to justify your response.

b) The guidance also says 'Commercial sensitivity will often

diminish over time - in some cases quite quickly.' Given that, according to your response, the debt was incurred over two and a half years ago, it seems that you are misinterpreting the guidance in refusing to reveal the debtor's identity.

c) Please confirm whether or not the debtor organisation is still trading

d) Please advise whether the Council has any existing or ongoing contracts (or other commercial arrangements) with the debtor organisation or with any other with which there are directorships or senior personnel in common. I would expect such information to be readily available from your 'due diligence' processes.

e) Please advise whether the Council has had any discussions about future business with the debtor organisation or with any with which there are directorships or senior personnel in common. Again, I would expect such information to be readily accessible from your internal processes.

6. The council responded on 31 October 2014 to each of the items a - e. It stated that:

Item a - this is not a request for recorded information but a request for an explanation of a previous decision.

Item b - this is a comment, not a request for recorded information.

Item c - the council cannot confirm the trading status of the organisation as the council is not in a position to express such an opinion.

Item d - no existing or ongoing contracts with the debtor organisation have been identified by a targeted search of the relevant departments.

Item e - we have conducted a targeted search of the relevant departments of the council and no recorded information in relation to discussions about future business with the debtor organisation has been found.

Additionally, s12 would be applied in respect of items d and e if the target search identified that information might be held.

7. On 04 February 2014 the complainant requested an internal review.

8. Following an internal review the council wrote to the complainant on 25 March 2014 and stated that:

Item a - the Review concluded that this part of the Request was not a request for recorded information but a request for an explanation of the decision in 1511854. (The council had decided, in 1511854, that the identity of a debtor organisation was to be withheld under section 43 of the FOIA. The complainants request for information is preceded by his summary of some aspects of that decision.)

Item b – the Review concluded that this is a comment, not a request for recorded information.

Item c - the Review concluded that the council cannot state whether the company is still trading and this is not a request for information but would amount to the council passing an opinion on the status of the company.

Item d - the Review was informed that the council's electronic systems, including its Oracle supplier database, had been searched against the debtor company by Financial Management. Checks had also been made of officers in Asset Management about contracts relating to property and no information about current contracts with the company was located. The Review was satisfied at the extent of the searches carried out and that no information had been identified as held by the Council in respect of "existing or ongoing contracts (or other commercial arrangements) with the debtor organisation...".

Item e - the Review was satisfied at the extent of the searches carried out and concluded that no information had been identified as held by the council regarding "discussions about future business with the debtor organisation or with any other with which there are directorships or senior personnel in common".

9. Also as part of the Review, the council accepted that the complainant had provided clarification about the information he was requesting for items a, b and c but determined that this clarification amounted to, in part, new requests for information. The complainant stated:

"Item a - This was indeed a request for recorded information. I assume that Council procedures are indeed documented in written form. To be absolutely clear, what I was asking for was a copy of the procedures which allow, and show on under what conditions, protection can be offered to third party debtors. Furthermore, in this particular case, I am asking for details of

the decision making process which would confirm that the Council has indeed satisfactorily differentiated between the 'interests of a third party and those of the public authority'. If, as claimed, the Council has no ongoing business/ negotiation with the debtor then it is clear that the exemption has been applied for the benefit of the debtor and not the Council and Council Tax Payer.

Item b - I think that you (wilfully?) miss my request for information here. Again, I re-phrase it for you and ask for a copy of those Council procedures which should be a matter of record and which allow information of this nature to be withheld after a lapse of nearly three years. I assume that there is, within the procedures, some indication of the time over which any 'commercial sensitivity' is considered relevant. Please therefore send me a copy of the relevant instruction. I presume also that there are such written procedures in order to avoid the obvious possibilities of favouritism, prejudice and corruption.

Item c - I was NOT asking for the Council's 'opinion' here. Whether the company is still a legal entity and whether it is actively trading is a matter of FACT and NOT of opinion. The status can be readily confirmed in less than 5 minutes, and at no cost, by the use of the CompanyCheck or DueDil websites. As long as you continue to withhold the name, I am clearly unable to carry out this search for myself. As such, I believe that you have an obligation to do so on my behalf."

10. The council, as part of the Review, responded to the new requests by confirming that it did not hold information relevant to the new requests. The council decided it did not require a further opportunity to review this particular aspect of its response.

Scope of the case

11. The complainant contacted the Commissioner on 11 May 2014 to complain about the way his request for information had been handled.
12. The complainant has indicated that he considers that the council has:
 - a) Responded late to his initial request for information;
 - b) Refused to release information;

- c) Not been open in their responses and have not helped him to access information he considers should be in the public domain.
13. The Commissioner considers that items a, b and c of the complainant's 02 January 2014 information request are not requests for recorded information, but are asking for opinions or explanations. As the FOIA only looks at recorded information, it is outside the Commissioner's remit to consider the council's response to these.
14. However, the complainant clarified items a, b and c in his 04 February 2014 internal review request. The council considered the clarification of items a and b to be new requests for information and responded that the information is not held. The council maintained that item c was not a request for information but a request that they pass an opinion on the status of the company.
15. The council has advised the Commissioner that it does not require a further opportunity to review its responses to the new requests for information identified as part of the Review. The council has no objection to the new requests being included in the scope of this complaint.
16. Accordingly, the Commissioner, in this case, will consider the new requests alongside the initial requests for information.
17. Therefore the Commissioner considers the scope of the case is to determine if the council is correct when it states that it does not hold information for items d and e of the initial request dated 02 January 2014, and that it does not hold information for the new requests identified in the internal review request of 04 February 2014. These new requests are set out in paragraph 9 above.
18. The Commissioner will only go on to determine if section 12 is engaged, for items d and e of the initial request for information, if he determines that the council does hold information relevant to these items.
19. Lastly the Commissioner will consider if the council has breached section 10(1) of the FOIA, in the time it took to respond to the initial request for information.

Reasons for decision

Section 1 of the FOIA – Held/ Not Held

20. Section 1 of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds the information and if so, to have that information communicated to him.
21. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held, he is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
22. Item a – in the request for internal review the complainant argued that his request was for recorded information, and confirmed:

"Item a - This was indeed a request for recorded information. I assume that Council procedures are indeed documented in written form. To be absolutely clear, what I was asking for was a copy of the procedures which allow, and show on under what conditions, protection can be offered to third party debtors. Furthermore, in this particular case, I am asking for details of the decision making process which would confirm that the Council has indeed satisfactorily differentiated between the 'interests of a third party and those of the public authority'. If, as claimed, the Council has no ongoing business/ negotiation with the debtor then it is clear that the exemption has been applied for the benefit of the debtor and not the Council and Council Tax Payer."

The council has treated this, in part, as a new request for information and confirmed that there are no procedures held in relation to the conditions that can be offered to third party debtors. The council is of the view that the requests for details of the decision making process is not a request for recorded information, but a request for opinion on a decision taken.

The Commissioner is of the view that it is highly unlikely that such specific guidance or procedure would be in place within the council to cover the subject raised. The council's confirmation of such, and

explanation of the procedures in place, more than satisfies the Commissioner that this information is not held.

23. Item b – in the request for internal review the complainant argued that his request was for recorded information, and confirmed:

"Item b - I think that you (wilfully?) miss my request for information here. Again, I re-phrase it for you and ask for a copy of those Council procedures which should be a matter of record and which allow information of this nature to be withheld after a lapse of nearly three years. I assume that there is, within the procedures, some indication of the time over which any 'commercial sensitivity' is considered relevant. Please therefore send me a copy of the relevant instruction. I presume also that there are such written procedures in order to avoid the obvious possibilities of favouritism, prejudice and corruption."

The council has treated this as a new request for information, and confirmed that there is no information held in relation to the 'relevant instruction'. The council is of the view that the request is for opinion on a decision taken. By way of assistance, the council has provided a copy of their Anti-Fraud and Corruption Strategy, as well as a link to information on their website regarding the Member and Officers Codes of Conduct in Part G of the Council's Constitution.

Again, such specificity is unlikely to be covered by specific internal guidance, as each case has to be considered on its merits. The Commissioner can see no reason to dispute the council's position that this information is not held.

24. Item c - in the request for internal review the complainant argued that his request was not for an opinion but argued:

"Item c - I was NOT asking for the Council's 'opinion' here. Whether the company is still a legal entity and whether it is actively trading is a matter of FACT and NOT of opinion. The status can be readily confirmed in less than 5 minutes, and at no cost, by the use of the CompanyCheck or DueDil websites. As long as you continue to withhold the name, I am clearly unable to carry out this search for myself. As such, I believe that you have an obligation to do so on my behalf."

The council upheld their view that they could not state whether the company is still trading and that this is not a request for information but amounts to a request that they pass an opinion on the status of the company.

The FOIA provides the right to ask for recorded information, but does not oblige a public authority to research or create information that is not held. As such, the expectation of searches being made on the requesters behalf fall outside of the FOIA and the Commissioner is satisfied that the council do not hold the information requested.

25. Item d – in the request for internal review the complainant argued that:

"You mention a 'targeted search' but give no indication as to its size, scope or the parameters used to define the remit. As such, it gives no assurance that you have done anything meaningful to establish the true facts."

The council confirmed that its electronic systems, including Oracle database, had been subjected to searches by Financial Management (against the debtor company) and Asset Management (about contracts relating to property) but these searches had not produced any positive results.

The Commissioners considers that a reasonable starting point for more detailed research would be a positive indication that further information, relevant to the request, is in fact held. The Commissioner is satisfied that the subject matter on which the searches were based, and the departments by whom the searches were made, would provide such a positive indication that further information might be held. As the results were negative the Commissioner is satisfied that this information is not held.

26. Item e - in the request for internal review the complainant argued that:

"Again you mention a 'targeted search' but give no indication as to its size or remit. Again, it gives no assurance that you have done anything meaningful to establish the true facts."

The council confirmed that enquiries had been made of officers in Asset Management but no information on discussions about future business had been identified.

Again, a reasonable starting point for more detailed research would be a positive indication that further information is held. The applicant's expectation that an external website could be used to do some preliminary research falls outside of the FOIA. The Commissioner is satisfied that, as a result of the search of information actually held and the department who undertook the search, this information is not held.

27. The Commissioner is therefore satisfied that on the balance of probabilities, the information is not held by the council. Accordingly, he does not consider that there was any evidence of a breach of section 1 of the FOIA.

Section 10 of the FOIA

28. Section 10 of the FOIA states that an information request should be responded to promptly and in any event not later than the twentieth working day following the date of receipt. As the council did not provide its response in the required 20 working day period from receipt of the request, the Commissioner finds that the council has breached section 10 of the FOIA. The request was received on 02 January 2014 and the response was issued on 31 January 2014.

Right of appeal

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: GRC@hmcts.gsi.gov.uk

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

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.

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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