

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 9 February 2017

**Public Authority:** Hastings Borough Council

**Address:** Town Hall  
Queens Road  
Hastings  
East Sussex  
TN34 1QR

#### Decision (including any steps ordered)

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1. The complainant has requested a copy of ratified accounts regarding section 106 agreements which the council has agreed. The council said that it does not hold relevant information falling within the scope of the request.
2. The Commissioner's decision is that on a balance of probabilities the council was correct to say that it does not hold information falling within the scope of the request.
3. The Commissioner does not require the council to take any steps.

## Request and response

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4. On 9 June 2016, the complainant wrote to council and requested information in the following terms:

*"I would be grateful for the Council Accountant ratified accounts to be supplied in relation to figures quoted by Chief Legal in relation to Section 106 Payments which have been stamped by accountant for the Council.*

*The figures I am referring [sic] to are in relation to s.106 Agreement Payments which were sent in a communication dated 25th May 2016 and following paragraph:*

*"Out of the £802,626, £346,870 relates to S106 Agreements for which the development has not commenced. The payment date for financial contributions to both Hastings Borough Council and East Sussex County Council is specified within each individual S106 Agreement. Payment can become due upon commencement of the development or upon a different trigger point as specified within the S106 Agreement for example upon occupation of the 5th dwelling. £20,000 of the £802,626 is not due for payment as the development has not yet reached its specific trigger point. £71,000 of the £802,626 is payable to East Sussex County Council, £70,000 of which has been paid to them. £195,766 has been superseded by subsequent planning applications. This is where the developer submits another application whilst the original planning permission remains extant. They could implement either permission and it is only on commencement of the development and / or the relevant trigger point that the money becomes due. Only £168,990 of the £802,626 is actually due for payment to Hastings Borough Council. This is in respect of three S106 Agreements which have reached the relevant date for payment of the financial contribution due in February, March and May this year. The February and March payments are expected to be paid this week.*

*In conclusion the amount due to the Council is £168,990 some of which is expected to be paid to the Council this week and the remainder has been requested. Payment of which will be pursued."*

5. The council responded on 17 June 2016. It said that it did not hold the requested information.

6. Following an internal review the council wrote to the complainant on 20 September 2016. It maintained its position that it does not hold the requested information and sought to explain that the request was based upon an incorrect premise.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 2 August 2016 to complain about the way his request for information had been handled. His initial complaint related to the time it had taken the council to respond to his requests.
8. The Commissioner clarified with the complainant that his complaint related to the council's response that it does not hold any information falling within the scope of the request, together with a consideration of any delays which occurred in the council responses.

### **Reasons for decision**

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9. Section 1(1) 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 them. This is subject to any exemptions or exclusions that may apply.
10. 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.

11. The request is for the ratified accounts of the council in respect of the section 106 payments highlighted by the complainant. The council argues that the request is based upon an incorrect understanding of the situation by the complainant. It argues that 'ratified accounts' are accounts are those that the Council would publish at the year end. The Commissioner understands by this that the council means that they are accounts which have been verified and 'signed off' by an accountant as correct.
12. The council argues that the information it holds on section 106 payments are not ratified accounts and it does not therefore hold any information falling within the scope of the request. In relation to Section 106 agreements it says that the only accounts that would be published are the 'balance on the reserve sheet', which it says has already been disclosed to the complainant.
13. Further to this the council argues that the requestor's argument that the figures provided to him previously are incorrect is based on the premise that all of the figures identified are immediately owed to the council. It says however that this is not in fact the reality of the situation.
14. The complainant had previously requested information pertaining to Section 106 agreements. He was sent a management working sheet that the finance department use to see what Section 106 agreements have been made. This is purely a working sheet, not ratified accounts, as section 106 agreements may not be owed or may not be paid dependent upon the circumstances agreed over the agreement. Additionally, S106 agreements can be superseded by further planning applications for the same land, agreed with separate/different s106 agreements – the applicant can then choose which of the developments to develop, and this will affect which of the separate s106 agreements will become 'live'. It argues therefore that the figures in the balance sheet are not total money owed to the council as this can be affected in a number of ways.
15. In summary, the council argues that the complainant has drawn the wrong conclusions about the information that the council would hold. It argues that the information which was provided to him was a correct copy of the worksheet as it stood at the time of the request. The information on the spreadsheet will however change over time as Section 106 monies are paid, superseded or changed in any other way.

16. The council argues that the spreadsheet serves as the council's only recorded finance management information in relation to Section 106 payments. As stated, therefore, the spreadsheet is not ratified and so the council considers that the information requested by the complainant is not held for the purposes of the request. It has supplied the information it does hold to him.
17. The Commissioner must base his judgement on the response of the council, the circumstances of the case and any other relevant information or circumstances which point to information being held or not held. He will also bear in mind the actions of the authority in searching for the information. As noted above, his decision is based upon a balance of probabilities.
18. In this case, given the council's explanation, the Commissioner considers that on a balance of probabilities the council was correct to state that no information was held falling within the scope of the request.

## **Other matters**

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Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

19. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As the Commissioner has made clear in *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
20. The complainant made his request for information on 9 June 2016. The council's initial response, stating that no information was held, was provided on 17 June 2016. This response was within the time deadlines set by section 10(1) of the Act.

21. The complainant then specifically asked the council to review its decision on 25 June 2016, although he had also written to the council on 23 June 2016 asking it to confirm that it did not hold information regarding figures which had previously been quoted to him as correct by senior officers at the council.
22. The council provided its internal review to the complainant on 20 September 2016. That response however sought to explain the error behind the complainant's request. It did not stipulate again that no relevant information is held falling within the scope of his request.
23. The complainant did write to the council pointing this fact out but did not receive a response from the council to this email. The council did, however, confirm its position that information is not held to the Commissioner once contacted by the ICO to confirm this.
24. The Commissioner has therefore noted that the council did not comply with the suggested timelines within the code of practice in this case.

## Right of appeal

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25. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

26. 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.
27. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**