

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 May 2017

Public Authority: Fenland District Council
Address: Fenland Hall
County Road
March
Cambridgeshire
PE15 8NQ

Decision (including any steps ordered)

1. The complainant has requested information from Fenland District Council (the council) relating to investigations and decisions regarding a planning enforcement matter in 2006. The council responded to say that due to the time that has elapsed, it could not locate the information sought.
2. The Commissioner's decision is that the council has complied with section 1 of the FOIA.
3. The Commissioner does not require the council to take any steps.

Request and response

4. The complainant made the following undated request for information with reference to a quote made by a specific named council officer to the BBC on the Look East program on or around 22 May 2007.

"We now need the following under the FOIA Act.

- 1) *What misunderstanding does [named council officer] refer to?*
- 2) *Where is the clarification of the advice to which [named council officer] refers?*
- 3) *Where is a copy of the investigation report?*
- 4) *Who carried out the alleged investigation?*

- 5) *Please forward a copy of the minutes of the meeting held, regarding this serious matter.*
 - 6) *Why was a copy of this meeting as stated by [named council officer] not sent to us, as requested before?*
 - 7) *What was I told to do regarding my stable home, "by fully qualified FDC"?"*
5. The council responded on 31 May 2016. It stated that the request had been received on 6 May 2016. It advised that the council did not hold the requested information. In respect of points 6 and 7, it also advised that it was unsure exactly what the complainant was requesting, and sought clarification.
 6. The solicitors acting on behalf of the requestor sought an internal review on 16 August 2016. The council provided the outcome of this on 30 August 2016. It advised that the council had contacted the named council officer regarding the request for information, but that it was unable to locate any specific documents in response to the request.

Scope of the case

7. The complainant contacted the Commissioner through his solicitors on 21 October 2016 to complain about the way his request for information had been handled. He explained that he did not accept the council's position that no information within the scope of his request was held. He asked the Commissioner to investigate this.
8. The Commissioner considers the scope of this case to be to determine whether the council was correct when it said that it does not hold the requested information.

Reasons for decision

Section 1 – Information held

9. Section 1 of the FOIA requires a public authority to confirm to the requester whether the requested information is held, and if so, provide it to him.
10. The Commissioner follows the lead of a number of Information Tribunal decisions in applying the civil test of the balance of probabilities to cases such as this. Where there is a dispute between the information located by a public authority, and the information a requester expects to be

held, the Commissioner considers whether, on the balance of probabilities, it is more likely than not that the information is held.

11. The complainant has informed the Commissioner that in his view, the requested information must be held. He finds it inconceivable that the investigation referred to in parts 5 and 6 of his request was not put in writing, or that there are no records of correspondence between council officers on the matter. The complainant considers that the named council officer would not have made the statement to the BBC if there was no supporting evidence, and he maintains that such evidence would be held in the planning file.
12. In his internal review request the complainant suggested that the council should contact the named council officer to "make known all he recollects about the matter."
13. The council has provided the Commissioner with some background information to the request and its dealings with the complainant in order to support its position that the requested information is not held.
14. The council explained that the complainant had enforcement action taken against him by the council in connection with the erection of an unlawful residential property. It stated that the complainant claims that prior to building the property he visited one of the council's customer services centres in 2005 to enquire if he needed planning permission. During this visit the complainant asserts that he was informed that he did not need planning permission and was given verbal planning permission.
15. The council confirmed that there is a record of a conversation with the complainant on 8 September 2006 in which he stated that he had a copy of a letter confirming the advice he says he was given by the council. Although there have been enforcement planning appeals and court cases the complainant has not been able to produce this letter. The council states that there is no record of such a letter on its files.
16. The council confirmed that in a court case between the complainant and the council in 2010, the issue of what advice, if any, the complainant received from the council was considered by the Judge. The council advised that as part of the court process, the Judge heard evidence given under oath and witnesses were cross examined. The council has highlighted the following as key points from the court case:
 - The complainant admitted that he never received his alleged permission in writing.
 - The Judge also watched the BBC Look East report (referred to in the request) in which the named council officer, who is no longer

an employee of the council, stated he was given wrong information. The named council officer told the court that a member of his team was contacted by the one-stop-shop after the complainant's visit and that he left "not clear about what he wanted". The named council officer also said he didn't know exactly what was said to the complainant by the staff at the customer service centre and didn't know who spoke to him. He concluded that he thought the complainant was confused and had left the customer service centre with the wrong impression. He apologised for this being the case.

- The named council officer also gave evidence that he had spoken to the Manager of the customer service centre who confirmed that no-one gave the complainant verbal planning permission.
 - The named council officer also gave evidence that a letter was sent to the complainant a few days after his visit to the customer service centre to clarify the position
 - The Judge commented that the complainant was unable to identify the person or persons that he claims gave him the verbal planning permission.
 - The complainant was unsuccessful in defending the enforcement court case.
17. The council has provided information to the Commissioner regarding the searches undertaken for the information, and the likely locations. The council explained that due to the passage of time, there are no members of staff at the council who were involved with the case at the time. However, searches have been undertaken in the relevant service areas of planning, legal, and customer services. Searches were undertaken of both electronic and manual records, as there is no one at the organisation who was involved in the matter at the time, the council has not been able to determine whether the information will be held manually or electronically, and has therefore undertaken searches of both types of information. It explained that searches have been made using the site address and the case or matter references.
18. The council has specifically confirmed that it has searched all relevant planning and legal files concerning the matter of the planning enforcement case, and has found no information pertinent to the request.
19. The council confirmed its data retention policy with regard to the determination of planning applications is 15 years after build completion. The retention period for summary management information for Building control regulation is a permanent retention requirement. The council has

confirmed that there is no record of any information within the scope of the request being held previously, and there are no records of the destruction of any such documents.

20. Turning to the specific requested information at questions 1 to 4, the council confirmed in its internal review that in order to fully consider the complainant's request, it contacted the named council officer despite the fact that he left the council some time ago. The named council officer explained the nature of the investigation the complainant refers to in his request as not being in the form of a formal report or similar. The council also confirmed that despite extensive searches it had not been able to locate any documentation relating to this matter.
21. There had been some confusion as to what the complainant wanted in respect of questions 5 and 6. The complainant confirmed to the Commissioner that the minutes referred to relate to a meeting he maintains was held in which the decision to burn down the building was made. In view of this clarification, the council confirmed to the commissioner that no meeting was held regarding the method by which the building was to be demolished. It states that the method of removal was not specified by the council when it requested quotes for the work. It advised that neither the request for quotes nor the returned quote from the contractor specified the demolition method. It is therefore confident that this information is not held.
22. There was also a need for clarification of question 7. The complainant confirmed that he sought documentation to support the named council officer's statement on the BBC Look East program that he had contact with the complainant in the days following his visit to the One-Stop-Shop to confirm that planning permission was required.
23. The council's key points from the 2010 court case show that the named council officer referenced a letter sent to the complainant after his visit to the One-Stop-Shop to clarify the situation with regard to planning requirements. However, despite the searches undertaken by the council, including contacting the named council officer, it has been unable to locate such a letter.
24. On this point, the council also states that it holds a record of a conversation with the complainant on 8 September 2006 in which he states that he had a copy of a letter confirming the advice he maintains he was given by the council. The council referred to the court case which tested this assertion and the complainant admitted he had never received his alleged planning permission in writing. As the complainant has not been able to produce this letter throughout the planning enforcement appeals and court actions, the council therefore suggests

that such a letter confirming planning permission was not required does not exist.

25. The Commissioner understands that the matter is deeply personal to the complainant, and that he seeks to understand more about the circumstances of the demolition of his stable home. However, a substantial amount of time has since passed, and now no-one remains at the council who was involved with the original planning enforcement case. This means that the council is not able to ask questions of such individuals regarding the requested information or the events that are believed or are alleged to have occurred. In addition it also means that there is an increased likelihood that any information that was not filed on the relevant planning enforcement or legal file at the time will no longer be held.
26. The Commissioner also appreciates the complainant's position that the named council officer would not have said what he did in the BBC Look East report in May 2006 if it was not based on fact. However the Commissioner does not fully accept the complainant's view on this point, not least since the matter has been heard in the 2010 court case. The Judge viewed the Look East footage in question and the named council officer made statements under oath to relating to the situation. The Commissioner submits that if the requested information existed, it is likely to have been available at the court case.
27. In addition to this, in contacting the named council officer, who no longer works for the council, the Commissioner considers that the council took steps beyond what is required of it to locate information in response to a freedom of information request. This is because the FOIA entitles individuals to information held by a public authority. There is no legal requirement on public authorities to either consult with third parties in order to locate information, nor to create information to answer an applicant's requests.
28. The Commissioner would draw attention to the fact that determining whether a public authority has complied with section 1 does not mean that she must be certain that the information is or is not held. The determination is made on the balance of probabilities, that is to say that it is more likely than not that the information is held.
29. In this case, given the considerable amount of time that has passed, the fact that the council employees involved in the matter at the time are no longer working at the council, and the searches undertaken by the council, the Commissioner finds that on the balance of probabilities, the council was correct to say that it did not hold the requested information.

Right of appeal

30. 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

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

31. 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.
32. 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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