Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 May 2019

Public Authority: Hastings Borough Council
Address: Town Hall
Queens Road
Hastings
East Sussex
TN34 1QR

Decision (including any steps ordered)

1. The complainant requested from Hastings Borough Council (the Council) information in relation to Councillors' and Planning Officers' potential membership of Freemasons' lodges. The Council provided the complainant with a link which contained the Councillors' record of interest forms and stated that it did not hold the requested information in relation to Planning Officers.

2. The Commissioner's decision is that the Council

    - failed to issue an adequate response to the complainant's request in relation to the Councillors' possible affiliation with Freemasons' lodges; and

    - on the balance of probabilities, does not hold information in relation to Council's Planning Officers' possible affiliation with Freemasons' lodges;

3. The Commissioner requires the Council to take the following steps:

    - Respond to the complainant with a fresh response to the part of the request seeking information related to the Councillors' possible affiliation with Freemasons' lodges. This response must set out clearly and accurately whether the Council holds information

falling within the scope of that part of the request and, in relation to any relevant information it does hold, either disclose any such information or explain why the FOIA does not require such a disclosure.

4. The Council 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 11 May 2018, the complainant wrote to Hastings Borough Council (the Council) and requested information in the following terms:

"The council Code of Conduct …states: 'Membership of professional /voluntary bodies & conflicts of interest – You should declare membership of any professional body or organisation where your membership may appear to represent a conflict of interest or attract accusations of bias...'

I request that you reveal your councillors' and your planning officers' membership (if any) of free masons' lodges that should by law be recorded in the directorate's declaration reporting books (which all councils are obliged by law to keep)."

6. The Council responded on 6 June 2018. It stated that it did not hold information in relation to Planning Officers' potential membership of Freemasons' lodges. With regard to the Councillors' possible affiliation with Freemasons' lodges the Council provided the complainant with a link[1] from its website which contained profiles of all the Councillors including *"Register of Interest"* forms for each councillor. In absence of a specific list of Councillors who are members of Freemasons' lodges, the Council indicated that any councillor who was a member of Freemasons' lodges should declare their membership in their *"Register of Interest"* forms.

7. Remaining dissatisfied, on 26 June 2018 the complainant requested the Council to conduct an internal review.

8. Following an internal review the Council wrote to the complainant on 19 July 2018. It upheld the original position.

[1] https://hastings.moderngov.co.uk/mgMemberIndex.aspx?bcr=1

Scope of the case

9. The complainant contacted the Commissioner on 6 August 2018 to complain about the way his request for information had been handled as he considered that the Council should have been in possession of further information within the scope of his request.

10. The Commissioner has therefore considered whether, on the balance of probabilities, the Council held further information to that which was located at the link referred to in the response of 6 June 2018 within the scope of the request at the time that the information request was submitted.

Reasons for decision

Section 1 of the FOIA – information held/not held

11. 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 within the scope of the request, and if so, to have that information communicated to them.

12. In this case, the complainant disputes that the information that was disclosed is all the information that the Council holds that is within the scope of the request.

13. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.

14. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the Council to check whether the information is held and any other reasons offered by the Council to explain why the information is not held. In addition, she will consider any reason why it is inherently likely or unlikely that information is not held.

15. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.

The complainant's position

16. The complainant believes that the Council should be in possession of further information to what was disclosed, within the scope of the request.

17. The complainant refers to the Council's Code of Conduct, which in its Paragraph 13(c) *"Membership of professional / voluntary bodies & conflicts of interest"* states that the Council's employees:

> *"…should declare membership of any professional body or organisation where your membership may appear to represent a conflict of interest or attract accusations of bias. This includes any private organisations whose membership is not totally open to the public. Any such membership must be recorded in the directorate's declaration reporting book."*

The Council's position

18. As part of her investigation, the Commissioner wrote to the Council requesting a submission in respect of a number of questions relating to the allegations raised by the complainant. The questions were focused on the Council's efforts to ensure that necessary searches were conducted in order to determine whether the requested information was held.

19. The Council stated that in response to the Commissioner's queries its "*freedom of information co-ordinators checked with their department for the information that has been requested. Our Audit department would be responsible if officers declared an interest. This request was also sent to the following departments to carry out a search: Human Resources, Planning, Audit and Finance/Insurance all came back with no information held."*

20. The Council explained that if information would be held it would be both on paper and electronic form.

21. To the Commissioner's question whether any information falling within the scope of the request was deleted or destroyed, the Council confirmed that, to its knowledge, it was not the case.

22. Further, the Council asserted that its Document Retention Policy does not specifically state the length of time that the information on declared interests should be held. However it confirmed that "*comparable documents are kept between 3-6 years."* In this response the Council provided the Commissioner with a link to its Document Retention Policy.

The Commissioner's view

23. The Commissioner has examined the submissions of both parties. She has also considered the overall handling of the request as well as the searches performed by the Council and the Council's explanations as to why there is no information held and the complainant's concerns.

24. For the purpose of providing a clearer picture, this decision notice will separate the analysis into two parts. The first part will deal with the handling of the complainant's request relating to the question about the Council's Planning Officers; and the second part will deal with the question relating to the Councillors.

Relating to the Council's Planning Officers

25. The Commissioner noted that during the course of the handling of the complainant's request, the Council in its initial response told the complainant that *"the Code of Conduct relates to Elected Members and not officers of the Council."*

26. However, in the Council's correspondence of 3 September 2018 to the complainant, the Council stated *"The Code of Conduct is for officers of the Council and as you are aware this has now been removed from our website and will be reviewed by our senior management team in due course."*

27. The Commissioner considers that this contradiction in these responses may have transmitted a confusing message to the complainant that led him to believe that the Council was attempting to conceal the information sought.

28. During the course of her investigation, it became apparent to the Commissioner that, at the time of the request, the Council had on its website two documents concerning the matters raised in the present information request:

    - Code of conduct – April 2017 revision, to which the complainant referred when the request was submitted; and

    - Part 5 of the Constitution of the Council – Codes and Protocols, which was cited by the Council when it addressed the issue of councillors' declared interests.

29. Whilst the Commissioner appreciates the Council's attempts to provide some information to the complainant, she considers that the Council failed to provide adequate clarification on the existence of two different documents in order to avoid any unnecessary confusion.

30. The Commissioner understands why the complainant believes that the Council ought to have retained information, since its Code of Conduct, in force at the time of the request, suggested that there should be a record of the Council's Planning Officers declared interests. However, the Commissioner notes that in a correspondence dated 21 September 2018, the Council admitted that the practice of keeping a central record of officers' interests has not been maintained and provided its clarification as to why this has happened.

31. The Commissioner accepts that the Council has conducted an appropriate search, involving relevant business areas. This search was designed to identify and locate any relevant information, but the Council has maintained that no such information was located.

32. The Commissioner is unable to identify any further action that the Council could reasonably be expected to take in order to comply with the request. If information is not held then it cannot be disclosed in response to a request. The Commissioner cannot comment on whether the Council ought to hold more detailed information relating to declared interests of its Planning Officers.

33. In conclusion, the Commissioner finds, on the balance of probabilities, that the Council does not hold any information relevant to this part of the request.

Relating to the Councillors

34. The Commissioner notes that in its response addressing the councillors' potential affiliation with freemasonry lodges, the Council did not state whether it held information on this subject. It only provided the complainant with a link which contained the forms of declared interests of all elected members of the Council.

35. The Commissioner wishes to refer to her Guidance on determining whether information is held[2] which states that *"When a public authority receives a request, its first task is usually to determine whether it holds the requested information."* Once that determination is made it is the Council's principal obligation under the FOIA to clearly state whether it holds information falling within the scope of the request and, in relation to any relevant information that is held, to provide that information or to issue a refusal notice clearly outlining the grounds for refusing the request.

[2] https://ico.org.uk/media/for-organisations/documents/1169/determining_whether_information_is_held_foi_eir.pdf

36. In this respect, the Commissioner considers that the Council's response to the complainant's request to reveal "*councillors' membership (if any) of free masons' lodges"* by providing a link of Councillors' profiles did not comply with its statutory obligation provided under section 1(1)(a) of the FOIA.

37. Therefore, the Commissioner finds that the Council breached section 1(1) of the FOIA. As noted at paragraph 3 above, the Council is now required to write to the complainant and provide a fresh response in relation to this part of the request.

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: 0870 739 5836
    Email: GRC@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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 .....

Ben Tomes
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