

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 December 2019

Public Authority: Shropshire Council
Address: Shirehall
Abbey Foregate
Shrewsbury
SY2 6ND

Decision (including any steps ordered)

1. The complainant requested information relating to Shropshire Council's highways contract. Shropshire Council (the Council) said that it did not hold the requested reports.
2. The Commissioner's decision is that, on the balance of probabilities, the Council did not hold information within the scope of the request. She therefore considers that the Council complied with its obligations under section 1(1) (general right of access to information) of the FOIA.
3. However, the Commissioner found a procedural breach of section 10(1) (time for compliance) of the FOIA.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 29 November 2018, following earlier correspondence, the complainant wrote to the Council and requested information in the following terms:

"Thanks for your swift response, the contract Table 1 "Performance Measures" indicates there are monthly reports submitted to the Council.

I would be interested in seeing the Reports relating to Reactive Works Service Area RW 1 from contact [sic] start in April 2018 up to date".

6. The Council responded on 22 January 2019, saying:

"Schedule 3 of the Contract Agreement (Partnering Information) specifies the Contractor's Performance Measure targets and the frequency of reporting.

The data from these reports will form the basis on an annual submission to Shropshire Council's Scrutiny Committee. Although no date has been set for this Committee, it will be during 2019 to enable a full twelve month review the [sic] Contractor's performance across all services in the first year of the contract".

7. Following an internal review, the Council wrote to the complainant on 20 February 2019. It revised its position, disclosing information to him and advising him of his right to contact the Commissioner.

8. The parties continued to engage in correspondence.

9. On 30 July 2019 the complainant wrote to the Council saying:

"Thank you for your email attaching Year 1 Performance Summaries.

This is not the information I requested in my FOI request, I have repeatedly asked for the monthly Performance Measures reports as required in the contract, ...

Given the failure of the Council to provide the requested information I shall now be making a formal complaint to the ICO".

Scope of the case

10. The complainant contacted the Commissioner on 30 July 2019 to complain about the way his request for information had been handled.

11. On 5 August 2019 the Council wrote to the complainant advising:

"I have discussed this further with the Department and they have confirmed to me that the individual monthly reports are held and they will be provided to you by early next week at the latest".

12. However, during the course of the Commissioner's investigation, the Council subsequently wrote to the complainant advising him that it did not hold the requested information. In that respect it said:

"I regret to inform you that although I was previously under the impression that we may be able to provide copies of monthly reports I can confirm that we do not hold this information and therefore cannot share anything other than the annual report which we have already provided..."

13. The analysis below considers whether, on the civil standard of the balance of probabilities, the Council held information within the scope of the request.
14. The Commissioner has also considered the timeliness with which the Council handled the request for information.

Reasons for decision

Section 1 general right of access

15. Section 1 of the 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."

16. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities.
17. 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 the balance of probabilities.
18. In this case, the Commissioner has sought to determine whether, on the balance of probabilities, the Council held the requested reports.
19. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, she will consider any

other information or explanation offered by the public authority which is relevant to her determination.

20. During the course of her investigation, the Commissioner asked the Council questions, as is her usual practice, relating to how it established whether or not it held information within the scope of the request. In particular, she asked the Council to explain why, having initially told the complainant that it held the requested reports, the Council subsequently concluded that no relevant information was held.
21. The Council acknowledged that its 'do not hold' response contradicted its email to the complainant of 15 August 2019 in which it advised that the reports were held and would be provided to him. It apologised for the confusion.
22. Regarding its denial that it held the reports it had previously said would be provided, the Commissioner recognises that the Council told the complainant:

"This issue has been picked up and internal action has been taken, to that end the matter has been rectified going forwards with monthly reports now being produced from June this year".

23. Similarly, the Council told the Commissioner:

"The reports [the complainant] has asked for are not held by the Council, everything we do hold in relation to his request has already been provided".

24. It acknowledged:

"... there was some confusion over this, [the department concerned] thought they did hold the reports but have subsequently found out they don't".

The Commissioner's view

25. The Commissioner recognises that, from the protracted correspondence between the parties, and the Council's assurances, the complainant understandably believed that the Council held information within the scope of his request.
26. However, while appreciating the complainant's frustration that the Council ultimately concluded that it did not hold information within the scope of his request, the Commissioner is mindful of the comments

made by the Information Tribunal in the case of *Johnson / MoJ (EA2006/0085)*¹ which explained that the FOIA:

"... does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold".

27. Having considered the Council's response, and on the basis of the evidence provided to her (in particular, that the Council changed its practice as a result of the request, so that, going forward, it collates the requested information), the Commissioner is satisfied that, at the time of the request and on the civil standard of the balance of probabilities, the Council did not hold information within the scope of the request.
28. The Commissioner therefore considers that the Council has complied with its obligations under section 1(1) of the FOIA.

Section 10 time for compliance

29. Section 1(1) of the FOIA states that upon receipt of a request a public authority must confirm or deny whether information is held, and if that information is held it must be communicated to the requester.
30. Section 10(1) of the FOIA states that public authorities must comply with section 1(1) within 20 working days of receipt of the request.
31. In this case, the Council denied holding the information that fell within the scope of the request during the course of the Commissioner's investigation.
32. By failing to provide this denial within the statutory time for compliance, the Council breached section 10(1) of the FOIA.

Other matters

33. Where public authorities experience difficulty establishing whether information relevant to a request is held, this might also indicate records management problems.
-

¹<http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i90/Johnson.pdf>

34. The code of practice issued under section 46 of the FOIA (the 'section 46 code') set out the practices which public authorities should follow in relation to the creation, keeping, management and destruction of their records.
35. Failure to conform to the section 46 code is not, in itself, a breach of FOIA or the EIR; however, the Commissioner promotes the observance of the code.
36. The Commissioner wishes to refer the Council to the section 46 code and expects that it will have due regard to its recommendations in future.

Right of appeal

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

38. 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.
39. 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

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF