

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 November 2013

Public Authority: Caerwent Community Council

Address: caerwentcouncil@aol.com

Decision (including any steps ordered)

1. The complainant requested the handwritten notes of meetings of the Council in April and May 2013. Caerwent Community Council (‘the Council’) initially stated that it considered the information to be exempt under section 22 of the FOIA. At the time of the internal review the Council stated that the complainant had not asked for any written information and as such the Council did not hold it. During the Commissioner’s investigation the Council stated that, whilst the information requested was held at the time the request was received, it had been destroyed in line with its normal retention and destruction policy, but it maintained that the information was exempt under section 22 of the FOIA. The Commissioner has been unable to consider the Council’s application of section 22 as the requested information is no longer held. The Commissioner has not ordered any steps but has commented on the Council’s handling of the request in the other matters section of this notice.

Request and response

2. On 12 April 2013, the complainant wrote to the Council and requested “...copies of the Hand Written notes for March April Community Council meetings”.
3. The Council responded on 15 April 2013 stating that “we are not able to provide any handwritten notes as these are exempt from the FOI Act Section 22 – Information Intended for Future Publication”.
4. On 16 April 2013 the complainant wrote to the Council and asked for an internal review of its handling of his request

5. The Council responded on 16 April 2013 stating that "as you have not asked for any written information I have to advise you that we do not hold this information".

Scope of the case

6. The complainant contacted the Commissioner on 13 June 2013 to complain about the way his request for information had been handled.
7. The scope of the Commissioner's investigation in this case is to determine what information the Council holds relevant to the request of 12 April 2013 and whether any information held should be disclosed.

Reasons for decision

Section 1 –General right of access

8. Section 1 of the FOIA provides 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.
9. As stated above, the Council's internal review response stated that as the complainant had not "asked for any written information I have to advise you that we do not hold this information". During his investigation, the Commissioner wrote to the Council confirming that the request for information of 12 April 2013 constituted a valid request for information under the FOIA as it was in writing, including the requestor's name and an address for correspondence and described the information requested, namely the handwritten notes of the Council meetings in April and May 2013. He asked the Council to confirm whether it held the information requested. If the requested information was held, and the Council was seeking to withhold it, he asked for full representations relating to any exemption(s) the Council considered applicable.
10. The Council advised the Commissioner that handwritten notes of Council meetings are held in order to produce the formal minutes of each meeting. They are destroyed once the minutes of a meeting have been approved, which generally happens at the next Council meeting. The Council confirmed that the notes of the meeting held in March 2013 were destroyed on 12 April 2013 (following approval at the meeting on 11 April 2013) and the notes of the meeting held in April 2013 were destroyed on 10 May 2013 (following approval at the meeting on 9 May

2013). The Council confirmed, therefore, that it no longer held the requested information. However, the Council maintained that that any handwritten notes that were held at the time of the request were exempt under section 22 – information intended for future publication.

11. Good records management dictates that a public authority should have a disposal schedule in order to identify and describe the records which can be disposed of as a matter of routine in accordance with a defined timetable. This is one of the ways in which a public authority can carry out the disposal of records in accordance with a clearly defined policy. The Commissioner would expect a public authority, as a matter of good records management practice, to be able to explain to an applicant when and why any information was destroyed. This conforms with the Code of Practice on records management issued under section 46 of the FOIA ('the section 46 Code')¹.
12. Section 1(4) provides that the information to which the duties apply under the FOIA is that which is "held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated [...], being an amendment or deletion that would have been made regardless of the receipt of the request."
13. This means that a public authority does not have to release information under FOIA if it is scheduled to be destroyed under its usual disposal schedule before the time for compliance with the request expires. This cannot apply to situations where the decision to delete or destroy is prompted by the request, or if destruction is scheduled for a date later than the 20 working day deadline for responding. Where this is the case, a public authority must still consider the request in the usual way.
14. In the context of section 1(4), the Commissioner interprets the reference to "*promptly*" in section 10 of FOIA to mean that where requested information is scheduled for deletion before a response is due to be issued, **if** the public authority is in a position to respond earlier in the statutory twenty working day time limit, and at that point the information is still held, the authority should provide the information.
15. In this case, the Commissioner notes that the request was submitted on 12 April 2013 and the Council's initial response was made on 15 April 2013. At the time of the Council's response, whilst the handwritten

¹ <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section-46-code-of-practice.pdf>

notes of the March meeting had already been destroyed in accordance with the Council's normal policies and procedures, it held a copy of the handwritten notes of the April meeting. The notes of the April meeting were later destroyed on 10 May 2013 following approval at the Council meeting on 9 May 2013.

16. The Commissioner considers that the Council's explanation as to why the handwritten notes were destroyed is reasonable and he accepts that the information was scheduled for deletion at the time of the request. The Commissioner has seen no evidence to suggest that, in this case, the Council decided to delete the handwritten notes of the meetings outside the ordinary course of business. However, the Commissioner notes that, in this case, despite being aware that the handwritten notes were the subject of an information request, the Council proceeded to destroy the information in accordance with its normal retention and destruction policies and procedures. As a matter of good practice, a public authority should delay the destruction of the information if it is known to be the subject of a request. Further commentary on the section 46 Code is provided in the "Other Matters" section of this notice.
17. The Commissioner is satisfied that, based on the representations provided, the Council no longer holds the information requested. In view of this he has been unable to make any decision as to whether section 22 of the FOIA was applied correctly by the Council.
18. In view of the fact that the Council held information at the time of the request, which was subsequently deleted prior to the complaint to the Commissioner and his investigation, he has considered whether the Council has committed an offence under section 77 of the FOIA in the "Other Matters" section of this notice.

Other matters

Section 46 – records management

19. The section 46 Code states that "disposal of records should be undertaken only in accordance with clearly established policies...". Disposal schedules form a key part of this process as they are timetables that set out when individual records or groups of records are due for review, for transfer to an archives service or for destruction. This will assist the authority in knowing the location of information it holds or has transferred to archives, or whether the information has been destroyed and, if so, why and when.
20. Paragraph 12.9 of the section 46 Code recommends that disposal decisions should take into account variations such as those caused by

outstanding requests for information. Paragraph 12.3 also states that where information is known to be the subject of a request for information, destruction should be delayed until all relevant complaint and appeal provisions have been exhausted. This will include internal reviews, any complaint made to the Commissioner, and any appeals from decision notices.

21. Given the various appeal processes, the Commissioner's view is that as a matter of good practice, any requested information should be kept for 6 months after a public authority's last communication about a request. This is particularly important if a public authority has refused to disclose any part of that information, it is recommended that a public authority retain the requested information for a period of at least six months from the date of the last communication about the request.
22. The Commissioner expects that, in future, the Council will ensure that its record management practices will conform to the recommendations of the section 46 Code.

Section 77

23. Section 77 of the FOIA states that a criminal offence is committed if any person alters, defaces, blocks, erases, destroys or conceals any information with the intention of preventing the applicant from receiving any of the information he is entitled to receive.
24. In order to secure a conviction in criminal proceedings, each element of an offence must be proven to the criminal standard, that being 'beyond reasonable doubt', as opposed to the lesser civil standard of 'balance of probabilities'. If this standard of proof is not met, any prosecution will fail. In order to uphold a section 77 offence the Commissioner has to prove that there was a clear intention to prevent disclosure on the part of the public authority.
25. If information that is held at the time of the request is destroyed outside of a public authority's normal disposal schedule, this is a breach of the FOIA as the authority must confirm that it holds the information and consider disclosure subject to any exemption or exception. Such action becomes an offence if the requested information is altered, concealed or destroyed with the **intention** of preventing disclosure under either FOIA.
26. In this case, the Council confirmed that the requested information was destroyed after the request was received, in accordance with its normal policies and procedures. As mentioned earlier in this notice, this does not conform to the section 46 Code which recommends that disposal decisions should take in to account variations such as those caused by

outstanding requests for information. However, the Commissioner considers there is insufficient evidence to suggest it was the Council's intention to deliberately delete the information requested to prevent disclosure. Therefore the Commissioner has not undertaken a criminal investigation in this case.

Right of appeal

27. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

28. 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.
29. 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

Anne Jones
Assistant Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF