

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 March 2014

Public Authority: Denbighshire County Council
Address: County Hall
Wynnstay Road
Ruthin
Denbighshire
LL15 1YN

Decision (including any steps ordered)

1. The complainant requested information about joint faith based education provision in North Denbighshire and the related consultation process. Denbighshire County Council ('the Council') provided information relevant to the request. In light of concerns raised by the complainant, the Council conducted further searches and made an additional two disclosures prior to the Commissioner's investigation. The complainant considered that the Council held more information relevant to his request than that which it provided to him. The Commissioner's decision is that, on the balance of probabilities, the Council has provided the complainant with all of the requested information that it held at the time of the request. He does not require any steps to be taken.

Request and response

2. On 23 May 2013, the complainant wrote to the Council and requested information in the following terms:

"Firstly I would like to specifically request to see an email that I understand was sent by [named Head of Service] to all county councillors on May 21st regarding this consultation process and any responses to that email. Secondly, I request to see all correspondence, including printed and handwritten letters and emails, between county

officers and elected representatives that are in relation to the joint faith based provision for North Denbighshire and the related consultation process. Thirdly, I request to see all correspondence, including printed and handwritten letters and emails, between council officers and the Catholic Diocese that are in relation to the joint faith based provision for North Denbighshire and the related consultation process. Fourthly, I request to see all correspondence, including printed and handwritten letters and emails, between council officers and the Church in Wales that are in relation to the joint faith based provision for North Denbighshire and the related consultation process. Finally, I would like to see all correspondence, including printed and handwritten letters and emails, between council officers and [name of individual redacted] that are in relation to the joint faith based education provision for North Denbighshire and the related consultation process”.

3. The Council responded on 26 June 2013 and provided a bundle of information relevant to the request.
4. On 4 July 2013 the complainant wrote to the Council expressing concern that it had not provided all the information it held relevant to the request. In particular, he said that he was concerned that in the email bundle relating to the named Head of Service there were no emails to or from the individual prior to April 2013. The complainant referred to the wording of his request and pointed out that it was not limited to information specifically about the formal consultation process but also included information relating to joint faith based provision for North Denbighshire.
5. The complainant wrote again to the Council on 5 July 2013 asking it conduct an internal review into its handling of the request.
6. The Council responded on 28 August 2013 and stated that a further check of the named Head of Service’s email account had been undertaken and no additional information relevant to the request was located. The Council confirmed that no other notes or correspondence had been located. The Council also advised that it was hoping to provide any additional information held by Councillors by 6 September 2013. On 9 September 2013, the Council provided some additional information held by Councillors.
7. On 29 August 2013, the complainant wrote to the Council about its retention policy and asked various questions about the policy. The Council responded to the points raised on 30 August 2013.
8. On 30 August 2013 the complainant submitted a new request for information for “a copy of the DCC formal disposal schedule or direct me to where I would find it on the DCC website.”

9. The Council responded on 4 September 2013 stating that it was unable to disclose a complete copy of its retention schedule as it was subject to copyright. It stated that, if the complainant could clarify exactly what documents he required the retention period for, it should be able to provide the relevant section of its retention schedule.
10. On 4 September 2013 the complainant wrote to the Council and asked it to clarify information contained within its response of 4 September 2013. He also asked the Council to provide information from its retention schedule in relation to "general email communications within DCC". More specifically he stated that he wanted to know what the timescales set out in the retention schedule were in respect of "emails to/from one named Council officer on the subject of the provision of faith based education in North Denbighshire?".
11. The Council responded on 10 September 2013 and explained that, as with most email systems, it was unable to physically prevent staff from deleting emails. It added that, the planned implementation of an Electronic Document Records Management System should assist staff in correctly capturing and storing relevant emails. The Council provided information from its retention schedule about the retention policies for general correspondence and project specific correspondence. The Council also confirmed that relevant searches had been undertaken of the named Head of Service's deleted items folder when it had searched for information held relevant to the request.
12. On 18 September 2013 the complainant wrote again to the Council asking whether it would be possible to retrieve any information which the named Head of Service may have deleted from her email mailbox using a number of different methods. He asked whether the Council would be taking any action in relation to the deletion of emails relating to the subject matter. The complainant also asked the Council to confirm what the backup and backup retention schedules are for emails, and specifically how often emails were backed up and how long the backups are kept up. The Council responded to the points raised on 9 October 2013.

Scope of the case

13. The complainant contacted the Commissioner on 18 September 2013 to complain about the way his request for information had been handled. In particular, he expressed concern at the apparent lack of information held by the Council relevant to his request, particularly in relation to the named Head of Service.

14. Prior to the Commissioner's formal investigation into this complaint, the complainant advised him that the Council had undertaken further searches of its backup tapes and provided additional information relevant to the request. However, the complainant indicated that he remained dissatisfied with the amount of information which the Council held relevant to the request, particularly in light of the fact that the subject matter had been a live matter since 2010 and is a contentious local issue.
15. The scope of the Commissioner's investigation into this complaint has been to establish whether the Council holds any additional information relevant to the request of 23 May 2013. The complainant has also alleged that the Council had either deliberately deleted information relevant to his request or deliberately continued to withhold relevant information. The Commissioner has therefore also considered whether the Council has committed an offence under section 77 of the FOIA in the Other Matters section of this notice

Reasons for decision

Section 1 –General right of access

16. 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.
17. In cases where a dispute arises over the extent of the recorded information that is held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to ascertain information falling within the scope of the request and he will consider if the authority is able to explain why further information is not held. For clarity, the Commissioner is not expected to prove categorically whether additional information is held. He is only required to make a judgement on whether the information is held "on the balance of probabilities"¹. Therefore, the Commissioner will consider both:

¹ This approach is supported by the Information Tribunal's findings in *Linda Bromley and Others / Environment Agency* (31 August 2007) EA/2006/0072

- the scope, quality, thoroughness and results of the searches and
 - other explanations offered as to why further information is not held.
18. The Council confirmed to the Commissioner that any information relevant to the request would be held in electronic format only. The Council provided the Commissioner with a list showing the names and roles of all staff involved in the subject matter of this request ie joint faith based provision for North Denbighshire and the related consultation exercise. It confirmed that detailed searches of all information held by the relevant staff were carried out for information held locally on personal computers (including laptop computers) and on networked resources.
19. The Council advised that no date range was applied to the searches – ie the searches were undertaken for all information held regardless of the date. The searches undertaken were around emails to/from the relevant officers and elected members and representatives of the Catholic Diocese, the Church in Wales and the two schools involved. The Council also confirmed that the searches were undertaken using the following keywords – faith, merger, catholic, anglican, diocese, councillor, St Brigid's, Blessed Edward Jones, and a number of named individuals associated with the Catholic Diocese, and the two schools involved.
20. The Council advised that, in light of comments made by the complainant about the lack of information held by the named Head of Service, further searches were undertaken in relation to this officer. This included checking the individual's email archives, deleted items folder, and trash and recycle bins. In addition, in October 2013, the Council conducted further searches from its backup tapes in relation to information in relation to this individual. The Council advised the Commissioner that:

"The Council only keeps 6 months' worth of email backups meaning that from backup we could only search restore [sic] copies as far back as March 2013 (at the time of the request) and that copy is as was at the end of the calendar month. Also note that if emails were deleted before the users 30 day archive schedule and before the monthly backup, the emails will not be present in either the backup or the archive.

The six restored copies of [name of Head of Service]'s emails were searched on 22nd. October and took approximately six hours to complete. On 23rd. October, [Name of Head of Service]'s email archive was further searched for numerous keywords as it could have included emails that may have been deleted. Search criteria used :- Faith, Merger, Catholic, Anglican, Diocese, St. Brigid's, Blessed Edward Jones, [names redacted of a number of named individuals associated with the

Catholic Dioceses and the two schools involved], Councillor. Time frame 01/11/2012 - 31st. May 2013. The search took in excess of 8 hours”.

21. The searches of its backup tapes uncovered some additional information, which the Council disclosed to the complainant. However, in his complaint to the Commissioner, the complainant said that he remained dissatisfied with the lack of information held by the named Head of Service, who he understands had a key role in managing the project. He also raised more general concerns about the lack of information held by the Council for the period from October 2010 to November 2012. This is because he believes the project has been ongoing since 2010, when the Council submitted an outline for the proposal and a request for funding.
22. During the course of the Commissioner’s investigation, the Council confirmed that a further search had been carried out of the backup tapes in relation to the named Head of Service for all date ranges and no further emails were identified.
23. In terms of the information held by the named Head of Service, the Council advised that as a Head of Service, with a team of officers working on multiple schemes, she would not necessarily get involved in the details of all arrangements in relation to the project. The Council confirmed that three of the other officers whose email boxes were searched undertook the initial research and were also involved in the analysis of information collected during the consultation process. The Council advised that communication between these officers is generally verbal and informal, and no notes or minutes were taken of meetings held during the consultation process. The Council confirmed that all relevant information held had been provided to the complainant.
24. In terms of the perceived lack of information held for the period October 2010 and November 2012, the Council advised that no progress was made on the particular area of work during the period in question.
25. In his submission to the Commissioner, the complainant referred to statements made by the Council in its responses to his request that “...not all emails are retained, especially outgoing correspondence and regular housekeeping of email accounts is undertaken” and “staff are encouraged to weed their in-boxes on a regular basis”. He believes this contradicts the Council’s retention policy which indicates that general correspondence is kept for three years (plus the current year) and project specific correspondence is kept for the life of the project plus 6 years.
26. As stated earlier in this notice, the complainant is particularly concerned at the lack of emails located in relation to the named Head of Service.

The complainant said that he considered that the individual concerned would have found it difficult to do their job properly with so few emails being exchanged. In light of the lack of information relating to this individual, the complainant considers it possible that emails have been copied to another device and then deliberately and wilfully deleted to prevent disclosure. As mentioned earlier in this notice, the Commissioner has commented on these allegations in the other matters section of this notice.

27. The Commissioner notes the Council's comments about housekeeping of email accounts. However, as far as the Commissioner can see the Council did not confirm to the complainant that any relevant information had actually been deleted. In response to the Commissioner's enquiries about this particular point, the Council stated that "to the best of our knowledge, no information was deleted or destroyed". The Commissioner notes that the searches the Council undertook included information held both on personal computers (including laptops) and networked resources. In addition, the Council conducted further searches of both deleted items and recycle bins.
28. The Commissioner's guidance on "Determining whether information is held"² refers to information held in backup storage. The Commissioner generally considers that information contained on a backup is not information that can be considered to be "held" for the purpose of FOIA. This is because the main purpose of a backup is disaster recovery and generally, the public authority will have no intention of accessing information held on a backup. In this case the Council has confirmed that its backup tapes are used for disaster recovery only and not as an archive. However, the Commissioner notes that the Council conducted further searches of its backup tapes in order to identify any information relevant to the request which had been deleted.
29. Based on the representations provided by the Council the Commissioner is satisfied that it has carried out adequate searches of all places where relevant information would be held. There is no evidence of any inadequate search or grounds for believing there is a motive to withhold information. Based on the searches undertaken and the other explanations provided by the Council, the Commissioner is satisfied that, on the balance of probabilities, the Council holds no further recorded

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[http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freed_om_of_Information/Practical_application/determining_whether_information_is_held_foi_eir.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~/media/documents/library/Freed_om_of_Information/Practical_application/determining_whether_information_is_held_foi_eir.ashx)

information relevant to the scope of the complainant's request other than that which has already been disclosed to him.

Other matters

Section 77

30. As indicated in paragraph 15 above, the complainant suggested to the Commissioner that the Council had either deliberately deleted information relevant to his request or it was deliberately continuing to withhold relevant information.
31. 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. 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.
32. 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 FOIA.
33. In this case, the Council has made reference to the fact that officers are encouraged to monitor and weed their in-boxes on a regular basis. However, the Commissioner considers there is insufficient evidence to suggest that the Council has deliberately deleted any requested information (either in accordance with or outside of its normal disposal schedule) to prevent disclosure. In addition, based on the Commissioner's finding that on the balance of probabilities the Council does not hold any additional information relevant to the request, he also considers that there is insufficient evidence to suggest that the Council has concealed information relevant to the request with the intention of preventing disclosure. Therefore the Commissioner has not undertaken a criminal investigation in this case.

Right of appeal

34. 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: GRC@hmcts.gsi.gov.uk

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

35. 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.
36. 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
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Cheshire
SK9 5AF