

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 May 2016

Public Authority: Hertfordshire County Council

Address: County Hall
Pegs Lane
Hertford
Hertfordshire
SG13 8DE

Decision (including any steps ordered)

1. The complainant has requested recorded information which concerns an on-going claim against the Hertfordshire County Council ("the Council"). The Council has endeavoured to provide the complainant with answers to many of the questions he has raised, and in many instances it has satisfied the complainant's information requirements. There are however a number of instances where the Council has failed to provide the complainant with copies of the recorded information it holds, particularly in relation to parts (e) to (h) of the complainant's request of 12 January 2015. In respect of those parts of the complainant's request, the Commissioner has decided that the Council has breached section 1 of the FOIA.
2. The Commissioner requires the public authority to revisit parts (e) to (h) of the complainant's request and provide a fresh response that complies with the Act.
3. The public authority 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 Act and may be dealt with as a contempt of court.

Request and response

4. On 12 January 2015, the complainant wrote to Hertfordshire County Council and requested information in the following terms:
- (a) "What was the structure and composition of the Public Liability insurance(s) held by HCC on 28th November 2013 to protect HCC against claims made by pedestrians for personal injury as a result of tripping or falling on pavements for which HCC has the responsibility to maintain under the Highways Act 1980 as regards (i) any amount of self-insurance or policy excess and (ii) limits of liability?"
 - (b) At 28th November 2013 what was the identity of those insurers i.e. name, address and policy identifies or policy number(s)?"
 - (c) If an intermediary was involved in the arrangements of that insurance, what is their name, address and identifying details?"
 - (d) In any respect in relation to the insurances referred to above, is there provision whereby the insurer(s) could specifically "invalidate the insurance cover" is any Member or Officer of HCC were to specifically "interfere with or seek to go against" the insurer(s) or "to comment on the circumstances of a claim"?"
 - (e) In relation to the above insurance(s), what provision was in force to entitle or allow HCC to be consulted or notified of any aspect of the handling of a personal injury claim of any amount or consequences or circumstances or similar?"
 - (f) At 28th November 2013, was the practice of employing the Public Liability claims handling services of Messrs Gallagher Bassett of London EC3 ("GB") the direct result of a contract between HCC and (i) GB or (ii) the insurer(s) or (iii) an intermediary?"
 - (g) In respect of any contract involving the provision of the above claims handling services, what is the precise provision for HCC to be indemnified by GB if the error or negligence or other reason causes HCC to be liable for an amount in excess of that which HCC would be liable in the absence of such error or negligence or other reason?"
 - (h) What is the precise contractual provision that entitles or allows HCC or its agents or representatives to control or audit or

otherwise check upon the quality of the claims handling services provided by GB generally or in respect of any particular claim?

- (i) In 2013 and 2014 how many Public Liability claims involving personal injury were handled by GB arising out of tripping or falling on pavements in the County?
 - (j) In relation to their powers of audit, how many such claims, claims arising in 2013 and 2014 were in fact audited by HCC or their representatives in the calendar years 2013 and 2014?
 - (k) In respect of 2013 and 2014 what was the total number of such claims were notified to HCC and handled by GB arising out of pedestrians tripping or falling on alleged defects in Berkhamsted High Street both (i) involving a personal injury claim and (ii) not involving a personal injury claim?
 - (l) In relation to their powers of audit, how many claims referred to in (k) above were in fact audited by HCC or its representatives?
 - (m) In 2013 and 2014, how many complaints were received (i) by HCC and (ii) GB about the handling of Public Liability claims (i) in Berkhamsted High Street particularly irrespective of any personal injury element following the tripping or falling of pedestrians on pavements?
 - (n) Does HCC require their public Liability claims handling services to satisfy all Codes or Regulations or other insurance provisions in relation to their standards and overall quality of operations? If so, what checks is any were carried out by HCC to ensure compliance (i) prior to the procurement of such services and (ii) to ensure on-going compliance and quality?
 - (o) In the event of litigation against HCC arising out of a claim handled by HCC or GB, please supply the names and addresses of those law firms employed by HCC or GB to defend such claims."
5. The Council responded to the complainant's request on 6 February 2015 under reference FOI/RAP/01/15/8170, providing him with information or answers to his request. Specifically, in response to parts (e) to (h) of the complainant's request the Council stated:
- "(e) Hertfordshire County Council handle such claims in conjunction with Gallagher Bassett and are involved with discussions. Gallagher

Bassett agrees that they will not settle major or contentious claims without the input of Hertfordshire County Council.

(f) Direct contract between Gallagher Bassett and Hertfordshire County Council.

(g) Gallagher Bassett agrees that they will exercise professional skill, care and diligence. In the event that they fail, then subject to normal considerations, HCC can seek legal redress, or otherwise look for reimbursement. However, all claims of any size are mutually considered.

(h) The provision of the tender, in 2013, allows Hertfordshire County Council to have in-house independent audits."

6. The complainant wrote again to the Council on 12 February 2015. In his letter, the complainant stated, he had asked for "the precise contractual provision governing audits but the answer is not given. Firstly, the reply covers the pre-contract tender. Secondly, I would expect in the contract more detail e.g. numbers of audits, types of claim (for example Open, Closed, Litigated, non-Litigated), the aspects of the handling to be checked (for example the overall level of professionalism, presentation, controls, legal knowledge used, quality of end result), who is going to carry out the audit and how is it to be conducted. What are such provisions?"
7. On 13 April the Council advised the complainant that, "Under the current service level agreement an audit was undertaken in December of last year with positive results. The audit was undertaken by two Senior Insurance Officers and discussed and agreed with Gallagher Bassett, RMP and AON. These included closed, open and litigated claims".
8. The Council's response prompted the complainant to write to the Council on 6 May 2015 and ask, "What is the wording in the contract?"
9. On 12 May 2015, the Council informed the complainant that it had provided a response to his original question at point (h) and that it had nothing further to add in respect of request 8170. The Council pointed out to the complainant that he had not asked for "What is the wording in the contract?" and invited him to clarify whether he wanted this question to be treated as a new request.
10. On 16 July 2015, the Council advised the complainant of its internal review decision. The Council accepted that the wording in the complainant's original request has the same meaning as the wording

used in his letter of 6 May. To assist the complainant, the Council advised him that the contract is not with Gallagher Bassett, but with the Underwriter who then appoints Gallagher Bassett to act as claim handler on behalf of the Council.

11. The reviewer informed the complainant that she had not seen the contract and therefore she is unable to comment on provisions relating to claims handling. The review determined that the Council did not fully comply with section 1 of the FOIA and that it failed under section 16 of the FOIA to advise and assist the complainant with his request. The reviewer stated that, "I shall ask that the Information Governance Unit obtains the framework agreement and sends you a redacted copy".

Scope of the case

12. The complainant contacted the Commissioner on 28 October 2015 to complain about the way his request for information had been handled. He asserted that:
 - The Council's replies to parts (e) to (h) of his request confirm that the Council had a direct contract in place with Gallagher Bassett. The complainant strongly disputes the Council's advice that the contract is between the Council and the 'underwriter' QBE.
 - The Council's answer to part (n) confirms a service level agreement was also in place between the Council and Gallagher Bassett.
 - The Council's reply to part (h) confirmed the right to independent audits – but only in the Tender.
13. The complainant considers that he is entitled to see the wording in the contract in relation to the audits, to date he has only been given the wording in the Tender.
14. The complainant considers that the existence of a direct contract or Service Level Agreement has been "wholly denied" even though the Council's solicitor has confirmed that original responses have been seen and that the control exercised by the Council, confirmed in its letter of 13 April 2015.
15. The complainant considers that he has not been given recorded information held by the Council in respect of the current position of the contract, the Service Level Agreement and the working relationship between the Council and Gallagher Bassett. He believes that the Council has provided contradictory information and

therefore as a consequence of this the Council has failed to provide unambiguous information under the FOIA/EIR.

16. In view of the complainant's assertions and points raised above, the focus of the commissioner's investigation has been to determine whether the Council has handled the complainant's request in accordance with the FOIA. Specifically, the Commissioner has investigated whether the Council holds recorded information which is relevant to parts (e) to (h) of the complainant's request and, if it does, whether he is entitled to receive it. He has also sought to determine whether the Council holds any information which relates to a Service Level Agreement or to audits.

Reasons for decision

17. The Commissioner has considered the nature of the information which the complainant seeks at parts (e) to (h) of his request. He has determined that the information falls to be considered under the FOIA rather than under the Environmental Information Regulations 2004 ("EIR"). In the Commissioner's opinion, the information does not satisfy the definition of environmental information which is provided by Regulation 2 of the EIR.

General right of access to information held by public authorities

Parts (e) to (h) of the complainant's request

18. Section 1 of FOIA states that –

"(1) 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.

19. In response to Commissioner's enquiry, the Council maintained its position that its responses to parts (e) to (h) of the complainant's request were correct. The Council provided the Commissioner with the following documents to illustrate and explain its position:

- A copy of its insurance policy with QBE Insurance (Europe) Limited for the relevant period.

- A copy of the Liability Insurance Schedule the Council has with QBE.
 - A copy of the 'Contract for Services' the Council had with Gallagher Bassett for the period 1 September 2013 to 31 August 2015.
 - A copy of the tender document placed with the Council's broker for the relevant period.
20. The Commissioner has examined the information which the Council has provided. This information is comprised of; the Tender for Combined Insurance Programme 2013, QEB European Operations Public Authority Combined Liability Insurance (UK Schedule), Gallagher Bassett Contract for Services, and QEB Public Authority Combines Liability Insurance (UK) Policy.
21. The Commissioner has decided to address parts (e) to (h) of the complainant's request separately.

Part (e)

22. The Council has drawn the Commissioner's attention to page 5 of the Liability Insurance Schedule. This page sets out the terms of the 'Claims Handling Authority' and makes clear the relationship between the Insurer (QBE) and its authorised agent (Gallagher Bassett) together with the agreed role of the Council in handling claims of specified types.
23. The response given to the complainant by the Council is an explanation of the wording of the Liability Insurance Schedule document which the Council provided to the complainant in order to answer the precise wording of his request at part (e).
24. The Council has advised the Commissioner that it considers the wording of the Schedule document to be incapable of answering the precise terms of the complainant's request. Consequently the answer given to the complainant was based on the Council's understanding of the Schedule and on its working relationship with Gallagher Bassett.
25. The Council chose to respond to part (e) of the request in this way in order to advise and assist the complainant in his understanding of its relationship with Gallagher Bassett. There is no other provision in place other than the fact that the Council and Gallagher Bassett acted in partnership under contract to provide a service.

26. The Commissioner has considered the Council's response to the complainant against its submissions in response to the Commissioner's enquiry. He accepts that the Council does not hold any document which contains the exact wording which the complainant is seeking.
27. As shown in para 21, the Council does, however, hold recorded information upon which it has based its response and could have been used by the complainant to answer his own question for himself.
28. The Commissioner accepts that the Council has provided its response to the complainant in the spirit of providing him with advice and assistance.

Part (f)

29. The Commissioner has examined the 'Contract for Services' which the Council had with Gallagher Bassett for the period 1 September 2013 to 31 August 2015. He considers that the Council's response to part (f) of the complainant's request does provide a correct answer to the complainant's question.
30. Notwithstanding this, the answer which the Council gave the complainant does not satisfy the requirements of section 1 of the FOA. Under this section the Council should have confirmed to the complainant that it holds the Contract for Services and it should have provided him with a copy of the contract or it should have issued a refusal notice under section 17 of the FOIA. Such a notice would require the Council to explain why it is refusing to supply it.
31. Again, the Commissioner accepts that the Council's response was given in the spirit of advising and assisting the complainant.

Part (g)

32. The Council asserts that it was not possible to obtain a particular document or wording that would provide a full response to part (g) of the complainant's request. The Council therefore chose to answer the complainant's question rather than provide relevant documentation in response to his request for information under the FOIA or EIR. And again, the Council chose to do this in the spirit of advising and assisting the complainant, particularly in respect of the Council's relationship with Gallagher Bassett.
33. In its response to the Commissioner's enquiry, the Council directed the Commissioner to page 10 of the contract between the Council and Gallagher Bassett. This sets out the mutual indemnity clause

between the client and the contractor in respect of the whole of the contract.

34. The information contained at page 10 of the contract, whilst not meeting the exact terms of the complainant's request, constitutes the information which is held by the Council and which is relevant to his request. Consequently the Commissioner finds that item 'E' of Schedule IV of the contract should have been considered by the Council for disclosure under section 1 of the FOIA.

Part (h)

35. The Council has advised the Commissioner that it holds no document which contains a precise contractual provision that entitles the client or contractor to audit any particular claim, other than the wording at section 12 on page 19 of the tender document. The Council has informed the Commissioner that this wording was supplied to the complainant.
36. The Commissioner has examined the wording contained in the Council's response letter of 6 February 2015. Under item (h), the Council stated:

"The provision of the tender, in 2013, allows Hertfordshire County Council to have in-house or independent audits."
37. The wording of the Council's response reflects the meaning of section 12, page 19, of the tender document: However, it is not the exact wording of that section.
38. In the Commissioner's opinion, the wording which the Council provided the complainant cannot be considered to be the recorded information which the Council holds and which is relevant to his request. Therefore the Council has not satisfied the requirements of section 1 of the FOIA.

The Commissioner's decision

39. The Council considers that it has provided the complainant with as full a response to his questions as possible: In some cases where the specific information is not held, it has tried to advise and assist him in gaining an understanding of the Council's relationship with its contractors.
40. Having considered the responses which the Council made to the complainant, and also those in respect of his own enquiry, the Commissioner has determined that the Council has not complied with

the requirements of section 1 of the FOIA in respect of parts (e) to (h) of the complainants request.

41. The Commissioner accepts that the Council has responded to the complainant's request in the spirit of assisting his understanding of the issues relating to his claim. Whilst this approach is to be applauded, it has left the Council open to breaches of section 1 of the FOIA.

Where no recorded information is held

42. The Commissioner has sought to determine whether, on the balance of probabilities, the Council holds information which the complainant believes it holds or should hold. This information includes the Service Level Agreement ("SLA") and audit-related information.
43. The Commissioner makes this determination by applying the civil test of the balance of probabilities. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held in cases which it has considered in the past.
44. The Commissioner has investigated this complaint by asking the Council a number of questions about the searches it has made to locate the information sought by the complainant and questions about its possible deletion/destruction.
45. The Council has informed the Commissioner that it uses AON as a broker to find appropriate insurance provision. Aon selects appropriate insurance providers based on the Council's requirements and it assists the Council in procuring the best contact. It has acted as a broker for Council since September 2013 and has tendered on the Council's behalf for all renewals annually since that time.
46. The County Council has a contract for casualty insurance, with QBE Insurance (Europe) Limited. As part of that contract, the Council agreed to have another contract, with Gallagher Bassett Claims, for the handling of claims including injury related claims.
47. The Council has contacted its partner organisations who have carried out searches of the information that they hold in relation to their contracts with Hertfordshire County Council.
48. The Council's Insurance Department would hold any and all relevant information to the complainant's request and this would be in both electronic and hard copy format. Searches were made of the departments' hard drive and manually held files. Likewise, searches were made of the Senior Insurance Officer's e-mail account.

49. The Council used search terms such as 'SLA' and 'Audit' but no information was located that matched the expectations of what the complainant considered should be held.
50. The information which the complainant seeks relates to what are live contracts. In the Council's experience, it is highly unlikely that any information in relation to the procurement and contractual terms of these contracts would have been deleted or destroyed and it has have found no proof to assume that this may have happened in this instance.
51. The Commissioner has considered the searches made by the Council and he has noted that it has liaised with its contracted partners. The Commissioner considers the actions taken by the Council to be entirely reasonable and in the absence of any concrete evidence to the contrary, the Commissioner has decided that the Council does not hold any further information which is relevant to the complainant's request.

Right of appeal

52. 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

53. 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.
54. 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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