

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 November 2017

Public Authority: South Yorkshire Fire and Rescue Authority
Address: 197 Eyre Street
Sheffield
S1 3FG

Decision (including any steps ordered)

1. The complainant has requested information about remuneration arrangements for chief fire officers, for working during industrial action.
2. South Yorkshire Fire and Rescue Authority (SYFR) disclosed information in response to the request. However, the complainant considered that it held further, relevant information which it had not disclosed.
3. The Commissioner's decision is that, on the balance of probabilities, SYFR has disclosed all the information it holds which falls within the scope of the request.
4. The Commissioner requires no steps.

Request and response

5. On 2 February 2017, the complainant wrote to SYFR and requested information in the following terms:

"I would like to ask for some information relating to the authority's decision to allow chief officers to claim lieu time for working during strikes."

Specifically, I would like the information held by the authority on this proposal and subsequent decision.

I note the audit committee minutes from last March include at item 8 on the action/recommendations plan to be followed on chief officer 'overtime' pay said: "Discussions have taken place with the CFO, Deputy CFO, and the Clerk to the Authority. A proposal paper will be submitted to the Authority for consideration in April / May 2016."

May's audit committee said: "A report has been prepared for the next FRA meeting which deals with retrospective time off in lieu proposals for the 2013 industrial action."

July's audit committee then said: "Officers are entitled to reclaim the overtime hours worked and will do so, on a time for time basis, over a period of time."

There is no record of a report going to the authority on this issue.

That being the case, I would be grateful if you would provide the information held on the discussions that took place as referred to in the March minutes. This would include all recorded information, whether notes, correspondence, internal reports, emails and so on. It also includes all further information relating to any and all further discussions that took place on this issue.

In addition, I would be grateful if you would provide any other information held on this issue. This would include, though not exclusively, information relating to the report that was being prepared for the authority for consideration."

6. SYFR responded on 3 March 2017. It disclosed to the complainant all the information it said it held which fell within the scope of the request, which comprised a brief exchange of emails about the report referred to in the request and a document called "Fire Authority Audit Committee Recommendations", both of which were also disclosed to the complainant.
7. The document entitled "Fire Authority Audit Committee Recommendations" was a means of briefing the Fire Authority Audit Committee on progress on various action points, and as such it was updated regularly. Recommendation 8 of the document dealt with action points regarding how chief officers who worked during industrial action should be recompensed. Two updates were issued in July 2016. The first stated:

"Following further consultation with relevant officers, no time-off in lieu will be given."

8. A further update was subsequently issued, revising the approach to be taken:

"Officers are entitled to reclaim the overtime hours worked and will do so, on a time for time basis, over a period of time"

9. The update also stated that the matter was for the Audit and Governance Committee to consider discharged (meaning that it required no further updates on the matter).
10. Following an internal review, SYFR wrote to the complainant on 10 March 2017 confirming that it had disclosed to him all the information it held which fell within the scope of the request. However, during the course of the Commissioner's investigation, SYFR located and disclosed to the complainant a further email which fell within the scope of the request.

Scope of the case

11. The complainant contacted the Commissioner on 13 March 2017 to complain about the way his request for information had been handled. He did not accept that he had been provided with all the information SYFR held which fell within the scope of the request. He was particularly concerned that no information had been disclosed about the reasons behind the change in approach with regard to the treatment of chief officers' remuneration, as set out in the updates to the "Fire Authority Audit Committee Recommendations".
12. The Commissioner has considered in this decision notice SYFR's assertion that, by the end of the investigation, it had disclosed to the complainant all the information it held which fell within the scope of the complainant's request.

Reasons for decision

13. Section 1 of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds the information and if so, to have that information communicated to him.
14. In cases where there is some dispute between 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 SYFR holds further information relevant to the complainant's request.

15. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. 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.
16. The complainant made detailed submissions to the Commissioner, as follows:

"The authority's audit committee minutes for last year recorded that discussions had taken place between the chief, deputy chief and authority clerk over the issue. They also said a report would be prepared for the committee to allow members to discuss the issue but this report never materialised.

The FOI request sought information on how this situation had arisen, why there was no report and who had taken relevant decisions by seeking the recorded information.

The authority subsequently sent a response which did not include any recorded discussions between the chief, deputy chief and authority clerk as referred to in the minutes.

The response included a report that had been written on the issue but subsequently withdrawn without any recorded information on who had decided to pull the report or why.

It also included an email referring to the chief officers at one point deciding they didn't want lieu time after all before another email from the chief fire officer - the very next day - stated they not only wanted the lieu time but also stating how the issue should be dealt with in the agenda.

There is no other recorded information on the chief officers changing their minds (either way) or who decided to agree with the chief officer's email of 14 July, including suggested wording for the audit committee's agenda.

...

On any reasonable reading of the emails provided, it is clear the chief officers had, at one point, stated they did not want lieu time.

...

It is hard to accept there is no further information held than that provided in the response. If the response is accurate, it would mean key decisions and discussions have not been recorded and have instead taken place without even any niceties as to when individuals might be free to discuss an issue which had been the subject of significant public exposure.

It is also notable there is not a single email from either the authority's clerk, [name redacted], or the deputy chief fire officer, [name redacted], despite their central role in the issue."

17. With this in mind, the Commissioner asked SYFR to explain its reasons for considering that it did not hold any further information. She asked a series of detailed questions aimed at determining the extent of the searches it had conducted and any specific reasons it had for considering that it did not hold the information. She also asked it to respond to specific points the complainant had made in his correspondence with her.
18. In response, SYFR explained to the Commissioner that it was satisfied that it had disclosed to the complainant all the information it held which fell within the scope of the request.
19. With regard to the searches it had conducted, it explained that the following officers had been identified as having involvement in the matters to which the request related: the Chief Fire Officer, the Clerk to the Authority, the Deputy Clerk to the Authority, the Director of Human Resources, the Service Director of Human Resources, the Solicitor and Monitoring Officer, and the Head of Internal Audit. Each was asked to conduct searches of their business areas for relevant information. They used their knowledge of where relevant information was likely to be held within their business areas, and used search terms such as: "overtime", "strike", "overtime claims" and "IA". These searches uncovered the information which was subsequently disclosed to the complainant. SYFR was satisfied that they were sufficiently comprehensive to recover all relevant information that it held.
20. The complainant had asked whether personal email accounts had been included within the scope of the searches conducted. SYFR stated that staff were not permitted to use personal email accounts for official business and so it had not been necessary to extend the scope of its searches in that way.

21. The complainant also expressed concern that the timeframe he had been led to believe SYFR had used when conducting its searches (April to July 2016) was overly restrictive. He pointed out that discussions about the subject of his request predated April 2016, and that imposing a search window of April – July 2016 would exclude recorded information about those discussions.
22. SYFR responded that the timeframe cited referred to one set of searches that had been conducted for specific information. It had also conducted other searches which were not time limited and which would have returned information held prior to April 2016, should any such information have been held at the time the request was received. SYFR was satisfied that no such information was held.
23. SYFR acknowledged that the complainant was concerned about the seeming lack of recorded information about a key decision relating to chief officers' remuneration during industrial action.

"I think this is an issue of [the complainant] lacking confidence in whether all the relevant information had been disclosed rather than a question of non-disclosure. This is in part at least because [the complainant] appeared to be surprised that there was not more extensive information given that a change of approach has been adopted and a decision taken not to deal with the matter by way of a detailed report when this had been the original intention. I recognise that the decision was taken to change the approach on the basis of relatively limited correspondence but that was the reality of how the decision was arrived at."

24. It clarified that discussions had taken place between the Chief Fire Officer and the Director of Human Resources about the issue of chief fire officers' remuneration during industrial action. However, these discussions were face-to-face, and no record of them was held.
25. SYFR said that there was no statutory obligation on it to hold such information, as the discussions related to a management issue.

"It is important to recognise [sic] that the decision which was taken was a management decision and not an elected member decision. The latter are necessarily always supported by an accompanying report to reflect the fact the [sic] such decisions are taken at formal meetings organised in accordance with the provisions of the Local Government Act 1972. They are the equivalent of in company law terms Board meetings.

Management decisions in both a local authority and a company context are inevitably subject to varying degree of formality of recording given that management decisions are numerous and wide ranging in their subject area. They are not recorded as a matter of

course and many management decisions are taken on the basis of discussions and conversations which are not necessarily part of formal meetings – where it is of course customary for minutes or notes to be taken. Increasingly these more informal processes are the subject of e mail correspondence which does have the benefit of producing a record. But many management decisions are taken more informally and will not necessarily result in anything being recorded. Whether or not a record should be made of such discussions is a matter of judgment depending on the nature of the decision.”

26. SYFR observed that the complainant appeared to be under the impression that the change of approach with regard to chief officers' remuneration was the result of planned discussions between senior members of SYFR and that there must be some recorded information about those discussions. It said that the fact was, no such discussions had taken place, and the change was entirely attributable to the legal position (that time off in lieu was a lawful contractual entitlement for chief fire officers) becoming clear.
27. SYFR explained that initially, a decision was taken at a senior management level to prepare a report for members to discuss the authorisation of time off in lieu, and a report was duly drafted. The only information held regarding this was a brief email exchange between the Clerk and the Director of Human Resources. This was overlooked in the initial disclosure, but located and disclosed to the complainant during the Commissioner's investigation.
28. There was then further informal discussion between the Chief Fire Officer and the Director of Human Resources, during which SYFR said they essentially misunderstood each other. The Chief Fire Officer expressed the view that he did not want the report to proceed. The Director of Human Resources understood him to be saying that he did not want to claim the benefit of time off in lieu. As set out in paragraph 24, there is no recorded information held about that discussion.
29. An update for the Fire Authority Audit Committee Recommendations was then prepared, and the Chief Fire Officer was consulted regarding wording about the report on Chief Fire Officers' remuneration; the misunderstanding between him and the Director of Human Resources then became apparent. The Chief Fire Officer clarified his belief that chief fire officers were contractually entitled to time off in lieu (and therefore it was not appropriate to invite debate on the issue). For this reason he did not want the report to proceed and he asked for the action plan progress to be worded to reflect the reality of the contractual entitlement.
30. Finally, SYFR provided evidence that it had already acknowledged that it held little in the way of recorded information about the change in

approach, prior to the complainant expressing concerns about it. On 13 February 2017 it had responded to an approach from local councillors for information about its decision to change the way chief fire officers were remunerated during strike periods. When responding to the councillors, the Clerk acknowledged that *"the reporting of the matter could have been done in greater detail"* and *"that the reporting of the matter was it is accepted somewhat lacking in detail."* SYFR provided the Commissioner with a letter from SYFR to the councillors, in which it accepted, with hindsight, that the reasons for the change in the decision on chief fire officers' remuneration should have been more clearly documented.

Conclusion

31. When, as in this case, the Commissioner receives a complaint that a public authority has not provided some or all of the requested information, it is seldom possible to prove with absolute certainty that it holds no further, relevant information. However, as set out in paragraphs 14 and 15, above, the Commissioner is only required to make a finding on the balance of probabilities.
32. In this case the Commissioner is satisfied that SYFR has demonstrated that it has reasonable grounds for considering that it does not hold any further information. It has set out details of the searches it conducted and explained why these would be likely to return information, if held. The Commissioner is satisfied that these have been thorough and wide ranging.
33. It has also explained how the decision as to how to treat chief fire officers' remuneration came to be reversed. This was not as a result of discussion amongst senior members of SYFR, but because of the realisation that it was a contractual entitlement. As such, it was not up for debate by the wider membership of SYFR.
34. The Commissioner understands why, on the face of it, the complainant came to believe that more information might exist. SYFR itself has acknowledged that, in hindsight, it could have documented more information about the change in approach, so that it might be more readily understood by anyone wishing to scrutinise it. However, when dealing with a complaint to her under the FOIA, it is not the Commissioner's role to make a ruling on how a public authority deploys its resources, or the strength of its business reasons for holding certain information but not other information. Rather, in a case such as this, the Commissioner's role is simply to decide whether, on the balance of probabilities, a public authority has facilitated access to the information it actually does hold. The question of whether it should take steps to record and hold other information is not one which is within her jurisdiction.

35. Taking all the above into account, and particularly SYFR's explanation of the process by which the approach to chief fire officers' remuneration came to be altered, the Commissioner is satisfied that, on the balance of probabilities, SYFR disclosed to the complaint all the information it held which fell within the scope of his request.

Right of appeal

36. 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

37. 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.
38. 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
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