

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 November 2024

Public Authority: Hampshire County Council
Address: The Castle
Winchester, Hampshire, S023 8UJ

Decision (including any steps ordered)

1. The complainant has requested Hampshire County Council (the council) to disclose information relating to Shared Lives Agreements. The council responded to each element of the request, providing its response under FOIA.
2. The Commissioner's decision is that the council has now handled the complainant's request in accordance with FOIA. He therefore does not require any further action to be taken.
3. It was however noted that the council disclosed information to which the complainant was entitled late. The Commissioner has therefore recorded a breach of section 1 and 10 of FOIA.

Request and response

4. On 4 September 2023, the complainant wrote to the council and requested information in the following terms:
"1. What weight in law do any of the shared lives agreements, such as the carer agreement, the license agreement, and the purchase agreement for residential nursing care, hold in accordance with existing legal frameworks?"

2. Within the shared lives agreements, could you please direct me to the specific section where it is stated that when respite care is taken and paid for, there is a non-payment period of 1 1/2 weeks per year?
3. Could you indicate the clause within the shared lives agreements which specifies that during respite periods, the rent will not be paid for the service user's room?
4. In the license agreement, where the items provided by carers are listed, could you please point out where it is mentioned that the cost cannot increase as the price of these goods and services increase?
5. I request a comprehensive breakdown of the food, bills, and rent components, including details on what these charges encompass, such as cleaning products, toilet paper, Internet services, council tax, cooking fuel, freezer fuel, fridge fuel, lighting of communal areas, etc.
6. There is an assertion that legally the food and bills cannot be increased, requiring service providers to operate at a loss. I seek clarification from the legal department, along with any supporting documentation, as this contradicts prior understandings.
7. Is it reasonable to infer that the daily fee within the arrangement for the purchase of service for residential nursing care is the daily fee for care, food, bills, and rent?
8. Could you provide insight into the legal standing of the shared lives agreements, including the care agreement, license agreement, and arrangement for purchase of service for residential nursing care?
9. Are Hampshire County Council's codes of conduct qualified or absolute in nature?
10. Do Hampshire County Council's policies carry a qualified or absolute status?
11. Were individuals named [names redacted], and [name redacted] subjected to a banding assessment? If not, kindly provide the reasons for this omission and clarify if this was a policy at the relevant time.
12. Is it possible to retrospectively apply banding assessments to rectify underpayments, and has this procedure been executed previously? I request documented evidence of this, as mentioned by [name redacted] this has happened to him.
13. I've faced challenges in communicating our terms and conditions and the possibility of joining a union with colleagues. Attempts to

circulate a letter through management were denied or altered. Could you confirm if this contravenes human rights legislation?

14. May I request access to any information held by Hampshire County Council that pertains to me?."

5. The council responded on 8 November 2023. For questions one and eight, it confirmed that these questions were outside the scope of FOIA, as they do not relate to existing recorded information. For questions two, three, four, five, six, seven and 12, a response was provided. For question five information was also disclosed. For questions nine, 10 and 13 the complainant was advised that these questions fall outside the scope of FOIA because they either requested a legal opinion or council's opinion on certain matters. In respect of question 11, the council applied section 40 of FOIA and refused to disclose the information. For question 14, it advised the complainant to submit a subject access request separately.
6. The complainant requested an internal review on 13 November 2023. They challenged the response they received to questions one to six and eight, nine, 10, 11, 13 and 14. In respect of question seven, the complainant thanked the council for answering this question. No internal review was requested for question 12.
7. The council completed the internal review process and notified the complainant of the outcome on 29 January 2024. It went through questions one to six, eight, nine, 10, 11, 13 and 14 and provided its final position. For questions one, three, four, six, eight, nine, 10 and 13 it introduced section 42 of FOIA (the exemption from the disclosure of information subject to legal professional privilege).

Scope of the case

8. The complainant contacted the Commissioner to complain about the way their request for information had been handled. The complaint was accepted for investigation on 18 May 2024.
9. During the Commissioner's investigation it was established that section 42 of FOIA was being applied to information the council would need to create in order to respond to those specific questions. The council was advised that there is no requirement to create new information in order to respond to an information request. The council therefore reviewed each element of the request again and provided a further response to the complainant on 24 September 2024.

10. There has been various responses issued to the complainant for these questions. The Commissioner does not consider this has been an attempt to misled or confuse the complainant but rather an attempt to issue the correct response to each that is in accordance with FOIA, whilst providing what information or explanation it can.
11. The Commissioner will go through each question in turn and outline whether the council has now responded in accordance with FOIA. He will also consider whether there has been any procedural breaches of FOIA.

Reasons for decision

Question one

12. The council said that this question falls outside the scope of FOIA, as it is seeking the council's interpretation of the Shared Lives Agreement, which is not already held in recorded form. It however disclosed a copy of the agreement in place at the time of the request and the latest version, which has since been amended.
13. The Commissioner agrees with the Council that this question is phrased in such a way as to ask for the council's interpretation in law of aspects of the Shared Lives Agreement. The council has confirmed that it does not hold this specific interpretation or opinion already in recorded form and to create that interpretation or opinion would be outside the scope of FOIA.
14. It has disclosed copies of the agreement in place at the time of the request and currently, which is all the relevant information it does hold.
15. The Commissioner considers this element of the request has been handled in accordance with FOIA.

Question two

16. This question asked the council to direct the complainant to a specific section of the agreement where it states a particular course of action. The council's initial response confirmed that there is no relevant section in the agreement. It however referred to correspondence having been sent to the Shared Lives Carers highlighting this arrangement.
17. Later responses referred to this question again seeking the council's interpretation of certain elements of the Shared Lives Agreement and it therefore being outside the scope of FOIA.

18. The Commissioner considers the initial response was the correct response under FOIA. It confirmed that there is no specific section in the agreement of the nature specified and any further debate over this specific issue is asking for the council to create new information detailing its interpretation and opinion of certain elements of the Shared Lives Agreement.
19. Its later response again referred to the copies of the Shared Lives Agreement at the time of the request and at the timing of writing being provided in order to assist the complainant.
20. The complainant's request for the correspondence that was sent to the Share Lives Carers, as mentioned in the council's correspondence of 8 November 2023, was a new request for information that should have been processed accordingly on receipt of it on 13 November 2023. As it does not fall in the scope of the original request, it does not fall within the scope of this investigation. However, the Commissioner will outline in the Other Matters section of this notice what action is now required.

Question three

21. This question again asks the council to direct the complainant to the specific clause in the agreement where a particular alleged practice is permitted.
22. The council has tried to explain from its perspective how rent is paid and provided copies of the agreement in place at the time of the request and now. The complainant clearly disputes this and believes the practice he has alleged in this question does take place.
23. The Commissioner is satisfied that the council does not hold any additional recorded information to that provided. It has explained from its perspective and the recorded information it does hold (the agreements) how rent is paid. It has also provided copies of those agreements. It has confirmed that the complainant's ongoing debate around this and the council's interpretation and opinion on that is not held in existing recorded information. It would therefore have to create new information in order to respond further, which is outside the scope of FOIA.

Question four

24. This question also asked where in the agreement it is said that a particular practice or action cannot occur.
25. The council stated in its initial response that the agreement does not contain such a clause.

26. The complainant challenged this further, saying that they were not asking if the carer has a specific clause to increase charges, but instead whether the costs couldn't increase in line with prices is stated in the agreement.
27. The council said in its internal review response and its later response that it considered the complainant's ongoing questioning in relation to this aspect of the request to be a request for the council's interpretation of specific elements of the agreement and the cost of services. It stated that such interpretation or opinion is not held in existing recorded information and so to respond would be outside the requirements of FOIA.
28. Again it referred to the agreements it disclosed in response to earlier elements of request and this being the only relevant information it holds.
29. The Commissioner again considers the council has responded to this element of the request in accordance with FOIA. It has confirmed that there is no clause (therefore no reference/recorded information) of the nature specified in this question in the agreement and it therefore does not hold the requested information in recorded form. To answer this element of the request would require the council to create new information, which would detail its response to the ongoing debate the complainant raises in relation to this specific issue, which is not a requirement of FOIA.
30. It has also disclosed the agreement in place at the time of the request and the most current one, which outlines the recorded clauses and terms and conditions.

Question 5

31. This element of the request required a breakdown of the food, bills and rent components, including the details of what these charges encompass.
32. The trust disclosed the recorded information it holds in its initial response. It outlined the client daily living contribution and how this was made up of six components. For each of the components the council outlined the individual amount.
33. The complainant however felt the response was vague and confirmed that they required a more detailed breakdown of each item.
34. The council advised that it does not hold any further information or more detailed breakdown. In its latest response it outlined how it had made further enquiries to its Adults Health and Social directorate and

how they had undertaken a search of service records to establish if a more detailed breakdown is held. It also explained that it had consulted with Shared Lives Plus and other shared lives scheme. It was established from these enquiries that it does not hold any further information to that already disclosed.

35. The Commissioner is satisfied that on the balance of probabilities the council does not hold any further recorded information to that already provided. It has explained what searches it has undertaken and what recorded information it does hold, and provided that. The Commissioner has received no evidence to the contrary and so has no reason to doubt the council's response to this element of the request or the extent and thoroughness of its searches.
36. As the council has disclosed the recorded information it does hold, it has dealt with this element of the request in accordance with the requirements of FOIA.

Question 6

37. This element of the request is making a statement and specifically seeks the council's legal department's response to it and any supporting documentation.
38. In terms of the former element, this is clearly outside the scope of FOIA. The complainant has made a specific claim and has directly asked for the legal department to respond to that and provide its response to that assertion. This is asking the council to take action – to do something specific. It is not a request for recorded information and is therefore outside the scope and remit of FOIA.
39. Regarding the latter element (any supporting documentation), the council has said that it has undertaken relevant searches and knows that it does not hold any recorded information which addresses this assertion or records the council's interpretation or response to it. To answer this element of the request it would again have to create new information, which is outside the requirements of FOIA.
40. To be helpful it has provided the complainant with copies of the agreements.
41. The Commissioner is satisfied that in terms of the council's obligations under FOIA it has responded appropriately. It has explained that the first element is outside the requirements of the legislation and confirmed that it does not hold any recorded information which would answer or address the second element of the request.

Questions seven, eight, nine and ten

42. These questions are asking the council to agree or not with the complainant's interpretation of the daily fee and asking the council what legal standing the agreements have. They are also asking about the council's code of conduct and policies and whether they are qualified or absolute.
43. The council has again stated that these questions are outside the scope of FOIA, as they are asking for the council's legal opinion and interpretation of the agreements in place. Two questions are also asking for the council's legal position on its code of conduct and policies. It has confirmed that it does not hold any recorded information which would provide the relevant answers. Again to comply and to provide the necessary explanations and stance on these points it would need to create new information.
44. The Commissioner is satisfied with how the council has handled these elements of the request. It has confirmed that it does not hold any recorded information of this nature and the questions are asking for specific legal opinions and interpretations of the agreements, the daily fee and the council's policies and procedures. To answer these questions it would need to create new information, which is not a requirement of FOIA.

Question 11

45. This question asked if two named individuals in receipt of adult social services were subject to a band assessment and if not, why not. To this the council applied section 40 of FOIA (personal data).
46. The council stated that this is the personal data of those private individuals and that disclosure would be unfair, unlawful and in breach of the Data Protection Act (DPA).
47. The Commissioner is satisfied that section 40 of FOIA applies. He will now explain why.
48. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual(s) other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

49. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
50. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA18. If it is not personal data then section 40 of the FOIA cannot apply.
51. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.
52. Section 3(2) of the DPA18 defines personal data as:

"any information relating to an identified or identifiable living individual".
53. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
54. The requested information is clearly information relating to the named individuals and disclosure would confirm that they are in receipt of adult social services and whether they were subject to a banding assessment. This information therefore falls within the definition of 'personal data' as set out in section 3(2) of the DPA.
55. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
56. The most relevant DP principle in this case is principle (a) and we now need to consider if disclosure would contravene principle (a).
57. Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

58. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
59. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.
60. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.
61. Information relating to special category data is given special status in the UK GDPR.
62. Article 9 of the UK GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
63. Having considered the wording of the request, the Commissioner finds that the requested information does include special category data. He has reached this conclusion on the basis that the requested information relates to vulnerable adults in receipt of adult social services care and whether they have been subject to a banding assessment. The information relates to the health and social care of these individuals and the financial support they receive which falls within the definition of special category data.
64. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
65. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject(s)) or (e) (data made manifestly public by the data subject) in Article 9.
66. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOI request or that they have deliberately made this data public.
67. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of FOIA.

68. The council cited section 40 of FOIA from the outset and so the Commissioner is satisfied that it has handled this element of the request in accordance with FOIA.

Question 12

69. In correspondence to the Commissioner the complainant has confirmed that they require the council to directly respond to the question asked and believe it holds the relevant recorded information to enable it to do that. They confirmed that they do not wish to have sight of documents or information, they simply require the council to directly respond to the questions asked – Is it possible to retrospectively apply banding assessments to rectify underpayments? And, has this procedure been executed previously?
70. This was the basis of the Commissioner's investigation into the handling of this specific question, as agreed with the complainant. On reflection and following discussions with the Commissioner the council acknowledged that it does hold recorded information from which these questions can be directly answered. It proceeded to issue a further response to the complainant on 7 November 2024.
71. This response confirmed that it is not possible to retrospectively apply banding assessments. It explained that there is no policy or procedure in place of this nature. However, it carried out a review of the funding provided for the care of Shared Lives service users in 2023/24. The fees paid for the care of service users were reviewed and any increase in banding (and the subsequent fee) was backdated to 1 April 2023. It explained that this was an isolated event. There has never been a retrospective review prior to 2023/24 and the council does not intend to repeat the exercise.
72. The Commissioner considers the revised response issued on 7 November 2024 answers the questions asked in accordance with FOIA. He therefore does not require any further action to be taken.

Question 13

73. This element of the request is outlining issues the complainant has had with the council in terms of communication and the possibility of joining a union. It asks the council to confirm if such actions contravene human rights legislation.
74. The council does not consider this element of the request to be a valid request for information. It therefore advised the complainant that it is outside the requirements of FOIA.

75. The Commissioner agrees with the council, this is not a request for recorded information. Instead it is asking the council to consider its actions in relation to the complainant and provide a legal opinion or position on whether it considers its actions are in accordance with human rights legislation.
76. The council is therefore not required to respond to this element of the request.

Question 14

77. This is a subject access request, where the complainant has asked for the information the council holds on them. This should be handled under the DPA and not FOIA.
78. There is an exemption under FOIA for any information which is the personal data of the complainant. This is section 40(1) of FOIA. It is all exempt information, as the correct access regime to consider such a request and access is the DPA.
79. The Commissioner is therefore satisfied that in terms of FOIA, there is no action to be taken in relation to this question.

Procedural matters

80. The Commissioner notes that the council disclosed the Shared Lives Agreements to the complainant and provide the correct response to question 12 late i.e. outside the statutory timeframe for compliance as outlined in section 10 of FOIA of 20 working days. The Commissioner has therefore recorded a breach of section 1 and 10 of FOIA.

Other matters

81. In relation to the complainant's subject access request the council confirmed that it issued a response on 22 January 2024. However, on reflection it does not consider that the correct response was provided. The council has confirmed that it will now undertake an internal review of its handling of the complainant's subject access request and issue a revised response as soon as possible.
82. If the complainant remains dissatisfied with the council's revised response once this is received, they should refer a new and separate complaint to the Commissioner via his website and the following link:

[Make a complaint about how an organisation has used your personal information | ICO](#)

83. It is also noted that the council failed to carry out the internal review within 20 working days of receipt. The Section 45 Code of Practice recommends that public authorities carry out internal reviews within 20 working days and certainly no later than 40 working days. The additional 20 working days should only be required in the most complex and voluminous of cases.
84. The Commissioner would like to remind the council of the requirements of the code and the importance of completing internal reviews in a timely manner.
85. Referring to paragraph 20 above, the Commissioner has drawn the council's attention to a new request for information that was made in November 2023. The council is required to consider this and issue an appropriate response under FOIA as soon as possible.

Right of appeal

86. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

87. 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.
88. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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