

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 May 2017

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested a planning report written by a named individual from the Ministry of Justice (the 'MOJ'). Initially the MOJ neither confirmed nor denied whether it held this information, citing sections 32(3) and 40(5) of FOIA, court records and personal information respectively. Following an internal review, the MOJ instead said it required further clarification of the request in order to determine whether it held the requested report.
2. The Commissioner's decision is that the MOJ was entitled to rely on section 1(3) of the FOIA because it required clarification as to which report the complainant has requested.
3. The Commissioner does not require the MOJ to take any steps to comply with the legislation.

Background

4. In June and October 2015 the complainant submitted two requests to the Planning Inspectorate relating to the Hastings Local Plan and to the report detailed below in his request to the MOJ, which resulted in decision notices *FER0590308*¹ and *FER0601857*².
5. The Commissioner found that the Planning Inspectorate had disclosed the requested report in *FER0590308*. In *FER0601857* the complainant requested an "authenticated" version of the report. The Commissioner concluded that the Planning Inspectorate was correct to confirm that it did not hold an "authenticated" copy of the requested report.
6. In June 2015, he also submitted a request to Hastings Borough Council for a copy of the Hastings Local Plan Report which resulted in decision notice *FS0597755*³. Here the Commissioner found that Hastings Borough Council had disclosed the requested information.
7. The complainant subsequently appealed *FS0597755* to the First-tier Tribunal (*EA/0300/2015*). The Tribunal found that the Council had, on a balance of probabilities, provided the complainant with the information it held in scope of the request. It also said that ensuring that what public authorities provide in response to a request is 'authenticated' in some way is outside the Tribunal's jurisdiction.

Request and response

8. On 17 November 2016 the complainant wrote to the MOJ via the *WhatDoTheyKnow.com* website and requested information in the following terms⁴:

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432996/fer_0590308.pdf /

² https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560080/fer_0601857.pdf /

³ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560375/fs_50597755.pdf

⁴ https://www.whatdotheyknow.com/request/re_request_for_document_involvin#incoming-931371

"Re Request for document involving FOIA & EIR request and case reference GIA/3094/2016

I write respectfully in request for the report at the Centre of this complaint GIA/3094/2016 which was originally requested in EA/0300/2015 and has not been provided. I believe this document is not except [sic] as it is a document which should be in the public domain and should have been provided to you in relation to your decisions. The document and the Main Issue of this complaint were detailed as follows:

Can you please provide me with a copy of the Planning Inspector Richard E Hollox BA(Hons) BSc (Econ) MPhil (Lond) FRTPI FRICS the Inspector report which he wrote immediately after the consultation on the preliminary findings and Main Modifications report in respect to the final consultation of the Local Plan Development Plan Public Examination.

For clarification as this has been a long process through previous FOIA Request, ICO complaint, Lower Tribunal / Upper Tribunal.

The report I am asking for is detailed on page 28-30 the Procedural Practice in Examination of Local Plans written by the Planning Inspectorate June 2016 (4th Edition v.1) [1]. It is stated here under Main Modifications 5.24 - 5.33 currently you have not provided this report and have not stated that it is not held."

9. This request was handled by the Upper Tribunal Administrative Appeals Chamber (Upper Tribunal) on behalf of the MOJ. It acknowledged receipt of the request on 23 November 2016 and advised that a number of exemptions may apply, for which it would need to consider the associated public interest tests.
10. On 8 December 2016 the MOJ asked the complainant to clarify his request and to explain why he believes the Upper Tribunal would hold the requested planning-related report. The complainant responded on 12 December 2016, reiterating his FOIA request in full. He did not clarify his request but explained that as the Upper Tribunal had made the decision in relation to reference GIA/3094/2016, in his view it should hold the requested report.
11. Subsequently, the complainant contacted the MOJ on a number of occasions asking it to respond to his request and quoting various planning related paragraphs. The MOJ replied on 19 December 2016 and said whilst it had sought clarification of the request on 8 December 2016, it still required further clarification from the complainant in order to process his request. It also explained that the 20 working days' limit for responding would start again once the complainant had clarified his request.

12. The MOJ provided its response to the request on 3 January 2017 citing 'neither confirm nor deny' in accordance with sections 40(5) personal information and 32(3) court records etc of the FOIA. It noted that the complainant had made his request citing both FOIA and the EIR and said:

"Although it has been refused under the FOIA, it would also have been refused under the EIR as the Upper Tribunal (Administrative Appeals Chamber) acts in a judicial capacity in relation to your application for permission to appeal and regulation 3(3) of the EIR provides that those regulations do not apply to a public authority to the extent that it is acting in a legislative capacity."

13. Following further contact from the complainant, the MOJ provided its internal review on 2 February 2017 where it revised its position stating:

*"It was incorrect to cite FOIA section 32(3) and 40(5) in your response. The MOJ is unclear as to what document you are asking for. I note that in your FOI request you have not specified the details of the report you require such as the date of the report and instead you have requested **'the Inspector report which he wrote immediately after the consultation on the preliminary findings and Main Modifications....'**. It is this document that we cannot confirm or deny we hold without further clarification."*

14. In accordance with section 16 of FOIA the MOJ provided assistance and located weblinks following an internet search for the requested information, which it thought may be of interest to the complainant, including a link to a planning report by the same author which it located on Hastings Borough Council's website. Additionally, the MOJ said it could not confirm or deny whether the information is held because it still required clarification from the complainant in order to perform further searches of its own records.

15. Following the internal review the complainant wrote to the MOJ to direct it to a *YouTube* video he had made (which appears to no longer be available on that site) showing his issues with the meta data and properties of the report available on the link the MOJ had provided (matters which were put before the First-tier tribunal and dismissed as set out in the 'Background' section of this notice). He also said:

"The report I am asking for is detailed on page 28-30 the Procedural Practice in Examination of Local Plans written by the Planning Inspectorate June 2016 (4th Edition v.1) [1]. It is stated here under Main Modifications 5.24 - 5.33."

16. The MOJ advised the complainant that if he was dissatisfied following the outcome of the internal review, he should complain to the Commissioner.

Scope of the case

17. The complainant contacted the Commissioner on 19 December 2016 to complain about the way his request for information had been handled.
18. The Commissioner's initial investigation was to consider whether, on the balance of probabilities, the MOJ held the requested report. This was because, having spoken to the MOJ about the outcome of its internal review, she formed the view that it may, in fact hold a report written by Mr Hollox given the EA/0300/2015 appeal case and its possible retention by the MOJ as a result of that appeal.
19. However, the MOJ responded to her investigation and said it could not determine whether the requested report is held without further clarification from the complainant as it was unclear precisely what report he required. It referenced that it had provided advice and assistance in accordance with section 16 of FOIA, asking the complainant: *"to provide the name, date, or any further detail which may assist in identifying the document he is referring to, however [the complainant] has not responded with any further information throughout his communication with the MOJ"*.
20. It also said: *"At present there are no issues relating to the search for information, as the request requires clarification, therefore the MOJ have not responded to the ICO's queries in regards to the civil standard of the balance of probabilities."*
21. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA. The FOIA is to do with transparency of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. The FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.
22. In light of the above, the analysis that follows considers whether the MOJ handled the request appropriately based on the wording of that request.

Reasons for decision

Section 1- general right of access

23. Section 1(1) of FOIA says that an individual who asks for information from a public authority is entitled to (a) be informed whether the authority holds the information and, (b) if the information is held, to have that information communicated to them.
24. Section 1(3) of FOIA says that a public authority is not obliged to comply with section 1(1) of the FOIA where it has asked the applicant to supply further information about the request in order to identify and locate the requested information, and has not received this further information.

The complainant's view

25. The complainant considers that the requested information is held and should be provided because it formed part of the appeal case *EA/0300/2015* and because the MOJ was involved in case reference *GIA/3094/2016*.

The MOJ's view

26. In its submission to the Commissioner, the MOJ said it had attempted to clarify the request (as set out in paragraph 13 of this notice).
27. It maintains that it is unable to search for the requested report without clarification from the complainant as to which specific report he requires and why he believes that the MOJ would hold it.

The Commissioner's view

28. The Commissioner's guidance on section 1 of the FOIA makes it clear that public authorities must interpret information requests objectively and avoid reading into the request any meanings that are not absolutely clear from the wording.
29. When an authority receives an unclear or ambiguous FOIA request its duty under section 16 of the FOIA to provide advice and assistance will be triggered and it must go back to the requester to ask for clarification.
30. If, following the provision of reasonable advice and assistance, the requester is still unable to supply the required clarification, the authority will not be expected to offer advice and assistance a second time.
31. The Commissioner's view with respect to the information requested is that, as noted above, attempts were made by the MOJ to bring the two

parties together in a common understanding of the scope of the original request.

32. The evidence suggests that the MOJ went to some lengths to try to understand what the complainant was asking for and that it conducted its own internet searches and provided the resulting weblinks in an effort to help him. However, the evidence also suggests that, while continuing to correspond with the MOJ, the complainant's attempts to respond constructively to its requests for clarification were not fruitful.
33. It is noted that the complainant has specified that he wants the report which the Inspector wrote "*... immediately after the consultation on the preliminary findings ...*". If this is not the report which the MOJ has already directed him to then this is the point that needed to be clarified by the complainant as it is unclear why he would believe that the MOJ may hold any other report. The Commissioner further notes that the MOJ is not the author of the report, the Inspector referred to as the author is not a member of its staff and there is therefore no obvious reason why it would hold the report specified or know anything further about exactly when any such report was written.
34. The Commissioner has conducted her own internet search for the document detailed in the request, namely the "*Procedural Practice in Examination of Local Plans written by the Planning Inspectorate June 2016 (4th Edition v.1*". She located such a document⁵ and has reviewed paragraphs 28 to 30 as specified by the complainant. These paragraphs set out a framework/process for 'main modifications to the plan'; she cannot locate any additional information which would assist the MOJ in locating the requested report.
35. Under section 1(3) of the FOIA where a public authority reasonably requires further information in order to identify and locate the information requested, and has informed the applicant that it requires that clarification of the request, it is not obliged to comply with the request unless it is supplied with that clarification.
36. In the circumstances of this case, the Commissioner considers that the MOJ is justified in requiring further information from the complainant in order to identify and attempt to locate the information he has requested.

⁵https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/531005/Procedural_Practice_in_the_Examination_of_Local_Plans_-_final.pdf

37. Having reviewed the correspondence that passed between the MOJ and the complainant in this regard, the Commissioner is satisfied that the MOJ was not required to go to greater lengths in order to understand the request.
38. The Commissioner is therefore satisfied that the MOJ was not obliged to comply with section 1(1) of the FOIA by virtue of section 1(3).

Other matters

39. The Commissioner considers that the MOJ took reasonable steps in attempting to assist the complainant in clarifying his request. The Commissioner is satisfied that, in the circumstances, the MOJ's efforts represented a reasonable attempt to engage with the complainant in order to fulfil the duty to provide appropriate advice and assistance under section 16 of FOIA.
40. In a bid to clarify the grounds of complaint, the Commissioner spoke to the complainant. It seemed to her that he is concerned with the authenticity of the report which he has already received as another person's name appears in the metadata of that report. In an effort to assist, and outside the scope of this specific investigation, the Commissioner contacted the named officer, who works at Hastings Borough Council, to query why her name appears in the metadata of the report.
41. The Council officer confirmed she had made a minor change to one of the paragraphs within Mr Hollox's report. She confirmed that the authors of all amendments to the original document are shown in the 'properties' of the report, but confirmed that the report itself was written by Mr Hollox and it is the only report that he has written in relation to this planning proposal; the Commissioner is grateful for her assistance.
42. The Commissioner relayed this information to the complainant who has a different view. However, for the purposes of this investigation, and as she has already explained to the complainant, the Commissioner can only consider his request to the MOJ for the report specified, and cannot consider any 'authenticity' matters as these fall outside the remit of the FOIA which only concerns provision of recorded information and not its 'authenticity'.

Right of appeal

43. 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

44. 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.
45. 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

Carolyn Howes
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