

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 12 March 2019

Public Authority: London Borough of Ealing
Address: Perceval House
14-16 Uxbridge Road
Ealing
W5 2HL

Decision (including any steps ordered)

1. The complainant has requested records of telephone or email contact regarding repair works undertaken on a specific property. The Council says it has provided all the relevant information it holds.
2. The Commissioner's decision is that the public authority does not hold any further information. The Commissioner does not require any steps to be taken.

Requests and responses

3. By way of background, the complainant is in dispute with the Council regarding noise complaints and subsequent repair work undertaken on a neighbouring property. The complainant has made a number of requests for information to the Council.
4. The request that is the subject of this decision notice was included in correspondence submitted by the complainant to the Council on 12 June 2018:

"Also it's not sufficient to say that "all telephone calls / emails may not have been logged onto the system". I need to understand what correspondence is therefore missing and what content did that entail. If that remains unknown then that seems to be a defective records retention policy and I want confirmation that the content of that correspondence is unknown."

5. The Council responded to this request on 4 July 2018 as follows:

"Telephone calls and emails are not always logged onto the IT system. We have checked with staff who have been involved with the case and provided those records. However, staff may have been involved and now left and it is not possible to look through their email account after they have gone as their emails are deleted."

6. The complainant was not satisfied with this response and requested an internal review on 29 July 2018. The complainant referred to the Council's records retention policy, and argued that external emails should have been retained, particularly since the repair work was the subject of litigation.
7. On 3 September 2018 the Council provided the complainant with the outcome of the internal review. The Council stated that it had previously advised the complainant that any correspondence between the Council and the neighbour would be exempt from disclosure under section 40(2) of the FOIA. The Council also cited its records retention policy:

"Ealing Councils retention policy states

When an individual leaves the council, the following process is followed:

- ICT team will delete the individual's account on the requested leaving date.*
- This includes all email accounts and personal drives.*
- Once deleted, this information cannot be recovered.*

Legal cases

The legal team will compile a file of relevant documentation, which includes emails from staff and/or to staff they believe are relevant to the case at the time of action.

Please note – if emails are requested from deleted accounts, this would not be available due to the retention policy advised above

Telephone calls

As mentioned in our original response, records of telephone calls are not always logged onto our IT system."

Scope of the case

8. The complainant contacted the Commissioner on 8 September 2018 to complain about the way the Council handled his request. The

complainant did not accept the Council's position that it did not hold the requested information comprising records of telephone calls and emails.

9. The complainant in this case is seeking records of communication between the Council and his neighbour relating to the repair works carried out at the neighbour's property. The complainant feels he is entitled to this information because the repair works are related to his dispute.
10. The Commissioner cannot comment on the complainant's dispute, but understands that it has resulted in large volumes of correspondence between the complainant and the Council, as well as several requests for information. The Commissioner has therefore clarified to the complainant that her role is to determine whether a particular request for recorded information has been handled in accordance with the FOIA. The volume and frequency of correspondence in this case has made it more difficult to identify a specific request for recorded information.
11. The Commissioner has also clarified to the complainant that the FOIA provides for information to be disclosed into the public domain. The Commissioner cannot require the Council to disclose information to the complainant if it could not also be disclosed to any other person.

Reasons for decision

Section 1: information not held

12. Section 1 of the FOIA says that public authorities are required to respond to requests for information. The authority is required to disclose information in response to a request, unless an exemption or exclusion applies. If a public authority does not hold recorded information that would answer a request, the Commissioner cannot require the authority to take any further action.
13. In cases where there is a dispute as to the information held by a public authority, the Commissioner will use the civil standard of proof, ie the balance of probabilities. Accordingly her investigation will consider the public authority's reasons for stating that it does not hold the information in question, as well as the extent and reasonableness of any search conducted. The Commissioner will also consider any arguments put forward by the complainant as to why they believe the information is held (as opposed to why it ought to be held). Finally, the Commissioner will consider whether there are any

further steps she could require the public authority to take if the complaint were upheld.

14. The complainant in this case has disputed the Council's explanation that its records of phone calls and emails may not be complete. The complainant has referred to the Council's retention policy, which states:

"Destruction of Records

Whenever there is the possibility of litigation, the records and information that are likely to be affected should not be amended or disposed of until the threat of litigation has been removed.

When records that have been identified for disposal in the Guidelines are destroyed, a register of these records needs to be kept. For records that are not covered by the Guidelines contact the Knowledge Management section or Legal Department for further advice. It is not sufficient to document that a quantity of records had been destroyed on a certain date. Enough details enabling the identification of which documents have been destroyed must be retained."

15. The complainant believes that the Council should have retained the requested information on the basis that it was relevant to his ongoing litigation. The complainant has advised the Commissioner that he wishes to know what correspondence is missing, and the content of that correspondence. However in the Commissioner's opinion this is extremely unlikely to be feasible.
16. The Commissioner noted that the Council provided the complainant with a copy of its retention policy. The policy states that not all information is logged, and that information cannot be retrieved from deleted email accounts.
17. However the policy also states that records relating to ongoing or potential litigation must be retained. This would appear to support the complainant's argument that the Council should have retained information relating to the repair works and associated litigation. The Commissioner can only investigate whether or not information is held by a public authority, not whether it ought to be held, but the Commissioner considers that the Council has not addressed the complainant's reasons for believing that further information may be held.
18. For this reason the Commissioner asked the Council to explain how it was satisfied that it does not hold any further information, despite the ambiguity in its retention policy. For example, the Commissioner asked whether there was a policy or practice setting out what records

should be created and/or retained by Council staff in these circumstances.

19. The Council advised the Commissioner that its staff were expected to save emails and correspondence, which would include a note of telephone conversations. It further explained that staff email accounts and shared folders are deleted when the member of staff left the Council. Managers were required to ensure that staff leaving the Council saved any relevant correspondence to a shared file or line of business system.
20. The Council also explained that the procedure within its Legal Services business area is for all communications to be saved electronically on the matter file. The matter file is kept for 7 years after the matter concludes.
21. The Commissioner asked the Council how it had searched for the specific requested information in this case. The Council said that it had consulted staff who had been involved in the complainant's dispute, and checked email accounts of current staff. It was unable to check the email accounts of staff who had left, owing to its information retention policy.
22. The Council said it had also taken the following steps:
 - Meetings of Council officers involved in the case and dealing with FOI's to establish information held and location;
 - Search of emails of officers and teams involved in the case;
 - Search of property case files including photographs;
 - Legal file;
 - Search of repairs IT system for job tickets raised;
 - Liaison with contractors involved for verification of requested information with respect to photographs, Invoices, specifications for work;
 - Liaison with court appointed officer in relation to the legal case; and
 - Search of Tenant file for the specified address.
23. The Commissioner understands why the complainant believes that the Council ought to have retained information, since its retention policy clearly states that pertinent information must be saved. However the Commissioner accepts that the Council has conducted an appropriate search, involving relevant business areas. This search ought to have identified any relevant information, but the Council is adamant that no such information was located.

24. The Commissioner is obviously concerned that, while the Council has accepted that relevant information ought to be retained, it is adamant that it does not hold the requested information even though it would appear likely to have been relevant to the dispute. The Commissioner is of the opinion that the Council ought to have been able to provide a more detailed and specific account of its actions in this case. Unfortunately it does not appear to be able to do so, and the Commissioner is unable to identify any further searches that the Council could reasonably be expected to take in order to identify relevant information. As has been set out above, if information is not held then it cannot be disclosed in response to a request.
25. In conclusion, the Commissioner finds, on the balance of probabilities, that the Council does not hold any further information relevant to the request.

Right of appeal

26. 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

27. 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.
28. 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
Sarah O'Cathain
Senior Case Officer

Information Commissioner's Office
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