

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 September 2020

Public Authority: City of York Council

Address: West Offices

Station Rise

York

YO1 6GA

Decision (including any steps ordered)

1. The complainant has requested information on the council's process for reporting decisions of the ICO, planning committee and the Local Government and Social Care Ombudsman (the LGSCO) to its councillors and committees. The council said that there was no set process that could be disclosed but provided a number of links to the websites of the ICO and the LGSCO where relevant information could be accessed. It applied section 21 on the basis that the information was already available to the complainant via these means. On review it provided a link to the records of its planning committee meetings and to its Audit and Governance committee.
2. The Commissioner's decision is that the council was correct to apply section 21 to refuse the request for information included within the links which were already available to the complainant. She has however decided that the council was not correct to rely on section 21 regarding information falling within the scope of the request about its Scrutiny and Executive Committee. She has also decided that the council did not comply with the requirements of section 10(1) in that it did not provide access links to all of the information requested within 20 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- To issue a fresh response, specifically regarding information falling within the scope of the request which has been reported to the Scrutiny and Executive Committee. The council should not seek to rely upon section 21 again to refuse this part of the request in its new response.
4. 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

5. On 9 August 2019, the complainant wrote to the council and requested information in the following terms:

"I understand that every planning appeal decision is sent in full without summary or lessons learned to all Councillors. There are arguably some more important decisions made from appeals to the ICO and LGO. Each one of these will also provide lessons for Members and Officers.

Please can you provide the recorded policy or decision record from each of these three oversight bodies. Please provide the exact process both at individual Councillor level and at committee level for individual decisions as well as summaries.

*Planning
LGO
ICO*

Where is it published in the public domain and what process is followed for each of these three bodies?"

6. The council did not initially respond to the request for information, and the complainant sent a chaser email requesting that the council carry out an internal review of its failure to do so on 10 September 2019.
7. The council did not provide its response until 22 November 2019, wherein it provided links to websites which it considered provided the complainant with the information he had requested. It said that:

"I can confirm that we hold this information. However, this information is exempt from disclosure under section 21 of the FOIA as it is considered reasonably accessible to you by other means as they are all publically [sic] available on the councils [sic] website.

** Planning*

You can locate the Planning information at:

[1]<https://democracy.york.gov.uk/mgListComm...>

If you scroll down to the bottom half of the webpage you will find a list of links for planning, where meeting minutes can be view etc.

** LGO*

You can locate the Local Government & Social Care Ombudsman (LGSCO) information at: [2]<https://www.lgo.org.uk/decisions>

From the link above you will be able to browse and search all the LGSCO decision notices.

** ICO*

You can locate the Information Commissioner Office (ICO) information at: [3]<https://icosearch.ico.org.uk/s/search.ht...>

From this link above you will be able to use the filters on the left hand side to browse and search all the ICO decision notices.

8. On 13 December 2019 the complainant asked the council to carry out a further review of its decision. He said that:
 1. *Your links to various websites is not precise and helpful and the information should be clearly made accessible.*
 2. *You have not provided the recorded policy from each of the three oversight bodies.*
 3. *You have not provided the information requested as to the exact process both at individual Councillor level and at level for individual decisions as well as summaries.*
9. Following an internal review, the council wrote to the complainant on 21 January 2020. It said that it upheld its position as regards point 1 of the requests but provided further information in response to parts 2 and 3 as it considered it had not previously addressed these parts of the request.

Scope of the case

10. The complainant contacted the Commissioner 26 November 2019 to complain about the way his request for information had been handled.
11. He argues that the council holds the information he has requested, and that it holds more information than it has disclosed to him.

12. The Commissioner considers that the complaint is whether the council was right to say that all of the information which it holds is available to him through the links it provided, and therefore that section 21 of the FOI Act applies.

Reasons for decision

Section 21 – Reasonably Accessible to the Requestor

13. Section 21 of the FOIA states that:

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)—

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

14. Section 21 is an absolute exemption, which means there is no requirement to carry out a public interest test if the requested information is exempt.
15. The Commissioner considers that the purpose of the section 21 exemption is to protect the resources of public authorities by shielding them from replying to requests for information which the requestor can access elsewhere. It also acts as an incentive for public authorities to be proactive in publishing information as part of their publication schemes. Finally, it protects the statutory right of public authorities to charge for certain information which they are bound by law to collect.

16. In the Commissioner's guidance for section 21¹ of the FOIA, the Commissioner explains that subsection (1) describes the fundamental principle underlying this exemption. That is, in order to be exempt, the requested information must be reasonably accessible 'to the applicant'. Unlike consideration of most other exemptions in the FOIA, this allows the public authority to take the individual circumstances of the applicant into account.
17. In effect, a distinction is being made between information that is reasonably accessible to the particular applicant and the information that is available to the general public. In order for section 21 to apply, there should be another existing, clear mechanism by which the particular applicant can reasonably access the information outside of the FOIA.
18. Information is only reasonably accessible to the applicant if the public authority:
 - knows that the applicant has already found the information; or
 - is able to provide the applicant with precise directions to the information so that it can be found without difficulty. When applying section 21 of the FOIA in this context, the key point is that the authority must be able to provide directions to the information.
19. Additionally, paragraph 23 of the Commissioner's guidance, following the case of *The London Borough of Bexley and Colin P England v Information Commissioner (EA/2006/0060 & 0066, 10 May 2007)*², states that for section 21 to apply, it is necessary to consider whether all of the information is reasonably accessible to the complainant. At paragraph 113 of the decision the Tribunal stated:

"The reasons are that in section 21 the word "reasonably" qualifies the "accessible" and in the majority's view, "reasonably accessible" applies to the mechanism that any applicant has available to him or her to obtain the information. We do not interpret the section as stating that a public authority has no obligation to provide information where a reasonable amount of that information is available elsewhere."

¹ <https://ico.org.uk/media/for-organisations/documents/1203/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf>

² <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i146/ENgland.pdf>

20. The council confirmed to the Commissioner that it holds the requested information however it argues that all of that information is also available to the complainant via the links it provided to him.
21. In the initial response the council provided links to the decision records for planning, the LGSCO and the ICO, and gave further direction on how to find relevant decisions, which also explains the process followed in each case. At review the council also provided further links to information held on the planning portal for planning appeals, and to the relevant section of the council's website for the Audit and Governance Committees.
22. It further explained that decisions and summaries are provided in these meetings and, although there is no written policy at Committee and Councillor level for reporting decisions, they are also reported to Scrutiny meetings, Mazars, (a company the applicant knows provide audits of the council), and the council's executive, on a case by case basis.
23. The council further argued that it recognises that further information will be held on its website for the relevant Scrutiny and Executive meetings. It explained that reports to the Scrutiny and Executive are far less frequent and it considered that searching for the information on these pages would not be considered reasonably accessible. However, it considered that where decisions are discussed in these meetings, they will also be discussed in either the planning meetings or in the Audit and Governance committee meetings. It argued therefore that the relevant information for the Scrutiny and Executive meetings can be found through the information in the links it provided.
24. The Commissioner presumes by this that the council is suggesting that the alternative methods it has provided would provide the relevant information to the complainant, without him needing to search through the Scrutiny and Executive minutes.
25. It said that the report packs and relevant information on the decision-making process is available for each meeting on the links provided, and there is also information about the purpose and functions of Planning Committees.

26. It argued that further information about the council's performance is also held by the council in the Ombudsman Annual Review Letters. It accepted that whilst these were not addressed in the original response or review, these letters are also considered to be reasonably accessible to the applicant by searching the Ombudsman's website under performance of council's and searching the Annual Review Letters. It added that, for further assistance, the letter for 2017 provides detailed guidance about the obligations under section 5(2) of the Local Government and Housing Act 1989.
27. The council said that it had taken into account the particular circumstances of the applicant when considering whether the information was reasonably accessible via the links it had provided. It said that it is aware that the complainant has shown previous interest in the democratic process and in complaint and information governance information relating to the council. It therefore considered he would be well informed as to its processes and would be able to identify the relevant information from the links it had provided to him. It said that the complainant is known to be able to search for and access information held on public websites and is familiar with accessing information held on the websites, including those for the Ombudsman, ICO and the council.
28. The Commissioner asked the council to explain how the complainant would be easily able to identify relevant information to his request from the links which the council provided to him. It said that the complainant's request was for the decision record for the three bodies named as well as the exact process both at individual Councillor level and at committee level for individual decisions. It argues that he did not specify any particular decision he was interested in, and therefore the council was not able to provide direction to specific decisions which may have been of interest.
29. It said that the links it provided are for all decisions, and how they were considered by the council. Whilst it recognised that this would require the applicant to complete searches on these links and read different agendas on for the audit and governance meetings, it argued that the information is nevertheless reasonably accessible to a person with an interest in it. It considered that they would not need specialist skills, knowledge or equipment and they would not need to search extensive or irrelevant information.

30. It argued that the audit and governance meetings regularly discuss these reports and therefore the majority of the meetings will include relevant information. The link to each of the meetings takes the applicant to a page with an agenda and an overview of the meetings, with the headings and summary of what was discussed, which can be reviewed in seconds, to identify if there were reports of interest.
31. The link for the Ombudsman takes the applicant directly to the search page for all Ombudsman decisions. All decisions relating to the City of York Council can be found by entering the council's name in the box marked "Organisation name".
32. Similarly, the ICO page can be searched by the name of the authority and will provide details of the decision notices which relate to the authority specified.
33. It therefore argues that as the information is publicly available to the complainant, otherwise than through the council providing it in response to his request, it considers that it is correct for it to rely upon section 21 to refuse the request in this instance.

The Commissioner's analysis

34. The complainant is seeking information on the reports and decisions which are passed on to its committees etc with a view to the council learning from decisions which have been taken against it. For instance, if the ICO issues a decision notice against the council, he wishes to understand the process as to how that is reported upwards to relevant committee's in order that he can understand how the council learns from the decisions which relate to it from the various regulatory organisations.
35. The council's response is that information of this sort is forwarded to relevant committees on a case by case basis, and there are no written procedures for that to occur which can be provided to the complainant. It points to its obligations under section 5(2) of the Local Government and Housing Act 1989 in this respect.
36. In effect, the way in which the complainant is able to access the information is to search through the relevant committee meetings, ascertain what information is held within those which he wishes to scrutinise further and then to obtain the relevant decisions from the other authorities websites. The council indicated that audit and governance meetings regularly discuss these reports, and therefore many meetings will include relevant information. It said that the link to each of the meetings takes the applicant to a page with an agenda and an overview of the meetings, with the headings and summary of what

was discussed, which can be reviewed in seconds, to identify if there were reports of interest.

37. The request was open ended, and the council is not therefore able to consider a specified period of time within which it could provide all summaries and decisions which were made available to the various committees. It notes however that the information will be available from the links it has provided, providing the complainant carries out the necessary web searches to determine what decisions were considered by the relevant committees. It provided the information which it considered was not reasonably accessible in its response to the request for review.
38. The Commissioner considers that it is reasonable for a public authority to assume that information is reasonably accessible to the applicant as a member of the general public, until it becomes aware of any particular circumstances or evidence to the contrary.
39. The Commissioner recognises that the work required of the complainant in accessing the relevant information would be potentially fairly burdensome compared to the council providing the complainant with a pack of information which details all of the relevant information to the complainant in one bundle of documents. However, she also recognises that producing such a bundle of documents would also create a burden on the council given the open-ended nature of the request; there is no time period specified within the request for information with which to reduce the work required. The first question which the council would need to consider is how far back it would need to research in order to meet the scope of the request.
40. The Commissioner therefore recognises that, in effect, the situation is that the information wanted by the complainant is available to him via the links provided by the council, however this would require work by him in order to collate the information together to understand what had occurred following decisions being made over the scope of all of the decisions considered.
41. On the other hand, given the open nature of the request, in order to provide the requested information to the complainant as an all-in-one pack of information, the council would have to carry out a similar process of determining which information falls within the scope of the complainant's request, and discarding it or including it as relevant based upon this. The council said that it does not collate and publish a separate decision log. It takes the information from decisions to the audit and governance committee and on occasions to Scrutiny and the Executive on a case by case basis. The links to the audit and governance committee were provided in the review. The links to the Scrutiny and Executive Committee were not, and the council considered that the

information on this was less accessible, albeit that it considers that the same information will also be available amongst the other information provided in the planning and audit and governance committee meeting minutes.

42. The Commissioner carried out a check of the audit committee meeting minutes from the council's website and accepts that the council's argument is correct that relevant information is available from this link. The agenda packs within relevant meetings contain summaries or actual copies of the decisions taken in respect of both the LGSCO and the ICO, and the minutes report the committee's response to the item. Both the LGSCO decisions and the ICO decisions also provide references which can then be searched for and obtained on the websites of these organisations.
43. The issue which the council rests upon when relying upon section 21 is that it would not be reasonable for it to carry out such work when the complainant is able to do so himself. The work which the complainant needs to carry out in order to obtain the information would otherwise need to be carried out by the council in order to respond to the request, and to ultimately provide him with the same information he is able to obtain himself. In the absence of a reason why the complainant is not able to carry out this task it is reasonable for the council to expect the complainant to carry out this task rather than it being required to do so. This is specifically the intention behind the inclusion of section 21 to the Act.
44. However, the complainant's request was intended to ascertain what processes were in place to 'learn' from the decisions of these regulatory bodies. In failing to provide a means by which to understand what information from the audit and governance committee etc was subsequently also considered by the scrutiny and executive committee, the council has missed an important issue to the complainant; that of understanding the full chain of reporting issues up to the highest level of the council's reporting pyramid. Although the information is also contained within other committee reports, the complainant will not be able to tell which of these decisions were also reported to the Scrutiny and Executive Committee. This information is not ascertainable from the information which the council has provided through the links.
45. As stated above, in the Commissioner's guidance states that section 21 can only be applied to the extent that the information is available to the applicant by other means. As per the Tribunals decision in the *Bexley* case, the council cannot apply section 21 to refuse the whole of the request on the basis that the majority information is reasonably accessible to the complainant via the links it provided.

46. Given this, whilst the Commissioner considers that the council was able to rely upon section 21 to the extent that that information is covered within the links it provided, she considers that section 21 cannot apply to the information in relation to information provided to the Scrutiny and Executive Committee. Although some aspects of that information may be mirrored in the Audit and Governance Committee meetings, the complainant is not able to tell, or understand, which of the cases considered by the other committees were forwarded on to this Committee to consider further, nor what the committee's reaction was, if any. Given that this is one of the highest levels of scrutiny within the council as regards its functions and high-level planning, the Commissioner considers that the council's response does not provide relevant information on an important point.
47. The Commissioner therefore considers that the council should respond to the request again, specifically, and only, as regards cases and decisions which were sent to the scrutiny and executive committee for overview, and without relying upon section 21 in its response.

Section 10

48. Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

49. The complainant made his request for information on 9 August 2019. The council did not provide its response providing some of the links to the relevant sites until 22 November 2019.
50. Furthermore, the council's initial response did not include links to its planning committee meetings, nor its Audit and Governance committee meetings via further weblinks until its review response, dated 21 January 2020.
51. The Commissioner's decision is therefore that the council did not comply with the requirements of section 10(1).

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@justice.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
Head of FoI Casework and Appeals
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF