

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 May 2021

Public Authority: Essex County Fire & Rescue Service
Address: London Road
Rivenhall
Witham
Essex
CM8 3HB

Decision (including any steps ordered)

1. The complainant requested information relating to Exercise Cygnus. Essex Country Fire & Rescue Service ("ECFRS") initially stated that it was withholding information, before subsequently stating that it did not in fact hold any information within the scope of the request.
2. The Commissioner's decision is that ECFRS has not discharged its duty under section 1(1) of the FOIA because it has not considered whether any information falling within the scope of the request is held by Essex Resilience Forum ("ERF") on behalf of ECFRS. The Commissioner is satisfied on the balance of probabilities that ERF holds at least some relevant information – and that it does so on behalf of ECFRS.
3. The Commissioner requires ECFRS to take the following steps to ensure compliance with the legislation.
 - Make reasonable enquiries of ERF as outlined in this Notice to identify all the information that organisation holds that would fall within the scope of the request and then;
 - Issue a fresh response, to the request, that does not rely on an assertion that ECFRS does not hold any information within the scope of the request.
4. ECFRS 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 23 December 2020, the complainant wrote to ECFRS and requested information in the following terms:

"Your organisation participated in Exercise Cygnus in its capacity as a category 1 responder within Essex Local Resilience Forum. I request the following information:

- (i) Copies of reports summarising information captured by Essex Local Resilience Forum (LRF) during and following the Command Post Exercise (CPX) for Exercise Cygnus in October 2016. Specifically, I request copies of hot debrief notes, cold debrief notes, and the evaluator questionnaire filled in by Essex LRF as part of Exercise Cygnus. The time period I am seeking information for is the 3 months following 18 October 2016. For clarification of the evaluations requested above, I refer to Appendix 4 to Annex C in this report:
<https://www.gov.uk/government/publications/uk-pandemicpreparedness/exercise-cygnusreport-accessible-report>*
- (ii) Copies of reports summarising findings of Exercise Cygnus provided to Essex LRF by the Civil Contingencies Secretariat. The time course I am seeking information for is from 1 November 2016 until 31 December 2017.*
- (iii) Copies of reports summarising findings of Exercise Cygnus provided to Essex LRF by the Department for Communities & Local Government. The time course I am seeking information for is from 1 November 2016 until 31 December 2017."*

6. ECFRS responded on 21 January 2021. It stated that:

"We can confirm that Essex County Fire & Rescue Service does hold the information you have requested."

7. It then went onto say that:

"I can confirm that Essex County Fire & Rescue Service does hold this information, however some of the information is exempt from disclosure to you"

8. ECFRS provided a document containing a summary of Exercise Cygnus, but it also stated that it was withholding some information and relying on section 24 (national security) and section 44 (statutory prohibition on disclosure) of the FOIA to do so.

9. Following an internal review ECFRS wrote to the complainant on 18 February 2021 upholding its original position. It noted the involvement of ERF in Exercise Cygnus and stated that:

"The ERF is a collaborative organisation and ECFRS, as an individual member, cannot release the information requested without the permission of the ERF. This permission has not been given by the ERF Stakeholders."

Scope of the case

10. The complainant contacted the Commissioner on 25 February 2021 to complain about the way his request for information had been handled.
11. The Commissioner wrote to ECFRS on 31 March 2021 asking it to justify its use of exemptions. In line with her usual practice, she noted that she would accept the public authority reconsidering its position, but encouraged it to keep the complainant informed if it intended to do so.
12. On 14 April 2021, the complainant contacted the Commissioner because he had received a further response from ECFRS – now stating that no information within the scope of his request was held. This correspondence was not copied to the Commissioner.
13. The Commissioner wrote to ECFRS again on 19 April 2021, noting the apparent change of position. She asked ECFRS to confirm to her whether it was now denying holding information and, if it was, to explain why it held no information – especially in view of its previous unequivocal statements confirming that it held relevant information.
14. On 29 April 2021, ECFRS responded. It denied holding any information within the scope of the request. It noted that it had acquired the information it had previously disclosed from ERF, but stated that:

"The ERF is not holder or controller of information relating to Exercise Cygnus."
15. The Commissioner responded to ECFRS the following day with a series of questions about the relationship between ECFRS and ERF. She also drew ECFRS' attention to her published guidance on determining whether information was held for the purposes of the FOIA and specifically on when information might be held by a third party on behalf

of a public authority.¹ That correspondence was responded to on 13 May 2021. ECFRS maintained its stance that it held no further information but was able to provide a redacted version of a report which it stated was the report that was originally withheld.

16. Having considered the various responses provided by ECFRS, the Commissioner considers that there is a lack of clarity about ECFRS' relationship with information held by ERF and therefore the responsible course of action for her to take as a regulator is to issue a decision notice on the matter.
17. The Commissioner considers that the scope of her investigation is to determine whether ERF holds information on behalf of ECFRS.
18. In the analysis that follows, the Commissioner has referred to information being "held" only in the legal sense of that term – that is, referring to information that would fall within the scope of the FOIA. She has referred to information being "possessed" in situations where a body has some sort of control or possession of that information, but where it is not clear that the information is "held."

Reasons for decision

19. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled—

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

20. Section 3(2) of the FOIA states that

For the purposes of this Act, information is held by a public authority if—

¹ <https://ico.org.uk/media/for-organisations/documents/1148/information-held-by-a-public-authority-for-purposes-of-foia.pdf>

- (a) *it is held by the authority, otherwise than on behalf of another person, or*
- (b) *it is held by another person on behalf of the authority.*

21. The Civil Contingencies Act 2004 requires various bodies to assess the risk of various different types of emergencies occurring and to maintain appropriate plans for continuing to discharge their usual functions. These bodies are defined as "Category 1 responders" and include the emergency services, local government, NHS trusts and the Environment Agency.
22. Local Resilience Forums (LRFs) are defined in the Civil Contingencies Act 2004 (Contingency Planning) Regulations 2005, which states that Category 1 responders in a particular local resilience area must cooperate together in a single forum. Part 3 of the Regulations provides for a duty to assess risk, Part 4 provides for a duty to maintain plans, Part 5 provides for publication of plans, and Part 6 provides for warning and provision of information and advice to the public. Essex Resilience Forum is one such local resilience forum, covering the county of Essex.
23. The Cabinet Office has published its own document on the role of the LRFs which says:

*"A Local Resilience Forum is not a legal entity, nor does a Forum have powers to direct its members. Nevertheless, the CCA and the Regulations provide that responders, through the Forum, have a collective responsibility to plan, prepare and communicate in a multi-agency environment."*²
24. In October 2016, a simulated exercise was run to test the UK's response to a flu pandemic. This was known as Exercise Cygnus. Numerous bodies took part in this exercise including several local resilience forums – one of which was ERF.
25. The final report from Exercise Cygnus lists ERF as having provided several forms of feedback on how the exercise went.³

² <https://www.gov.uk/government/publications/the-role-of-local-resilience-forums-a-reference-document>

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/927770/exercise-cygnus-report.pdf

ECFRS' position

26. Despite its earlier answers, ECFRS maintained that it does not hold relevant information and that no information is held, by ERF, on its behalf.
27. ECFRS noted that ERF is not a data controller or a legal entity in its own right. It was merely a forum set up to facilitate multi-agency partnership working. No document exists that codifies the relationship between ECFRS and ERF.

"no agency provides information to an LRF/ERF. All agencies, which includes ECFRS, provide information to enable multi-agency emergency preparedness planning, response and review to occur."

28. When the Commissioner asked what information ECFRS was entitled to request from ERF, it responded to say that:

"The ERF co-ordinator holds copies of multi-agency response plans, reviews and training events produced by agencies on behalf of the ERF, the majority of which being produced by a multi-agency group with an agreed lead agencies on behalf of the ERF partnership. The ERF co-ordinator could be asked to support and coordinate information requests. The ECFRS (as a partner) is able to request any information that is requested by members of the public from the ERF."

29. ECFRS explained that the original report from ERF had been prepared by Essex County Council on behalf of ERF members.

30. In its letter to the Commissioner of 29 April 2021, ECFRS stated that:

*"The ERF coordinates various activities and organises resilience planning in preparation for or response to national or local emergencies. [sic] These could range from security, environmental, health or other topics. **They do not have a secretariat function.** Their meetings are normally hosted at ECFRS's Kelvedon Park headquarters. This is maybe why this FOI was directed to ECFRS."*
[emphasis added]

31. However, in its letter of 13 May 2021, when the Commissioner asked ECFRS who had prepared the debrief notes and the evaluator questionnaire, ECFRS stated that:

"The ERF Secretariat holds a copy of the Cold Debrief Report, as previously shared. The ERF Secretariat is not holding, previously or now, copies of the Hot Debrief & Evaluator Questionnaires. The ERF Secretariat assessment of this is that individual partners would

have completed and returned these direct to the national exercise planning team. Individual participating partners would need to confirm/clarify this assessment, and to if they are holding their own copies of Hot Debrief or Evaluator Questionnaires."

The Commissioner's view

32. Having considered the responses provided by ECFRS and information in the public domain, the Commissioner concludes that ERF holds information on behalf of ECFRS.

33. The Commissioner's published guidance for determining when information is held on behalf of a public authority (referred to above) refers to several different scenarios in which information might be held by a third party on behalf of a public authority, including:

"Partnership or consortia arrangements are forms of collaborative working between two or more organisations. As the organisations do not have the legal status of a body or organisation separate to its members, they need to be certain what information is held on behalf of each partner or member. This will arise in the public sector when the partners, who are otherwise independent bodies, agree to co-operate to achieve a common goal, create an organisational structure and agreed programme and share information, risks and rewards..."

"...In general terms, information that is brought to the partnership by one of the partners is regarded as being held by or on behalf of all partners...Much will depend on the individual arrangements of the partnership as to whether or not all information is held by all the partners or whether some is held by the partners solely on behalf of one of them."

34. Having reviewed ECFRS' response to her queries, the Commissioner considers that they are somewhat confused and, in some cases contradictory. It is apparent that the application of the FOIA has not been given adequate consideration by either ERF or its members and this appears to have undermined ECFRS' ability to provide a clear response.

35. The Commissioner accepts that ERF is not a public authority for the purposes of the FOIA. Nor does it even appear to be a legal entity in its own right.

36. However, the very fact that ERF is not a legal entity in its own right suggests that it cannot possess information on its own behalf and therefore, if it cannot possess information on its own behalf, logically,

any information it possesses is likely to be possessed on behalf of someone else.

37. The Commissioner has also had regard to ERF's published "Combined Operating Procedure for Essex" (COPE) document, which states that:

*"COPE has been prepared in accordance with the joint agreement reached by the Essex Resilience Forum. **Ownership of the document is shared by members of the ERF**, with all agencies responsible for their own contribution and any content referencing their own organisation."*⁴ [emphasis added]

38. ECFRS helpfully supplied the Commissioner with a copy of the ERF's internal guidelines. According to the ERF guidelines (3.1), Category 1 Responders act as the ERF Executive Programme Board and share responsibility for delivering on objectives. The Board agrees funding, authorises ERF projects, and has executive responsibility to make decisions. ECFRS is explicitly listed at point 3.3 as a member of the Board.
39. In addition, ECFRS told the complainant at internal review that the information is possessed "jointly under a collaborative framework" and that information "could not be disclosed without permission" – presumably meaning permission of the members of the Board. Again, this would point to information being possessed on behalf of the Board, and, by extension held on behalf of those ERF members who make up the Board.
40. On the basis of the evidence provided, the Commissioner is satisfied that ERF holds information on behalf of ECFRS.
41. Whilst the Commissioner's decision is only binding upon ECFRS, she considers it highly likely that the same approach would be applicable to all the other members of ERF – particularly those comprising the Board.
42. In its original responses to the complainant, ECFRS referred to at least one document that it was withholding – although it later clarified that this was a document possessed by ERF. As the Commissioner has determined that information possessed by ERF is held on behalf of ECFRS it follows that, on the balance of probabilities ECFRS *does* hold

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http://www.essexprepared.co.uk/upload/documents/3.1_1_COPE_Document_v4_2_23_Dec_2019_605202b67fa6f.pdf

some information within the scope of the request. Therefore, because it changed its stance during the investigation, the Commissioner does not consider that ECFRS has properly discharged its duty under section 1(1) of the FOIA.

43. Given the history of this request, the Commissioner considers that the appropriate remedial step is for ECFRS to go right back to the beginning and start by identifying the information, within the scope of the request, that it either holds itself or which is held on its behalf – either by ERF or by any other body.
44. In order to demonstrate that it has made the “reasonable enquiries” of ERF ordered by this notice, ECFRS will need to show that it has made similar enquiries to ERF to those it would make of its own internal departments to establish whether information was held. This is likely to include, but would not be limited to, asking ERF to carry out appropriate electronic or manual searches to establish what information it holds.
45. The Commissioner wishes to stress that she has not determined that ECFRS will, even after consulting ERF, find that it holds information within the scope of every element of the request. Nor does anything in this decision notice prevent ECFRS from relying on exemptions in future to withhold information within scope. Once a fresh response has been provided, the complainant will have the opportunity both to test any exemptions applied and contest the extent of the information that is held.

Other matters

46. As a matter of courtesy and good practice, the Commissioner will be providing a copy of this notice to ERF. Whilst she has no power to compel ERF to take action, it is not apparent, from the issues raised in this case, that either ERF or its members have given sufficient consideration to how requests for information possessed by ERF should be handled. It would clearly be beneficial for all concerned if some sort of protocol were to be introduced to allow ERF members to process requests of this nature more efficiently.

Right of appeal

47. 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

48. 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.
49. 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

Pamela Clements
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