

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 10 June 2021

Public Authority: Isle of Anglesey County Council
Address: Council Offices
Llangefni
Anglesey
LL77 7TW

Decision (including any steps ordered)

1. The complainant has requested information about official fact-finding visits made by the Isle of Anglesey County Council (the Council) to Japan, in connection with the proposed construction of a nuclear power plant. The Council disclosed all the information it said that it held, but the complainant considered that it held more. During the Commissioner's investigation, the Council located more information, but it did not disclose it to the complainant.
2. The Commissioner's decision is that the Council holds information falling within the scope of part (3) of the request, which it has not sought to exempt from disclosure and which it has not disclosed. It has therefore breached section 1(1)(b) and section 10 of the FOIA. However, she is satisfied that, on the balance of probabilities the Council does not hold any further information.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the following information: the Chief Executive's email of 6 June 2014; the draft report created prior to the 2018 visit and the Chief Executive's briefing note to Members.
4. The Council 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 22 October 2019, the complainant wrote to the Council and requested information in the following terms:

"Re: Wylfa Newydd and IACC official visits to Japan April 2012 to April 2019, inclusive

It would appear there were a number of visits to Japan authorised by (or, on behalf of) the County Council, in connection with a proposal for a new nuclear power station in Anglesey, subsequent to acquisition of the Wylfa site by Hitachi Limited.

In respect of each visit, perhaps I may be permitted to request the following information.

- 1. The date and duration;*
 - 2. composition of each delegation and respective roles;*
 - 3. case by case justification and any terms of reference approved by the Council, and the date of approval decision;*
 - 4. the specific purpose and itinerary agenda details;*
 - 5. the delegates' full report back to the Council;*
 - 6. the Council's response to findings and outcomes of each visit;*
 - 7. due diligence of proposed project and/or potential development partners, undertaken*
 - a. by delegates whilst in Japan; and,*
 - b. by the Council subsequent to receiving delegates' reports; and,*
 - 8. level of travel, accommodation, hospitality and subsistence expenditure."*
6. On 29 October, the Council responded to each part of the request as follows:
1. It confirmed that two visits had taken place on 21-27 June 2014 and 13-20 October 2018.
 2. It disclosed this information.
 3. It stated "A detailed business case was submitted to the Chief Executive who made the decision to accept the invitations in accordance with the decentralised powers outlined within section 3.5.2 of the Council Constitution. Actual approval dates not recorded as decision made under delegated powers."

4. It explained the purpose of the trip and disclosed the itinerary.
5. It disclosed a link to a full report which was presented to the Executive Committee in September 2014 following the first visit. It said that following the second visit, a post-visit report was prepared. This was not a 'public' document and the Council did not disclose it.
6. It referred the complainant to information in the 2014 visit report. It reiterated that the 2018 visit report was not a 'public' document.
7. For both (a) and (b), the Council stated: "*The Chief Executive undertook due diligence in his decision to accept the invitations in accordance with the decentralised powers outlined within section 3.5.2 of the Council Constitution.*"
8. It disclosed travel, accommodation, hospitality and subsistence expenditure for each trip.
7. The complainant requested an internal review on 4 December 2019, setting out his reasons for considering that parts (3) – (8) had not been adequately answered, and requesting a copy of the report on the 2018 visit. He also expressed dissatisfaction with the information he was given about the internal review procedure.
8. The Council provided an internal review on 13 March 2020. It responded point by point to the complainant's concerns, explaining why it believed it had responded correctly. For part (5), it disclosed a copy of the report of the 2018 visit, with some information redacted under section 43(1) and 43(2) (commercial interests) of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 12 June 2020 to complain about the way his request for information had been handled. He disagreed with the Council's application of section 43 to redact information from the 2018 report. He also believed that the Council had not disclosed all the information he had requested at parts (3), (6) and (7) of the request.
10. During the Commissioner's investigation the Council withdrew its reliance on section 43 of the FOIA and it disclosed a copy of the 2018 visit report in full.
11. The analysis below therefore considers whether, on the balance of probabilities, the Council disclosed all the information it held in response to parts (3), (6) and (7) of the request.

Reasons for decision

Section 1 – General right of access

12. Section 1(1) of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds that information and, if so, to have that information communicated to him.
13. In this case, the Council said that it had provided all the information it held with regard to parts (3), (6) and (7) of the request. The complainant maintained that these parts had not been fully responded to. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely or unlikely that the public authority holds information relevant to the complainant's request.
14. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.

The complainant's position

15. Much of the complainant's submission to the Commissioner concerned the Council's application of section 43 to redact information from the 2018 visit report, which was subsequently informally resolved by the Council's disclosure of the report in full. With regard to the question of further information, the complainant expressed the view that parts (3), (6) and (7) of the request had not been responded to in full and that he wished to receive further information, which he assumed the Council held.

The Council's position

16. During the Commissioner's investigation, the Council located some recorded information falling within the scope of part (3) of the request.
17. In respect of the 2014 visit, it located an email dated 6 June 2014, from the then Chief Executive, confirming that he had approved the 2014 visit

to Japan. The Council explained that he was empowered to take such decisions by the Council's Constitution:

*"Section 3.5.2 of the Council's Constitution delegates to the Chief Executive the authority to approve the visit and (3.5.2.1) take whatever decisions which are within his/her professional judgement and competence in order to implement approved Council policies within the approved budget delegated to him/her by the Council in order to provide and manage the services for which he/she is responsible, which shall include but shall not be limited to ... incurring of expenditure."*¹

18. With regard to the 2018 visit, the Council said it had located a draft, incomplete report which was created prior to the 2018 visit, in order to set out the objectives and aims of the 2018 visit. It also located a briefing note to Members, from the then Chief Executive, setting out the main objectives of the visit. It said that taken together, these documents set out the objectives of the 2018 visit.
19. The Council said that it was satisfied that it held no further information on this. As the Chief Executive had delegated power to authorise the visit and had briefed Members about the visit, it was not deemed necessary to record further information on the decision.
20. The Council forwarded a statement from the Deputy Chief Executive, expanding on the reasons for believing no further information was held:

"I was the Head of Service for the Regulation & Economic Development Service at the time of the 2014 and 2018 visits to Japan. In 2018, I recall that the invitation to visit Japan and the actual departure date was closely aligned and that this required a prompt decision about the Council's participation in the visit. Given that the CEO had delegated power to authorise the visit and that this was the most streamlined decision making process and that he was fully aware of the aims and objectives of the project, including its importance to the Island, I would not expect additional information to have been created. As explained, the authority of the CEO to authorise the visit did not necessitate more bureaucratic processes within the limited time available."

21. With regard to part (6) of the request, the Council referred the Commissioner to sections 6.0 and 7.0 of the 2018 visit report, which

¹ <https://www.anglesey.gov.uk/en/Council/The-Constitution/Isle-of-Anglesey-County-Council-Constitution.aspx>

refer to "*learning and outcomes*" and which it felt addressed this point. It said that no further information was held.

22. With regard to part (7) of the request it said no further information was held.
23. For all parts of the request, the Council said that officers who were thoroughly briefed about the purpose of the search, familiar with the dataset and able to identify the information that was being requested, undertook searches for information relating to the visits. The searches extended to electronic records and manual filing systems. The paper file contains 70 pages of A4. The electronic file comprises twelve folders containing 33 documents.
24. It said that officers undertook searches of information stored both electronically (including the email accounts of relevant officers, the electronic filing system on the Regulation & Economic Development Service's network drive and the hard drives of the laptops used by relevant officers) and manually, and it was satisfied that all relevant information held would have been identified by them. It provided the search terms which were used to search individual devices and networked resources (which included delegates' names, "Japan", "Hitachi" and "visit").
25. It said that in line with its retention policy, all information which had been generated by and about the 2018 trip, would still be held at the time of the request and would not yet have been deleted. Since no further information could be located, the Council was satisfied that none had ever existed.
26. The Council said that there was no business reason or statutory requirements requiring it to create and retain the requested information.

The Commissioner's conclusion

27. When the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, in this case, the Council has referred the Commissioner to three items of information falling within the scope of part (3) of the request (the Chief Executive's email of 6 June 2014, draft report prior to the 2018 visit and the Chief Executive's briefing note to Members) which it has recently located.
28. The Commissioner has reviewed the information and is satisfied that it falls within the scope of part (3) of the request. The Council has not sought to argue that it should not be disclosed because it falls under any of the non-disclosure exemptions in Part II of the FOIA. The Council must therefore disclose this information to the complainant.

29. With regard to whether any further information is held, as set out in paragraphs 13 and 14, above, the Commissioner is required to make a finding on the balance of probabilities. The complainant has expressed the view that further information is held, but he has not provided any evidence that it is, whereas the Council has provided a detailed account of the searches it conducted and why they would be likely to have located any further, relevant information. It also consulted the Deputy Chief Executive, who was involved in the trips at the time and was able to give an account of the processes surrounding the decisions to visit Japan.
30. While the Commissioner considers that it was reasonable for the complainant to question whether more information was held, she is satisfied that the Council has demonstrated to her that it conducted thorough searches, capable of locating further information, if it was held. She also considers that the Deputy Chief Executive has addressed the question of why further information was not recorded, and that his is a credible explanation.
31. The Commissioner is therefore satisfied that, on the balance of probabilities, the Council does not hold further information falling within the scope of the request.
32. While appreciating that the complainant may be frustrated that the Council does not hold further information, the Commissioner is mindful of the comments made by the Information Tribunal in the case of *Johnson / MoJ* (EA2006/0085)² that the FOIA:

"... does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold".

Section 1 – general right of access

Section 10 – time for compliance

33. Section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.

²<http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i90/Johnson.pdf>

34. Section 10(1) of the FOIA states that on receipt of a request for information, a public authority should respond to the applicant within 20 working days.
35. The complainant submitted his request on 22 October 2019. As set out in paragraphs 16 – 18 above, the Council has confirmed that it holds further information falling within the scope of the request which it has not disclosed to the complainant and which it has not argued is exempt.
36. The Council has therefore breached section 1(1)(b) and section 10(1) of the FOIA.
37. As set out in paragraph 28, the Commissioner now requires the Council to disclose this information to the complainant.
38. The Commissioner uses intelligence gathered from individual cases to inform our insight and compliance function. This aligns with the goal in our draft "Openness by design"³ strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our "Regulatory Action Policy"⁴.

Other matters

Section 45 - internal review

39. There is no obligation under the FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where an authority chooses to offer one, the code of practice established under section 45 of the FOIA sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales.
40. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.

³ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁴ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

41. In this case, the complainant asked for an internal review of his request on 4 December 2019. The Council provided its response, dated 13 March 2020, which the complainant says he received on 16 March 2020, 70 working days later. It therefore exceeded the recommended maximum 40 working days.
42. The Council's attention is drawn to the information about her Regulatory Action Policy at paragraph 38, above.
43. The complainant has also said that the time limits for conducting an internal review were not outlined to him during the process and he would have found it helpful for the Council to have informed him of them.
44. For the reasons set out above, the Commissioner cannot require the Council to take this action. However, she considers it to be a practical suggestion and the Council (and, indeed, any public authority) may wish to consider including this in the standard information it provides about internal reviews, when responding to requests.

Right of appeal

45. 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

46. 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.
47. 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

Samantha Bracegirdle
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SK9 5AF