

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 March 2014

Public Authority: North East Lincolnshire Council

Address: Municipal Offices
Town Hall Square
Grimsby
DN31 1HU

Decision (including any steps ordered)

1. The complainant requested information and advice produced by North East Lincolnshire Council's (the Council's) legal department about the deduction of additional ground rent from a water rebate in relation to properties on the Humberston Fitties chalet park. The Council initially confirmed that it held the requested information but considered it exempt from disclosure on the basis of sections 42 and 43 of FOIA. It subsequently explained that it did not actually hold the requested information, a position the complainant disputed. The Commissioner has investigated this complaint and is satisfied that on the balance of probabilities the Council does not hold any recorded information falling within the scope of this request.

Request and response

2. Following an exchange of emails with the Council regarding ground rent and water charges for her property on the Humberston Fitties chalet park, the complainant submitted the following request to the Council on 10 May 2013:

'...thanks for your email confirming you can deduct from the water rebate the additional ground rent invoice, Can you please provide the previously gained Counsel advice referred to in your earlier email.'

3. The Council confirmed that it held information falling within the scope of the request but considered it to be exempt from disclosure on the basis of sections 42(1) and 43(2) of FOIA. The complainant complained to the Commissioner in relation to the Council's refusal of this request. The Commissioner issued a decision notice, FS50501173, on 25 November 2013 in which he concluded that the requested information was exempt from disclosure on the basis of section 42(1) of FOIA.
4. During the Commissioner's investigation of FS50501173, the Council confirmed that the Counsel's advice which the complainant had requested concerned the calculation of the water rebate; that is to say it did not directly concern the deduction of the water rebate from the ground rent. Rather, the Counsel's advice was used to inform the Council's legal team's own advice which considered the deduction of the rebate from the ground rent.
5. As a result of this, the complainant submitted the following further request to the Council on 27 October 2013:

'I am requesting a copy of all the advice and information produced by the Council's legal team considering the deduction of the additional ground rent invoice from the Fitties water rebate'.

6. The Council responded on 13 November 2013 and confirmed that it held information falling within the scope of this request but considered it be exempt from disclosure on the basis of sections 42(1) and 43(2) of FOIA.
7. The complainant contacted the Council on 14 November 2013 and asked for an internal review to be conducted.
8. The Council informed her of the outcome of the review on 19 November 2013; the review upheld the application of both exemptions.
9. At this point the complainant contacted the Commissioner in order to complain about the Council's decision to withhold the information falling within the scope of the request she had submitted on 27 October 2013.
10. The Commissioner subsequently contacted the Council and asked to be provided with a copy of the information which fell within the scope of this request. In response, the Council explained that it had now established that it did not hold a specific written record of legal advice provided in relation to the consideration of the deduction of the additional ground rent invoice from the water rebate. The Council therefore withdrew its reliance on sections 42(1) and 43(2) and instead confirmed that its position was that it did not actually hold recorded information falling within the scope of the request of 27 October 2013.

11. The Council informed the complainant of this amended position on 10 January 2014.

Scope of the case

12. As noted above, the complainant initially contacted the Commissioner on 22 November 2013 in order to complain about the Council's decision to rely on sections 42(1) and 43(2) to withhold the information sought by the request she submitted on 27 October 2013.
13. However, in light of the Council's amended position that it did not in fact hold the requested information, the nature of her complaint to the Commissioner altered. That is to say, the complainant disputed the Council's position that it did not hold any information falling within the scope of her request; her reasons for doing so are referred to below.
14. The Commissioner has therefore considered whether the Council holds information which falls within the scope of the request submitted on 27 October 2013.

Reasons for decision

Section 1 – right of access to information

15. Where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
16. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request.
17. The Commissioner has set out below the complainant's reasons why she believes that the Council holds information within the scope of the request; the Council's submissions to support its view that no information is held; and he has then gone on to set out his view as to whether recorded information is held.

The complainant's position

18. The complainant argued that she found it difficult to accept that officers would only receive the legal advice sought by her request informally and that there would not be any record of it made by any officer. She argued

that records have to be kept to protect the officers and the Council. The complainant emphasised that this was a decision to deduct a £180 disputed proposed ground rent increase from a legitimate water rates overpayment refund. As such, the decision was always likely to be challenged by individuals, their advisors or in the course of business such as a financial audit, especially if the invoice is sent out two years late, against normal procedures. Consequently, the complainant considered it unlikely that the Council did not hold the requested legal advice.

The Council's position

19. In its revised response to the complainant of 10 January 2014, the Council explained that following further enquiries with the Council's legal team and Balfour Beatty Workplace who manage the Humberston Fitties Chalet Park on behalf of the Council, it had established that no specific written record of legal advice was held which addressed the 'consideration of the deduction of the additional ground rent invoice from the water rebate'.
20. The Council explained that considerable legal advice had been provided to officers dealing with the administration of Humberston Fitties Chalet Park, which would have included advice relating to the water charges and the consideration and determination of the deduction from the water rebate. This advice from the Council's legal service will have been provided, in the majority of cases verbally at meetings or via telephone to officers dealing with matters. The Council explained that this appeared to have been the case in relation to the question of 'the deduction of the additional ground rent invoice from the water rebate'.
21. By way of an explanation as to why it amended its position in relation to this request, the Council noted that it had originally determined that written internal legal advice concerning the water charges and a Delegated Powers report on the surplus water charges fell within the scope of the request. However, upon further consideration of the request it had concluded that both documents fell outside the scope of the request.
22. In order to investigate this complaint, the Commissioner asked the Council to respond to a number of questions regarding the searches it had undertaken to locate information that would fall within the scope of this request. The Commissioner has quoted these questions and the Council's responses below.

1) What searches were carried out for information falling within the scope of this request and why would these searches have been likely to retrieve any relevant information?

2) If searches included electronic data, please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.

Searches have been carried out by relevant senior officers within the following areas: Assets, Estates and Valuation...Finance and Legal involved in the management of Humberston Fitties Chalet Park and in particular the decision making and administration of the water rebate. The searches were made of e-mail accounts as this would be the communication method used if the information was in recorded form. These searches are likely to have retrieved any relevant information held as they were undertaken by officers involved in the subject of the information request.

3) If searches included electronic data, which search terms were used?

Searches were made based on the following criteria:

*Relevant officers involved in the activity / decision making information has been requested about;
Relevant terms i.e. Water rebate; and
Relevant dates.*

4) If the information were held would it be held as manual or electronic records?

It is the opinion of the services involved in the decision that any recorded information if held, would be held in an electronic format.

5) Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?

No record is held of this information ever being held by North East Lincolnshire Council in a recorded form.

The officers involved in the decision making and administration of the water rebate identified that any internal legal advice concerning the deduction of the outstanding ground rent from the water rebate was given verbally, and no recorded information is held of this. It is not unexpected that no record of internal legal advice is held, as the decision would have been based upon external legal advice. The external legal advice on this matter was the subject of a previous information request from the applicant (ICO ref: FS50501173 –

NELC ref: 5007 _1314), that was determined by the Information Commissioner on 25th November 2013 to be exempt from disclosure.

North East Lincolnshire Council's position is that it is reasonable before refunding any monies to check that the recipient does not have any outstanding debts, in order to protect the public purse and ensure effective administration for the citizens of North East Lincolnshire.

6) If recorded information was held but is no longer held, when did the Council cease to retain this information?

See response to question 5

7) Does the Council have a record of the document's destruction?

See response to question 5

8) As [the complainant] suggested, is there not a business need to record information regarding this particular decision?

No business need has been identified by North East Lincolnshire Council, for the recording of any internal legal advice provided in relation to this matter, as the decision would have been based upon the external legal advice received which was the subject of a previous information request from the applicant (ICO ref: FS50501173 – NELC ref: 5007 _1314).

The Commissioner's position

23. The Commissioner recognises the logic of the complainant's line of argument that given the circumstances of the decision in question - the deduction of the additional ground rent invoice from the water rebate - it would seem reasonable to assume that the legal advice supporting this information would be recorded.
24. However, in the Commissioner's view the searches conducted by the Council for the requested information are detailed, logical and focused. Consequently, if recorded information falling within the scope of this request were to be held, in the Commissioner's view it is reasonable to conclude that such searches would have located this information.
25. Furthermore, the Commissioner notes that the Council has previously located without any problems other pieces of legal advice concerning the

administration of the chalet park in question, eg the information that was considered by the Commissioner in case reference FS50501173. This suggests, in the Commissioner's view, that the Council has adequate records search systems in place to allow it to locate recorded information so that if a particular piece of legal advice was held it could be easily located and retrieved.

26. Moreover, the Commissioner is persuaded by the Council's line of argument that because of the existing pieces of wider ranging written legal advice concerning the administration of the chalet park – both the advice falling within the scope of case FS50501173 and the advice initially considered to fall within the scope of this request– there was not necessarily a business need to record more advice given on more specific queries, eg advice that was given on the deduction of the additional ground rent invoice from the water rebate.
27. The Commissioner is therefore satisfied that on the balance of probabilities the Council does not hold information falling within the scope of the complainant's request of 27 October 2013.

Right of appeal

28. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

29. 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.
30. 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

Jon Manners
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