

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 December 2011

Public Authority: The Common Council of the City of London
Address: Guildhall
PO Box 270
London
EC2P 2EJ

Decision (including any steps ordered)

1. The complainant requested information relating to the Hampstead Heath Constabulary and the Epping Forest Keepers. The Common Council of the City of London ("the council") responded that the information requested was not covered by the scope of the Freedom of Information Act 2000 ("the FOIA"). In order to assist however, it provided some information that it considered was relevant. During the Commissioner's investigation, the council identified further information which it said may be relevant however it maintained that the request was not covered by the FOIA in any case.
2. The Commissioner's decision is that the council correctly concluded that the information requested could not be disclosed under the FOIA because the information would not be held in its capacity as a local authority, police authority or port health authority. The Commissioner does not require any steps to be taken.

Request and response

3. On 13 May 2011, the complainant requested information in the following terms:

"I would like to ask if the Corporation has made an agreement with the Independent Police Complaints Commission under section 26 of the Police Reform Act 2002 in respect of either Hampstead Heath Constabulary or the Epping Forest Keepers, and if such agreements have been made then I would like to be provided with them.

If no agreements have been made under that section, then I would like

the details of any other agreements made with or between the Corporation, the City of London Police, the IPCC or any other body in respect of the investigation of complaints made against members of Hampstead Heath Constabulary and the Epping Forest Keepers”.

4. The council replied to the complainant on 10 June 2011. It explained that the request relates to activities that are funded by private or charitable income and therefore, any information held would not fall within the scope of the Freedom of Information Act 2000 (“the FOIA”). The council said that although it was under no obligation to respond, it wished to confirm that appropriate staff members at Hampstead Heath and Epping Forest are subject to a disciplinary procedure that has been drawn up in association with the Independent Police Complaints Commission.
5. The complainant replied on the same day. He asked the council to reconsider whether it was obliged to respond under the FOIA. The complainant also said that he wanted the council to address whether it held agreements made under section 26 of the Police Reform Act 2002 and in any event, he wanted the text of any agreement that had been made.
6. The council completed an internal review on 8 July 2011. It said that it had decided not to uphold the appeal. It said that it maintained that it was not under an obligation to respond however, it was willing to provide the complainant with a copy of the disciplinary procedure that is held and it attached this to its response.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the council had correctly said that the requested information fell outside the scope of the FOIA. If the information was covered by the FOIA, the complainant wished the Commissioner to consider whether any further information was held falling within the scope of the request.

Reasons for decision

Is the information requested covered by the scope of the FOIA?

8. The FOIA only applies to public authorities. Part 3 of the FOIA states the following:

“3(1) In this Act, ‘public authority’ means -

- (a) *subject to section 4(4), any body which, any other person who, or the holder or any office which –*
- (i) *is listed in Schedule 1, or*
- (ii) *is designed by order under section 5, or*
- (b) *a publicly-owned company as defined by section 6”.*
9. The council is only a public authority for some of its functions. It has explained that only its “city fund” activities fall under the scope of the Freedom of Information Act 2000 (“the FOIA”) i.e. those relating to its functions as a local authority, police authority and port health authority. This is set out in Schedule 1, part II, paragraph 9 of the FOIA in the following terms:
- “The Common Council of the City of London, in respect of information held in its capacity as a local authority, police authority or port health authority”.*
10. The council has explained that it has other charitable and private functions which do not fall under the scope of the FOIA. Its activities in respect of Epping Forest and Hampstead Heath are funded by charitable or private sources.
11. When asked to explain why he considered that the request falls within the scope of the FOIA in view of the above, the complainant referred to paragraph 64 of Schedule 1 which states the following shall be classed as a public authority:
- “Any person who –*
- (a) *by virtue of any enactment has the function of nominating individuals who may be appointed as special constables by justices of the peace, and*
- (b) *is not a public authority by virtue of any other provision of this Act in respect of information relating to the exercise by any person appointed on his nomination of the functions of a special constable”.*
12. The Commissioner understands that the complainant believes that the Hampstead Heath Constables and the Epping Forest Keepers should be classed as “special constables” under the meaning in paragraph 64. The council has disputed this and it has said that even if it was wrong about that, the fact is that in accordance with part (b) of paragraph 64, it is removed from this part of the legislation because it is a public authority by virtue of another provision of the FOIA (namely paragraph 9).
13. The Commissioner understands that the complainant does not accept the council’s position and he has said the following:

“Admittedly, this paragraph is badly worded, and could actually be interpreted as excluding the Corporation from its scope, because the Corporation is ‘a public authority by virtue of any other provision of this Act’. I believe this is most certainly a debatable point. However, it is clearly an unintended loophole and I am sure you will agree that the spirit of the legislation is to include any body which runs a specialist constabulary of this manner, regardless of whether they are already included by virtue of the Act, the true intent of sub paragraph (b) being to avoid including a body twice in respect of identical functions, not to exclude the body in respect of an additional function”.

14. The Commissioner carefully considered this argument however he decided that he agreed with the council in this respect. The council is a public authority in respect of another provision of the FOIA and in that provision, parliament set out what information held by the council would fall within the scope of the FOIA. The complainant’s belief that this was an unintended “loophole” is not supported by evidence. The fact that the complainant clearly believes that this type of information *should* be covered is not relevant.
15. For the avoidance of doubt, the Commissioner would like to explain that in the House of Lords case *Sugar (Appellant) v British Broadcasting Corporation and another (Respondents) [2009] UKHL 9*, it was established by a majority agreement that where bodies are listed in Schedule 1 of the FOIA in respect of a certain type of information only, they remain public authorities under the FOIA regardless of the type of information at issue. This judgement is binding on the Commissioner. Therefore, an argument cannot be made in this case that the council is not a public authority under another provision of the FOIA in respect of the class of information described in part (b) of paragraph 64.
16. In view of the above, the Commissioner must return to a consideration of whether the information falls outside the scope of the functions for which the council is covered under the FOIA, namely information *“held in its capacity as a local authority, police authority or port health authority”*.
17. The general power to appoint the Hampstead Heath Constables was conferred upon the City by paragraph 18 of the Greater London and Parks and Open Spaces Order 1967 (“the Order”), which was made under the Schedule to the Ministry of Housing and Local Government Provision Order Confirmation (Greater London Parks and Open Spaces) Act 1967. Paragraph 18 of the Order states:

“A local authority may procure officers appointed by them for securing the observance of the provisions of all enactments relating to open spaces under their control or management and of the byelaws and

regulations made there under to be sworn in as constables for that purpose but any such officer shall not act as a constable unless in uniform or provided with a warrant:

Provided that nothing in this article shall be deemed to render applicable to any such officer the provisions of the Police Pensions Act 1921 or any other enactments relating to pensions, gratuities and allowances in respect of police services”.

18. However, the Order was superseded by the London Government Reorganisation (Hampstead Heath) Order 1989, (“the new Order”) paragraphs 4 and 5 of which effectively vested all rights and liabilities in respect of the Heath in “the City” and transferred all the functions conferred by the Greater London Parks and Open Spaces Order 1967, including paragraph 18 above, to “the City”. Therefore, the appointment of Constables is a function of “the City”.
19. The City is defined in paragraph 2 of the new Order as follows:

“‘The City’ means the Common Council of the City of London, and in relation to the vesting of property, means the Major and Commonalty and Citizens of the City of London acting by the Common Council; and for the purposes of this definition references to the Common Council are references to that body in a capacity other than as local authority, police authority or port health authority”.
20. The function of appointing Constables for the Heath is vested in the authority in a capacity other than that of local authority, police authority or port health authority. Therefore, information relating to that function falls outside the scope of the FOIA Schedule 1, paragraph 9.
21. In relation to the Epping Forest Keepers, the issue is again whether the City holds the information in its capacity as a local authority, police authority or port health authority.
22. The Epping Forest Constables are appointed pursuant to s.43 Epping Forest Act 1878. This Act vests the regulation and management of the forest in the authority as Conservators. The Conservators effectively hold the land on trust to preserve it as an open space and to protect existing grazing rights etc. The argument of the authority appears to be that, as a result, it is acting in a private capacity as a trustee of sorts, as opposed to acting as a local authority. The council covers all expenses involved in the regulation and management of the forest from its private funds (i.e. no taxpayer funding is used).
23. Given the circumstances described above, the Commissioner agrees with the council in this case that the information requested relates to the regulation and management of the forest, which is conducted as a

private matter outside of its functions as a local authority. Therefore, the information requested falls outside the scope of Schedule 1, paragraph 9.

Right of appeal

24. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

25. 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.
26. 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
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