

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **8 September 2015**

Public Authority: **North Lincolnshire Council**

Address: **Civic Centre
Ashby Road
Scunthorpe
DN16 1AB**

Decision (including any steps ordered)

1. The complainant has requested a copy of a lease made between North Lincolnshire Council and Sir Reginald Sheffield. The Council has withheld the lease in reliance on Section 21 of the FOIA on the grounds that it can be obtained from the Land Registry. The Commissioner has decided that the Council is entitled to rely on Section 21.
2. The Commissioner has also decided that the Council has breached section 10 of the FOIA by failing to respond to the complainant's request within the twenty working day compliance period. He also finds that the Council breached section 16 by failing to offer the complainant appropriate advice and assistance in respect of a Schedule of Condition which the Council holds, and which is relevant to the requested lease.
3. The Commissioner requires North Lincolnshire Council to take the following steps to ensure compliance with the legislation.
 - The Council is required to offer the complainant appropriate advice and assistance in respect of the Schedule of Condition it holds, which is dated 22 December 1965.
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 5 September 2014, the complainant wrote to North Lincolnshire Council ("the Council") and requested information in the following terms:

"Please show the full terms of the lease between Sir Reginald Sheffield and North Lincolnshire Council, regarding the use of Normanby Hall."

6. On 9 October the Council wrote to the complainant advising him that the information he seeks is subject to an exemption. The Council informed the complainant that it would need time to consult with third parties.
7. The Council made its formal response to the complainant on 11 November 2014. The Council advised the complainant: "As this may prejudice commercial interest, under Section 43 of the Freedom of Information Act, North Lincolnshire Council are unable to provide this information."
8. On 19 November the Council confirmed to the complainant that it is relying on section 43(2) of the FOIA to withhold the information he seeks.
9. The complainant wrote to the Council again on 3 December to complain the time taken by the Council to respond to his request; the grounds which the Council gave for withholding the requested information; the failure of the Council to specify the precise subsection of the FOIA; and, the failure of the Council to respond to his email communications without the need for him to send reminder emails.
10. The complainant's email was accepted by the Council under its established complaints procedure and was given an appropriate reference. The complaint was responded to on 2 March 2015. The Commissioner understands that the Council's response served as its internal review for the purpose of the FOI Code of Practice.
11. In the Council's response the Council accepted that it had exceeded the 20 day compliance timescale required by the FOIA. The Council explained the necessity of this by informing the complainant of its need to refer to third parties. The Council also established that the requested lease is held at Hull Land Registry and therefore it determined that section 21 of the FOIA should have been applied.

Scope of the case

12. The complainant contacted the Commissioner on 1 May 2015 to complain about the way his request for information had been handled.
13. The complainant complained about several aspects of the Council's handling of his request: The complainant was particularly concerned about the possibility that the Council holds information relevant to his request, which was not provided by Hull Land Registry and therefore he asserted that the Council's application of section 21 of the FOIA cannot be relied on.
14. The basis of the complainant's assertion come from section 2(iii) of the lease he received from the Land Registry. This section states –

"(iii) and also will keep the buildings and each and every part thereof (including lifts) and all boundary walls and gates and all ornamental walls and other erections and all fixtures and fittings in or about the demised premises in good and substantial repair (regard being had to the present state and condition thereof according to a Schedule of Condition bearing the date of the twenty-fourth day of July One thousand nine hundred and sixty-four a copy of which signed on behalf of each of the parties hereto is retained by each party) and all..."
15. The complainant asserts that the Council holds the Schedule referred to above and this has not been provided to him.
16. The remaining relevant elements of the complainant's complaint concern:
 - The Council's initial reliance on section 43 and its failure to properly identify the correct subsection of this exemption in its refusal.
 - The time taken by the Council to respond to his request for information.
 - The Council's 'deliberate obfuscation' in dealing with the request.
17. The Commissioner has investigated the complainant's concerns. This notice constitutes the Commissioner's decision.

Reasons for decision

18. Under section 1 of the FOIA, a person making a request for information is entitled to be informed in writing whether the public authority holds the information he seeks. If the public authority holds the requested information, the requestor is entitled to have that information communicated to him.
19. Under section 10 of the FOIA, the public authority must comply with section 1 promptly and in any event not later than the twentieth working day following the receipt of the request.
20. Where a public authority seeks to rely on any of the exemptions provided by Part II of the FOIA, it must, within the twenty working days compliance period, provide the requestor with a notice under section 17 of the FOIA. Such a notice should state that the public authority is relying on one or more of the Act's exemptions; it should identify the exemption(s) it is relying on; and, it should state why the exemptions apply.
21. In this case, although the Council acknowledged receipt of the complainant's request within the compliance period, it did not inform the complainant that the information he seeks was being withheld in reliance on section 43 of the FOIA until 11 November 2014.
22. On the facts of the case, the Commissioner finds that the Council has breached section 10 of the FOIA.

Section 21 – Information accessible to the applicant by other means

23. The Council's email to the complainant of 11 November 2014, informed him that the information he seeks was being withheld in reliance on section 43 of the FOIA. The Council did not specify which part of section 43 it was relying on and consequently the complainant asked the Council to do this.
24. The Council provided the complainant with this clarification on 19 November, making clear that it was relying on section 43(2) – where disclosure would, or would likely, prejudice a commercial interest.
25. When the Council completed its internal review, the Council determined that section 43 could not be relied on.
26. Having established that the requested lease could be obtained from the Land Registry, the Council advised the complainant that the lease was being withheld in reliance on section 21 of the FOIA – where the information is available to the applicant by other means.

27. Section 21 states –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”²

28. The complainant subsequently obtained a copy of the lease from the Land Registry.

29. Part of the complainant’s complaint is that the Council is not entitled to rely on section 21 because the Council holds a schedule, which is referred to in the lease, which has not been provided to him.

The established facts of the case

30. The Commissioner has examined the lease which the complainant has requested. He notes that the lease contains two schedules which are appended to it and which clearly form a part of the lease.

31. Neither of the appended schedules is the ‘Schedule of Condition’ which is referred to in section 2(iii) of the lease.

32. The requested lease is dated 22 December 1965.

33. The Commissioner has also examined the Schedule of Condition which is held by the Council. This schedule is also dated 22 December 1965.

34. The Schedule of Condition of 22 December 1965 is not the schedule referred to by section 2(iii) of the lease: That schedule should be dated 24 July 1964.

35. The Council has assured the Commissioner that it has searched for a schedule dating from 24 July 1964 and that it has not been able to find this document.

36. The Commissioner has decided to accept the assurance given by the Council in respect of its searches. The Commissioner has decided that ‘on the balance of probabilities’ the schedule from July 1964 is not held.

37. The question now for the Commissioner is whether the Schedule of Condition of 22 December 1965 constitutes part of the lease: If it does, it is possible that the Council may not be able to rely on section 21 of the FOIA; if it doesn’t the Council will be entitled to rely on section 21.

38. The Council accepts that the lease does refer to a Schedule – a Schedule of Condition and that the one it holds relates to the lease which the complainant seeks.

39. Nevertheless, the Council asserts that the Schedule of Condition is a separate document and it points out that the complainant has not asked for it.
40. The Council's position is that the Schedule of Condition which it holds falls outside of the scope of the complainant's request and therefore the Council is correct to rely on section 21 of the FOIA in respect of the lease itself.
41. The Commissioner has considered the Council's arguments: He accepts that there are many instances where a document refers to another document, which does not form part of the document containing the reference. This argument is supported by reference being made in the lease to a Vesting Deed of 6 July 1927: The Vesting Deed is clearly not part of the lease which the complainant seeks, being an entirely separate document.
42. On the facts of the case, insofar as the Commissioner understands them, the Commissioner is prepared to accept that the Schedule of Condition from 1965 is not the one referenced by the lease.
43. The Commissioner agrees with the Council that the Schedule of Condition of 22 December 1965 does not form part of the lease and consequently it constitutes a separate document.
44. This conclusion, together with the fact that the complainant clearly demonstrated his ability to obtain a copy of the lease from the Land Registry, leads the Commissioner to determine that the Council is entitled to rely on section 21 of the FOIA in respect of that lease.

Section 16 – duty to provide advice and assistance

45. Section 16 requires the Council to provide advice and assistance to a requestor, where it is reasonable to do so.
46. In this case the Council should have advised the complainant that it holds a Schedule of Condition – albeit dated differently to the one referenced in the lease, which may be relevant to his initial request.
47. The Commissioner considers that the Council should have invited the complainant to make a further request for this schedule and then to have determined whether it could be disclosed to him.
48. By failing to offer this reasonable advice and assistance the Commissioner finds that the Council has contravened section 16 of the FOIA.

Other matters

49. The Commissioner notes that the complainant's complaint about "the Council's 'deliberate obfuscation' in dealing with the request".
50. The Commissioner has already decided that the Council has contravened the requirements of section 10 and 16.
51. The Commissioner considers it appropriate to draw the Council's attention to the Code of Practice issued by the Secretary of State under section 45 of the FOIA¹.
52. The Code of Practice requires the Council to have a procedure in place for dealing with complaints concerning requests for information. Any written reply from a requestor which expresses dissatisfaction with a request should be treated as a complaint.
53. In all cases, complaints should be acknowledged promptly and the complainant should be informed of the authority's target date for determining the complaint.
54. Where it is apparent that determination of the complaint will take longer than the target time, the Council should inform the requestor and explain the reason for the delay. The complainant should always be informed of the outcome of his or her complaint.
55. Authorities should set their own target times for dealing with complaints; these should be reasonable and subject to regular review. Each public authority should publish its target times for determining complaints and information as to how successful it is with meeting those targets.
56. In this case the complainant expressed his dissatisfaction with the Council's response in his email of 3 December 2014: it wasn't until 2 March 2015 that the Council made its formal response to the complainant's representations. The Commissioner finds this delay to be excessive and unacceptable.
57. The Commissioner acknowledges that the Council has an established procedure for dealing with complaints; nevertheless he must impress on the Council the need to meet all of its obligations under FOIA and the

¹ <https://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

Cope of Practice in making timely responses to requestors and complainants.

58. In the Commissioner's opinion it is not acceptable that a complainant finds it necessary to send reminders to a public authority so that he can obtain responses to his correspondence. That said, the Commissioner finds no evidence which confirms the Council acted to deliberately obfuscate in respect of the complainant's request.

Right of appeal

59. 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@hmcts.gsi.gov.uk

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

60. 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.
61. 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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