

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 December 2017

Public Authority: Selby District Council
Address: Civic Centre
Doncaster Road
Selby
North Yorkshire
YO8 9FT

Decision (including any steps ordered)

1. The complainant made a freedom of information request to Selby District Council for copies of an email containing representations relating to a planning application heard at the Council's Planning Committee on 7 September 2016. In response the Council said that the requested information was not held.
2. The Commissioner's decision is that on the balance of probabilities the requested information is not held and the Council dealt with the complainant's request in accordance with FOIA. The Commissioner requires no steps to be taken.

Request and response

3. On 28 November 2016 the complainant made a request for information to the Council which asked for the following:

"A copy of the email sent from [a named councillor] to all Planning Committee Members regarding an application to be heard at the Planning Committee Meeting of 7th September 2016.

It was declared as a Disclosure of Interest by all committee members."

4. The Council responded to the request on 12 December 2016 when it explained that the information was not held and that any email of the

type referred to in the request would be held by the Councillor themselves and not the Council.

5. On 10 January 2017 the complainant contacted the Council again to ask that it reinvestigate her request because she said that the email had been mentioned in the Planning Meeting Minutes of 7th September 2016 as a Disclosure of Interest by all Planning Committee members. She referred to the Council's own "Code of Practice for Councillors and Officers Dealing with Planning Matters" which makes it clear that copies of any such lobbying material should be provided to Planning Officers.
6. There then followed some further correspondence where the complainant clarified what information she was seeking.
7. On 14 March 2017 the complainant contacted the Council's Solicitor and asked her to reinvestigate the request.
8. On 12 April 2017 the Council's Solicitor wrote to the complainant with what was effectively an internal review of its handling of the request. The internal review upheld its initial response to the request and confirmed that the information was not held.

Scope of the case

9. On 3 May 2017 the complainant contacted the Commissioner to complain about the way her request for information had been handled.
10. The Commissioner considers that the scope of her investigation is to decide whether or not the Council holds any information falling within the scope of the complainant's request.

Reasons for decision

Section 1 – Right to information

11. The complainant is concerned that the Council have been unable to find a copy of the email she requested. She explained that the existence of the email was referred to at the planning committee meeting which she attended. The Council's minutes of the meeting also refer to Councillors having received representations about a particular planning application as follows:

"All Councillors declared that they had received representations in relation to application 2015/0683/FUL Low Farm, Low Farm Road, Bolton Percy."

12. However, the complainant believes that this was recorded incorrectly and that the representations were in fact made against her own, entirely different, planning application. This alleged mistake has, she argues, allowed the Council to make what she refers to as a circular argument whereby it is able to say that it does not hold any representations about the Low Farm application recorded in the minutes and neither does it hold any email referring to her own application. In light of this the Complainant has said that she is interested in any email sent by the named councillor at the Planning Committee Meeting of 7 September 2016 regarding any planning application. Whilst she suspects that the email referred to her own planning application her request was phrased in such a way as to capture any email sent by the named councillor regardless of which planning application it may concern. In investigating the complaint the Commissioner explained to the Council that she would expect it to take account of this in any search for relevant information.
13. In scenarios 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 Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
14. Councillors perform a variety of roles. Information held in respect of their role as an elected member (as opposed to a member of a Committee or the Council's Cabinet) is not subject to FOIA. However, if the email was in fact received by members of the planning committee then it would potentially be caught by the FOIA. This is because the email would then be held for the purposes of these councillors' roles as members of the planning committee. It would then be effectively held on behalf of the Council.
15. Where there is evidence to suggest that requested information may be held in a public authority's employee's, or in this case councillor's, private email account the Commissioner would expect a public authority to ask the individual to search their own account.

16. In this case, the Commissioner asked the Council a number of questions to examine what steps it took to search for the requested information. The Commissioner also asked the Council to confirm whether individual councillors were asked to search their email accounts and whether these were Council or private accounts.
17. The Council confirmed that emails sent to a councillor's selby.gov email address are auto forwarded to the councillor's personal email address accessed on a personal (councillor owned) computer/device. Further, no copy is kept of the email that is auto forwarded as it is automatically deleted and is not backed up. Representations relevant to an application should be sent to the planning officer.
18. The Council provided the Commissioner with a detailed account of the steps it took to search for the information. This included searching all Council emails for relevant information. The Council used the names of the properties and the planning references for both the application referred to in the minutes of the planning committee and the complainant's planning application as search terms. The search also used the named councillor as a search term. No relevant emails were found – the information was not held on its own systems.
19. The Council confirmed that Planning Committee members and the planning officer were also asked on several occasions whether they held the information the complainant was seeking. They confirmed that no emails were held.
20. The Council's solicitor also contacted the planning committee members to investigate whether the requested email existed. The Solicitor was also present at the planning committee meeting and so was able to draw on her own recollections. She confirmed that she had found "no evidence that [the named councillor] sent an email to members of the planning committee in advance of the meeting as [the complainant] allege".
21. The Council made clear that it had asked the Chair of the planning committee for all emails from the named councillor to the Planning Committee. The Chair of the Planning Committee has confirmed that no email was received in his private account from the named councillor relating to the complainant's planning application or any matter being considered on 7 September 2017.
22. The Commissioner is satisfied that the Council has taken all reasonable steps to search for the requested information and no email was recovered. The Commissioner is also mindful that whilst the complainant referred to the minutes of the planning meeting as evidence that

representations had been made, the minutes do not mention any having been received from the named councillor, regardless of what planning application they may have related to. The complainant's request specifically asked for copies of representations sent by the named councillor via email. Therefore the Commissioner would have to accept that without any clear evidence to the contrary, and on the balance of probabilities, the requested information is not held.

Right of appeal

23. 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

24. 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.
25. 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

**Paul Warbrick
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**