

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 October 2018

Public Authority: Sheffield City Council
Address: Town Hall
Pinstone Street
Sheffield
S1 2HH

Decision (including any steps ordered)

1. The complainant has requested information about how a contract provision governing the management of trees by Sheffield City Council ('the Council') might operate in the future. The Council said that it did not hold any information from which the request could be answered.
2. The Commissioner's decision is that, on the balance of probabilities, the Council does not hold the requested information.
3. The Commissioner requires no steps.

Request and response

4. On 20 March 2018, the complainant wrote to the Council and requested information in the following terms:

"In the Yorkshire Post article at the web link below it says that a financial adjustment will be made if the PFI contract Schedule 2 measure of 17,500 felled street trees isn't reached by the end of the 25 year contract.

Can you clarify please whether, if these circumstances occurred whether:

a) The financial adjustment will be made in Ameys favour (ie a transfer of money from Sheffield Council to Amey); or

b) The financial adjustment will be made in Sheffield Council's favour (ie a transfer of money from Amey to Sheffield Council)

<https://www.yorkshirepost.co.uk/news/sheffield-council-confirms-contract-containing-17-500-tree-felling-figure-won-t-be-changed-1-9072762>".

5. The Council responded on 10 April 2018. It stated that it did not hold any recorded information from which the request could be answered.
6. Following an internal review, the Council wrote to the complainant on 11 May 2018. It maintained its position that it did not hold any recorded information from which the request could be answered. It referred the complainant to a previous statement it had released on the matter:

"Any suggestion that 17,500 trees is a target or a requirement is an incorrect interpretation of the contract, and indeed the High Court was clear that the 'objective of the council has been to retain trees where possible.'

The contract wisely gives the ratepayer 'insurance cover' to ensure we aren't vulnerable to long term risks as the health and impact of our street trees continue to change over time. If for any reason, such as major disease outbreak, the council has to replace a number of trees it can do so without any extra cost to the Sheffield ratepayer."

7. It further clarified in response to the request:

"As a result Sheffield City Council does not hold information relevant to your request as no such adjustments would be required under the contract if the 17,500 figure is not the final outcome of the contract term. I believe that, as noted on a number of occasions, the Council's hope is to retain as many trees as possible but the stock does need appropriate review and management to ensure that issues are not caused by trees which meet the 6 D's (Dangerous, Dead, Diseased, Dying, Damaging or Discriminatory)."

Scope of the case

8. The complainant contacted the Commissioner on 11 May 2018 to complain about the way his request for information had been handled.
9. The analysis below considers whether, on the balance of probabilities, the Council holds the information described in the request.

Reasons for decision

Section 1 – general right of access

10. Section 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.
11. In this case, the complainant clearly believes that the Council holds information from which it can answer the request. The Council's position is that it does not.
12. 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.
13. 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

14. By way of background, the complainant explained that it was his belief that the Council had entered into a street management contract which made a commitment to the felling of 17,500 trees, with penalty charges if that figure was not met.
15. The complainant regarded the Council's statement that it did not hold any information from which his request could be answered as implausible, in view of a quote attributed to it in the Yorkshire Post article cited in his request. According to that article:

"The authority said today that if fewer than the 17,500 trees listed in the contract with private firm Amey are removed "a financial adjustment will be made" at the end of the term. The council added it

cannot yet say how the "financial adjustment" would work as Amey are not paid to replace individual trees".

16. From this, the complainant said that, contrary to what the Council told him in the internal review, it appeared that a financial adjustment *would* be made if fewer than 17,500 trees were felled, and that it was therefore implausible that the Council held no information about it.

The Council's position

17. The request relates to the interpretation of Performance Requirement 6.38 of Service Standard 6 to Schedule 2 of the 'Streets Ahead' contract, a redacted version of which can be found on the Council's website¹.

18. The Performance Requirement states:

"The Service Provider shall replace Highway Trees in accordance with the Annual Tree Management Programme at a rate of not less than 200 per year so that 17,500 Highway Trees are replaced by the end of the Term, such replacement to be in accordance with the Highway Tree Replacement Policy, unless Authority Approval has been obtained for deviation from this policy."

19. The provision allows for an "adjustment" to be made to the Performance Requirement. The Council has redacted the details of the adjustment from the website version, although the Commissioner has had sight of the unredacted version.
20. The Council said that the Performance Requirement is clear and that the Council does not hold any other information which aids its interpretation. It said that when it made the contract documents available on its website, it also issued the press statement quoted in paragraph 7, above, to clarify that the 17,500 trees quoted in the provision was not a target figure for the number of trees to be felled.
21. With regard to the discrepancy between what the Yorkshire Post article said (that an adjustment will be made if fewer than 17,500 trees are felled) and what the complainant was told in the internal review (that no adjustment would be required) the Council said that the internal

¹ https://www.sheffield.gov.uk/content/dam/sheffield/docs/roads-and-pavements/streetsahead/Schedule%20,%20Service%20Standards_Redacted_2018.pdf

reviewer had interpreted the press statement incorrectly and it apologised that the complainant had been misinformed in this way.

22. The Council believed that the request was predicated on a misinterpretation of the Performance Requirement, that the figure of 17,500 represents a target for felling. It explained that the figure actually operates as an upper limit, within which the Council would not incur additional charges. It acknowledged that there had been local concern about the significance of the cited figure of 17,500 trees. However, it said that the Council has consistently maintained that this figure merely acts as insurance against the consequences of managing future harm or specific disease to the city's tree stock. It was adamant that it is not a commitment to fell 17,500 trees.
23. The Council argued that the request asked it to provide an interpretation of the contract provision as it stands, in relation to a hypothetical situation, rather than requesting specific, recorded information held by the Council. As such, it said that it held no information from which it could answer the request. It pointed out that the FOIA applies to information *held* by public authorities and they do not have to create new information in order to respond to requests. It said that the FOIA did not oblige it to offer an opinion, if one was not already recorded and held, on something which might or might not occur.
24. It said that on the basis of this, it was satisfied that the Council does not hold any recorded information to enable it to provide a response to the request.

The Commissioner's conclusion

25. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in paragraphs 13 and 14, above, the Commissioner is required to make a finding on the balance of probabilities. In doing so in this case, she considers that it is particularly important to examine what it is that is actually being requested.
26. The Commissioner considers that the request may accurately be summarised as follows:
 - *If fewer than 17,500 trees have been felled by the end of the contract, the financial adjustment will operate in whose favour? The contractor or the Council?*
27. The Commissioner notes that a key function of the contract is to set out what is expected of each party to it, and the protections afforded to them. To that end, she notes that it contains details of an adjustment

that may be made in respect of the Performance Requirement at 6.38 of the Service Standard. However, the request does not ask for details of the adjustment itself, but rather whether it would financially favour the contractor or the Council. Having viewed the unredacted adjustment information, the Commissioner is satisfied that it does not answer that question, and that it therefore falls outside of the scope of the request.

28. The Council says that this is a conditional request, based on a situation that has not yet happened (and which might not). The Commissioner agrees with this assessment. The contract is set to run for 25 years, meaning it has a projected end date of 2037. The request asks to know how matters which might occur some considerable time in the future, would be dealt with under the contract, including whether and how contract provisions may be enforced. The Commissioner notes that the Yorkshire Post article referred to by the complainant itself says, "*The council added it cannot yet say how the "financial adjustment" would work...*".
29. In view of the Council's assurances to her that the figure of 17,500 trees is not a target, the Commissioner considers it highly unlikely that the Council would hold information from which the request could be answered and she accepts that the Council cannot be required by the FOIA to speculate or give an opinion as to how the contract might work in certain circumstances, in order to answer the request.
30. In the circumstances of the case, the Commissioner is therefore satisfied that, on the balance of probabilities, the Council does not hold information from which the request can be answered.

Right of appeal

31. 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

32. 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.
33. 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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