

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 April 2019

Public Authority: Newcastle City Council
Address: Civic Centre
Newcastle upon Tyne
NE1 8QH

Decision (including any steps ordered)

1. The complainant requested a report into a data breach from Newcastle City Council ("the Council"). The Council stated that it did not hold any information falling within the scope of the request.
2. The Commissioner's decision is that the Council failed to carry out an objective reading of the complainant's request and has therefore not complied with its duty under section 1(1) of the FOIA.
3. The Commissioner requires the Council to take the following step to ensure compliance with the legislation.
 - Issue a response to the complainant which complies with section 1(1) of the FOIA.
4. The Council 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.

Background to the request

5. On 15 June 2017, an employee in the Council's adoption team accidentally attached an internal spreadsheet to emails inviting adoptive parents to the Council's annual adoption summer party. As was reported in the Council's press release at the time, the attachment, which was sent to 77 people, contained personal details relating to 2743 individuals. This data breach ("the data breach") was subsequently reported to the ICO.

Request and response

6. On 26 April 2018, the complainant wrote to the Council and requested information in the following terms:

"I would like a copy of the report written by the Council into the data breach last year at the adoption services".
7. On 11 June 2018, the complainant complained to the Commissioner that he had not received a response to his request.
8. On 12 July 2018, the Commissioner issued decision notice reference FS50754272¹. This recorded the Council's breach of section 10 of the FOIA in failing to respond to the request, and the Council was ordered to respond.
9. The Council then issued a response to the complainant on 18 July 2018. It refused the request and cited section 42(1) of the FOIA – legal professional privilege.
10. Later that day, the complainant requested an internal review, reiterating that he had requested a copy of "a report".
11. After some delay, the Council provided the outcome of its internal review on 7 December 2018. It stated that the individual who had issued the response of 18 July 2018 had since left the Council. The Council commented:

"What [the individual who wrote the original response] appears to be referring to is the initial internal Audit/ICT security investigation that immediately followed the breach, which was previously referred to in the breach reporting procedures between the authority and the ICO. The ICO requested a copy of any audit report or security investigation report and any subsequent review... whilst it is the case that there was work undertaken as part of an investigation, it did not form part of a formal report into the matter. We believe that [named individual] was simply referring to the investigation, the work undertaken in respect of which was subject to legal professional privilege".

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259461/fs50754272.pdf>

12. The Council stated, further: *"we should state that there is no report written by the council into the data breach... we are therefore unable to provide you with any report"*.
13. The Council apologised that its position had not previously been made clear.

Scope of the case

14. The complainant contacted the Commissioner on 21 August 2018 to complain about the way his request for information had been handled. At this stage, he was still awaiting the outcome of the Council's internal review.
15. Following the outcome of the internal review, the complainant confirmed that he wished the Commissioner to investigate the Council's handling of his request, commenting that he found its position *"puzzling"*. He commented that *"I know [the] Council were writing a report into the circumstances of the breach and the lessons learned"* and confirmed that he wanted to see the information which had apparently been withheld in the Council's response of 18 July 2018.
16. The Commissioner contacted the Council explaining that it appeared to be necessary, in this case, for it to obtain further clarification from the complainant of what information he had requested.
17. On 23 January 2019, the complainant made an information request to the ICO for *"the report sent to the ICO"*. At the date of this notice, this information request is being addressed by the ICO; however, it is relevant to the considerations in this notice that the complainant expressed an interest in information held by the ICO relating to the data breach at the Council.
18. Following this, the Council liaised with the complainant. It provided him with a letter that had been sent out in 2017 by the Council to families affected by the data breach.
19. On 10 March 2019, the complainant contacted the Commissioner to explain that he remained dissatisfied. He stated that he had not been given a reason why the Council *"will not release the report from Newcastle to the ICO"*.
20. On 11 March 2019, the Commissioner wrote to the Council, setting out the complainant's view of what he considered would be held, and giving it a further opportunity to consider whether it held information falling within the scope of the complainant's request of 26 April 2018. If

information was found to be held, she asked it to consider whether the information could be disclosed to the complainant.

21. On 29 March 2019, the Council wrote to the Commissioner setting out its position regarding the request. It maintained that no information within the scope of the request was held.
22. This notice covers whether the Council complied with its duty under section 1(1) of the FOIA and carried out an objective reading of the request.

Reasons for decision

Section 1 – what information is held?

23. Section 1 of the FOIA states that states that:

"(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

24. In complying with section 1(1) of the FOIA, a public authority is expected to carry out an objective reading of a request in order to respond.
25. In cases where there is more than one objective reading of a request, a duty arises under section 16 of the FOIA for the public authority to return to the requester for clarification.
26. In this case, the Commissioner has considered whether the Council carried out an objective reading of the request, and what the scope of the complainant's request was when read objectively.

The complainant's position

27. The complainant states that he is aware that the data breach was reported by the Council to the ICO. He therefore considered that the Council should be able to provide him with a copy of its report.

The Council's position

28. The Council, in returning to the Commissioner on 29 March 2019, stated that *"all recorded information related to the data breach is stored in a single folder on our ICT network."*
29. It stated further: *"any information related to the data breach is stored on the Council's ICT network rather than stored locally on personal computers or laptops. All documents related to the breach are held in a central repository and there was nothing there that could be seen as a 'report'."*
30. It stated: *"we have on several occasions told [complainant] in response to his request that a report does not exist."*

The Commissioner's decision

31. The Commissioner considers that this case has turned on making an objective reading of the complainant's request.
32. She notes that the complainant was, understandably, left "puzzled" by the Council's change of position following its initial response to his request. Whereas the Council initially stated that it wished to withhold the information he had requested under section 42(1) of the FOIA, it subsequently informed him that it did not hold the information.
33. Due to the change in the Council's position as to whether it held any information within the scope of the request, the Commissioner encouraged the parties to liaise directly, in order to clarify what it was that the complainant (a) considered would be held, and (b) wished to receive; however, this has not resolved matters to the complainant's satisfaction.
34. To comply with its duty under section 1(1) of the FOIA, a public authority must carry out an objective reading of a request. The Commissioner has therefore returned, herself, to the wording of the request.
35. The request was for *"the report written by the Council into the data breach"*.
36. It has, evidently, been clear to both the Council and the complainant: (a) that he was asking for information that had been generated *by* the Council (*"written by the Council"*) and (b) that the subject matter of the information would be the data breach (*"into the data breach"*).
37. However, there has evidently been disagreement over the complainant's use of the word *"report"*.

38. The Commissioner notes that the Council apparently clarified, and, arguably, narrowed, its interpretation of the word "report" when it provided its internal review response.
39. However the Commissioner notes that the Council, nevertheless, itself referred to "breach reporting procedures" in describing its communications with the ICO, in that response.
40. The complainant has been consistent in his use of the word "report" when communicating about his request. He has explained to the Commissioner that he is aware that the breach was reported to the ICO.
41. The Commissioner is aware that the Council submitted a "data breach notification form" to her.
42. In the Commissioner's view, by asking for a "report", the complainant considered that the Council would hold information which, effectively, summarised how the data breach had occurred, and what measures had been put in place to safeguard against such a breach occurring in future.
43. The Commissioner's view is that an objective reading of the wording of the request is that it did not require the Council to limit its searches only to documents which were actually titled "report", or stored under the word "report", as it appears may have been the case.
44. She considers that the Council has not carried out an objective reading of the request. It appears to have disregarded potentially relevant information on the basis that the word "report" is not explicitly used, rather than considering more widely whether any findings about the data breach could be disclosed to the complainant under the FOIA.
45. The Commissioner considers that an objective reading of the request required this broader interpretation. It is without doubt that the Council "reported" the breach to the ICO, using the appropriate form and responding to the ICO's investigative letters. Indeed, the Council itself described these as "reporting" procedures.
46. In the Commissioner's view, copies of the data breach notification form is very likely to be held by the Council in the folder it has referred to previously. The view of the Commissioner is that this information is within the scope of an objective reading of the complainant's information request.
47. She has therefore determined that the Council has not complied with its duty under section 1(1) of the FOIA and requires the Council to make a fresh response. In doing so, the Council should ensure that it identifies any relevant information and considers it for disclosure.

Right of appeal

48. 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

49. 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.
50. 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

Ben Tomes
Team Manager
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Wycliffe House
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