

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 July 2020

Public Authority: Birmingham City Council
Address: Council House
Victoria Square
Birmingham
B1 1BB

Decision (including any steps ordered)

1. The complainant has requested information about a meeting held between Birmingham City Council and West Midlands Police about the 'Trojan Horse Letter'. The Council responded, stating no information was held, but later changed its position and applied section 12 (costs limit) to the request.
2. The Commissioner's decision is that Birmingham City has breached section 16 of the FOIA by failing to engage with the complainant to clarify the nature and scope of the request. Until this is done, she is unable to consider the Council's arguments for the application of section 12.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Engage with the complainant to clarify the request;
 - If necessary, provide advice and assistance to bring the request within the costs limit, taking note of the Commissioner's comments on Boolean searches.
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 3 April 2018 the complainant wrote to Birmingham City Council and requested information in the following terms:

"On December 16th, 2013, there was a meeting chaired by Birmingham City Council, which included the West Midlands Police, to discuss the anonymous 'Trojan Horse' letter, which had been received by the council on November 27th, 2013, outlining an Islamist plot to takeover schools within Birmingham.

The conclusion of that meeting, as quoted in The Clarke Report, Annex 3: Timeline, Page 113, was that there was a 'credibility gap' with the letter.

I would like to request a full transcript of that meeting, as well as any exhibits or materials that were considered. If there are audio or video recordings of the meeting, I would like to request those. If no full transcript exists, I would like the agenda, meeting minutes, notes produced during the meeting, and any other materials from the meeting."

6. The Council responded on 27 April 2018, stating that no information was held. The complainant requested an internal review of the response on 12 June 2018, asking the Council to confirm whether the meeting actually took place. If it did, but no records were kept, under section 16 of the FOIA (advice and assistance) the complainant requested help to identify where the comment in the Clarke report about the 'credibility gap' came from.
7. Following a number of chaser emails from him, the Council eventually responded on 20 November 2018. It said that further searches had been undertaken, but as no information had been found it could neither confirm if the meeting had taken place, nor advise where the 'credibility gap' quote had been obtained by Peter Clarke, author of the Clarke Report.

Scope of the case

8. The complainant contacted the Commissioner on 9 July 2019 to complain about the way his request for information had been handled. He provided the Commissioner with another document that he had already received from the Council, entitled 'Briefing Note', where the meeting with the police at the centre of the request was referenced, along with the 'credibility gap' quotation. Given this, along with the high

profile nature of the Trojan Horse affair and the reference in the Clarke Report to the meeting, he found it hard to believe the Council's assertion that it did not hold any information.

9. For context, the Trojan Horse letter outlined a strategic plot by Muslims to take over schools in Birmingham and run them according to strict Islamic principles. It was sent to Birmingham City Council at the end of 2013, who contacted West Midlands Police. The letter was later believed to be fake, but it resulted in inspections and investigation by the Council, the Department for Education (DfE) and Ofsted. The Trojan Horse affair attracted huge media attention both locally and nationally.
10. The Commissioner contacted the Council and asked a series of questions to ascertain the nature and type of searches undertaken by the Council to locate any information falling within the scope of the request, and asking it to remedy any insufficient searches. She specifically asked why the Council's searches to date had not resulted in the 'Briefing Note' where specific reference to the meeting was made.
11. The Council provided responses to the Commissioner's search questions but several of these failed to provide the level of detail requested, or properly address the question being asked (for example, exactly what specific search terms were used). It also failed to reference the 'Briefing Note' that the Commissioner had flagged in her investigation letter.
12. She therefore sent a follow-up letter to the Council, highlighting the deficiencies in its responses and the absence of the 'Briefing Note'. She again asked the Council to fully address her search questions.
13. The Council responded to the follow-up with further detail of the searches undertaken, but the Commissioner remained concerned that these were not sufficient, particularly as the search terms used appeared inadequate – for example no Boolean search was undertaken using 'West Midlands Police' *and* 'Trojan Horse'.
14. Given that the Council had taken five months to provide its review response to the complainant, and that it had been provided with two opportunities by the Commissioner to check the adequacy of its previous searches and undertake new ones if necessary, but still failed to do so, the Commissioner was compelled to issue the Council with an Information Notice (IN) to force compliance.
15. The IN required the Council to provide the Commissioner with:
 - Evidence of a new search for information, detailing a list of all the systems, folders, files and documents searched and the search terms used.

- All information found falling within the scope of the request as a result of a new search.
 - An explanation of why the Briefing Note referred to was not been found in the Council's previous searches.
16. The Council responded to the IN, providing details of a new search, which revealed two documents. However, it did not consider these to be in scope of the request and did not provide them to the Commissioner. Based on the searches undertaken in response to the IN, the Council revised its position from maintaining that no information was held, to the application of section 12 of the FOIA – costs of compliance exceeds the appropriate limit.
17. Whilst the Council considered that the two documents found as a result of the IN searches did not fall within the scope of the request, it did provide information about their nature. Based on this information the Commissioner considered that they may well fall within the scope of the request, and the most expedient way for the Commissioner to secure them was to issue a second IN to the Council for the documents.
18. The Council complied with the IN and supplied the two documents. The Commissioner considered them to fall within the scope of the request, and therefore discussed with the external solicitors who were acting on behalf of the Council what would be deemed a reasonable interpretation of the request. Had there been any doubt on behalf of the Council about the scope of the request and the information that the complaint was seeking, it is obliged under section 16 to provide advice and assistance to the complainant. It could have done this either when responding to the request, or during the Commissioner's investigation. It failed to do either.
19. This decision notice therefore considers whether the Council:
- has breached section 16 by failing to provide advice and assistance; and
 - is entitled to rely on section 12 to refuse the request on the basis that the cost of compliance exceeds the appropriate limit.

Reasons for decision

Section 16 – duty to provide advice and assistance

20. Section 16 of FOIA states that

'(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.'

21. Generally, the section 45 code¹ is about good practice by public authorities in handling FOIA requests, rather than obligations. However, where a public authority has satisfied the provisions of the code it will not be in breach of section 16.
22. The Commissioner recommends that a public authority should treat the code as a *minimum* standard and go beyond its provisions as a matter of good practice.
23. Paragraphs 2.6 to 2.9 of the code deal with 'clarifying the request' and relate specifically to when a public authority needs more information to identify and locate the information a requester is looking for.
24. A public authority may ask for more detail if needed and, if necessary, should assist applicants in clarifying the information requested. If a public authority can objectively read an information request in more than one way, it may need further information in order to identify the information requested. Section 16 requires a public authority to assist the applicant to clarify the request under these circumstances.
25. The Council has provided representation to the Commissioner regarding its interpretation of the request. This has emerged as a result of trying to ascertain why the 'Briefing Paper', which was produced by the Council in February 2014 makes reference to the meeting between the Council and West Midlands Police. Whilst the Commissioner is not in agreement with the Council's interpretation of the request, it is not her role to second-guess the information sought by the complainant.
26. In this case, after complying with the searches required as part of the Commissioner's IN, the Council has applied section 12 to the request. It has provided the Commissioner with evidence that the searches of

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

various email accounts and systems exceeds the 18 hours threshold under section 12, particularly as it involves several archived accounts. However, the Commissioner is unable to determine the validity of these as the Council has failed to engage with the complainant to clarify and agree the scope of the request in the first instance. Nonetheless, she is concerned that the Council does not appear to have undertaken Boolean searches i.e. it has searched for 'Trojan Horse', OR 'West Midlands Police'. Given the huge significance of the Trojan Horse affair in the Council, the term 'Trojan Horse' would return a large volume of information that does not relate to the meeting. Had it searched for 'Trojan Horse' AND 'West Midlands Police', this would have only returned information containing both terms, and reduced the material significantly.

27. Where a public authority deems that complying with the request would exceed the costs limit, paragraph 2.10 of the Section 45 code states that it 'should provide applicants with advice and assistance to help them reframe or refocus their request with a view to bringing it within the costs limit.'
28. The Commissioner therefore finds that the Council has breached section 16 of the FOIA by failing to engage with the complainant to clarify the nature of the request in the first instance, and then if necessary to discuss if it can be brought within the costs. It has not followed, nor shown any awareness of, the section 45 code. Given that interpretation of the request is fundamental to the nature of the searches required by the Council to locate information falling within scope, the Commissioner is not able to make a finding on its application of section 12. She requires that the Council engage with the complainant to clarify the nature of the request and issue a fresh response, providing any necessary advice and assistance in line with the section 45 code. The Council should also take note of the Commissioner's comments regarding Boolean searches.

Other matters

29. This decision notice draws attention to the Council's failure to undertake a review of the request for five months without reason, and the general inadequacy of thorough and appropriate searches in response to the request and the Commissioner's investigation letters. The Commissioner reminds the Council of its obligations under the FOIA, and given its poor compliance record, urges it to pay close attention to the Commissioner's own guidance, easily accessible on her website, as well as the section 45 (Good Practice) and section 46 (Records Management) Codes of Practice.

Right of appeal

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

31. 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.
32. 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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