

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 May 2020

Public Authority: Sunderland City Council
Address: Civic Centre
Burdon Road
Sunderland
Tyne and Wear
SR2 7DN

Decision (including any steps ordered)

1. The complainant has requested information about a government-led national drugs strategy from Sunderland City Council ("SCC").
2. The Commissioner's decision is that, based on the civil standard of the balance of probabilities, SCC does not hold the requested information. No steps are required.

Background

3. SCC has provided the Commissioner with the following background information about the context of the request and its dealings with the complainant:

"... it would appear that "Better, Brighter Futures" may have been the "brand name" of a government-led national drugs strategy, directed at problematic drug use/substance use in adults. In pursuance of that strategy, the APPS [Approved Preferred Provider Scheme] was apparently a scheme in this region that sought to put together a standing list of service providers meeting the relevant pre-contract qualification criteria for commissioning purposes. It seems that the APPS would enable tendering processes to be more easily undertaken, without the lengthy process of verification of tenderers that would otherwise be required on each occasion.

The strategy for tackling problematic drug/substance use in Sunderland came within the remit of the Safer Sunderland Partnership, with the key partners in this specific instance being Sunderland City Council and what was, at the time, Sunderland Teaching Primary Care Trust – an NHS body. The role of the Council within the Partnership was to determine what services were required in order to tackle the drug/substance abuse problem within the area. The role of the Primary Care Trust ("PCT") was then to identify service providers and commission the necessary services.

I am told that, in order to facilitate joint working, a team of individuals employed/contracted by the PCT was physically located at Sunderland Civic Centre, in an office immediately adjacent to the Council's Community Safety Team. The Complainant, [name redacted], was part of the PCT team and it is the recollection of the staff to whom I have spoken in connection with this matter that the Complainant was, in fact, engaged by the PCT as a consultant rather than an employee. All are clear that the Complainant was never employed directly by the Council, notwithstanding his occupation of an office within the Civic Centre".

Request and response

4. On 9 July 2019, the complainant wrote to SCC and requested information in the following terms:

"I am writing to ask that a data subject FOI request be made in my name. The period will be from Nov 2005 to date.

This is because the EC [European Commission] DG GROW [Directorate-General for Internal Market, Industry, Entrepreneurship and Small and Medium-sized Enterprises] in Feb 2018 have said that "all of them [public authorities] [sic] have dismissed your grievances".

5. On 9 July 2019, SCC sought clarification as to the capacity in which the complainant had been involved with it. On 13 July 2019, the complainant responded, advising:

"Between November 2005 and June 2007 I worked as part of the Safer Communities Team, employed by both the Council and PCT to handle a bespoke public procurement exercise known and advertised as Better, Brighter Futures or Approved Preferred Provider Scheme. This work then continued one year later, at a sub-regional level, as part of the an [sic] annual review of contract decisions for the NHS SoTW [South of Tyne and Wear]. This was

from May 2008 - February 2009 and the contacting authority was Gateshead PCT.

The context for my inquiry [sic] is that work done in my name has not been reported correctly. This means that reports submitted to the Health Scrutiny Board in Summer/Autumn of 2007 did not represent the fact. Efforts made to (i) clarify and (ii) remedy this error have been thwarted and handled in a way that is outside any ordinary contractual obligations that would apply to any Local authority or the NHS.

In Decision [reference redacted] the EU Ombudsman decided that their Office could not open a Substantive Inquiry into the matters raised. This is because DG GROW had relied on information given to them by UK authorities and it was this detail that rendered the complaint outside their mandate to investigate”.

6. On 15 July 2019, SCC responded and advised:

“It is apparent that you require information about yourself and about the work you have done.

The information you require about yourself will be dealt with under Subject Access Requests rules while the information about the work you have done (which won't be personal information) will be dealt with under Freedom of Information rules.

You will receive a reply in due course for both lots of information”.

7. On 16 July 2019, the complainant added: *“During my work with the Safer Sunderland Team I had 2 email accounts one with the Council and another with the PCT”.*

8. On 17 July 2019, SCC wrote advising:

“I have received confirmation from HR that they do not have any records of your employment at all.

In terms of the other information could you please clarify, provide more specific information as to what you actually require and we will check our records”.

9. On 23 July 2019, the complainant responded providing further details of his employment and the work he undertook. He explained:

“My inquiry is not about my employment or employment status, although I can see why these are important, but rather how the findings of the procurement work that I had done, (Better Brighter

Futures) could have been so radically misreported to the Health and Scrutiny Board in 2007.

These matters were brought to the attention of Internal Audit and NHS Counterfraud. In 2010 NHS Counterfraud stated that there was not sufficient evidence for a criminal prosecution but acknowledged short comings. In 2018, following an EU Ombudsman complaint, I learnt from the DG GROW (an EU institutuion [sic]) that both the Council and NHS had dismissed my concerns.

It is this that I am looking into”.

10. SCC responded on 26 July 2019 and advised the complainant that it had no record of him having worked for the Council, albeit it understood that he had been employed by the PCT. It denied holding the requested information.
11. On 3 August 2019, the complainant requested an internal review.
12. SCC provided an internal review on 29 August 2019, in which it revised its position, advising that a small amount of information had been found - which it disclosed. It maintained that no information was held in respect of him either having been employed by the Council or which would show if (and if so, how) the findings of his work had been 'misreported'.
13. During the Commissioner's investigation, SCC located further information around the subject matter which it provided to the Commissioner for her to consider. It advised that it did not think that any of it fell within the scope of this request but added that some of it might be the complainant's personal information. It advised that it would deal with any 'personal data' under the remit of the Data Protection Act 2018 (DPA), and provide the complainant with any personal data which it considered he was entitled to receive (this would fall outside the remit of the FOIA).
14. The Commissioner can confirm that she has considered the additional information referred to above. She agrees with SCC that it falls outside the scope of the request - it includes items such as minutes, meeting schedules, accreditation and other matters regarding the implementation of the scheme. However, there are no emails and nothing concerns the reporting of matters to the Health and Scrutiny Board.
15. SCC has also confirmed that the complainant was employed by / contracted to the PCT, rather than by SCC, which it was able to establish by way of: "*recollections of staff with knowledge of the arrangements at that time, coupled with an absence of any record of employment within Human Resources and Organisational Development*".

16. SCC also confirmed that the PCT is not, and was not at any time, part of SCC.

Scope of the case

17. The complainant contacted the Commissioner on 12 September 2019, to complain about the way his request for information had been handled. The Commissioner required further information from him which was provided on 21 October 2019. He also later provided the names of some members of staff whose email accounts he thought would be likely to provide some of the requested information; the Commissioner forwarded these to SCC for it to include in its searches.
18. The Commissioner considers the request to be for any information held which evidences how work the complainant did on the subject of 'Better Brighter Futures' was subsequently reported to the Health and Scrutiny Board in 2007. She agreed with the complainant that she would consider whether, on the civil standard of the balance of probabilities, SCC holds any related information.
19. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA. The FOIA is concerned with transparency of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. The FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

Reasons for decision

Section 1 – general right of access

20. Section 1 of the FOIA states that anyone making a request for information to a public authority is entitled to be informed whether the public authority holds the information and, if so, to have that information communicated to them.
21. In this case, the complainant suspects that SCC holds information from which it could answer the request. SCC's position is that it does not.
22. 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.

23. 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

24. The complainant is of the view that the information he requires must be retained as he believes that there would be a statutory requirement for SCC to hold it.

25. The complainant has also stated:

"[Name redacted] (letter 29th August 2019) ... did send me some documents, (listed in her letter 29th August 2019) but this still falls short of the Councils [sic] statutory responsibilities under their public procurement and public contracts regulations.

These regulations require that a record is kept of key activities related to the work I handled. It is now called a Regulation 84 Report under the Public Contracts Regs 2015 but the same existed under the earlier 2006 Regs.

This includes 'all documents relevant to the pre-tendering, tendering and contracting administration phases' of the work done and subsequent decisions taken. This includes the evaluation criteria and any subsequent scoring and notes of any disputes".

26. He has also stated:

"... in my view the record of actions taken in October 2007 and reported on the 5th December 2007 (see pg 8 of 11 of the Health and Well-Being Review Committee) do NOT add up. The recorded information about APPS made on the 14th March 2007 and then on the 13th June 2007 do represent an accurate record. However, there is a departure from this between June 2007 and October 2007 and it follows that an event and subsequent decisions to change the provision of health and social work services have been taken and it

is statutory duty to record this. It is also a statutory requirement for the NHS to report all significant changes to the Councils Health and Well-Being Review Committee”.

(The Commissioner has not had sight of the document referred by the complainant above and she does not consider it necessary for her to do so in order to reach a decision in this case).

The public authority's position

27. In response to the complainant's assertion that regulation 84 of the Public Contracts Regulations 2015 required it to draw up and retain a written report of key procurement activity, SCC advised:

"Procurement work arising from the APPS was apparently undertaken by the relevant NHS trust in Gateshead and not by Sunderland City Council (as acknowledged by the Complainant in an email sent to the Council on 19th July 2019 where he indicates that "the cont[r]acting authority was Gateshead PCT", which accords with the recollections of the officers to whom I have spoken). Sunderland City Council is therefore not a "contracting authority" for the purposes of the Regulations.

The regulation in question in any event requires only that records of this nature be kept for a period of 3 years from the date on which a contract is awarded”.

28. Regarding searches for any information which may be held, SCC explained as follows.
29. Home drives and email accounts would only be held on SCC servers if the individuals concerned were SCC employees. The PCT was not part of SCC. It added that one of its officers recollected that the NHS team working at the Civic Centre used NHS computer equipment and not Council-provided computers.
30. SCC advised:

"The ICT team is unable to advise on the processes adopted in 2007 for deleting email/home drive accounts for staff that had left or retired from the authority but email and network log in accounts would be deleted some time after the leave date. Since 2007, and for a significant period, the Council only retained backup data for home areas for 28 days and so there would be no information relating to email or home areas dating back to 2007. The current process is that the information stored in a home area is recoverable for up to 93 days following departure and email is recoverable for up to 24 months”.

31. The Commissioner here notes that the complainant has advised that he had two email accounts at the time, one of which he says was an SCC account. However, even were this the case, as he ceased his consultancy work more than 24 months ago it would have by now been deleted.
32. SCC also explained to the Commissioner that all but one of the individuals named by the complainant had now left, with one of them being deceased. It said:

"Due to the length of time since their departure, the previous home areas and email accounts of those individuals are not recoverable. [Named redacted] is the only individual named by Complainant who is a current employee and she has confirmed that no records accessible by her contain any information relating to the Complainant or the APPS".
33. SCC confirmed that it had undertaken searches of electronically-held information within its Procurement, Audit and Community Safety teams as this would be where any information about Better, Brighter Futures / APPS would be held. SCC confirmed that the search terms 'Better, Brighter Futures' and 'Approved Preferred Provider Scheme' / 'APPS' were used in connection with the electronic searches made. It added that it assumed that any paper records generated by the PCT team would have been transferred back to the PCT when the team in question moved back to NHS premises.
34. SCC explained that, with the exception of the one remaining employee, the searches of electronic data could not include any information held locally on PCs or in the email accounts of such officials as there were no such employees. The remaining employee had confirmed that, although she recalled having some dealings with the complainant some time ago, no related records were held and she was not aware of any matters arising from those dealings.
35. SCC provided the Commissioner with details of its formal Records Management Policy, sending copies of its Retention Schedules for service areas which it considered might be relevant. It confirmed that all are based on the Records Management Society's Retention Guidelines for Local Authorities and these are the timescales to be applied if there is no specific in-house schedule. There is nothing to suggest that information of the type requested would still be retained by SCC after such a long time period.
36. SCC explained that it was not aware of any electronic data having been deleted and that there was no business purpose, or statutory requirement, for which the requested information should be held.

37. SCC added the following in its response to the Commissioner:

"Notwithstanding the above, I can inform you that, as a result of making yet further enquiries in relation to this matter ... a certain amount of archived material stored by a former NHS employee or employees has, in fact, now been identified within the Council's Public Health Directorate (using the search terms "APPS", "Approved Provider", "Approved Preferred", "Better brighter futures", "Brighter futures", "Better brighter", [complainant's name redacted]). It is assumed that the material would have been held on NHS servers during the time that the Complainant was engaged in his work on the APPS and that it must have been brought across to the Council with other records when the NHS employee(s) holding the information "TUPE transferred" to the employment of the Council in 2013, at the time when Public Health functions were reassigned from health authorities to local authorities. In addition, a folder labelled [name removed] in a Community Safety shared drive has been found to contain four documents relating to the APPS. I have briefly viewed the documents available from both sources but do not consider that any seem to address the specific matter in relation to which the Complainant submitted his FOIA request i.e. the alleged mis-reporting of his work on the APPS to the Council's Health and Wellbeing Scrutiny Committee and how this came about (although some may be relevant to the "subject access" element of the request and due consideration will be given to this). If you require sight of these documents in order to form your own view on that point, please advise accordingly and copies can be provided".

38. The Commissioner asked for copies and this is the information which the Commissioner referred to earlier in this notice; she agrees with SCC that it falls outside of the scope of this complaint.

The Commissioner's conclusion

39. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some, or all, of the 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 the paragraphs, above, the Commissioner is required to make a finding on the balance of probabilities.

40. The Commissioner notes the complainant's view that there should be emails which would reveal / evidence what, in his view, 'went wrong' and this is what he is trying to source. He therefore provided names of individuals who may have been party to the information required and SCC has searched accordingly.

41. The Commissioner considers that SCC contacted the relevant parties / departments to consider whether or not any information was held in respect of the request, which is proven by it locating some related information albeit outside the scope of this request. It is also noted that SCC's Records Management Policy would indicate that records of this age would no longer be retained.
42. SCC has also explained that it was not 'responsible' for the PCT, which was a public authority in its own right at the time, and that it did not itself have any 'ownership' of the work undertaken.
43. Whilst this may be disappointing for the complainant, the explanation is comprehensive. It is also unfortunate that the PCT itself no longer exists so this, coupled with the time period of over 10 years ago, means that any information which may still exist somewhere becomes very difficult to 'track down' as multiple public authorities were involved.
44. Based on the information provided the Commissioner is satisfied that, on the civil standard of the balance of probabilities, no recorded information within the scope of the request is held. She is therefore satisfied that SCC has complied with the requirements of section 1 of the FOIA in this case.

Other matters

45. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.
46. In responding to enquiries raised by the Commissioner, SCC stated the following:

"First of all, it is the Council's view that the Complainant's request for information ... was phrased in very unclear terms and that the information required was not actually specified. The Complainant simply asked "that a data subject FOI request be made in [his] name. The period will be from November 2005 to date."

This was followed up, upon request, by an explanation of the context of the request, which was the Complainant's concern that "work done in [his] name" in connection with the Approved Preferred Provider Scheme ("APPS") was allegedly not reported correctly to the "Health Scrutiny Board" (presumed to be a reference to the Council's Health and Wellbeing Scrutiny Committee) in Summer/Autumn of 2007. The Complainant gave no indication of the matters that had been the subject of any reports to that Committee or in what way he believed his work to have been mis-reported.

In view of that, it could be said that there has, in fact, been no proper request under the Freedom of Information Act ("FOIA") to which the Council is required to respond.

Clearly, the Council still endeavoured to be of assistance by conducting a search for any material appearing to be connected to the matters referred to by the Complainant and did provide to the Complainant, upon review, copies of a number of Scrutiny Committee reports from the relevant time which contained at least some reference to the APPS (even though these are accessible to the public on the Council's website and therefore exempt from disclosure in response to any FOIA request). In responding to the Complainant and undertaking the review that he requested, the Council was unable to trace any other records that might address the issues referred to in his correspondence.

However, in the event that your view is still that a valid FOIA request was made, I address below the various points/queries raised in your letter of 5th March".

47. The Commissioner would like to respond to this by clarifying that she has at no point formally stated any view as to whether or not she considered the request to be valid. This is a matter for SCC to initially consider and clarify with a requester prior to issuing any response.
48. SCC seemingly considered the request to be valid and dealt with it accordingly at the time. If it did not think it was valid, it should either have informed the complainant at the time, and explained why this was the case, or it could have revised its position during the investigation of this complaint and again explained why this was the case.
49. As this matter was not formally raised the Commissioner has not considered it further.
50. Additionally, if the complainant requires sight of any of the information referred to in this notice, he is able to make a further request to SCC under the FOIA. When doing so he should clearly state what recorded information he requires. As SCC has indicated that it is considering whether any of it can be disclosed to him under the 'subject access' process, a further request under the DPA should not be necessary.

Right of appeal

51. 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

52. 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.
53. 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

Carolyn Howes
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