

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 29 April 2022

**Public Authority:** North East Procurement Organisation  
**Address:** Northern Design Centre  
Abbots Hill  
Baltic Business Quarter  
Gateshead  
NE8 3DF

#### **Decision (including any steps ordered)**

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1. The complainant has requested information about the performance of a contractor engaged by two councils. The North East Procurement Organisation (NEPO) stated that it did not hold the information.
2. The Commissioner's decision is that on the balance of probabilities, NEPO does not hold the requested information. Nor is information held on NEPO's behalf by any other body. NEPO has therefore correctly discharged its duty under section 1(1)(a) of FOIA.
3. The Commissioner does not require further steps.

#### **Request and response**

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4. On 19 January 2021, the complainant wrote to NEPO and, referencing a previous disclosure in which NEPO confirmed the Key Performance Indicator (KPI) data provided by its principal contractor Bloom, requested information in the following terms:  

"For the contract between Ignite and Taunton Deane and West Somerset Councils (leading to the formation of the new Somerset West and Taunton Council), I would like all of the above KPI and Management information for that contract."
5. NEPO responded on 19 February 2021. It denied holding the requested information.

6. Following an internal review NEPO wrote to the complainant on 19 March 2021. It upheld its original position.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 23 March 2021 to complain about the way his request for information had been handled. He considered that NEPO ought to hold the information that he had requested.
8. On 3 February 2022, the Commissioner wrote to the complainant to outline his preliminary view of the complaint. He noted that, given that the request sought details of a contract to which neither NEPO nor Bloom were partners, it seemed very unlikely that the information would be held by or on behalf of NEPO. The two councils involved (both now defunct) would, when they existed, probably have held relevant information but that information, would now if it still existed, be held by their successor council (Somerset West and Taunton Council). The Commissioner therefore suggested that the complainant try submitting his request to this organisation instead.
9. The complainant rejected this conclusion. His reasons for doing so are discussed in more detail below.
10. The Commissioner considers that the scope of his investigation is to determine whether any information within the scope of the request is held either by or on behalf of NEPO.

## **Reasons for decision**

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11. Section 1(1) of the FOIA states that:

"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."

12. Section 3(2) of FOIA states that:

"For the purposes of this Act, information is held by a public authority if—

- (a) it is held by the authority, otherwise than on behalf of another person, or
- (b) it is held by another person on behalf of the authority.”

13. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, he will consider any reason why it is inherently likely or unlikely that information is not held.
14. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

### **The complainant's position**

15. The complainant's position is that the information he has requested ought to be held by NEPO or, in the alternative, that it ought to be held by Bloom (NEPO's principal contractor) on NEPO's behalf.
16. The complaint drew attention to the findings of an audit report on the contract in question which had highlighted numerous failings. He stressed the importance of being able to hold the contractor (Ignite) to account for its performance.
17. Finally, the complainant provided a copy of an email he had received from a Taunton and West Somerset councillor who reiterated the same points about the public interest in transparency and the difficulty in acquiring the necessary information.

### **NEPO's position**

18. At the outset of the investigation, the Commissioner wrote to NEPO with a series of detailed questions. As there seemed to be little dispute that the NEPO held the information itself, the Commissioner's questions focused on the relationships between NEPO, Bloom, Ignite and the two councils.
19. NEPO's original response to the Commissioner's enquiries was provided on 21 February 2022. NEPO informed the Commissioner that it did not hold the requested information because it was:

"not party to the contract between Ignite and Taunton Deane and West Somerset Councils therefore we have no right to access such information if it exists relating to their agreement. NEPO does not hold or collect the KPI data for any of the individual contracts under the Framework Agreement, the referenced Key Performance Indicator and Management Information is only relevant to our contracted supplier Bloom Procurement Services Ltd."

20. The Commissioner did not consider that a mere assertion that the information was not held was sufficient and asked NEPO to respond to the detailed questions he had posed. NEPO provided a further submission on 10 March 2022.

21. In its submission of 10 March 2022, NEPO addressed the Commissioner's question regarding the information it was entitled to received from Bloom by stating that:

"NEPO contractually has the ability to monitor the performance on the Neutral Vendor against all of the specified KPIs within the Framework Agreement However these measures are one element of what is used to identify and monitor the performance of a contract or supplier, in cases where a supplier or contract is performing well, all of these mechanisms may not be fully deployed or required to be reported during the lifetime of the contract term."

22. When asked whether NEPO had the ability to seek information on individual contracts entered into via the Framework (such as Ignite's with the two councils), NEPO responded to say that:

"Yes. NEPO has an array of solutions across all main categories of public sector expenditure. Performance data is designed specific to the requirements of the solution and documented within each advertised Invitation to Tender. The terms and conditions of each solution governs the frequency and purpose of all data collection, aligned to NEPOs overarching Contract Management processes. Importantly, each Contracting Authority also determines, with the appointed supplier(s) at Call-Off, any performance data criterion specific to their individual needs and requirements."

23. Having considered this submission, the Commissioner was not persuaded that this explanation precluded the information being by Bloom on NEPO's behalf. In particular, he noted that, if NEPO was able, under the terms of its contract to request certain information from Bloom, that information would be held, by Bloom, on NEPO's behalf – regardless of whether NEPO had ever sought the information or not.

Drawing attention to his published guidance<sup>1</sup>, the Commissioner suggested to NEPO that the requested information may be held on its behalf and to make appropriate enquiries of Bloom.

24. NEPO responded on 7 April 2022 to say that:

“As outlined in our previous correspondence under the NEPRO(2) Framework Agreement, Bloom Procurement Services Ltd is required to provide NEPO with Key Performance Indicator (“KPI”) information data. NEPO must highlight that this data is reported at Framework Agreement only and not at an individual Call-Off contract or Work Order level. The performance monitoring applicable to a Call-Off contract is managed directly between the Contracting Authority and appointed supplier(s) across NEPOs portfolio of Framework Agreements. Contracting Authorities may determine, with the appointed supplier(s), any performance monitoring criterion specific to their individual needs and requirements.”

25. However, NEPO also noted that it had contacted Bloom about the particular information and had received the following response:

“I have reviewed the extent of our disclosure obligations under the NEPRO2 Framework and consider this belated request for project specific KPI’s [sic] is outside the scope of the defined information that NEPO is entitled to request. Having said that, on this occasion only, to assist you in fully answering the ICO query I can confirm that I have reviewed our records and there are no project specific KPI’s referenced in any of the Work Order documents for the six projects you have referred to.”

### **The Commissioner’s view**

26. Having considered the various responses that have been provided, the Commissioner is satisfied that, on the balance of probabilities, that the information is not held either by or on behalf of NEPO.

27. The Commissioner has not been sufficiently persuaded in this particular case that the information, were it held by Bloom, would not be held on behalf of NEPO. NEPO’s response of 7 April 2022 appears to suggest that it does not have the ability to seek KPI data on the individual contracts entered into via its framework, although, its response of 10 March was

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1148/information\\_held\\_by\\_a\\_public\\_authority\\_for\\_purposes\\_of\\_foia.pdf](https://ico.org.uk/media/for-organisations/documents/1148/information_held_by_a_public_authority_for_purposes_of_foia.pdf)

an unequivocal "yes", when it was directly asked whether it had that ability.

28. However, the Commissioner notes that Bloom has unequivocally said that it does not hold the requested information. No evidence has been put forward to contradict that statement. Therefore the extent to which information would or would not be held on NEPO's behalf is academic in this case as there is no recorded information either way.
29. The Commissioner declines to make a formal decision, in this case, as to whether, hypothetically, the information would have been held on behalf of NEPO. Such a determination should be made in a case where the outcome would have an impact on the information that might need to be disclosed.
30. The complainant has put forward reasonable arguments to explain the value of the information and why it ought to be held. However, the Commissioner's role is to determine whether information is, as a matter of fact, held in recorded form.
31. The Commissioner is satisfied that, on the balance of probabilities, no information within the scope of the request is held either by, or on behalf of, NEPO.

## Right of appeal

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32. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

33. 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.
34. 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 .....**

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