

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 April 2022

Public Authority: Bournemouth, Christchurch and Poole Council

Address: Town Hall
Bourne Avenue
Bournemouth
BH2 6DY

Decision (including any steps ordered)

1. The complainant requested from Bournemouth, Christchurch and Poole Council ("the Council") information relating to an Annual Governance Statement. The Council stated that the requested information was not held.
2. The Commissioner's decision is that the Council does not hold the requested information.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 7 June 2020, the complainant wrote to the Council and requested information. The full text of the request is recorded in Annex A.
5. The Council responded on 15 July 2020. It stated that no recorded information was held but referred the complainant to other explanatory correspondence it had sent about the subject matter.
6. Following an internal review, the Council wrote to the complainant on 1 September 2020. It maintained its position that no recorded information was held.

Scope of the case

7. The complainant contacted the Commissioner on 7 February 2021 to complain about the way his request for information had been handled, and specifically that the Council held the requested information.
8. The scope of this case and of the following analysis is whether the Council is likely to hold the requested information.

Reasons for decision

Section 1 – General right of access to information

9. 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.

10. Section 1(1) requires that any person making a request for information to a public authority must be informed in writing by the public authority whether it holds information relevant to the request, and if so, to have that information communicated to them. This is subject to any exclusions or exemptions that may apply.
11. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
12. In other words, in order to determine such complaints, the Commissioner must decide whether on the balance of probabilities a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request).

The Commissioner's investigation

13. The Commissioner asked the Council to explain what recorded information it considered the request to seek.
14. The Council explained that it interprets the request as seeking recorded information ('Decision Records') about the Council's decision to not

present two specific issues in its Annual Governance Statement for 2018-2019, namely:

- The Council's decision to *"to exclude the IT procurement matter from reference as a specific significant governance issue within the Annual Governance Statement for 2018/19."*
 - *And "the omission to make available for public inspection the draft Annual Governance Statement."*
15. The Commissioner asked the Council to confirm and explain its position on whether such information was held.
 16. The Council stated that such information was not held. The Council explained that no such information had been created in the first place, as the Council did not consider there to be a statutory or business reason to do so. The Council elaborated that it did not consider the two specific issues to be governance issues needing to be included in the Annual Governance Statement, as the issues had already been comprehensively covered within related Audit & Governance Committee meetings.
 17. The Council has further elaborated that a *"Decision Record is not written for every topic that may be considered for reporting to Full Council"*.

The Commissioner's conclusion

18. The Commissioner has considered the Council's position, in conjunction with the request.
19. The Council has stated that it does not hold the requested information and has provided a clear explanation to the Commissioner to explain why it would not expect to.
20. Whilst the complainant appears to strongly disagree with the Council's position, there is no clear evidence available to the Commissioner that suggests the requested information is held.
21. It is not within the Commissioner's authority to consider whether the Council should have created the information, nor is it relevant to this determination. The terms of the FOIA only apply to recorded information.
22. On this basis the Commissioner has concluded that, on the balance of probabilities, the requested information is not held.

Right of appeal

23. 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

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

24. 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.
25. 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

Daniel Perry
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex A

26. On 7 June 2020, the complainant wrote to the Council and requested information in the following terms:

Please arrange to forward to my above email address a copy of the individual decision-maker's dated written record of decision, reasons and any background papers or - where otherwise applicable - a copy of the dated minutes of the relevant forum in meeting (including details of all those attending) and any background papers in respect of each of the following five subject matter items.

1. Basis of the former Bournemouth Borough Council (BBC) statutory Annual Governance Statement (AGS) for the year ended 31 March 2019 (2018/19) as published in the public domain:

- *Copy of the individual council officer's dated written record of decision and reasons for formulating the AGS basis as restated in the narrative of items 1 and 2 under the heading "Forward" on page 105 of BBC's final version of the AGS for 2018/19 as later presented for approval to BCPC's Audit & Governance Committee (AGC) on 25 July 2019.*

2. Exclusion from BBC's final published AGS for 2018/19 of the council-acknowledged significant governance issue relating to the remedial actions for IT procurement internal control weaknesses. That being contrary to the extant mandatory AGS disclosure requirement notified in my PDF letter of 6 September 2019 to a now former Statutory Monitoring Officer, current Chief Executive, current Leader of BCPC and others prior to finalisation of the council's annual reporting and external audit on 20 September 2019:

- *Copy of the individual decision maker's or if otherwise applicable corporate management team/cabinet/committee/sub-committee meeting's dated documented decision and reasons regarding exclusion of the above significant governance issue from the AGS.*

3. Exclusion from BBC's final published AGS for 2018/19 of the significant governance issue relating to the council's later acknowledged contravention of regulation 15(2)(a)(ii) of the statutory Accounts and Audit Regulations (2015 Regulations) ie BCPC's failure to publish BBC's draft AGS for 2018/19 for inspection

during the stipulated period for the exercise of public interest rights. As fully explained in my PDF letter of 6 September 2019 to a now former Statutory Monitoring Officer, current Chief Executive, current Leader of BCPC and others prior to finalisation of the council's annual reporting and external audit on 20 September 2019:

- *Copy of the individual decision maker's or if otherwise applicable corporate management team/cabinet/committee/sub-committee meeting's dated documented decision and reasons regarding exclusion of the above significant governance issue from the AGS.*

4. The decision by a now former Statutory Monitoring Officer not to inform by agenda item the whole of BCPC's regulatory AGC at the meeting on 10 October 2019 - nor by other means prior thereto - concerning the material contravention of the statutory 2015 Regulations noted in 3 above. The agenda having been published before my related written question to that AGC meeting notifying the committee of the contravention of the 2015 Regulations:

- *A copy of the now former Statutory Monitoring Officer's dated written record of decision and reasons not to inform the AGC at or before the meeting on 10 October 2019 regarding the above noted material contravention of law.*
- *Paragraph 5.1(r) in Part 3 of BCPC's governing Constitution refers regarding the AGC's function of oversight in such matters of regulatory compliance.*

5. Non-compliance with the non-exempt and currently still unfulfilled Statutory Monitoring Officer's duties stipulated in subsections 5A(2), 5A(3)(a), 5A(5)(a) and 5A(5)(b) of the Local Government & Housing Act 1989 (1989 Act) in respect of the preparation and sending of a report notifying each council Member of the material contravention of law relating to the breach of the 2015 Regulations noted in 3 and 4 above; thus also negating the council's "executive" (ie BCPC Leader & cabinet) awareness of the matter and disabling subsections 5A(6) to 5A(9) inclusive of the 1989 Act which stipulate the executive body's following duty of consideration, determination of action and related reporting of the breach to each BCPC Member:

- *A copy of the now former Statutory Monitoring Officer's dated written record of decision and reasons (prior to that Officer relinquishing the post in May 2020 to acquire another legal position within BCPC) either not to comply with or to defer indefinitely compliance with the reporting requirements of sections of 5A of the 1989 Act noted above. The latter omission having followed my initial written intimation by addendum on 18 July 2019 to the Statutory Monitoring Officer, current Chief Executive, current Leader of the council and others concerning the related causal contravention of the 2015 Regulations noted in 3 above.*

BCPC's governing Constitution refers:

- *Paragraph 3(b) on page 2-20 in Part 2/Article 11 regarding the monitoring officer's specific duty to "Ensure lawfulness and fairness of decision making".*
- *Paragraph 1.1(b) on page 2-22 of Part 2/Article 12 regarding the general requirement to "Ensure that the decision and the decision making process are lawful".*
- *Paragraph 1.1(g) on page 2-22 of Part 2/Article 12 regarding the general requirement to "Ensure the decisions are not unreasonably delayed".*

For the avoidance of doubt and consequent possible delay in fulfilling this request in accordance with the Freedom of Information Act, the council will recognise that the above noted requirements for decision-making conform with the statutory obligations applying to local authorities in England and BCPC's governing Constitution's obligatory protocols relating to decision-making and the recording of decisions including those regarding "General Delegations" to council officers.

Similarly, it will be recognised that the non-disclosure of confidential or exempt information as defined by the provisions of the Local Government Act 1972 do not apply in this instance by reason of the nature of the subject matter and its specific embodiment in the statutory rights of public interest noted above.

Likewise, by the same token, the discretionary right of a monitoring officer to exempt such information from disclosure as not being in the public interest, and the right of a local authority to neither confirm nor to deny the holding of such recorded information, do not operate here.

I look forward to the council's acknowledgement of this request within the stated 2 working days and receipt of the above information within the usual 20 working days.

Please firstly advise me for confirmation of the amount of any charge the council wishes to make for preparing and transmitting the above information together with BCPC's BACS details for payment purposes.