



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2019/0458

Decided without a hearing

Before

JUDGE DAVID THOMAS

Between

RICHARD PADDOCK

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

SHROPSHIRE COUNCIL

Second Respondent

DECISION AND REASONS

The appeal is allowed. Within the later of 28 days from the date of this decision or of an unsuccessful appeal to the Upper Tribunal, Shropshire Council is to disclose the information identified in paragraph 25.

NB Numbers in [square brackets] refer to the open bundle

1. This is the appeal by Mr Richard Paddock against the rejection by the Information Commissioner (the Commissioner) on 5 December 2019 of his complaint that

Shropshire Council (the Council) had wrongly refused to disclose certain information to him under section 1(1)(b) Freedom of Information Act 2000 (FOIA).

2. Mr Paddock and the Commissioner opted for paper determination of the appeal. I am satisfied that I can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).¹
3. As I explain below, I decided to add the Council as a Respondent.

The request and what followed

4. On 29 November 2018 [51], Mr Paddock made this request for information of the Council (the request):

'... the contract Table 1 "Performance Measures" indicates there are monthly reports submitted to the Council.

I would be interested in seeing the Reports relating to Reactive Works Service Areas RW 1 form contact (sic) start in April 2018 to date'

5. The contract referred to was between the Council and an independent contractor, Kier Highways (Kier), worth some £21m a year. 'Reactive works' is one of a number of types of service which Kier agreed to provide.
6. Mr Paddock had in fact preceded the request with a request earlier the same day for 'information on the highways contract with Kier. Specifically, how defective work is reported to them by the Council and what commitments Kier then has to rectify the defective work. I am particularly interested in defective repair of potholes ...'. The Information Governance Team had responded promptly with a link to the contract (some of it redacted). That enabled Mr Paddock to formulate the request.
7. It is worth summarising the exchange of emails which followed, initially between the Council and Mr Paddock and then between the Council and the Commissioner, because unfortunately the Council fell significantly below the high standards it had initially set:

- **22 January 2019 [54]:** The Council replied to the request:

'Schedule 3 of the Contract Agreement (Partnering Information) specifies the Contractor's Performance Measure targets and the frequency of reporting.

The data from these reports will form the basis of an annual submission to [the Council's] Scrutiny Committee. Although no date has been set for this

¹ SI 2009 No 1976

Committee, it will be during 2019 to enable a full twelve months review the (sic's) Contractor's performance across all services in the first year of the contract'.

Self-evidently, this gave neither the information Mr Paddock had requested nor an explanation as to why he could not have it

- **6 February 2019:** a phone call between Mr Paddock and a member of the Information Governance team. The call was summarised in an email to Mr Paddock **the following day**. Mr Paddock had apparently communicated this message:

'If the council does not have the information requested [ie monthly monitoring reports from Kier as defined in Table 3 of the contract], can the council provide the information on which they are monitoring the performance of the contractor, Kier?'

- **7 February 2019 [59]:** Mr Paddock clarified that he had asked for monthly reports for Reactive Works Performance Measure 1 (RW1) which relate to highway repairs and that, if Kier were not providing the reports, he would like to see information authorising this change to the contract
- **20 February 2019:** The Council gave a revised reply to the request. It provided 'monthly data received on day works gangs', excluding 'Planned and Capital works and other routine works. Or emergency works, or for works tendered out to other providers'.

This, too, was not the information Mr Paddock had requested.

- **22 February 2019 [64]:** Mr Paddock made that point and explained that it was impossible to determine from the data provided whether the contractor was achieving the Target Performance Level specified in the contract. If the Council could not provide the monthly reports he had requested but had alternative data, he wanted to know where it came from and how it was used to monitor Kier's performance. He offered to speak to the Council to clarify understanding of his request
- **17 March 2019 [66]:** Mr Steve Brown, Interim Head of Infrastructure & Communities, wrote Mr Paddock a long email. He said that the annual performance report was being prepared. It would be circulated along with all of the data in May/June 2019. It could be sent to Mr Paddock then but for the moment the Council was entitled to rely on section 22 FOIA (information intended for future publication)². The data that Mr Paddock had previously

22 (1) Information is exempt information if –

been sent was used at operational meetings and extracted daily, weekly and monthly from the Council's management system, Confirm, on a filter basis. This information could be extracted on a real-time basis. Kier had access to Confirm 'so that data and finances flow between [the] two parties'. He added: '... the extracted data we have provided is the monthly report'. He explained more about how performance was monitored

- **18 March 2019:** Mr Paddock reiterated that what he wanted were the monthly reports stipulated by the contract. He wanted the reports to date (i.e. covering just about the first year of the contract)
- **23 May 2019 [69]:** Mr Brown sent Mr Paddock another email. This evidently followed a telephone call between the two. He provided some data showing that, for 2018/9, 'reactive works highways' were well below the contract target
- **28 May 2019:** Mr Paddock explained that this was not the information he had requested
- **29 July 2019:** The Information Governance team sent Mr Paddock further information said to be relevant to the request. The information was provisional and was being checked with Kier
- **30 July 2019:** Mr Paddock explained, once again, that this was not the information he had requested
- **15 August 2019 [119]:** The Information Governance team wrote to Mr Paddock: 'I have discussed this with the Department and they have confirmed to me that the individual monthly reports are held and they will be provided to you by early next week at the latest'.
- **28 August 2019:** Mr Paddock chased for the information

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which falls within subsection (1).

- **17 October 2019 [133]:** Mr Brown now said that the Council did not hold monthly reports and therefore could not share anything other than the annual report which had already been provided. The problem had been rectified: from June 2019, monthly reports were being provided
- **18 October 2019:** The Information Governance team wrote to the Commissioner to the same effect
- **30 October 2019:** The Commissioner wrote to the Council asking what searches (including electronic searches) had been carried out for the requested information
- **12 November 2019 [141]:** The Council replied that the monthly reports had not been provided by Kier to the Council. The annual performance information data had been formally reported to the Council for the financial year 2018/9 (this was the same information previously supplied to Mr Paddock pre-verification). Action had been taken against a member of staff who should have ensured that the monthly reports were provided.

The Commissioner's decision

8. The Commissioner decided that, on the balance of probabilities, the Council did not hold the monthly reports.

The Grounds of Appeal and the Commissioner's Response

9. In his Grounds of Appeal [11], Mr Paddock maintained that it was clear from the Council's emails of 22 January and 17 March 2019 that the information was held. He highlighted the importance of key performance indicator (KPI) reporting with a contract of this value.
10. He attached a report to the Communities Scrutiny Committee prepared by Mr Brown in November 2019 [15]. The report 'focuses on the progress, issues and performance of the contract during the first year ... across the core areas of the contract'. The report contained detailed analysis of Kier's performance, with figures against targets for the year.
11. In her Response [40],³ the Commissioner, relying on *Oates v Information Commissioner and Architects Registration Board*,⁴ argued that she was entitled to take a denial by a public authority that it did not hold information at face value unless there was some reason not to do so (for example, an indication that she was being misled).

³ [25]

⁴ EA/2011/0138

Case management directions

12. The manner in which the Council had dealt with the request clearly left a great deal to be desired. I therefore issued case management directions (CMD) adding it as a Respondent. The CMD continued:

1. ... I note that, on 7 November 2019, the Council compiled an annual report of Kier Highways' performance for 2018/2019 [15]. Clearly, it must have had data to prepare that report. Freedom of information requests should generally be construed liberally and there may be an argument that, if the Council does not hold the monthly reports contemplated by the contracts, Mr Paddock's request should be construed as encompassing the data that should have been included in the reports, broken down for the months in question.

2. I therefore direct that:

i. The Council is added as Second Respondent

ii. Within 28 days, the Council is to file and serve a Response (a) explaining what data it used for the annual report; (b) whether it accepts that the request should be construed as extending to that data (up to the date of the request); (c) and, if so, whether it should be and can be broken down on a monthly basis for April to November 2018 and provided to Mr Paddock in that form.

iii. Also in its Response (or a witness statement if it prefers), the Council is to explain exactly what steps it has taken to locate the monthly reports and why it has concluded that it does not hold them

13. The dates of emails in the Appendices to the Response subsequently provided by the Council did not altogether match those given in the text of the Council's Response, which again does not inspire confidence. The Council maintained its position that it did not hold monthly reports from Kier for the period in question and said that the contractor had confirmed that it had not provided them. Performance information was, however, provided by Kier and circulated internally by the Council on 15 July 2019 (the Council did not send me the attachments).

14. The Council added:

'We can request and instruct for the breakdown to [be] undertaken for 2018/2019 working back from the annual report. This data will have to be extrapolated, so technically possible ...'

15. Mr Paddock was justifiably critical of the Council's Response. He commented pointedly that it was a sad reflection on the Council that for almost 12 months it had no idea how its contractor was performing against the KPIs required by a

contract worth more than £20m. He did indicate that he would be happy with the information the Council was now offering.

Discussion

16. Under FOIA, members of the public have a qualified right to information held by public authorities on request. However, it is self-evident that a public authority can only disclose information which it holds.

17. Section 3(2) FOIA contains a partial definition of whether information is held:

*‘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’.*

The definition means that mere possession by a public authority of information is not sufficient (if it is held on behalf of someone else) but also that possession is not necessary (if the information is held on behalf of the authority by someone else). An example of the latter would be an archive company.

18. For it to be disclosable, information must also be held in recorded form. This is because the definition of ‘information’ in section 84 FOIA is ‘(subject to sections 51(8) and 75(2) [not relevant]) ... information recorded in any form’. ‘Recorded form’ implies a degree of permanence. Information which is simply in the mind of an employee is not held in recorded form.

19. It follows that the issue is whether the information Mr Paddock has requested is held by the Council in recorded form. In order to answer that question, I must first determine the scope of the request.

20. As I said in the CMD, FOIA requests should generally be construed liberally: see the House of Lords’ decision in *Common Services Agency v Scottish Information Commissioner*.⁵ This reflects the fact that requesters are usually not advised by lawyers. It is clear to me that what Mr Paddock wanted was information about Kier’s performance under the relevant part of the contract, broken down month by month: see, for example his exchanges with the Council in February 2019. He asked for monthly *reports* because, having looked at the contract, that is what Kier should have been providing. But it was the monthly *information* in the reports which he wanted, rather than the reports *per se*.

21. I am satisfied that, at the time in question, the Council held the information in question attributable to different months. It has effectively confirmed that it did so in its Response. It needed that information to compile its annual report for the Communities Scrutiny Committee – the annual report is in effect an

⁵ [2008] UKHL 47

amalgamation of monthly data. The time in question is the date of its initial response, 22 January 2019.

22. Given the conclusion I have reached, I do not need to consider whether Kier also held this information on behalf of the Council, thereby triggering section 3(2)(b) FOIA. That would depend on the terms of a long and complicated contract and I have heard no argument on the issue.
23. In my judgment, Mr Paddock is entitled to the monthly information up to and including January 2019 (during which the Council gave its initial response) but no later. By definition, the Council did not at that time hold information about Kier's performance in the months which followed and so it does not have to disclose information for the remainder of the first year of the contract, though it may do so if it wishes.

Conclusion

24. For these reasons, the appeal is allowed.
25. The information to be disclosed is that which the Council holds relating to Kier's performance under the Reactive Works Service Areas section in the contract. The information is to be broken down month by month for the period April 2018 to January 2019 inclusive.
26. I substitute this decision for that of the Commissioner.

Signed

Judge of the First-tier Tribunal
Date: 10 July 2020