

Our ref: MH/MH/037384
Your ref:
Date: 4 March, 2020

request-635582-
7e752ccb@whatdotheyknow.com

Dear Mr Barker,

FOI 1920-753 - Internal Review

I write further to your email dated 14 February 2020, in which you requested an internal review. I have been appointed to carry out the review as a Senior Officer of the Council and confirm that I was not involved in dealing with the original request.

BACKGROUND

On 17 January 2020, you wrote to the Council requesting information and stated:

*"I am writing to you as Chief Executive of Harrogate Borough Council (HBC), to **request minimal evidence, to prove that HBC is able to make legally valid decisions, without having to comply with legally imposed stipulations.***

BACKGROUND

The point about not complying with the law, is also raised in the Freedom of Information request entitled, 'Is Harrogate Borough Council knowingly deceiving council tax payers - ??'.

HBC's records show, that it has not complied with legal stipulations on what it must do, when creating Tree Preservation Orders (TPOs).

Regarding TPO number 70/2017, the landowner was not given advanced notice and the same or something similar happened in connection with TPO number 49/2017.

On behalf of the landowning charities, I asked whether those TPOs could be legally valid, as the required legal procedure had not been followed. I also made clear, that the charities had no objections to the creation of TPOs on those trees.

Although adjacent landowners are not known to have objected to the creation of TPO number 70/2017 on a large oak, they have since raised concerns about its safety. A developer seems keen to have the tree removed, possibly to assist with gaining planning permission.

I had submitted an application to remove branches which overhang one of those properties. That was rejected, because HBC claimed it must follow the correct legal procedure and that requires that I submit a plan showing the exact location of that tree. As HBC issued a location plan with the TPO., I have declined to copy its own plan back to it.

As HBC has not complied with the most substantive legal procedure, there cannot be a need for me to send to HBC what it already has.

Staff must be prepared to either stand by their assessment or withdraw it. Either the oak is, "in good health and is of good form with a long future life expectancy" or it is not.

If that assessment is wrong and mindful of the fact that the correct legal procedure was not complied with when creating the TPO., HBC has the option of immediately declaring the TPO legally invalid. If it does not do that, it is effectively confirming that the tree is not unsafe." [Emphasis added]

On 10 February 2020, the Council responded stating:

"Thank you for your email received by the Council on 17th January 2019 requesting information under the Freedom of Information Act 2000 ('FOIA') relating to Tree Preservation Orders.

Please note that section 1 of the Freedom of Information Act states:

(1) 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.

Your request is not one which seeks information that the Council "hold", it asks questions or for opinions of the Council and is not therefore covered by the Freedom of Information Act."

On 14 February 2020, you responded and requested an internal review in the following terms:

This freedom of information request was another about unlawful (ultra vires) actions on the part of Harrogate Borough Council (HBC).

I requested, "minimal evidence, to prove that HBC is able to make legally valid decisions, without having to comply with legally imposed stipulations".

Your reply states that you do not "hold" what I have requested and that I have asked "questions or for opinions of the Council".

That is not true, as you will see if you look carefully at my request.

I have not asked any questions or for any opinions.

I have asked for "evidence" and that must exist in writing which HBC must "hold", e.g. proof from primary and/or secondary legislation, bylaw, case law cum legal precedent, statutory guidance or some other source.

For the avoidance of doubt, it is rare that anyone has difficulty with isolated human errors made in good faith, when public service standards are high or at least adequate.

My profound concerns are about routine law breaking, unless that is you "hold" written information, which proves that HBC does not have to comply with the various aspects of law, to which I have drawn your attention, so you can respond decisively and honourably as HBC's Chief Executive.

Please provide the requested "evidence".

REVIEW

I think that it is important before I provide my comments that I set out the parameters of the Council's obligations under FOIA and in respect to an internal review.

Section 1 of the FOIA states: "1) 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.”

The definition of information in the FOIA is “information” (subject to [sections 51\(8\)](#) and [75\(2\)](#)) means information recorded in any form” [Emphasis added]

The ICO guidance on its website states: “The Act does not cover information that is in someone’s head. If a member of the public asks for information, you only have to provide information you already have in recorded form. You do not have to create new information or find the answer to a question from staff who may happen to know it.”

The FOIA does not contain a provision for internal reviews but it is recognised as good practice in the FOIA code and the Council operates a system of review. An internal review is intended to contain a review of whether the Council has complied with its obligation under the FOIA. In doing so I have considered the FOIA, the ICO guidance and all the submissions which I have set out above. My conclusions are as set out below.

I consider that your request does appear initially to be a request for an opinion and so I can appreciate why the FOIA officer considered it so. I consider however, that clarification of the request should have been sought before confirming the position.

Please therefore confirm whether the information you seek relates to the specific tree preservation order referenced in the background section of your request and what decisions and legally imposed stipulations you refer to. The Council will then be able to confirm whether it holds the information, you seek. In the meantime, I refer you to the link to the Council’s constitution on its website. The various decision-making processes of the Council are set out there.

https://www.harrogate.gov.uk/downloads/download/72/constitution_of_the_council

If you are not content with the outcome of this review then you have the right to make a complaint to:

The Information Commissioner

Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF

Tel: 0303 123 1113

Website: <https://ico.org.uk/>

Yours faithfully

MAIR HILL

CHIEF SOLICITOR

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