

MEETING:	GENERAL OVERVIEW AND SCRUTINY COMMITTEE
DATE:	4 MARCH 2013
TITLE OF REPORT:	FREEDOM OF INFORMATION AND ARM'S LENGTH COMPANIES
REPORT BY:	GEOFF HARDY, GOVERNANCE SERVICES MANAGER

1. Classification

Open

2. Key Decision

This is not a key decision

3. Wards Affected

County-wide

4. Purpose

To note the position in respect of the extent and applicability of the Freedom of Information Legislation (FOI) to arm's length companies.

5. Recommendation(s)

THAT: The content of the report be duly noted.

6. Key Points Summary

- FOI is applicable to Public Authorities which includes the Council.
- Other Public Authorities and external organisations may hold information on behalf of the Council in which case a request received by the Council may mean obtaining this information in order to comply with the law.
- In some cases however, external organisations may hold information arising from their work with the Council but this is outside the scope of FOI.
- There are some commonly identified factors that may indicate on what basis information is held by external organisations.

- There may be valid exemptions from disclosure that should be applied, which may take into account the adverse impact disclosure could have on the Council, the holder of the information or a third party

7. Alternative Options

None.

8. Reasons for Recommendations

8.1 Not applicable.

9. Introduction and Background

9.1 At the Council's Overview and Scrutiny Committee meeting of 14th January 2013, the Chairman requested that further reports were commissioned in respect of the position of Hereford Futures Limited which included the position in respect of FOI and how it relates to arm's length Companies.

9.2 The Freedom of Information Act 2000 and its associated legislation, the Environment Information Regulations 2004, place a duty on Public Authorities to respond to requests for information confirming whether or not the information requested is held by them. If it is, the requester is entitled to a copy of the information or access to it, subject to the application of a number of exemptions detailed in the legislation.

9.3 Where a public authority does not intend to supply the requested information for whatever reason, it must respond within the statutory timescales giving sufficient detail as to why this is so. If the requester disagrees with this decision they can ask for it to be reviewed. If they remain dis-satisfied after review they can refer the matter to the Information Commissioner.

9.4 "Public Authorities" are listed in schedule 1 to the Act and include all forms of Council in England, Wales and Northern Ireland. In the Case of companies set up by Public Bodies with 100% of the shares owned by that body, those companies are also taken to be Public Authorities for the purposes of the legislation.

9.5 The Protection of Freedoms Act will, in due course, be amending this position to incorporate companies with shares held by more than one public authority but those provisions are not currently in force. There is no proposed date for implementation at present.

9.6 At the present therefore section 3(2) sets out the two principles to establish whether information is "held" for the purposes of the Act, namely:-

- (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 Information Commissioner is clear that each case must be examined on its own merits, but that there are certain factors that may be indicative one way or the other.

9.7 Factors that may indicate the holding of information solely on behalf of another person are:-

- The Authority has no access to, use for, or interest in it
- Access is controlled by another
- The Authority does not provide any direct assistance at its own discretion in creating, recording, filing or renaming it
- The Authority is merely providing storage facility

Example of this could be Coroner's records per the decision Digby-Cameron v ICO and DWP v ICO where records held by the Institute of Actuaries used as the basis of some of the advice they gave the Department of Works and Pensions was not taken to be held on behalf of the DWP.

9.8 Factors indicative that information may be held jointly or on behalf of the Public Authority include:-

- The Authority provides administrative and clerical support
- The Authority controls access to the information
- The Authority makes decisions as to what is held, retained, amended etc.
- The Authority deals with enquiries about the information in question.
- Costs arising from holding the information are met by the Authority.

An example would include (FS50118044) Swift and Leeds City Council, where questionnaires that were to form part of a final report to the Council were held to be within its ownership or control, or (FS 50080369) where the Department of Business Enterprise and the Regions held Employment Tribunal Services registration data on behalf of the Service but also used it, itself, for the purposes of statistics.

9.9 In the case of arm's length companies who are carrying out core functions on behalf of the Council, information in relation to this core work is more likely to be considered within the scope of FOI than purely internal operational decisions by the arm's length company such as where they purchase their supplies or how many staff they dedicate to a particular task or what their recruitment policy is.

9.10 Where the arm's length company is retained more in the role of adviser or for specialist knowledge only, there will be less of a presumption of ownership by the Public Authority of the information that the company holds. This is particularly so where the information does not relate to Core Service but rather the discretionary use of powers such as the general power of competence under S1 of the Localism Act 2011 for example.

9.11 The factors mentioned above are not conclusive and, as stated may carry different relative weight depending on individual circumstance. In the case of the information that is jointly held, the impact of disclosure of item should take into account effect on both the public authority and the holder of the information as part of the public interest test of the application of any exemption.

9.12 Finally, under the Act, any request should be answered on the basis of the information held at the time of request. Information previously held and returned to external organisations would be outside the scope of the Act, provided that the information in question has not previously been put into the public domain.

- 9.13 With regard to the possible widening of FOI in future, a well-known sector spokesman reported on 6th February:-

“Government will not extend FOIA to private contractors. The government has ruled out extending the Freedom of Information Act to private companies and contractors who work under public contracts. During a recent debate, MP Sir Alan Beith said the issue of private organisations who were spending public money and not being freely scrutinised by the public was a “significant problem.” However, Justice Minister, Helen Grant, said that instead of bringing such organisations under FOI law, contracts should include “contractual transparency clauses [that are] used and enforced to ensure that freedom of information obligations are met.” The government will issue guidance to encourage public authorities and contracts to go further than the minimum requirement to provide information.

10. Key Considerations

- 10.1 The area of Freedom of Information is acknowledged to be a complex one and therefore the Public have a right to request a review of any decision not to disclose, where they believe the refusal is unjustified. If, upon review, they remain dissatisfied appeal lies to the Information Commissioner and ultimately the courts.
- 10.2 Where the information in question may give rise to commercial considerations and confidences this may not be apparent without adequate explanation.
- 10.3 In the case of companies with whom the Council works closely or has indeed helped to found, the issue remains whether the information requested is held by the company on behalf of the Council. A close relationship is not of itself grounds to make a company within reach of FOI. Conversely, lodging information that validly belongs to the Council or has been created in performance of a contract between them with a company is not a means of evading FOI.
- 10.4 Applying these principles to Hoople Ltd. and Hereford Futures Ltd., for example, neither Company is under an obligation in law to answer questions about how it is run and how and why it makes operational decisions to do its work. Material information that these companies hold commissioned by the Council and ultimately likely to be incorporated into reports to go to the Council (for example) would be, but these would be subject to the normal considerations of any FOI request as to whether the information may be subject to any exemption under the Act and whether the public interest favours disclosure if it is.

11. Community Impact

- 11.1 None identified.

12. Equality and Human Rights

- 12.1 This report does pay due regard to our public sector equality duty.

13. Financial Implications

- 13.1 None

14. Legal Implications

- 14.1 As set out in the report.

15. Risk Management

- 15.1 Breaching the legal duties under the Act can give rise to a range of enforcement responses by the Information Commissioner which include service of Information Notices and Enforcement Notices, breaches of which may be treated as a contempt of court, giving rise to financial penalties.
- 15.2 The issue of as full an explanation as possible for a refusal to supply information to a requester frequently results in complaints not being upheld if referred to the ICO.
- 15.3 There is a presumption of disclosure under the Act, so any 'borderline' decisions should come down in favour of making information public.

16. Consultees

- 16.1 N/A.

17. Appendices

- 17.1 None

18. Background Papers

- 18.1 None identified.