

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 February 2012

Public Authority: City of Westminster
Address: P.O. Box 240
Westminster City Hall
64 Victoria Street
London
SW1E 6QP

Decision (including any steps ordered)

1. The complainant has requested information relating to the funding of a particular employees salary and the operation of various schemes run by the parking services department.
2. In relation to part 1 of the request, the Commissioner's decision is that the City of Westminster dealt with the request in accordance with the FOIA as it has provided the complainant with all of the information it holds relevant to the scope of this request. No further action is required in respect of part 1 of the request.
3. In relation to part 2d of the request, including clarified requests a) and b), the Commissioner's decision is that the City of Westminster did not deal with the request in accordance with section 1(1)(a), section 1(1)(b) and section 10(1) of the FOIA, in that it did not inform the complainant that recorded information was held, or disclose that information within the statutory time limit.
4. In relation to part 2d – c) of the request, the Commissioner's decision is that the City of Westminster failed to provide a response to the request within the statutory time frame of 20 working days.
5. In relation to parts 3a and 3b of the request, the Commissioner's decision is that, on the balance of probabilities, the City of Westminster does not hold the requested information. No further action is required in respect of parts 3a and 3b of the request.

6. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To respond to part 2d – clarified requests a) and b) in accordance with the requirements of the FOIA.
 - To respond to part 2d – c) of the request in accordance with the requirements of the FOIA.
7. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

8. On 31 July 2011 the complainant wrote to the City of Westminster ('the council') and requested information in the following terms:

"Question 1)

Which account of the funding of [named employee's] salary after September 2009 is true – the account given in FOI 6570 and supported by your invoice to the FTA dated 29th January 2010, (i.e. that third party part-funding ran until February 2010) or the account given in FOI 6161 (i.e. that the council fully funded [named employee's] salary from October 2009)?

Question 2)

Point 6 of FOI 6570 states that 'Light Touch' was not dissolved and point 7 goes on to explain that: "...'Light Touch' was a 3-month trial from 16th February 2009... "

So:

2a) Did 'Light Touch' continue after May 2009?

2b) Has any scheme other than 'Light Touch' been introduced since 2008 to allow commercial vehicles to load and unload on single and double yellow lines?

2c) In May 2009, [named individual], of the FTA stated that after its trial period, 'Light Touch' would be rolled out as part of the Freight Operator Recognition Scheme. Please confirm whether this happened.

If it didn't happen as described by [named individual], please explain what did happen.

2d) If the Freight Operator Recognition Scheme or any equivalent scheme that reduces PCNs for commercial vehicles is currently running, please tell me who is currently administrating, co-ordinating or otherwise looking after it?

2e) If no such scheme is in place, please confirm that the practice of entering specific vehicle registration numbers into parking attendants handsets for the purpose of ensuring that those vehicles are not served PCNs has ended. If it has not ended, please explain why.

Question 3)

Since council employees' salaries are funded by the taxpayer, I was surprised to learn in FOI 6570 that: "...The Agreement between the FTA and Westminster Council, for the [specific post], was on a verbal agreement for 12 months..." I am surprised also that the FTA would have been willing to hand over a large sum such as 50% of a professional salary without supporting documentation or paperwork protecting either party. This seems an extremely cavalier approach to managing taxpayers' money.

So:

3a) What specific justification(s) was there for not formalising the agreement in writing?

3b) Was the agreement examined and deemed legal by Westminster Council's (or indeed any other organisation's) legal department? If so please provide all associated paperwork.

3c) Was [named employee's] personal salary altered at any point before, during or after the FTA salary subsidy arrangement?

3d) Though I do not require actual currency figures, if the answer to 3c) is 'yes', please provide the date and degree of each alteration expressed as a percentage of her salary as at May 2008."

9. The council responded on 31 August 2011. It provided narrative answers to all questions except 3a and 3b for which it stated that under Section 1(4) of the Freedom of Information Act 2000 this information is not held and we are therefore unable to provide it.
10. An internal review was requested on 5 September 2011 in relation to parts 1, 2d, 3a and 3b of the request. The council responded on 31

October 2011. It upheld its initial position and provided further narrative information concerning part 2d.

11. In relation to 2d, the council informed Mr Carter on 8 November 2011 that;

"[named employee] was responsible for Light Touch / the Brewery trial while she was undertaking the [specific role]; however, as advised in the below e-mail, this role no longer exists. The Brewery Trail is now administered by a number of individuals within Vertex and City Council and there is no key individual responsible."

Scope of the case

12. The complainant contacted the Commissioner on 5 October 2011 to complain about the way his request for information had been handled. On 20 November 2011 in relation to 2d in correspondence to the Commissioner, he rephrased the questions, to the Commissioner, as follows:

"a) Is [named employee] responsible for, connected to, or in any way, shape or form involved with any aspect of the Loading/Unloading Dispensation Trial? If 'yes' please give details.

b) Is [named employee] responsible for, connected to, or in any way, shape or form involved with any aspect of the Loading/Unloading Dispensation Trial? If 'yes' please give details.

c) Does the council currently receive any payment for any purpose from the organisation, company or companies involved with the Loading/Unloading Dispensation Trial? If 'yes' please give details."

13. The Commissioner will consider whether the council responded to parts 1 and 2d of the request in accordance with the legislation. This includes the refined requests a) and b) in the above paragraph. The Commissioner considers that request c) in the above paragraph constitutes a new request. This was communicated to the council on 14 December 2011 who, on the 19 December 2011, stated that it had been logged as a new request and an acknowledgement would be sent under separate cover. However, on 24 January 2012, the council informed the Commissioner that it has not been possible to acknowledge the new request as it does not have a contact address for the complainant. In the circumstances of this case, the Commissioner considers it appropriate to consider whether the council dealt with request c) in accordance with the legislation deal as part of this decision notice.

14. The Commissioner also considers whether information in relation to requests 3a and 3b is held by the council.

Reasons for decision

Section 1 – General right of access to information and Section 10 – time for compliance with the request

Part 1 of the request

15. Sections 1(1)(a) and (1)(1)(b) of the FOIA state that any person making a request for information is entitled to be informed by the public authority whether it holds the information and if so, to have that information communicated to him.
16. Section 10(1) of the FOIA states that a public authority in receipt of a request for information has a duty to respond within 20 working days.
17. The Commissioner notes that part 1 of the request is phrased as a question rather than a direct request for recorded information. However, it is clear that questions should be treated as requests if recorded information exists which would answer those questions.
18. In its original response, the council stated that;

“[Named employee’s] role was within an Internal Department of the Council and as a result Westminster City Council paid the salary in full. The Council then invoiced the FA to claim their contribution under the part-funding arrangement”.

The Commissioner’s view is that this response is unclear as it both refers to the council paying the salary in full and refers to the arrangement as a ‘part-funding arrangement’. Whilst the Commissioner appreciates that the council paid the salary in full, hence ‘fully funded’ the salary, and then invoiced the FTA to claim their contribution, hence ‘part funding arrangement’, he considers the mixture of terminology used in its response to be ambiguous.

19. The complainant’s review request in relation to part 1) was worded as follows:

“In FOI 6161 Question 3, the council stated that it had fully funded [named employee’s] salary since the restructuring of September 2009. However, an invoice released by the council also under FOI shows that the council specifically invoiced the FTA for its contribution up to [named employee’s] salary up to and including February 2010.

This shows that the FTA did continue to part-fund [named employee's] salary beyond October 2009. Furthermore the council informed the Information Commissioner in the course of its investigation (ref: FS50362936) that in fact "...the agreement was terminated as a result of [named employee] going on long term leave in March 2010..."

This means that the statement provided by the council in FOI 6161, Question 3, that the council fully funded [named employee's] salary following the restructuring in October 2009 must be false.

Please properly and truthfully explain which version is correct and please explain why the council choose to give the wrong version under FOI."

20. As the council have clearly described the same arrangement as both 'fully funded' and a 'part-funding arrangement', the Commissioner appreciates why the complainant believes that one of the council's responses must be untrue. However, the Commissioner also appreciates that the council can pay the full amount of salary to an employee and then re-claim an amount of that from a third party via an invoice. The council have confirmed to the Commissioner that they have disclosed all the information they hold with regards to the arrangement and the Commissioner considers that the information held in relation to request has been provided. Therefore, he does not consider the council to be in breach of section 1 of the FOIA.
21. However, the Commissioner has considered the council's review response to this part of the request in the 'Other matters' section of this decision notice.

Part 2d of the request

22. The council's original response to the request for who is currently administering, co-ordinating or otherwise looking after the Freight Operator Recognition Scheme, or any equivalent scheme, was that there is a 'Brewery Trial' being run by Westminster City Council assisted by a number of brewery companies.
23. The complainants internal review request was worded as follows:

"The City Council Brewery Trial Dispensation appears to be almost identical to the 'Light Touch' scheme it replaced. Therefore my question requesting the name of the person or persons "...currently administrating, co-ordinating or otherwise looking after it..." has not been answered.

Please provide me with the name or names I have requested."

24. The internal review response stated that Parking Services has confirmed that the Freight Operators Recognition Scheme is run by Transport for London.
25. The complainant pointed out that he asked about the Brewery Trial, as an equivalent scheme, and requested an answer. The council responded by stating that [named individual] was responsible for Light Touch / the Brewery trial while she was undertaking the [specified role]; however, this role no longer exists. The Brewery Trail is now administered by a number of individuals within Vertex and City Council and there is no key individual is responsible.
26. In his complaint to the Commissioner, the complainant stated that he could see no justification for the council withholding the name or names requested, regardless of how many names there are. However, as stated in paragraph 12, he rephrased the question as follows:
 - "a) Is [named employee] responsible for, connected to, or in any way, shape or form involved with any aspect of the Loading/Unloading Dispensation Trial? If 'yes' please give details.
 - b) Is [named employee] responsible for, connected to, or in any way, shape or form involved with any aspect of the Loading/Unloading Dispensation Trial? If 'yes' please give details.
 - c) Does the council currently receive any payment for any purpose from the organisation, company or companies involved with the Loading/Unloading Dispensation Trial? If 'yes' please give details."
27. As the Commissioner is aware that the council also refer to the Brewery Trail as the Loading/Unloading Dispensation Trial, he considers that a) and b) above are not new requests for information but are clarifications of the original request, narrowing the scope of that request. In light of this, he requested that the council either provide the answers to questions a) and b) or, if it is not willing to do that, provide the names of the individuals 'currently administrating, co-ordinating or otherwise looking after' the 'Brewery Trial' or cite a valid exemption under the FOIA for why the information is not to be disclosed. The Commissioner also asked the council to treat c) as a new request for information.
28. The council did not provide the answers to questions a) and b), or provide the names of the individuals 'currently administrating, co-ordinating or otherwise looking after' the 'Brewery Trial', or cite a valid exemption. Instead, it stated that the questions raised constitute new requests and would be logged and acknowledged as such. As stated in paragraph 13, the council later informed the Commissioner that it has

not been possible to acknowledge the new request as it does not have a contact address for the complainant.

29. The Commissioner considers that the council could have easily contacted the complainant by responding to his original request or internal review request on the WhatDoTheyKnow website. He also considers that although the terms of the original request could have been objectionably read as requiring either the names of the organisation or the names of the individuals administering, coordinating or looking after the scheme, the complainant clarified in his internal review request that he required individual names. Therefore, in relation to request 2d, including clarified requests a) and b), the Commissioner considers that the council did not deal with the request in accordance with section 1(1)(a), section 1(1)(b) and section 10(1) of the FOIA, in that it did not inform the complainant that recorded information was held, or disclose that information within the statutory time limit.

Part 2d – c) of the request

30. Section 10(1) of the FOIA states that a public authority in receipt of a request for information has a duty to respond within 20 working days.
31. Despite the Commissioner requesting that the council provide a response to this request, and the council logging the request, a response has not been issued to date.
32. Therefore, the council has failed to respond to the request within the statutory time frame of 20 working days.

Section 1 – Is the information held

Part 3a and 3b of the request

33. Sections 1(1)(a) and (1)(1)(b) of the FOIA state that any person making a request for information is entitled to be informed by the public authority whether it holds the information and if so, to have that information communicated to him.
34. In the request for information itself, the complainant has asserted that he is surprised that the Freight Transport Association ('FTA') would have been willing to hand over a large sum such as 50% of a professional salary without supporting documentation or paperwork protecting either party. He commented that this seems to be an extremely cavalier approach to managing taxpayers' money.
35. As part of his review request, the complainant stated that as the employee who's salary is in question arranged the salary subsidy agreement in dialogue with the FTA, with some input from her manager,

that employee, or her manager, should be fully able to provide an answer to the question of why the arrangement remained verbal and was neither formalised in writing nor checked by any legally qualified entity for lawfulness.

36. In correspondence with the Commissioner, the complainant stated that some paperwork was generated because the council has previously provided copies of the invoice to the FTA in which it was explicitly stated that the latter was being billed for its contribution to [named employee's] salary. He expressed the view that it is inconceivable that an invoice could be generated from an audited accounts department without some formal instruction to the council accounts staff on paper. He further stated that if it is indeed true that no further paperwork exists, then this in itself, under the spirit of the Act, demands that a full explanation of the reasons for this anomaly should be forthcoming from the council. He is of the opinion that this information is crucial and, believes there is a clear implication that the criminal act of bribery has occurred in this case, which is overwhelmingly in the public interest. He stated that the two key council employees involved are in a position to provide the answers and are, to the best of his knowledge, still employed by the council. He can therefore see no justification for the council refusing to oblige the two employees to fully explain both their actions and their motives in what he describes as 'this sorry affair'.
37. The complainant also expressed his view to the Commissioner that the employee who's salary was being subsidised knew that what they were doing was 'at best, immoral, almost certainly unlawful and very probable illegal', they deliberately ensured that there was little or no documentation concerning the arrangement, that the relevant legal departments were never informed of the arrangement and that the arrangement was quietly dropped once certain members of the public became aware of it.
38. In its review response, the council stated that there is no recorded information as to why the agreement was not formalised in writing. Nor, as the agreement was verbal, is there any paperwork associated with an examination of such agreement and having reviewed the correspondence relating to the funding arrangements the council is satisfied that it correctly responded to this request in applying section 1(4) of the FOIA. The council further stated that the employees concerned have both confirmed in the course of responding to the original request that they do not hold any recorded information with regard to this matter and as there is no requirement to create information where it was not already recorded, or to provide opinion/comment on responses already provided, the council considers that it has discharged its duties under the FOIA.

39. During the investigation, the Commissioner made enquiries as to the searches carried out to establish whether the information was held. The council confirmed that it asked the two employees concerned whether this information was held and that searches would be likely to reveal any information as they were involved in the funding arrangement and could confirm whether or not this was ever formalised and if legal advice had been sought on the matter. Both staff members confirmed that there was no decision taken not to formally record this arrangement and that Legal Services were not asked to comment on whether or not such arrangement was legal. The council also confirmed that all relevant information relating to the salary and associated invoicing arrangements was passed to the Knowledge and Information Management Team as part of the investigation into a previous freedom of information complaint and all such records were included in the current search.
40. In reaching a decision the Commissioner has considered if the requested information was what he would expect the council to hold and whether there was any legal requirement or business need for the council to hold the information. The complainant clearly expects that the council should hold the information and the Commissioner is of the opinion that it appears unusual for such a financial arrangement not to be formalised in writing. The council did not directly respond to the Commissioners enquiries as to whether there was any legal requirement or business need for it to hold the information and the Commissioner does not consider it to be within his remit to identify such a business need or legal requirement. However, in the absence of evidence that there is a formal requirement to hold such information, the Commissioner cannot conclude that such information should be held.
41. The Commissioner also considered whether the council had any reason or motive to conceal the requested information. He notes the complainant's view that information was deliberately not created in order to conceal an unlawful arrangement. However, the Commissioner does not view this as evidence that the council is concealing information. Furthermore, it is not the Commissioner's role to comment on whether such an agreement is lawful.
42. In addition, the Commissioner considered whether there is any evidence that the information was once held. The council confirmed that the information was not created and therefore never held.
43. In relation to the complainants assertion that the employee who's salary is in question and her manager should be fully able to provide an answer to the question of why the arrangement remained verbal and was neither formalised in writing nor checked by the legal department, the Commissioner considers it clear that public authorities do not have to create new information in order to respond to a request. Whilst it may

be good practice for a public authority to respond to a question as to why such an arrangement was not formalised in writing nor examined by the legal department, the FOIA does not place a duty upon public authorities to answer a question unless recorded information exists.

44. In the circumstances, although the Commissioner is of the opinion that it appears unusual for a salary subsidy arrangement not to be formalised in writing, he does not consider that there is any evidence in this instance that would justify refusing to accept the council's position that it does not hold the information requested in this case. The Commissioner is therefore satisfied that on the balance of probabilities, the information requested is not held by the council. Accordingly, he does not consider that there was any evidence of a breach of section 1 of the FOIA.

Other matters

45. In the internal review response of 5 September 2011, the council held the view that it was not required to undertake an internal review as FOI 6161 was not submitted by the complainant. It stated the following:

"It is Westminster City Council practice to only undertake an Internal Review where the request to do so is submitted by the original applicant. The council will not therefore comment specifically on responses sent to other parties. As FOI request 6161 was not submitted by you, the council has not considered its response as part of this Internal Review."

46. The council further expressed its opinion to the Commissioner that it shouldn't have to undertake an internal review into material posted in response to a request of which the complainant is not the applicant as it is not an appropriate use of public authority resources to be tied up in multiple internal reviews per each request. However, the Commissioner considers any response to an FOI request to be a response to the world at large and notes that the information provided in response to FOI 6161 is in the public domain via the WhatDoTheyKnow website. The Commissioner does not consider that the complainant's internal review of part 1 of this request amounts to an internal review request of FOI 6161; the current review request does reference a previous request but that does not amount to a review of that previous request. Therefore, as a matter of good practice under Part IV of the Section 45 Code of Practice, the council should have provided a response to this part of the review request.

Right of appeal

47. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

48. 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.
49. 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

Andrew White
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