

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 2012

Public Authority: Bolton Metropolitan Borough Council
Address: Town Hall
Victoria Square
Bolton
BL1 1RU

Decision (including any steps)

1. The complainants requested background information about the way the public authority had dealt with one of their requests. The public authority provided some information and also relied on the exemption at section 36 of the FOIA. The complainants raised various issues to do with the handing of their request. The Information Commissioner's decision is that the public authority dealt appropriately with the request. He requires no steps to be taken.

Request and response

2. On 30 September 2011 the complainant wrote to the public authority and requested information in the following terms:

"Under the Data Protection Act 1998 and / or the Freedom of Information Act 2000 please provide copies of all internal communications, emails or any other correspondence, between any employees of Bolton Council which discuss Freedom of Information Request 972 from submission on the 19th June 2011 to date.

This request includes but is not limited to copies of all:

- *emails, briefing notes, advice, descriptions, etc provided by any Bolton Council employee in relation to FOIR 972.*

With regard to the letter 'authorised' by [name removed] and sent on 18th July 2011, please provide:

- *the name(s) of the Council employee(s) who decided that this request should be dealt with under the Environmental Regulations Act 2004 rather than the Freedom of Information Act 2000.*

With regard to the meeting held on Monday 8th August 2011 to discuss how to respond to queries raised in our letter of 27th July 2011 in relation to the Council response to FOIR 972, please provide:

- *the names of all attendees at the above meeting.*
- *the names of the Council employees to which the words 'we' and 'our' in the 'Performance and Improvement' email of 16th August relaying the outcome of this meeting refer to?*
- *copies of all notes, minutes, action lists, emails etc arising etc from the above meeting.*

With regard to the letter from [name removed] dated 25th August 2011 please provide:

- *the name(s) of the Council employee(s) who decided that Point 2 should be reassigned as a 'request for an internal review' rather than a 'request for clarification'.*

For the purpose of this request 'Council employee' means permanent, contract or agency staff".

3. Following an automated acknowledgement, the public authority wrote to the complainants on 28 October 2011. It advised that it was considering the release of internal communications under section 36 of FOIA and required further time in which to consider the public interest in disclosure; it provided an estimated response date of 25 November 2011 for this information. It disclosed information in respect of other parts of the request, withholding some elements under section 40 and 42 of the FOIA.
4. On 4 November 2011, prior to being sent the remainder of the public authority's response, the complainants sought an internal review. They complained that the public authority had not responded promptly and that it had done so on the twentieth working day. They further complained that it had failed to cite the subsection(s) of section 36 that it was relying on and also that there would be a 'conflict of interest' as

some of the withheld information would include correspondence from the public authority's 'qualified person'. They further challenged the citing of section 42.

5. On 21 November 2011 the complainants chased an acknowledgement of their request for an internal review.
6. On 24 November 2011 the public authority wrote with the results of its consideration of the public interest in relation to section 36(2)(b)(ii). It outlined how the complainants could seek an internal review but did not respond to their letters of 4 and 21 November 2011.
7. On 24 November 2011 the complainants again sought a response to their earlier correspondence. An apology was sent the following day and they were advised that their request for an internal review would be dealt with.
8. Following an internal review the public authority wrote to the complainants on 21 December 2011. It explained its position regarding the timeliness issues raised by the complainants. It disclosed the information previously withheld under section 42. It advised that there was no conflict of interest in respect of section 36 as no emails from the qualified person fell within the scope of the request.

Scope of the case

9. On 6 January 2012 the complainants contacted the Information Commissioner to complain about the way their request for information had been handled. They raised various issues which the Information Commissioner tried to clarify. By response they confirmed that they wished him to consider the following (the Information Commissioner's initial scoping is included in the four numbered sentences, the complainants' comments are added to these):

"We feel that the scope of your enquiries regarding our complaint should include the following :

1) the length of time taken to provide your initial response;

In our experience, Bolton Council take 20 days to respond to every request and 20 days for every extension as in this case.

2) whether Bolton Council was entitled to extend the time period to consider the public interest;

Disclosure of the 'public interest test' used to exempt information specifically:

- i what information was used in applying this test?*
- ii why is it not in the public interest to disclose the information?*
- iii why did it require 20 days to carry out this test and / or reach this conclusion?*

3) whether there was a 'conflict of interest' in the handling of your request;

The 'conflict of interest' test has a number of elements that need to be examined:

- i. The appeal officer was involved in the day-day handling of FOIR 972*
- ii. The appeal officer was responsible for exempting the information that we appealed against*
- iii. The council ignored our concerns about any conflict*

4) the lack of timely acknowledgement to two pieces of your correspondence dated 4th and 21st November 2011;

The issue is not simply lack of acknowledgment but ignoring the content of the correspondence; specifically our request for a review".

10. Where appropriate, the Information Commissioner will consider the complainants' issues in this notice; however, some matters raised fall outside of the remit of section 50 and are therefore referred to in 'Other matters' at the end of this notice. Furthermore, in respect of parts 2(i), (ii) and (iii), the Information Commissioner is unable to consider whether or not the public authority was correct to rely on the exemption at section 36(2)(b)(ii) because, when asking for an internal review, the complainants did not ask for the application of the exemption to be considered. Therefore, as the public authority has not been required to revisit its citing of this exemption, the Information Commissioner will not consider it in this notice.

Reasons for decision

Timeliness

11. Section 10(1) FOIA states that, subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

12. The obligation to respond “promptly” to a request for information under the FOIA is distinct from, although linked to, the obligation to respond within 20 working days. The Information Commissioner regards the primary obligation on the public authority as that to respond “promptly”; the 20 working day time limit acts as a “long stop”. Therefore, it is theoretically possible to find that a public authority’s duties under section 1(1) were complied with within 20 working days, but still not “promptly”.
13. If a complainant raises the issue, the Information Commissioner will investigate a complaint that an authority has failed to respond promptly to a request by considering the specific circumstances of the case. It should be noted that he will consider the section 10(1) duty to reply promptly to be explicitly linked to the specific duties under sections 1(1)(a) and 1(1)(b) of the Act. So a general response sent within 20 working days (such as an acknowledgement of a request or a holding response), which doesn’t confirm or deny whether information is held, or provide information, will not meet the section 10(1) requirement to comply with section 1(1) promptly or within 20 days. However, where a public authority has complied with its section 1(1) duties within 20 working days, it will be unlikely that the Information Commissioner will find that an authority failed to respond promptly unless there is evidence that it acted unreasonably in failing to reply sooner.
14. The question of promptness was considered by the First-tier Tribunal in *Gradwick v Cabinet Office* (EA/2010/0030). The tribunal confirmed that it was legitimate to consider this issue. It largely upheld the Information Commissioner’s original decision notice, including his finding that the public authority had complied with the 20 working days deadline. However, in the appeal the tribunal also considered the complainant’s argument that:

“it was not just compliance with the 20 working day deadline that concerned him, but also the fact that the Cabinet Office could, in his view, have responded earlier than the last date stipulated; it was not right for it to have left its response to the final day.”

The tribunal concluded:

“The plain meaning of the language of the statute is that requests should be responded to sooner than the 20 working days deadline, if it is reasonably practicable to do so. However, we consider that the information requested in this case was substantial and complex and the subject matter was of great

potential significance. In those circumstances we have no hesitation in saying that the Cabinet Office was entitled to take the full statutory period in responding to Mr Gradwick."

15. In this case a partial response was sent by the public authority within 20 working days. It disclosed some information and advised that further information was held. However, it also advised that additional time was required for consideration of the public interest, as permitted by section 36 on the FOIA, in which to consider disclosure of the remaining information. It subsequently complied with the estimated time extension that it had given to the complainants.
16. To ascertain whether or not the public authority dealt with requests promptly, the Information Commissioner asked the public authority to provide him with evidence of the timeliness in respect of all FOIA requests it dealt with in the month of September 2011 - the month in which this particular request was received. He was advised that a total of 74 requests had been received and he was provided with relevant dates.
17. Having considered the response times, and further explanations offered by the public authority, the Information Commissioner has seen no evidence to uphold the complainants' assertions that the public authority always responds "at the last opportunity". Whilst 21 of the requests were responded to on the twentieth working day, the Information Commissioner recognises that a public authority must consider its position thoroughly when responding to information requests. He does not agree that there is any evidence to support the complainants' views that the public authority does not deal with requests promptly.
18. Additionally, in respect of the complainants' assertion that: "*In our experience, Bolton Council take 20 days to respond to every request and 20 days for every extension*", the public authority explained to the Information Commissioner:

"It does not always take 20 working days to issue notice of requiring a time extension. It depends on the nature and complexity of the request. Some requests which require consideration of the public interest can be dealt with within the 20 working days, others not. There can be many factors to take into account and with some requests, such as this, there is a mixture of information it is considered should be disclosed and elements to which different exemptions might apply. You will note that on the 28th October 2011 the Council not only gave notice of a time extension but also provided some of the information as well as redacting some. It was not

straightforward. The Council had used the 20 working days to consider each element and the relevant exemptions, as well as obtaining and considering the information that fell within the scope of the request. It would have been rash not to seek an extension and deal too hastily with consideration of the public interest in this case ... Please note this request was a request regarding the handling of a previous request which added to the complexity”.

19. The Information Commissioner accepts that the length of time taken to deal with this request was appropriate on this occasion.
20. Considerations of the complainant's concerns regarding the extension of time limit to consider the public interest are covered in "Other matters" below.

Request for internal review

21. The complainants have complained that the public authority ignored their request for an internal review made on 4 November 2011 and the chase-up which they then submitted on 21 November 2011. Having received the results of the public interest test that the public authority had completed and emailed on 24 November 2011, the complainants again emailed the public authority to chase an internal review. On the following day the public authority emailed an apology for its delay in responding to the email. It advised them:

"I can confirm that your request for an internal review has been logged, but that this has not yet been progressed as the request (RFI 1263) had not yet been completed, due to the time required to consider exemptions. I have contacted the Corporate Information Team this morning and requested that an internal review is now undertaken. This should be completed within 20 working days, however if that is not possible, they will let you know the progress made in the review and when you can expect to receive a final response”.

22. Although it is unfortunate that the public authority did not acknowledge the receipt of the 2 emails sent on 4 and 21 November 2012, the Information Commissioner notes public authority's position that it was not at that point able to conduct an internal review as it was still considering the actual request. As such, it acted appropriately. He also notes that it apologised for its lack of communication, although the request for internal review had been logged. The Information Commissioner can find no breach of the FOIA in this regard.

Conflict of interest

23. When asking for an internal review the complainants advised the public authority that they did not believe its Monitoring Officer should act as a qualified person for the purposes of section 36 as they believed there would be emails from him included in the scope of their request. Whilst they accepted that the public authority was able to rely on the opinion of its Monitoring Officer as the 'qualified person' when considering section 36 of the FOIA, they also stated:

"As the Council's Monitoring Officer is [name removed] and any e-mails from [name removed] are amongst those which are currently being withheld; there would clearly be a conflict of interest in him exercising 'reasonable opinion'. Similarly if we subsequently disagreed with any decision he made regarding exemption under Section 36, as the Council Monitoring Officer he would conduct the internal review just as he did in respect of [our previous request]".

24. The Information Commissioner's view is that an internal review should be impartial and undertaken by someone senior to the person who took the original decision where practicable, or if not, by someone different to the original decision maker but who is trained and understands freedom of information. This is not stipulated in the FOIA itself but he considers it to be best practice. The officer at whom the complainant's complaint is directed assured them: *"There is no conflict of interest in respect of this request. No e-mails from me fell within the scope of this request and were not subject to consideration of s36"*.
25. As the public authority has clarified its position, the Information Commissioner finds that there is no conflict of interest in the Monitoring Officer carrying out his role of conducting internal reviews. Furthermore, on the same rationale, there can be no conflict of interest in him acting as a qualified person for the purposes of considering the exemption at section 36 of the FOIA.

Other matters

Extension of time limit to consider the public interest

26. It is the complainants' view that the public authority took too long to carry out its consideration of the public interest. The Information Commissioner put this view to the public authority, advising that it was the complainants' contention that it always took a further 20 working days to consider the public interest. The public authority responded that:

"This is not the case ... However, considering the public interest clearly has to be dealt with carefully, weighing up the competing interest that are is [sic] supported by the relevant exemption and, whilst always trying to respond within a reasonable time, the decision is never rushed.

It is my opinion that the initial request and the review were responded to within the timescales as directed by the ICO Good Practice Guidance No4 and Section 45 Code of Practice".

27. The Information Commissioner notes that there is no statutory time in which a public authority has to conduct a public interest test. However, as stated by the public authority, he has issued guidance which indicates what he considers to be reasonable. The public authority has complied with this guidance.

Right of appeal

28. 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

29. 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.
30. 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

Jon Manners
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