

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 January 2014

Public Authority: Wigan Council

Address: Town Hall
Wigan
WN1 1YN

Decision (including any steps ordered)

1. The complainant requested information regarding the correspondence between a named individual and the Director of Education.
2. The Information Commissioner's decision is that Wigan Council ('the Council') has breached section 1(1) and section 10(1) of the FOIA because it did not provide the requested information within the time for compliance.
3. The Commissioner does not require the public authority to take any further steps.

Request and response

4. On 27 January 2011 the complainant requested the following information:

"Finally, could you please supply, under the Freedom of Information Act, copies of all correspondence (including electronic) between [a named person] and the Director of Education (latterly Children and Young People's Services) for 2005, 2006 and 2007."

5. This request was also considered in decision notice FS50392234. The Council considered that it had sought clarification of the request but the complainant said he did not receive the request until after the intervention of the Commissioner. The complainant then refused to provide clarification and informed the Commissioner that he did not wish to pursue his request. However, following the First-tier Tribunal decision

[EA/2012/0126] of 31 December 2012 the Council was ordered to issue a valid response to the request of 27 January 2011.

6. The Council issued its response on 6 February 2013. It provided some information within the scope of the request and issued a refusal notice in respect of further information. The refusal notice stated that the Council was unable to provide electronically held information which had been deleted in line with its Records Management Policy retention periods.
7. On 7 February 2013 the complainant requested an internal review and raised various points in respect of the treatment of the information within the scope of his request and the administration of the Council.
8. The Council provided its review on 5 July 2013 responding to the points raised by the complainant and upholding the initial response.

Scope of the case

9. On 9 August 2013, the Commissioner received a complaint from the complainant about the Council's response. The Commissioner determined the scope of his investigation to be the consideration of the Council's 'not held' response and the operation of its retention schedule within its Records Management Policy.
10. The complainant set out various concerns in respect of the Council's Records Management Policy, retention of records and the specific circumstances relating to his information requests which he does not consider to be 'normal'.

Reasons for decision

Section 1- Is the information held?

11. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request, and if so, to have that information communicated to him.
12. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. The Commissioner must therefore decide whether on the balance of probabilities the public authority holds any

information which falls within the scope of the request (or was held at the time of the request).

13. In this case the complainant's view appears to focus on his consideration that the Council should have changed its Records Management Policy to exclude from the automatic deletion process any information which may have fallen within the scope of his request of 27 January 2011. The Council considered that it had asked the complainant for clarification of the request and any further action in terms of searching for information was pending receipt of that clarification. The Council's position did not change until the judgement of the First-tier Tribunal in December 2012 which directed the Council to respond to the original request.
14. During his investigation the Commissioner enquired as to the scope, quality and thoroughness of the searches carried out by the Council to determine whether any information within the scope of the request is held. The Council acknowledged that if it had searched for information within the scope of the request in January 2011 further information may have been disclosed. However as the search did not take place at that time the Council cannot determine whether further information would or would not have been located.
15. The Council explained that notwithstanding its Records Management Policy and the operation of its retention schedule (see paragraph 19), it had searched further by contacting members of staff who were employed at the time period specified in the request to determine if any information was held outside the 'Outlook' programme. The Council explained to the Commissioner that the information it had provided to the complainant was not stored in 'Outlook' and therefore had not been subject to deletion. The emails which comprised the information had been retrieved from a folder stored by a personal assistant to the Director of Children and Young Persons' Services at the time. The Council, having determined that this information was held and fell within the scope of the request, consequently provided the information to the complainant. However, the complainant advised the Commissioner that this information provided was, "..for the most part, useless".
16. The Commissioner questioned the Council regarding any other information which may have been stored separately by any other assistant or secretary to the named person. The Council explained that the named person was not employed by the Council and therefore did not receive administration support from the Council; consequently there was no opportunity for emails to have been stored in a folder held by the Council.
17. The Commissioner accepts that had this request been fully considered by the Council within 20 working days of its receipt any correspondence

from 2006 and 2007, which was deleted as at 6 February 2013, would not have been deleted and may have fallen within the scope of the request (see paragraph 19). The Council accepted the First-tier Tribunal direction that its letter of 23 February 2011 to the complainant was not a request for clarification within the meaning of Section 1(3) of the FOIA. However as this direction to the Council was given 23 months after it received the request the Commissioner accepts that the Council could not have pre-determined this outcome and therefore it is not reasonable to assume that the Council should have amended its retention policy.

18. The complainant gave his opinion on the Council's response as follows:

"I [sic] would appear that the Council operates a perverse Records Management System. It did not delete superfluous emails but did delete those that had been requested and made the subject of a Commission decision. The question of what criteria are applied by the Council's IT department in making its decisions to keep or delete comes into play."

19. The Commissioner asked the Council to explain the operation of its retention policy. The Council explained that the software which managed archived emails is set at a retention period of five years. The system automatically deletes emails after that time period with no record or log of the deleted emails retained. The Commissioner understands that the email archive, along with all other data systems is 'backed up' between Christmas and New Year. The Council considers that this back up is an action taken to protect records in a disaster situation.

20. The FOIA section 46 Code of Practice states that:

"A record cannot be considered to have been completely destroyed until all copies, including back-up copies, have been destroyed, if there is a possibility that the data could be recovered."

However, the Commissioner considers that information held on a back-up is not held for the purposes of the FOIA. This is because, generally, the public authority will have no intention of accessing the information held on the back-up. (In the circumstances of this case, the Commissioner is satisfied that the back-up is not used as an archive.) The Commissioner's focus is on the intention of the public authority rather than on whether the records can actually be recovered in any circumstance.

21. In the circumstances of this case, the Commissioner does not consider that there is any evidence that would justify refusing to accept the Council's position that it does not hold any further information relevant to the request. The Commissioner is therefore satisfied that, on the

balance of probabilities, the information held by the Council has been provided.

Other matters

22. The Commissioner notes that the Council's engagement with his office has been subject to repeated delays which have not assisted his investigation.
23. The Commissioner wishes to draw particular attention to the time taken to provide an internal review in this case which was excessive and outside the Commissioner's guidance of 20 working days. Although this does not form a requirement of the FOIA the Commissioner suggests that the Council applies his guidance in these matters.

Right of appeal

24. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

25. 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.
26. 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

Alexander Ganotis
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