

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 2 January 2014

**Public Authority:** Northumberland County Council  
**Address:** County Hall  
Morpeth  
Northumberland  
NE61 2EF

#### **Decision (including any steps ordered)**

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1. The complainant has requested Northumberland County Council's record management and personal data policies. Northumberland County Council (the "Council") explained it was updating its data protection policy and refused to provide it citing the exemption at section 22 (information intended for future publication) as its basis for doing so. During the course of the Commissioner's investigation, it identified relevant links on its website and provided them to the complainant.
2. The Commissioner's decision is that the Council has contravened the requirements of section 1, 10 and 17 in the handling of this request and that the requested information is exempt from disclosure under section 21(3) (information reasonably accessible by other means).
3. No steps are required.

#### **Request and response**

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4. On 12 February 2013, the complainant requested information of the following description:

"Further to our recent correspondence I wish to make a formal freedom of information request and to formally request sight of the Councils record management and personal data policies.

Given that the information requested is contained within your publication scheme (see below for relevant extracts) I would expect a prompt response to my request as per the Freedom of Information Act (see below S10 Freedom of Information Act) and so well within the statutory maximum period of 20 working days.”

5. The relevant extract from the Council’s publication scheme that he supplied with his request was as follows:

“The Information you will have access to

You will have access to all policy and procedure documents, minutes of meetings, Performance and Service Plans and reviews, Council Accounts, Inspection reports and much more. Some of this has always been available to you; The Freedom of Information Act makes it easily accessible and makes much more information available. If you require information not covered in this scheme please let us know (see section on how to get the information you need) and we will do our best to help you. All the information is listed at the end of this document.

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#### E. Our Policies and Procedures

Codes of practice, standing orders, procedures, policies and protocols for delivering services and responsibilities

1. Policies and procedures for conducting council business.
  2. Policies and procedures for delivering services.
  3. Policies and procedures for recruitment and employment.
  4. Customer services.
  5. Records management and personal data policies.
  6. Charging regimes and policies.”
6. On 12 March 2013, the Council responded. It provided its data protection policy but refused to provide its Corporate Records Retention Guide. It cited section 22(1)(a) – information intended for future publication as its basis for doing so.
  7. The complainant requested an internal review by return on 12 March 2013.
  8. The Council sent the complainant the outcome of its internal review on 9 April 2013. It upheld its original position regarding section 22 and commented that this did not contradict its publication scheme. It confirmed that it intended to publish the document but it did not have a date for publication.

## Scope of the case

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9. The complainant contacted the Commissioner on 25 April 2013 to complain about the way his request for information of 12 February 2013 had been handled. At the time, he was in correspondence with the Commissioner on a data protection matter. The Commissioner set up a separate FOIA case while dealing with his data protection concerns.
10. Regrettably, the Commissioner did not progress this separate complaint under FOIA as expeditiously as he should have done. Primarily, he failed to obtain copies of the complainant's pre-complaint correspondence with the Council. The Commissioner needed this copy correspondence in order to take the complaint forward. He asked the complainant for this information on 10 October 2013. Fortunately, the complainant provided the necessary information promptly upon request.
11. The complainant raised 2 points in his complaint:
  - Had the Council contravened section 19 by failing to provide information which it said was available in its publication scheme?
  - Could the Council rely on section 22 as a basis for withholding information described in his request?
12. The complainant has also asserted that, as a consequence of the Council's response to his complaint, he has concluded that the Council does not, in fact, have a records retention policy. This notice will also address whether this is the case.
13. During the course of the Commissioner's investigation, the Council identified two pages from its website which link to its draft Record and Information Management Policy Statement (last updated on 5 June 2009) and its Retention and Disposal Guidelines (last updated on 25 September 2009).<sup>1</sup> It described these to the Commissioner as being "inadequate for the make-up of the Council" and explained that the Council was updating them. It intended to publish the revised versions in early 2014.
14. At the Commissioner's prompting, the Council duly provided the links to the complainant on 28 November 2013.

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<sup>1</sup> <http://www.northumberland.gov.uk/default.aspx?page=5810> and <http://www.northumberland.gov.uk/default.aspx?page=5812>.

15. It should also be noted that separately the Commissioner had conducted a data protection audit of the Council. It conducted a follow-up audit in 2013. An executive summary of the follow-up is available on the Commissioner's website.<sup>2</sup> Of relevance to the matter at issue in this complaint is the following conclusion in the executive summary:

"More work is required at the Council's records archive, along with a revised Data Retention Policy to ensure paper records are disposed of in line with agreed retention schedules."

16. This reflects that the Council is in the process of revising its Data Retention policies as it had explained to the complainant.

## Reasons for decision

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### Section 19

17. Section 19(1) of the Act provides that a public authority must adopt and maintain a scheme which relates to the publication of information and is approved by the Commissioner. Section 19(1)(b) places an obligation on public authorities to "publish information in accordance with its publication scheme". Section 19(2)(a) provides that a publication scheme must specify classes of information which a public authority "publishes or intends to publish". The Commissioner considers that the relevant "class of information" referred to in the Council's publication scheme, in this instance, is "Policies and procedures".<sup>3</sup>
18. As noted above, the Council explained that it was revising its records management policy and intended to publish a revised version once it was completed. It argued that the latest draft version was exempt under section 22. However (and as noted above), during the course of the Commissioner's investigation, it found online links to information which also fall within the class of information referred to in the request.

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<sup>2</sup>

[http://www.ico.org.uk/what\\_we\\_cover/audits\\_advisory\\_visits\\_and\\_self\\_assessments/audits](http://www.ico.org.uk/what_we_cover/audits_advisory_visits_and_self_assessments/audits) (see 18 October 2013).

<sup>3</sup> Current information about the Council's publication scheme is available via the following link: <http://www.northumberland.gov.uk/Default.aspx?page=4763>. At the time of the request, it described the information in this class in more detail as is shown in the wording of complainant's request.

19. In the Commissioner's view, the Council mishandled this request and made a sensitive situation even more difficult by doing so. The Council's approach to data retention has had an impact on the complainant personally although the Commissioner does not propose to set out any more detail about this here.
20. In response to the complainant's request, the Council should have provided the links set out in Note 1. At the same time, it could have explained that the information was being revised – the FOIA does not prevent public authorities from providing contextual background with the information they disclose. Strictly speaking, the Council should have explained that information published in accordance with the publication scheme is reasonably accessible to an applicant under section 21(3) and is therefore exempt under that provision of the Act.
21. Section 21 provides that: -
  - "(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
  - (2) For the purposes of subsection (1)—
    - (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
    - (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.
  - (3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme".
22. Put another way, if the information is available via the Council's publication scheme, it is exempt under section 21(3) because it is reasonably accessible to the applicant by other means.
23. The Commissioner notes that according to the first link (see Note 1) "[the Council's] Records Retention and Disposal Policy and Schedule lists record series with examples of individual records. It is still a work in progress; however it can still be used to assist members of staff who are

preparing records for storage. The Policy and Schedule will be reviewed regularly."

24. The Commissioner considers that although the policy is under review, the online information is explicitly described as a resource regarding records management that the Council still uses. He also recognises that the information is referred to as a "work in progress" or "draft" on its website. However, if it was available as a resource to which employees were asked to refer, albeit an inadequate one, it still constitutes the policy document that was in use. The Commissioner acknowledges the Council's concern that it only provides the most up-to-date information. However, he is satisfied that this information, regardless of how out-of-date it may be, falls within the scope of the request and within the class of information referred to in the publication scheme. It should have been provided to the complainant on request.
25. The complainant contends that the Council did not have a data retention policy at the time of his request. The Commissioner would disagree with the complainant's view on this point. The Commissioner is satisfied that the Council did have a policy that it was directing its employees to use. The Council appeared reluctant to draw attention to the policy because it required updating. Separately, in the course of a data protection audit, the Commissioner has also found that it still needs to be updated (see Note 2).
26. Regardless of the apparent inadequacies of the policy, the Commissioner is satisfied that the Council did have a policy at the time of the request as described in its publication scheme. However, it failed to provide it to the complainant at the time of his request without good reason.
27. Section 1(1) provides that -  

"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."
28. Section 10(1) provides 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."
29. Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

30. In failing to explain to the complainant that it still published its records retention policy as described in its publication scheme and in failing to explain within 20 working days that the information was exempt under section 21(3) of the Act because it was available under its publication scheme, the Council contravened its obligations under section 1(1)(a), section 10(1) and section 17(1) of the Act.
31. The Council did not contravene the requirements of section 19, as suggested by the complainant, because it still published the information described in that scheme which is also described in the request. It was not published in an obvious place and the Council appeared to misdirect itself about its existence. However, it was available at the time of the request and remains available online at the time of writing this Notice.

### **The draft information**

32. The Council seeks to rely on section 22 in relation to information which it is currently revising and which relates to its records management policies.
33. For reasons outlined above, the Commissioner has concluded that current records retention and management policies existed at the time of the request, although these are considered to be in need of review. In light of this, the Commissioner has concluded that the draft version of a revised policy falls outside the scope of the complainant's request. The complainant did not ask for a version that was not yet in use, he asked for the version that was currently in use as described in its publication scheme. The Council held records management policies which, according to its own website, were available as a resource to its staff. It has since acknowledged the inadequacy of these policies. However, it failed to provide the policies to the complainant in a timely manner.
34. The Council clearly did not think the working draft was outside the scope of the request when it received the request. It devoted all its attention to the disclosure or otherwise of this draft in its handling of the request.

The Commissioner, however, has concluded that it took this approach in error.

35. Before he knew of the information available online, the Commissioner asked the Council to identify in the draft that information which it genuinely intended to publish. [The Commissioner explained to the Council that, in his view, if, during the course of the preparation of information for publication some material is rejected, the exemption will no longer cover the rejected material. The Council will no longer hold that material with a view to publication. In other words, if the Council held information at the time of the request within the scope of the request but which had been rejected for publication by that time, it is unlikely that section 22 could apply to it.] The Council said that it intended to publish the information "once completed" but did not identify what, if any, information had been rejected. Having read the draft, it is clear that the document is not yet completed but it is not clear what information is likely to be rejected.
36. Again, before he knew of the information available online, the Commissioner also explained to the Council that if it wished to rely on other exemptions, it should provide its arguments to him and to the complainant. It did not provide any arguments in this regard.

### **The draft information - Conclusion**

37. The Commissioner has concluded that the information in draft form falls outside the scope of the complainant's request. The complainant specifically asked for the Council's record management and personal data policies as described in its publication scheme. The Council gave him its data protection policy but neglected to consider information which was still available on its website regarding records management. Information in draft, by definition, is not part of its publication scheme and therefore outside the scope of the request. The Commissioner has made further comment about this in the Other Matters section of this Notice.



## Other matters

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38. Although the Commissioner has concluded that the draft version of its records management policy falls outside the scope of the complainant's request, the complainant is at liberty to make a request for it under the Act. The Council has indicated that its target for publication of the revised policy is early 2014. If it meets this target then the question of access should be resolved promptly. However, if it does not meet this target, the Council should take into consideration the Commissioner's view regarding section 22. The Council can only rely on this exemption where the specific information to which this exemption has been applied is intended for future publication. The Commissioner would, once again, draw the Council's attention to his own published guidance on section 22.<sup>4</sup>

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[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/section\\_22\\_information\\_intended\\_for\\_future\\_publication.pdf](http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_22_information_intended_for_future_publication.pdf)

## Right of appeal

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39. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

40. 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.
41. 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**  
**Group Manager – Complaints Resolution**  
**Information Commissioner’s Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**