

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 29 July 2015

Public Authority: Wirral Metropolitan Borough Council
Address: Wallasey Town Hall
Brighton Street
Wallasey
Wirral
CH44 8ED

Decision (including any steps ordered)

1. In a 26 part request, the complainant requested information from Wirral Metropolitan Borough Council ('the Council') about minutes of various committees. The complainant is satisfied with the Council's response to 16 parts of this request and the Commissioner's investigation focussed on its response to the 10 remaining parts. Following its response to the request in November, and during the Commissioner's investigation, the Council revised its position with regard to different parts of the request on more than one occasion. It finally relied on section 14(1) because it considered some parts of the request with which the complainant remains dissatisfied are vexatious. The Council says it does not hold information in relation to three parts and did not provide a response to one further part.
2. The Commissioner's decision is that the Council:
 - Does not hold information related to parts 4 and 11 of the request and has met its obligations under section 1 of the FOIA.
 - Does not hold information related to part 21 of the request and has met its obligations under regulation 5(1) of the EIR.
 - Breached section 10 of the FOIA with regard to parts 5 and 10 of the request because it did not disclose information or provide a response in relation to these parts within 20 working days.

- Incorrectly applied section 14(1) to parts 15, 18, 19 and 26 of the request, because these elements of the request are not vexatious.
 - Correctly applied section 14(1) to part 8 of the request because it is vexatious.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
- Disclose the information withheld at parts 15, 18, 19 and 26 or issue a fresh refusal notice in compliance with section 17 of FOIA but without relying on section 12 or section 14. It should clearly identify any information it intends to exempt under its stated exemptions.
4. 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 29 March 2013, the complainant wrote to the Council and requested information in the following terms:

"Please could you provide minutes of the previous meetings of the following committees. If minutes whether in draft form or not are not available of the previous meeting, please provide the minutes of the meeting directly before. I have given each of the committees a number in order which can be used in future communications to avoid misunderstandings.

If minutes for any of these committees are not available in electronic form and to provide them in digital form would exceed the 18.5 hours rule then I am happy to collect paper copies from Wallasey Town Hall instead.

- 1. Complaints Panel (School Curriculum and Related Matters)*
- 2. Education Staff Panel*
- 3. Headteacher Appointments Panel*
- 4. School Appeals Panel*
- 5. Standing Advisory Committee on Religious Education (SACRE)*
- 6. Wirral Schools Forum (Funding Consultative Group)*
- 7. School Admissions Forum*

8. *Adoption / Fostering Panels*
9. *Housing Review Panel*
10. *Unified Waiting List Management Advisory Board*
11. *Discharge from Guardianship by Wirral Council under the Mental Health Act 1983 Panel*
12. *Independent Remuneration Panel*
13. *Youth and Play Service Advisory Committee*
14. *Corporate Parenting Group (formerly known as Virtual School Governing Body)*
15. *Headteachers and Teachers JCC*
16. *SEN Advisory Committee*
17. *Wirral Schools' Music Service Consultative Committee*
18. *Members' Training Steering Group*
19. *Members' Equipment Steering Group*
20. *Birkenhead Park Advisory Committee*
21. *Hilbre Island Nature Reserve Management Committee*
22. *Wirral Climate Change Group*
23. *Anti-Social Behaviour Partnership Body*
24. *Birkenhead Town Centre Consultative Group*
25. *Wirral Trade Centre Working Party*
26. *Safeguarding Reference Group*

6. Following intervention by the Commissioner (case reference [FS50509081](#)), the Council provided a new response to the complainant on 4 November 2014. It told the complainant that it does not hold the information requested in eight parts of the request. It withheld information requested in parts 15, 18 and 19 under section 36 (prejudice to effective conduct of public affairs). It withheld information requested in parts 4, 8, 11 and 26 under section 40(2) (personal information). It partly disclosed information requested in parts 5, 7, 14, 17, 20, 22 and 23, redacting some which it said was personal data under section 40(2). It said information requested in parts 6, 12 and 13 is already published and provided web links to this. It did not provide a response to part 10.
7. The complainant requested an internal review on 12 November 2014 as he was not satisfied with the Council's response (or lack of) to parts 4, 5, 8, 10, 11, 15, 18, 19 and 26. Again, following the Commissioner's intervention, the Council provided the complainant with its review on 30 April 2015. It revised its position, informing the complainant that it considers the request to be vexatious and is not obliged to comply with it (that is, the remaining nine parts above) under section 14(1) of the FOIA.

Scope of the case

8. The complainant initially contacted the Commissioner on 22 January 2015 because he had not received an internal review. He subsequently confirmed that he is not satisfied with the way the Council has handled his request. He has questioned why the Council has applied various sections of the FOIA to his request since it first received it in 2013 and disagrees with its final reliance on section 14(1). The complainant is also of the view that the Council's review of its application of section 36 to aspects of his request, in its November response, was not valid. He maintains that only a Chief Executive can make decisions regarding a section 36 application.
9. During his investigation, the complainant told the Commissioner that he is also not content with the Council's response to part 21 of his request; that it does not hold information related to this part.
10. The Commissioner has considered how the Council has managed this request since November 2014. He focussed his investigation on the Council's position that it was refusing to comply with eight elements of the request (4, 5, 8, 11, 15, 18, 19 and 26 – it had mistakenly not included part 10) because it considered these to be vexatious under section 14(1).
11. During the Commissioner's investigation, the Council revised its position again. It now says that it does not hold information falling within the scope of parts 4 and 11. The Council also confirmed to the Commissioner that, having reconsidered its response to part 5 of the request, it is now prepared to release this information to the complainant and did so on 20 July. The Commissioner considered whether the Council met its obligations under section 10 with respect to this part.
12. The Commissioner's investigation therefore finally focussed on the Council's application of section 14(1) to parts 8, 15, 18, 19 and 26. He has considered whether or not it is likely that the Council holds the information requested at parts 4, 11 and 21. The Commissioner has also considered the time the Council took to respond to parts 5 and 10 of the request.

Background

13. The Commissioner's decision in FS50509081 issued in September 2014 deals with how the Council managed this request prior to 4 November 2014 including its previous application of section 12 of the FOIA (cost exceeds the appropriate limit) and 12(4)(b) of the EIR (manifestly unreasonable) to the request. Consequently, the Commissioner does not intend to consider this in depth in this notice. However, he notes the Council's explanation that when it had originally applied section 12 to the request in its initial response of 19 June 2014, it had mistakenly believed that the costs associated with redacting personal information could be included in section 12 calculations. In its initial response dated 4 November 2014, it had therefore addressed this mistake, changing its position to rely on the exemptions from disclosure under section 36 and 40(2) with relation to parts of the request. It subsequently refused to comply with these parts under section 14(1).

Reasons for decision

Section 1 – information held/not held

14. Having originally said it was withholding the information requested at parts 4 and 11 because it was exempt under section 40(2), the Council now says that it does not hold the information requested at these parts. With regard to part 4 – the School Appeals Panel minutes – the Council says that electronic records for this Panel only originated in April 2014 ie after the date of the request. The Council says its records manager has now looked in the Council's storage area for relevant information; that is the minutes of Panel meetings nearest to the date of the complainant's request, and no records have been found. The Council says most School Appeals Panels will have taken place the previous year, in 2012, and that the minutes (ie the decision notices) are normally only kept for two years.
15. With regard to part 11 – Discharge from Guardianship by Wirral Council under the Mental Health Act 1983 Panel minutes – the Council has told the Commissioner that this Panel has not met, due to the Council not having received any discharge applications. Therefore the Council says it does not hold the information that has been requested at this part.
16. Having considered the search the Council undertook and its explanation of the circumstances of these two Panels, the Commissioner is prepared to accept that, on the balance of probabilities, the Council does not hold the information requested at part 4 and part 11 of the request.

Regulation 5(1) – information held/not held

Is the requested information environmental information?

17. The information requested at part 21 of the request concerns the minutes of the Hilbre Island Nature Reserve Management Committee. Information is 'environmental' if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR. The Commissioner considers that the responsibilities of this particular Committee are/were likely to concern environmental matters – a nature reserve. As such, the Commissioner considers it highly likely that, if it is held, the requested information that derives from that Committee would be environmental information as defined by regulation 2 of the EIR. He has consequently considered part 21 of the request under the EIR.
18. The Council said, in its response of 4 November 2014, that it does not hold the information requested at part 21. It explained to the Commissioner that the present Committee formed in March 2014 and that at the time of the request, therefore, the Council did not hold any Committee minutes from 2013. The Council then provided this explanation to the complainant. The Complainant disputes that the Hilbre Island Nature Reserve Management Committee did not exist prior to March 2014. He has had contact from two Councillors who sat (or sit) on the Committee. One maintains that the Committee has existed for five years at least. The second Councillor has said "I was a proud member for a number of years." The Council, however, confirmed to the Commissioner on 20 July 2015 that, having undertaken a thorough search, it does not hold any Committee minutes from 2013 or earlier.
19. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request or was held at the time of the request. On the evidence provided to him by both parties in this case, the Commissioner is prepared to accept that, at the time of the request, and irrespective of whether the Hilbre Island Nature Reserve Management Committee was or was not active at that time, the Council did not hold the information requested at part 21.

Section 10 – time for compliance

20. The Council had failed to address part 10 of the request in its response of 4 November 2014 and its internal review of 30 April 2015. During the investigation, it told the Commissioner that the only information it holds about the Unified Waiting List Management Advisory Board is its terms of reference. The Council says that it does not hold any further information about this Board because, following the transfer of the Council's housing stock, completed in 2009, this Board has not met. On the balance of probabilities, the Commissioner is prepared to accept that the Council does not hold any additional information within the scope of this element of the request. On 14 July, the Commissioner asked the Council to relay its response to part 10 to the complainant and on 20 July, the Council confirmed it had done so.
21. Section 1(1) of the FOIA says that when a public authority receives a request, it must confirm or deny whether it holds the information, and if it does, the authority must be communicated to the requester.
22. Section 10(1) of the Act says that public authorities must comply with section 1(1) within 20 working days of receiving the request.
23. In this case, the complainant submitted his request on 29 March 2013 and will not receive a response to this part and, in addition, part 5 (see §12) until some four months later. This is a clear breach of section 10.

Section 14(1) – vexatious request

24. Following its internal review, the Council withdrew its reliance on section 36 and 40. It now considers parts 8, 15, 18, 19 and 26 of the request to be vexatious under section 14(1) and it is therefore not obliged to comply with them.
25. The term "vexatious" is not defined in the FOIA. The Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. These are set out in his published guidance on vexatious requests. In short they include:
 - Abusive or aggressive language
 - Burden on the authority
 - Personal grudges
 - Unreasonable persistence
 - Unfounded accusations
 - Intransigence
 - Frequent or overlapping requests
 - Deliberate intention to cause annoyance

26. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.
27. The Commissioner's guidance suggests that, if a request is not patently vexatious, the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In doing this the Commissioner considers that a public authority should weigh the impact of the request upon it and balance this against the purpose and value of the request.
28. Where relevant, public authorities also need to take into account wider factors such as the background and history of the request.
29. In this case, the Council says that it is entitled to rely on section 14(1) because the scope and size of the request is such that in order to respond, the Council's resources will be "squandered" and cause it a disproportionate burden.
30. In its original submission to the Commissioner, the Council told him that the complainant has requested information concerning 26 different panels and boards. It said that most of these are not formal Council committees or sub-committees and that any related minutes are therefore not immediately available electronically.
31. The Council's information manager had calculated that it took 70 hours and £1,750 to provide its response to the complainant dated 4 November. It argued that the amount of time the information management team had to spend on locating, retrieving and reading information falling within the scope of the request had a detrimental impact on the team.
32. The Council said that some of the minutes the complainant has requested – such as those associated with the Schools Appeal Panel, the Adoptions and Fostering Panel and the Discharge from Guardianship by Wirral Council under the Mental Health Act 1983 Panel – contain personal data relating to children and sensitive personal data relating to adults' mental health.
33. The Council said that the effort needed to meet the complainant's request will be grossly oppressive in terms of the strain on its time and resources. The information manager has estimated that the further work needed would take 32 hours at a cost of £800. It says that further work would include contacting individuals (including the parents of children) mentioned in the minutes to see whether they consent to their or their child's personal data being disclosed, and redacting personal data.

34. The Council says this work would cause a disproportionate burden because the request does not appear to have an inherent purpose or value.
35. The Commissioner considered the Council's submission. He noted that the complainant was not dissatisfied with all of the Council's response of 4 November; he was originally satisfied with the Council's response to 17 parts of his request and asked for an internal review of nine parts. The complainant subsequently confirmed that he is dissatisfied with 10 parts of the original response. The Commissioner drew the Council's attention to this in correspondence dated 8 June. He told the Council that he considers that the complaint that is the subject of this notice concerns those 10 parts. As explained at §9 to §13, the Commissioner considers that the Council's application of section 14(1) applies only to five parts of the request and not to the request in its entirety.
36. For reference, those parts and the Council's original response are:
- Part 8 – information withheld under section 40(2)
 - Part 15 – information withheld under section 36
 - Part 18 – information withheld under section 36
 - Part 19 – information withheld under section 36
 - Part 26 – information withheld under section 40(2)
37. The Commissioner notes too, that the complainant has requested the 'previous' set of minutes from each committee (or the minutes from the meeting directly before if the previous minutes are not available) ie one set of minutes for each committee meeting – five items of information in total (although part 8 requests the minutes of two separate Panels).
38. The Commissioner has first considered the degree to which preparing the material in question for disclosure would be a burden to the Council.
39. The Commissioner's guidance on section 14 discusses requests where collating the requested information will impose a significant burden. It recommends that public authorities whose main concern is the cost (and time) of finding and extracting the information should consider the request under section 12 of the Act (cost of complying exceeds the appropriate limit), where possible.
40. The Council is aware from FS50509081 that section 12 cannot be applied in this case. This is because the costs covered in section 12 include those incurred in: determining whether the information is held; locating the information; retrieving the information and extracting the information. The costs and effort covered by section 12 do not include those associated with considering exemptions or redacting exempt information,

which is one of the activities that the Trust considers it will need to undertake to comply with the request.

41. The Commissioner's guidance goes on to say that a public authority may apply section 14(1) where it can make a case that the amount of time required to review and prepare the information for disclosure would impose a "grossly oppressive" burden on the organisation. It confirms that the Commissioner considers there to be a high threshold for refusing a request on such grounds. The guidance says that an authority is most likely to have a viable case where: the requester has asked for a substantial volume of information **and**; the authority has real concerns about potentially exempt information **and** any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.
42. Looking at the first of these criteria, the Commissioner is of the view that the complainant has not asked for a substantial volume of information. This is because, as discussed, his complaint centres on the Council's response to five parts of his wider request, and these parts are each requests for one set of minutes. The Commissioner notes that the information requested at part 8 – minutes of an adoption panel and minutes of a foster panel – totals 95 pages. Nonetheless, he does not consider the amount of information requested in the five parts in total to be overwhelming.
43. The Commissioner has had sight of the information in question. With regard to the second criteria above, he notes that the Council had originally said that some of the information held in the requested material may be exempt under section 36 (parts 15, 18 and 19) and section 40(2) (parts 8 and 26). He also notes the Council's concern that that some personal data withheld under section 40(2) may also be sensitive personal data. With regard to part 8 of the request in particular – this contains a large amount of personal data and sensitive personal data relating to children, potential adopters and foster parents and sensitive personal data concerning other individuals. Personal data categorised as sensitive personal data needs to be handled with particular care. The Council has emphasised to the Commissioner the extreme sensitivity and confidentiality of this information, which the Commissioner notes and accepts. The Council has not raised specific concerns about the potentially exempt information in parts 15, 18, 19 and 26.
44. Turning to the third criteria at §42, and with regard to part 8, the Commissioner notes that the potentially exempt information is scattered throughout the 95 pages. Given the extreme sensitivity of this information, the Council says that a senior member of staff would need to handle this information. It would then need to be quality checked ie checked to make sure that all the personal and sensitive personal data

had been redacted. The Council estimates that 15 minutes would need to be allowed for each page and that preparing the material requested at part 8 would consequently take 23.5 hours.

45. The information requested at parts 15, 18, 19 and 26 however, totals fewer than 15 pages (30 sides). The Commissioner considers that the potentially exempt information in these parts could be easily isolated within the requested information as a whole.
46. The Commissioner considers that, with regard to parts 15, 18, 19 and 26, the three criteria outlined at §42 have not been met. The volume of information is not substantial, the Council has not identified specific concerns about any potentially exempt information and it would be relatively straightforward to identify and redact any exempt information. He is therefore not convinced that reviewing and preparing this particular information for disclosure would impose a "grossly oppressive" burden on the Council. He does not therefore consider that these parts of the request can be categorised as vexatious under section 14(1).
47. With regard to part 8, the Commissioner considers that two of the criteria outlined at §42 have been met: the Council rightly has serious concerns about any of the personal or sensitive personal data contained in this information being released in error. The personal and sensitive personal data is also scattered throughout 95 pages. The Commissioner agrees that to reduce the risk of its accidental release – by taking time to quality check the prepared material and by involving senior staff in the process – would place a "grossly oppressive" burden on its staff. The Commissioner also considers that this would be a disproportionate burden because Wirral Council publishes information about its fostering and adoption processes on its website. The Commissioner has therefore decided that the Council is not obliged to comply with part 8 of the request as it is vexatious under section 14(1).

Other matters

48. Regarding the complainant's criticism of how the Council approached its application, and subsequent removal, of section 36 to aspects of the request, the Commissioner assumes his reference to the role of the Council's Chief Executive relates to the 'qualified person' feature of this exemption. Whilst section 36 has not been considered in this decision notice to be engaged it does require a 'qualified person' within a public authority to give their 'reasonable opinion' that disclosing information would or would be likely to cause prejudice. Ideally, an internal review should also be carried out by someone more senior than the individual who provided the original response. However, being involved in an internal review of an authority's application of section 36 is not the responsibility of the qualified person (or the Council's Chief Executive in

this case). The Commissioner is therefore satisfied that the internal review process the Council undertook on 30 April 2015 was appropriate and valid.

49. The Commissioner notes the Council's handling of this request, from its original, incorrect application of section 12 in 2014 to its reconsideration and amendment of its response to various parts of the request during this, the Commissioner's second investigation of the Council's fresh response. The complainant will not receive a response to some parts of his request until more than two years after he submitted it. The Commissioner publishes guidance on how to handle requests for information under the FOIA on his website; this includes guidance on what public authorities should do when they first receive a request: <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/receiving-a-request/> . As well as familiarising themselves with the terms of the FOIA, public authorities should make sure they are satisfied they understand the substance and scope of any request for information they receive. Authorities can then be confident about whether or not they hold the requested information and what, if any, exemptions or procedural sections of the Act may apply to it, at the time they receive a request.

Right of appeal

50. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

51. 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.
52. 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

Pamela Clements
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