

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 June 2019

Public Authority: Westminster City Council
Address: Portland House
Bressenden Place
London
SW1E 5RS

Decision (including any steps ordered)

1. The complainant has requested information on the rules, guidance and policies used by the 'Client Affairs' department of Westminster City Council ('the Council').
2. The Commissioner's decision is that on the balance of probabilities the Council has provided the limited information held at the time of the request.
3. The Commissioner does not require the public authority to take any further steps in this case to ensure compliance with the legislation.

Request and response

4. On 23 April 2018 the complainant wrote to the Council and requested information in the following terms:
"I am interested in talking about and acquiring the rules, guidances and policy[ies] [by whatever name] regarding Client Affairs. Please revert to me on [contact number provided] and send the documents to me."
5. In the absence of a response to his request for information, the complainant contacted the Commissioner on 6 June 2018.

6. The Commissioner served a decision notice (FS50752695)¹ on the Council on 4 July 2018 ordering that a response be issued within 35 calendar days.
7. The Council responded on 31 July 2018 and provided some information comprising the Office of the Public Guardian - Professional Standards, Professional Deputies².
8. The complainant requested an internal review on the same day, 31 July 2018. He explained that the response had provided information but had not provided the information he requested.
9. On 29 August 2018 the complainant again contacted the Commissioner to complain that the Council had not provided an internal review.
10. In the absence of an internal review response, the Commissioner wrote to the Council on 3 September 2018 reminding it of her guidance which sets out that a review should be completed within 20 working days of the request for review and in no circumstances should it take longer than 40 working days.

Scope of the case

11. The complainant contacted the Commissioner again on 22 September 2018 and explained that he had not received an internal review.
12. On 27 September 2018 the Commissioner wrote again to the Council advising that she had accepted the complainant's case and applied a different reference number as she had previously dealt with matters pertaining to this request under FS50752695 and as a decision notice was issued in respect of the first complaint, a fresh case reference number has been allocated to move matters forward in respect of this second complaint.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259396/fs50752695.pdf>

²

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/504356/SD5-Deputy-standards-professional-deputies.pdf

13. In her letter of 27 September 2018 the Commissioner advised that when she next contacted the Council she would expect it to have used the time since receipt of her correspondence to have thoroughly reviewed its handling of the request such that it is fully prepared and ready to provide its response when contacted.
14. Following several attempts to contact the Council, with no response forthcoming, the Commissioner served an information notice on 25 January 2019.
15. The Commissioner considers the scope of her investigation to be to determine whether the Council provided all the information it held, within the scope of the request.

Reasons for decision

Section 1 – General right of access

16. Section 1 of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds that information and, if so, to have that information communicated to him.
17. In this case, the complainant clearly believes that the Council holds information from which it can answer the request. The Council's position is that it does not.
18. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
19. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that the requested information is not held. For clarity, the Commissioner is not expected to determine categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

The complainant's position

20. The complainant's over-arching view is that it is not possible for the Council not to hold relevant information in respect to his request. He explained to the Commissioner:

"I expected to receive from WCC the rules, guidances and policy[ies] [by whatever name] regarding Client Affairs. This means what services and assistance one may expect from the Council in respect of the care of the elderly and infirm and the precise details of same.

I believe that there are, or should be, such rules, guidances and policies in place otherwise the Council will be operating in a vacuum with the attendant consequences both legal and practical. In short, how is the public to ascertain the Council's lawful responsibilities and duties without access to those documents? Is the Council acting lawfully? Is the Council acting 'on-the-hoof'?"

21. Following the Council's final response to the information notice served by the Commissioner; the complainant wrote to the Commissioner as follows:

"1. It seems to me that there must have been rules, guidances and policies in place at the time of the original request as without same the Council and its staff would have had no idea as to what their legal duties and obligations were. In other words, the Council and its staff would have operated in a vacuum and simply made up things as they went along which is impermissible under the **Care Act 2014**.

2. Since the Act was enacted, the Council had ample time to formulate and publish its rules, guidances and policies. The text of the Act may found here:

<http://www.legislation.gov.uk/ukpga/2014/23/contents/enacted>

3. The rules, guidances and policies as originally requested were necessary in order to ascertain how the Council complied with its duties under the said Act and what vulnerable people could expect from it [the Council].

4. Moreover, without these documents in place, the Council would not have known how to budget for the staff and services nor how to account for same during any accounting period.

5. It is therefore disingenuous and obfuscatory for the Council to say to the IC, "*Client Affairs are in the process of reviewing and updating their procedure documents and are looking to have more comprehensive process documents in place by the end of March 2019*".

6. Given that the hitherto belatedly provided documents are nothing to the point, what do the underlined words [above] mean?

7. What procedures and processes were in place at the time of the original request?"

22. Understandably the complainant remained dissatisfied by the Council's handling of his request and considers that the documents ("Death of Client" and "New Referral") provided were not in the scope of his request.

The Council's position

23. The Council responded, in part, to the Commissioner's information notice on 8 February 2019. It advised the Commissioner that the Council's Head of Client Affairs stated that the guidelines under which the department operates are issued by the Office of the Public Guardian. It further advised that the guidelines were publicly available³ The response indicated that two further documents had been found which related to 'internal policy' regarding 'the death of a client' and 'new referrals' and the Council was prepared to disclose this information to the complainant.

24. On the same day the Commissioner asked the Council to provide the complainant with the internal review requested on 31 July 2018 along with the further information.

25. The Council provided the internal review and the further information on 5 March 2019. It acknowledged the failings in its handling of the complainant's request which it attributed to 'resourcing issues' within the Information Management team.

26. On 18 March 2019 the Council very briefly explained the searches undertaken to locate the requested information as follows:

"All paper and electronic files were searched without success. 2 Personal pcs and emails were included in the search.

We are aware that procedure notes were completed some year ago. We have been unable to locate these. They would in any case now be out of date, and we are in the process of creating fully up to date procedures."

3

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/504356/SD5-Deputy-standards-professional-deputies.pdf

27. The Commissioner does not consider this to be an appropriate response to her detailed questions on the searches undertaken. The above explanation does not provide the detail she required.
28. On 20 March 2019 the Commissioner asked for further clarification of the Council's responses to her questions. She was advised that the Council had attempted to contact the complainant with a view to a discussion regarding his case. The Council was unable to provide any further explanation on the lack of guidance and policies in existence at the time of the request. It reiterated that it was in the process of drafting and finalising procedure guidance and policies and would provide the Commissioner with a schedule of the work being undertaken.
29. On 28 March 2019 the Council provided the Commissioner with a list of documents in progress⁴ and explained that a comprehensive set of guidance notes including flowcharts was planned to be in place by 30 June 2019 and will be reviewed annually.

The Commissioner's conclusions

30. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in paragraphs 19 and 20, above, the Commissioner is required to make a finding on the balance of probabilities.
31. It is unfortunate that the Council did not provide more detailed or cogent explanations in advising the Commissioner of its position and the searches undertaken. The Commissioner must agree with the complainant that it is far from ideal for the Council to be unable to provide the requested information. She clearly understands the complainant's concerns and disbelief that recorded guidance and procedures were not in place at the time of the request. However, it is not for the Commissioner to comment on the Council's conduct in the absence of policies, guidance, processes or procedures, other than in relation to its compliance with the FOIA.

⁴ New referrals, Opening a virtual bank account, Ordering an ATM card, Applying to be appointee for state benefit, Applying to Court of Protection to be appointed Deputy, Actions on receiving Deputy order, Setting up payments/standing orders/direct debits, Completing annual accounts, Annual review, Applying for benefits/Maximising income, Appealing DWP decisions, Investing Client Funds, Death of client.

32. The Commissioner understands the complainant's view in paragraph 22 above that the information provided did not fulfil his request. The Commissioner considers that the Council applied a wide scope to the request in attempting to provide some information. She understands that the complainant intended his request to be understood as a request for information on "what services an elderly person might expect from the Council". The information latterly provided details relating only to the financial matters of the incapacitated and procedures following the death of an individual.
33. Notwithstanding the above, the Commissioner must decide whether on the balance of probabilities the Council held information, other than the information provided, when responding to the complainant's request. The Commissioner is satisfied that in the circumstances of this case she is able to accept that the Council demonstrated that it did not hold the requested information at the time of the request. The Commissioner considers that the Council would have provided the requested information were it able to do so. She does not believe that the Council has tried to make its procedures unclear or difficult to understand, however, she welcomes the Council's confirmation of the steps it is taking to put comprehensive guidance in place and to publish this more widely.
34. The Commissioner has therefore concluded that the Council has complied with the requirements of section 1 FOIA.

Other matters

Section 45 - internal review

35. There is no obligation under the FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where an authority chooses to offer one the code of practice established under section 45 of the FOIA sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales.
36. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
37. In this case the internal review was requested on 31 July 2018 and the Council provided the review over seven calendar months later on 5 March 2019. Clearly this is not acceptable. The Council has already provided the Commissioner with confirmation that it has dedicated resources in place to handle internal reviews.

38. We will use intelligence gathered from individual cases to inform our insight and compliance function. This will align with the goal in our draft [Openness by design strategy](#) to improve standards of accountability, openness and transparency in a digital age. We aim to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our [Regulatory Action Policy](#)
39. The Commissioner has recently met with the Council to discuss her concerns. The Council confirmed that it has started to implement a transformation plan to improve information governance.

Right of appeal

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

41. 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.
42. 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

Susan Hughes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF