

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 August 2019

Public Authority: London Borough of Harrow
Address: Civic Centre
Station Road
Harrow
HA1 2XY

Decision (including any steps ordered)

1. The complainant has requested information on the transfer of arts and heritage services to Cultura London.
2. The Commissioner's decision is that the London Borough of Harrow ("the Council") holds no further information in the scope of the request. However, the Council has breached sections 17(1) and 17(3)- Refusal of request, as it did not provide the complainant with a refusal notice within 20 working days and did not provide any public interest arguments associated with its application of section 42 within the statutory timeframe, at the time of the initial response..
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 5 June 2018 the complainant wrote to the Council and requested information in the following terms:
 - "1. Please provide me with all the documents and correspondence including paper, electronic and emails relating to the decision to withdraw from and terminate the transfer of arts and heritage services

to Cultura London.

2. Please provide me with a copy of the decision to withdraw from and terminate the transfer of arts and heritage services to Cultura London.
3. Please provide me with all documentation setting out the powers under which a Cabinet decision can be legitimately reversed.”
5. The Council responded on 21 August 2018. It provided some information whilst withholding information in reliance of section 42 FOIA – Legal professional privilege. The complainant was unable to open some of the information provided electronically. He advised the Council of this in emails of 10 and 18 September 2018. The complainant again wrote to the Council’s Chief Executive on 8 and 30 October 2018 to complain about its handling of his request. On 19 October 2018 the Council advised the complainant:

“Due to the nature of these requests, it has been agreed that the Council’s principal lawyer will oversee the response. This is to ensure that all information which falls within the remit of your requests has been disclosed unless the information is not held or there is a relevant exemption as to why the information cannot be released.”
6. Following an internal review the Council wrote to the complainant on 9 November 2018. It re-sent the information which could not be opened in the initial response, redacted in reliance of section 40(2) FOIA. It stated that the information previously provided and opened the Cabinet Report dated 14 September 2017 entitled “Future Delivery of Arts and Heritage Services: Update” gave a “clear record of the Cabinet decision to reverse the proposed transfer decision.”

Scope of the case

7. The complainant contacted the Commissioner on 21 December 2018 to complain about the way his request for information had been handled. The complainant provided a comprehensive chronology of his contact with the Council. He explained his dissatisfaction with the Council not meeting the expected timescales and with the content of the information provided. The complainant explained to the Commissioner his view that the Council had not provided the information he had requested.
8. The Commissioner considers the scope of her investigation to be the Council’s handling of the request and her consideration of whether the content of the information provided comprises all the information held by the Council in the scope of the request.

Reasons for decision

Section 1 - general right of access

9. Section 1(1) of FOIA 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.”

10. The complainant considers that he has not been provided with “all the documentation and correspondence relevant to the decision to terminate the transfer”. He considers that the Cabinet report and the information provided with the initial response and the internal review do not address his request.

11. The complainant explained the following:

“The decision to transfer the arts and heritage services to Cultura London was made by LB Harrow’s Cabinet. It delegated powers to officers and certain councillors to finalise the agreement. However, it did not delegate powers to reverse the decision. The council’s constitution does not include any provision for officers or councillors to reverse a cabinet decision.

Subsequent to the decision there are reports to Cabinet that reflect that the transfer of the service has been terminated but there is no report or decision by Cabinet confirming this action.”

12. The Commissioner has seen the information provided to the complainant. She notes that the emails, including legal advice, concern the Council and its arrangements with Cultura. The Cabinet Report provides an update on the cessation of the proposed transfer of arts and heritage services. The introductory paragraph of the report covers a brief chronology and advises:

“However, no agreement could be reached with Cultura London on the options proposed by the Council, resulting in the arts and heritage services remaining in-house.”

13. Information contained in the Report explains that in December 2016 a number of options for finalising the terms of associated leases were considered. The Council recommended one of five options but the option selected was not acceptable to Cultura. Consequently, as it was

not possible to finalise the terms of the leases that were acceptable to all parties, the report states that the arts and heritage services would remain in house.

14. In his request for internal review the complainant commented:

"I have not been provided with a copy of the decision to withdraw and terminate the transfer of arts and heritage services to Cultura London. All that I have been provided with is post facto references to a decision being made in a Cabinet report. I have not been provided with the answers as to who made the decision, when and under what authority."

15. The complainant also explained his consideration that the Council had not provided all the documents and correspondence relating to the decision to terminate the transfer.

16. The complainant's view is that the Cabinet Report explains that the delegated authority relates clearly and specifically to the approval of the transfer but not to reverse the decision. His opinion is:

"For the decision to be lawfully reversed it should have been brought back to Cabinet for the decision to be made to withdraw from and terminate the process of transfer."

17. The complainant indicated to the Commissioner that the information he seeks concerns the decision referenced in paragraph 2.7 in the Cabinet Report states:

"Soon after the decision had been made not to proceed with the transfer,"

18. Regarding "the decision", the complainant explained to the Commissioner:

"This is exactly the information I am seeking, who made the decision, when and under what powers but this is totally absent. The Cabinet report just requests Cabinet to note the final outcome of the proposed transfer. It does not even seek the confirmation of the decision to reverse a decision that it had made previously."

19. The Commissioner notes that, following the internal review, the complainant wrote to the Council on 16 November 2018 and explained the same point set out in paragraph 18. He also advised:

"Cabinet recommendations and decisions need to be, and are very carefully drafted as they have legal consequences. The approved recommendations were for concluding and giving of final approval and not for anything else. This was very specific and quite rightly so for a

decision of this scale and importance for the delivery of services in Harrow, and for its associated financial implications.”

20. The Council did not correspond with the complainant any further, save for an acknowledgement of 19 November 2018.
21. The Council explained to the Commissioner that having provided its internal review advising that the next course of action was to contact the ICO, it did not see what further assistance could be offered at that stage by the Council. It advised:

“it was not considered necessary to have a protracted email exchange when the appeal route had been clearly defined previously.”
22. The Commissioner notes the Council’s comment to the complainant that there is a large volume of information held, some of which is not relevant to the request. She asked the Council to explain to her how it determined “the relevant information” and to provide her with all the information the Council considers falls within the scope of the request, marked with the exemption relied on to withhold any of the content.
23. The Council did not respond to this request.
24. The Commissioner wrote again to the Council and explained that the issue of who made the decision, when and under what powers is at the centre of the complainant's concerns. She asked the Council to confirm whether any information which would answer these points is held.
25. In its response to the Commissioner, the Council advised that its internal review stated:

“The September 2017 Report sets out clearly why officers decided not to proceed with the transfer, mainly because it was not possible to finalise the terms of the leases that were acceptable to all parties, and Cabinet noted and agreed the decision not to proceed with the transfer.”
26. The Council added:

“The Senior Officer’s name is clearly identifiable on the front page of the report along with the 2 portfolio holders responsible for this area of Council business. The decision was taken by Cabinet where all attendees and full minutes of the meeting can be found online. We therefore conclude from our perspective that [the complainant] has been provided with all the information we hold concerning this aspect of his appeal.”
27. The Commissioner has concluded from the Council’s correspondence that “the Cabinet” made the decision not to proceed before September

2017. With regard to the powers under which the decision was taken the Council referred the Commissioner to its Constitution which includes, the decision making process, overview & scrutiny and powers under which the Council operates. The Council provided no further explanation and confirmed to the Commissioner that no further information is held.
28. The Commissioner understands the complainant's concerns, however, she is unable to provide any further clarity to satisfy those concerns. She is surprised that the Council does not hold any further recorded information. She accepts that the complainant considers that information regarding "the decision" must have been created in order to change the original decision.
29. The Commissioner cannot comment on the procedures required to be followed by the Council in the conduct of its business. She must focus on the Council's application of the access to information legislation. In this regard she has concluded that, on the balance of probabilities, the Council does not hold any further information in the scope of the request.

Section 17– Refusal of a request

30. Section 10(1) of FOIA provides that 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.
31. Section 17(1) states that if a public authority is relying on an exemption in Part II of the FOIA to either withhold information it holds, or to refuse to confirm or deny it holds relevant information, it should issue the applicant with an appropriate refusal notice within the timescale for complying with section 1(1).
32. Section 17(3) obliges a public authority to include, where it is applicable, a breakdown of the public interest factors which were taken into account and the reasoning behind the authority's conclusion that the public interest lay in maintaining the exemption.
33. Under section 17(3) a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest. The Commissioner considers it reasonable to extend the time to provide a full response, including public interest considerations, by up to a further 20 working days, which would allow a public authority 40 working days in total. The Commissioner considers that any extension beyond 40 working days

should be exceptional and requires the public authority to fully justify the time taken.

34. In its initial response the Council apologised for the delay in providing a response and explained that:

“There is a large amount of documentation concerning Cultura and this took time to work through to see if any of the information was actually relevant to this request. Also, 2 of the main Officers namely [named officer] and [named officer] no longer work for Harrow Council so to retrieve information from their inboxes which are now obsolete takes time.

Due to the nature of the request, Legal advice had to be sought as to what material was considered exempt under the Act.”

35. In this case the Council responded with its initial response, after 56 working days. In this response it relied on section 42 – Legal professional privilege, to refuse to provide some information. However, when relying on this exemption it did not provide any public interest considerations. The Commissioner considers that a delay such as this demonstrates poor practice when a full public interest consideration is provided. She therefore considers this to be a matter of concern when a public authority has delayed its response and still not conducted a public interest test.
36. The Council therefore breached sections 17(1) and 17(3) in providing a late response with no public interest consideration.

Section 42 – Legal professional privilege

37. Section 42 of FOIA states that information in respect of which a claim to legal professional privilege to confidentiality of communications could be maintained in legal proceedings is exempt information.
38. In the first response the Council relied on section 42 to withhold information, however, the internal review did not make reference to this exemption nor did it withdraw reliance but advised the complainant that personal information in reliance of section 40(2) had been redacted from the information provided.
39. In her investigation the Commissioner asked the Council to explain its reliance on section 42. It advised:

“On reviewing what we have sent, we included email advice from HBPL dated 9 March 2017 and 15 June 2018. So we reviewed our decision and did provide legal advice given relating to Cultura. The advice reflects the problems with granting the leases without a forfeiture right

which was the main reason for the decision not to proceed with the transfer.”

40. The Commissioner therefore has not considered the Council’s initial application of section 42.

Other matters

41. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe. In the Commissioner’s view it is reasonable to expect most reviews to be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days.
42. In this case the complainant requested a review on 18 September 2018, notwithstanding he had already expressed his dissatisfaction before this date. The Council informed him of the outcome of the internal review on 9 November 2018, after 40 working days. As set out above, the Commissioner considers 40 working days to be the upper limit for the provision of an internal review in *exceptional circumstances*. The Commissioner has seen no evidence of any exceptional circumstances in this case.
43. The Commissioner wishes to point out that she will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft [Openness by design strategy](#) to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her [Regulatory Action Policy](#).

Right of appeal

44. 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

45. 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.
46. 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
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