

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 December 2019

Public Authority: Warrington Borough Council

Address: New Town House
Buttermarket Street
Warrington
WA1 2NH

Decision (including any steps ordered)

1. The complainant has requested information held by Warrington Borough Council (the council) relating to public objections received about its 2017/2018 draft accounts.
2. The request under consideration follows on from two previous requests that the complainant had made for similar information. In response to all three requests, the council has applied section 12(1) of the FOIA (costs exceeds the appropriate limit).
3. The Commissioner's decision is that the council has breached section 16(1) of the FOIA. This is because it failed to provide the complainant with appropriate advice and assistance to help him to bring his request within the relevant cost limits.
4. The Commissioner is also satisfied that the council has breached section 17(5) of the FOIA as it failed to notify the complainant that it had applied section 12(1) to the request within the required statutory time period.
5. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide adequate advice and assistance to help the complainant refine his request within the cost limit. When doing so, the council should consider the four separate parts of the complainant's request of 27 September 2019 and provide him with sufficient information to enable him to understand the estimated cost to deal with each specific part in isolation.

6. The council 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

7. On 23 October 2018 the complainant wrote to the council and requested information in the following terms:

'Please let me have a copy of all correspondence and the minutes of any meetings between the Council and the auditors Grant Thornton or any other organisation, firm, advisor or company, where the subject is the Council's 2017/2018 accounts.'

8. The council responded on 6 December 2018. It stated that the information was to be withheld under section 43(2) of the FOIA as it believed its disclosure would prejudice the commercial interests of both the council and other named third parties. The council went on to confirm that it had considered the public interest test and that this weighed in favour of withholding the information in this instance.
9. On 2 January 2019 the complainant requested an internal review. This was acknowledged by the council on 11 January 2019. He then sent chaser emails to the council on 1 February 2019, 4 February 2019, 8 February 2019, 26 February 2019, 1 March 2019, 6 March 2019 and 12 March 2019.
10. On 13 February 2019 the complainant raised concerns with the Commissioner about the way in which his request was being handled. The Commissioner contacted the council on 26 April 2019 to request that it now notify the complainant of the outcome of its internal review. She had to contact the council again on 14 June 2019 before it then issued its internal review decision on 28 June 2019.
11. The council revised its original response to the complainant's request, stating that it now believed section 12(1) of the FOIA to be engaged. It set out its reasons for this decision stating the following:

'In relation to emails alone 3,751 emails were sent to Grant Thornton from the Council and 3,197 received (a total of 6,768) during the period from 1st April 2017 to the compilation of this response. These were to and from 113 email accounts. Given their position as the Council's auditors it is likely that the vast majority of these communications will be about the Council's accounts. Given the period it is likely that most of these contacts will be about the 2017/18

accounts although there may be correspondence about the 2016/17 and 2018/19 accounts or indeed other matters.

In relation to emails where the subject contained accounts for the same period there were 8,419 sent and 13,961 received (a total of 22,380) in relation to 1242 Council email accounts. Again these may relate to the later or earlier period and indeed to accounts other than the Council's accounts.'

12. The council went on to say that it would have to manually locate and extract the emails from the system. It estimated that, with respect to the *'Grant Thornton emails alone'*, it would take more than 10 seconds per email to locate these and establish if they were relevant to the request and then collate them for consideration of disclosure. The council advised that as this would amount to more than 18 hours, the cost of complying with the request would exceed the appropriate limit and therefore was being refused for that reason. The council stated that, given this, it did not intend to go on to consider the original reasons it had provided for refusing the request.
13. The council also confirmed that as it would *'clearly'* be possible to obtain some of the information within the 18 hour limit, if the complainant was able to *'narrow the terms of the search'* then it might be possible to bring the request within the cost limits. However, it did go on to say that even if the refined request fell within the cost limits, it would still have to consider whether the relevant information *'would benefit from an exemption or exemptions under the Act and be refused in relation to such an exemption or exemptions.'*
14. On 4 July 2019 the complainant wrote to the council advising of the following:

'Clearly I am going to narrow the terms of my enquiry so would appreciate some advice here. The main aim of my query is to establish information about the Grant Thornton public objection to the 2017/2018 draft Accounts. I'd therefore be happy to take out "where the subject is the Council's 2017/2018 accounts" and replace it with "where the subject is the public objection to the 2017/2018 draft accounts" In this context the word 'subject' means mention of the objection in the Subject field header and also the body of an email/letter.'
15. The complainant then wrote to the council again on 12 July 2019 stating the following:

'Please let me have a copy of all correspondence and the minutes of any meetings between the Council and the auditors Grant Thornton or

any other organisation, firm, advisor or company, where the subject is the public objection to the Council's 2017/2018 accounts. The response should include all correspondence up to the date of the response to this FoI request. The term 'subject' should not be limited to just the Subject field header of an email. I use it in its general sense.

Would that allow the information to be provided or would it need narrowing down even more? Would you let me know fairly quickly since I'm anxious to have this matter concluded.....'

16. The Commissioner would add at this point that she is satisfied that the complainant's correspondence of the 12 July 2019 should be treated as a further clarification of the request of 4 July 2019, and was not intended to be a new and separate request for information.
17. On 31 July 2019 the council, after receiving a further chaser letter from the complainant, confirmed it had received his correspondence of 4 July 2019 and that it aimed to provide a response by 8 August 2019. The complainant subsequently sent further reminders to the council on 14 August 2019, 20 August 2019 and 9 September 2019.
18. The Commissioner then wrote to the council on 11 September 2019 to ask that it now provide a response to the complainant's request within 10 working days.
19. On 26 September 2019 the council provided its response to the complainant's request. It advised that it believed section 12(1) was engaged, confirming that 830 emails had been identified from its search of the system and that the time it estimated that it would take to locate and extract the relevant emails, and then collate them for disclosure, would alone exceed the 18 hour limit. The council then went on to say the following:

'As well as emails there are other elements of your request to process for example the minutes of audit and corporate governance committee where the objection to the accounts has been discussed with the Councils auditors and others present. A sample review of two agendas took 20 minutes and did reveal relevant material which would have to be extracted. Other meeting minutes would have to be considered to ascertain whether they fall into the description of information requested. I would ask you to note that the minutes and agendas of those meetings are available on the Councils website.'
20. The council, once again, confirmed to the complainant that it would 'clearly' be possible to obtain some of the information requested within the 18 hour limit, and that if he was able to 'narrow the terms of the search' then it might be possible to bring the request within the cost

limits. The council also reiterated the point that even if the request was refined to fall within the cost limits, it would still have to consider whether the relevant information *'would benefit from an exemption or exemptions under the Act and be refused in relation to such an exemption or exemptions.'*

21. On 27 September 2019, the complainant submitted a further request to the council as follows:

'I am not unappreciative of the work you have done so far, and I fully accept the council's resources are under strain in many departments. I certainly have no wish to add to the council's burden and I always think twice even three times before seeking information and only do so if after reflection I genuinely believe the answers to information requests may be of significant public interest. Of course from my point of view that can only be confirmed when the information has been given.

All that said, I first raised this FoI request in October 2018 and now with its anniversary fast approaching it has taken nearly twelve months to identify that the S 12(1) cost limit applies. That could surely have been determined much sooner.

However we are where we are and I note your comment that some of the material may be obtained within the 18 hour limit, so let me narrow and prioritise my request.

First may I clarify a particular point in your paragraph beginning "It took approximately 30 minutes...." In that paragraph you say

"As well as emails there are other elementsfor example the minutes of audit and corporate governance committee where the objection to the accounts has been discussed with the Councils auditors and others present. A sample review of two agendas took 20 minutes and did reveal relevant material which would have to be extracted. Other meeting minutes would have to be considered to ascertain whether they fall into the description of information requested. I would ask you to note that the minutes and agendas of those meetings are available on the Councils website."

If I understand that correctly you are drawing a distinction between two categories of meetings, those where the minutes and agendas are publicly available on the Council's web site and those that are not.

I presume that all such publicly available minutes and agendas will be found in the Committee Meeting Papers 2018-19 area of the web site in the Cabinet Committee and the Audit & Corporate Governance

Committee areas. If not simple hyperlinks to the URLs of other pages on the web site will suffice.

That being the case I am of course perfectly happy to confirm that anything that is publicly available on the Council's web site need not be considered part of this request.

In order of priority would you therefore address the review request for information in the following order.

1. Copies of the agendas and minutes of meetings between the Council and both Grant Thornton and the council's external legal advisers that discuss the public objection to the 2017/2018 accounts.

2. Given the time taken to address this FoI request and now that a further year has elapsed, copies of the agendas and minutes of meetings between the Council and both Grant Thornton and the council's legal advisers that discuss the public objection to the 2018/2019 accounts. (If you feel that this is not permissible given the original request then I'm happy to leave this out).

I presume that the number of meetings are reasonably small, probably not more than one per month at the most and therefore the time taken to extract this information should not be too onerous and that the following information can then be addressed.

3. For each of the following

*[name redacted], Director of Corporate Services
[name redacted], Head of Democratic and Legal Services
[name redacted], Chief Executive
[name redacted], Deputy 151 Officer*

*3.1 Copies of correspondence and emails **originated by** each person and addressed to Grant Thornton or the Council's external legal advisers.*

3.2 Copies of responses by Grant Thornton or external legal advisers to correspondence originated by each person.

*4. I assume the 41 page list you mention identifies the number of emails associated with each of the 31 account holders. In which case, ranking these in order of the number of emails each account holder (excluding those identified above) **originated**, and starting with the account holder with the highest number, please let me have*

*4.1 Copies of correspondence and emails **originated by** each account holder in turn and addressed to Grant Thornton or the Council's external legal advisors.*

4.2 Copies of responses by Grant Thornton or external legal advisers to correspondence originated by each account holder in turn (4.1 above).

Notes for clarification.

4.1 & 4.2 above should be completed first for each account holder before moving on to the next account holder with a smaller number of originating emails.

The nature of email chains necessarily means that unless people delete previous responses when replying, later emails contain the text of earlier emails and responses. I do not expect you to spend time deleting such repeats merely to meet the specific and limited requirements in each of 4.1 & 4.2 above.'

22. As the complainant failed to receive response to his request the Commissioner wrote to the council on 6 November 2019.
23. On 15 November 2019 the council provided the complainant with its response to his request. It advised that it regarded the information requested to be 'exempt' from disclosure on the basis that it '*appears to be the same as your previous request in that it still seeks disclosure of all correspondence between the Council and the external auditor, Grant Thornton.*' The council went on to say that, as a result, the refusal previously set out in its response to the complainant dated 26 September 2019 can be applied to the request, i.e., refused on the basis of section 12(1) of the FOIA.
24. The council also once again advised the complainant that as it would be possible to obtain some 'material' within the 18 hour limit, if he was able to narrow the terms of the search further, then it may be possible to bring the request within the cost limit.

Scope of the case

25. The Commissioner has given some consideration to the fact that the complainant has now made three requests to the council for information on the same subject, all of which have been refused under section 12(1) of the FOIA. Having considered the information available, including the communications sent between parties over the last twelve months, the Commissioner is mindful that there is a real possibility that the same

scenario will continue to be repeated if the complainant submits further 'refined' requests on the same subject.

26. The Commissioner has not, at this stage, conducted an investigation into the council's decision to apply section 12(1) to the requests. The primary purpose of this decision notice is to consider whether further requests and responses of the same ilk can be avoided, and if the information access process can be moved forward from its current stagnant position. When considering this matter, the Commissioner regards it to be most relevant to take into account the provisions set out within section 16 of the FOIA.
27. In addition, the Commissioner also regards it to be appropriate to consider certain procedural matters relating to the council's handling of the complainant's request of 27 September 2019.

Reasons for decision

Section 12 (1)

28. Whilst the Commissioner does not intend to consider whether the council was correct to have applied section 12(1) to the complainant's request of 27 September 2019, given its continued reference in the council's responses to the complainant, she does believe it to be appropriate to provide a brief explanation of the content of this provision.
29. Section 12 of the FOIA states that a public authority does not have to comply with a request for information, if it estimates that the cost of complying with the request would exceed the appropriate limit. This is currently set at £600 for central government departments and £450 for all other public authorities (which would include the council). A maximum of £25 per hour can be charged to undertake the work required to comply with the request and for 'other public authorities' this equates to 18 hours work.

Section 16 Advice and Assistance

30. Section 16 of the FOIA imposes an obligation on public authorities to provide advice and assistance to a person making a request, so far as it is reasonable to do so. Section 16(2) says that a public authority is taken to have complied with its section 16 duty in any particular case if

it has conformed with the provisions in the section 45 Code of Practice¹ in relation to the provision of advice and assistance.

31. Paragraph 14 of the section 45 Code of Practice states that where a public authority is not obliged to comply with a request because it would exceed the appropriate limit to do so, then it:

".....should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee."

32. Paragraph 62 of the Commissioner's guidance, 'Requests where the cost of compliance exceeds the appropriate limit'², also states that where section 12 is believed to be engaged, public authorities should inform the requester of what information can be provided within the appropriate limit. The guidance goes on to say that advising a requester to narrow their request without indicating what information can be provided within the appropriate limit can often just result in requesters making new requests that still exceed the limit.

33. The Commissioner, when contacting the council about this request, advised that she regarded there to be a strong indication that the complainant did not fully understand how he could revise the terms of his request to fall within the cost limits. Indeed, he explicitly asks the council for assistance in doing this in his correspondence of 4 July 2019 and 12 July 2019.

34. The Commissioner's guidance sets out the minimum requirements that are expected in order for a public authority to satisfy section 16 and confirms that a public authority should do the following:

- provide an indication of whether it would be able to provide any information within the appropriate limit;
- provide an indication of what information could be provided within the appropriate limit; and,

¹ <https://www.gov.uk/government/publications/code-of-practice-on-the-discharge-of-public-authorities-functions-under-part-1-of-the-freedom-of-information-act-2000>

² <https://ico.org.uk/media/for-organisations/documents/1624140/duty-to-provide-advice-and-assistance-foia-section-16.pdf>

- provide advice and assistance to enable the requester to make a refined request.
35. It is the Commissioner's view that the council, in its responses to all the complainant's requests that are set out within this decision notice, has only met the first of the three bullet points set out in paragraph 34 of this decision notice.
 36. The council has indicated that the complainant's request of 27 September 2019 was a repeat of his request of 4 July 2019. The Commissioner does not accept this to be the case for two reasons. Firstly, the complainant has, for the first time, asked for information held that relates to the 2018/19 accounts (adding if this would fall within the cost limits). He has also attempted to refine his request by setting out in some detail what information he requires in order of priority. However, she does accept that even if the council were to accept this alternate view, this is unlikely to change its decision that section 12(1) can be applied to this request in its entirety.
 37. A public authority may search up to, or even beyond, the appropriate limit of its own volition. There is nothing to prevent the public authority from taking this same approach if asked to do so by the requester. Whilst there is no obligation for a public authority to deal with a request in this way, if it does decide instead to apply section 12(1), it is still required to properly consider its obligations under section 16 of the FOIA.
 38. The Commissioner's correspondence to the council of 6 November included the advice and guidance set out within paragraphs 30 and 33 of this decision notice. Whilst she confirmed that, at that point in time, she was not investigating whether the council was correct to apply section 12(1) to any of the complainant's previous requests, she asked that proper consideration be given to section 16 before the council provided its response to the complainant's request of 4 July 2019. However, the council's subsequent response to the complainant dated 15 November 2019 makes no reference to its obligations under section 16 of the FOIA, nor does it provide any advice or assistance on how he could refine his request so that it would fall within the cost limits.
 39. It is the Commissioner's decision that the council has failed to provide the complainant with appropriate advice and assistance to enable him to refine his request so that it would fall within the cost limits. She therefore finds the council to be in breach of section 16 of the FOIA.
 40. Section 50(4) contains provision which allows the Commissioner to specify steps to direct a public authority to provide advice and assistance, where she has found there to be a breach of section 16.

41. In most instances, the Commissioner will view it be sufficient to ask the public authority to provide appropriate advice and assistance without further comment on how it should do so. However, given the circumstances of this particular case, the Commissioner believes it is necessary to be more specific about the steps she now requires the council to take. These steps are set out in paragraph 5 of this decision notice.

Procedural matters

42. Section 1(1) of the FOIA provides that any person making a request for information to a public authority is entitled to be told whether the information is held and, where it is, to have it communicated to them.
43. Section 10(1) of the FOIA requires public authorities to comply with section 1(1) promptly and within 20 working days of the date of the receipt of the request.
44. Section 17(5) of the FOIA states:

A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), given the applicant a notice stating that fact.

45. In this case the council only issued a refusal notice to the complainant on 15 November 2019 and therefore did not provide this within 20 working days of the request. As a result, the Commissioner is satisfied that the council has breached the requirement of section 17(5) of the FOIA.

Other matters

46. The Commissioner's decision relates to the complainant's request of 27 September 2019. However, she regards it to be necessary in this instance to highlight the fact that the council also failed to respond within 20 working days to the complainant's requests of 23 October 2018 (taking 27 working days) and 4 July 2019 (taking 59 working days). In addition, the council took 123 working days to provide its internal review response in respect of the complainant's original request of 23 October 2018. It is also noted that it was only following the Commissioner's intervention on each occasion that the council provided its internal review response of 28 June 2019, and its responses to the complainant's subsequent requests of 4 July 2019 and 27 September 2019.

47. The Commissioner has some concerns that this could be an indication of a more widespread problem in terms of the timeliness of the council's responses to information requests. She would ask that the council ensures that it takes steps to ensure that it is able to respond to any information requests that it receives in the future within the statutory timescales.

Right of appeal

48. 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

49. 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.

50. 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

Andrew White
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