

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 7 December 2020

**Public Authority:** Wealden District Council

**Address:** Council Offices  
Vicarage Lane  
Hailsham  
BN27 2AX

#### Decision (including any steps ordered)

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1. The complainant has requested information held by Wealden District Council (the council) which relates to the estimated service costs for a particular set of properties for the financial years 2019/20 and 2020/21.
2. The council provided the complainant with some information relating to the estimated service costs for 2019/20. It advised that the information relating to the financial year 2020/21 had not yet been calculated and therefore was not held.
3. At the internal review, the council advised the complainant that whilst it maintained its previous position, it accepted that it should have cited an exemption in its original refusal notice. The council confirmed that as the information was to be published at a later date, it believed section 22 of the FOIA to be engaged.
4. The Commissioner's decision is that the council was not correct to cite section 22 of the FOIA in response to the complainant's request. This is because she is satisfied that, on the balance of probabilities, the council did not actually hold the estimated service costs for the financial year 2020/21 at the time that the request was received. However, the Commissioner has determined that the council's failure to apply the correct exemption is not, in itself, a breach of the FOIA.
5. Furthermore, in response to claims made by the complainant that the information which was provided to him was inaccurate and incomplete, the Commissioner finds that the council has disclosed a full and correct copy of the breakdown of the estimated service costs held for the year 2019/20.

6. The Commissioner does not require the council to take any steps as a result of this decision notice.

## Request and response

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7. On 14 December 2019, the complainant wrote to the council and requested information in the following terms:

*'I am seeking information on the costs estimated by the WDC for all service charges at cherry Tree Court and Hill Drive in service charge years 2019-20 and 2020-21.'*

8. The council responded on 16 January 2020. It provided some information that it stated related to the estimated service costs for 2019/20.
9. The council advised the complainant that the service charge estimates were not yet available for 2020/21. It stated that this was because the figures would not be calculated until the Housing Revenue Account (HRA) budget for 2020/21 had been approved at the Full Council meeting set for 19 February 2020. The council went on to say that tenants and leaseholders would also be notified of the 2020/21 service charges four weeks prior to the date the charges were due, and that this would be by 9 March 2020.
10. The council also provided the complainant with an explanation as to how the service charges for Retirement Living Courts are calculated each financial year. It went on to confirm that the 2019/20 estimated service costs included adjustments that related to the actual costs for the financial year 2017/18.
11. The council advised the complainant that adjustments are made to the service charges each year to ensure that actual costs relating to services for the property are recovered; it stated that this means that the service charges for residents may go up or down each year to reflect under, or over, recovery of the previous year's costs. The council also advised that individual service charges might vary depending on whether the resident is a leaseholder or a council tenant, stating that a leaseholder will pay service charges in accordance with the terms of their lease, and a council tenant will pay charges in accordance with their tenancy agreement.
12. On 20 January 2020, the complainant requested an internal review of the council's decision. He said that whilst the council had provided him with some information relating to the 2019/20 estimated service costs, he believed that this was, in part, inaccurate and incomplete.

13. Firstly, the complainant advised that whilst the total costs shown were £114,474, he had calculated the total estimated cost to be £115,184. In addition, the complainant raised concerns that the council had incorrectly provided him with the information on the over, or under, recovery of service charge costs for 2017/18, rather than the 2018/19 costs that he believed he should have received.
14. On 26 January 2020, the complainant contacted the council again to request that its internal review also consider some additional points to that set out in his letter dated 20 January 2020.
15. The complainant referred to the council's assertion that the 2020/21 estimated costs were not yet available, but that they would be presented at the cabinet meeting set for 19 February 2020. He questioned whether this would be the case, stating this had not occurred in previous years.
16. The complainant went on to say that he would have anticipated that the council would have already prepared the estimated costs for 2020/21 as it held the costs for the previous year, and the revenue which had been derived from the charges which had been made to residents for that year. He therefore did not accept the council's assertion that this information was not held.
17. On 12 February 2020, the council provided its internal review response to the complainant. It set out the summary of the complainant's internal review request as follows:

*You have asked the Council to review its original response to you because although the Council advised you that you would be provided with the requested information by 9 March 2020, you consider that the information should be made available to you now.*
18. The council advised that, after further consideration, it recognised that it had previously failed to cite an appropriate exemption when refusing to provide information relating to the estimated service costs for 2020/21. Given this, it attached a revised copy of its original response which now included confirmation that section 22 of the FOIA had been applied to part of the request.
19. The council advised that in its original response it had been made clear that the information requested would be published in due course, and that this would be by 9 March 2020. As a result, the council confirmed that it upheld its previous decision as it was satisfied that section 22 of the FOIA was engaged.

## Scope of the case

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20. The complainant contacted the Commissioner on 17 March 2020 to complain about the way his request for information had been handled.
21. The Commissioner considers the scope of her investigation to be as follows:
  - whether the council has provided correct and complete sets of information in relation to the estimated service costs for the year 2019/20;
  - whether, at the time the request was received, the council held the information that has been requested that relates to the estimated service costs for 2020/21; and,
  - whether the council is correct to have applied section 22 of the FOIA to any part of the request.

## Reasons for decision

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### **Has the council provided the correct and complete set of information for the estimated service costs for 2019/20?**

22. The Commissioner, having considered the representations that she has received from both parties, is mindful that there may be some misunderstanding about what information is used to calculate the estimated service costs for each financial year.
23. The complainant appears to believe that the calculation for the estimated service costs for the financial year 2019/2020 would take into account an adjustment for 2018/19, and not 2017/18 as indicated by the information that he received.
24. The council has explained that the service charge calculation is based on the budgeted estimated costs for each financial year i.e., 1 April to 31 March. It states that there will be an adjustment to the service charge calculation which amounts to the difference between the '*previous year's*' estimated costs, and the final actual costs.
25. The Commissioner regards it to be crucial to note that the council states that the adjustments will always be a year in arrears due to the actual costs only being available when they have been audited. This occurs following the closure of accounts and completion of a certificate signed by the Chief Finance Officer. The council states that this takes place in a period within six months at the end of the financial year.

26. The complainant has argued that the '*previous year*' adjustments that are relevant to the service charge estimates for 2019/20 should be taken from the 2018/2019 accounts. However, if the Commissioner's understanding of matters is correct, this latter figure is not actually available at the time the estimated service costs for 2019/20 are set (in February/ March 2019); indeed, they would not become available until up to six months after the end of that financial year (up to the 30 September 2019).
27. The council has confirmed that, on 30 September 2019, when responding to the complainant on other matters, it provided him with a copy of the 2018/19 certificate, which provides a breakdown of the actual costs against the estimated costs for that financial year. It says that the wording on the surplus or deficit says to be recovered the next year; this means that these figures will be included in the service charge estimates for the financial year April 2020 to March 2021.
28. As the period adjusted in the 2019/20 service charges does relate to the financial year 2017/18, the Commissioner accepts that the council did provide the correct information to the complainant, and that all the information contained within the document supplied to him was relevant to his request.
29. With regard to the complainant's concerns that the figures provided for 2019/20 are incorrect or incomplete (stating that they add up to £115,184 and not £114,474 as set out within the document) the Commissioner is satisfied that the document is a complete version of that held by the council.
30. The Commissioner notes that three of the charges contained within the list of figures under consideration; '*Fees and Charges*' (£300), '*Retirement Living Guest*' (£220), and '*Retirement Living TV Licence*' (£150), all include a minus sign before the figures. Therefore, these all appear to be deductions to the final estimated costs; it would seem most likely that the complainant has added, rather than subtracted, these figures with the other costs listed when doing his calculations. If these three figures are deducted from the total of all the other charges contained within the list (rather than added), the figure that remains is the total estimated cost as is recorded within the document, that being £114,474 (total costs of £115,144, minus deductions of £300, £220 and £150).
31. The Commissioner is satisfied that the information which has been provided to the complainant is a complete copy of that held by the council and that there is no evidence that it contains inaccurate information, or is an incomplete set of data.

## Section 1 of the FOIA – information held by public authorities

32. Section 1 of the FOIA states that:

*'(1) 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.'*

33. The Commissioner notes that the council's original response to the complainant dated 16 January 2020 stated the following:

*The Service Charge estimates for 2020/21 are not available, as they will not be calculated until the Housing Revenue Account Budget 2020/21 is approved by Full Council at its meeting on 19 February 2020. Tenants and Leaseholders will be notified of the 2020/21 Service charges four weeks prior to the date charges are due, which will be by 9<sup>th</sup> March 2020.*

34. The council has confirmed to the Commissioner that, at the time of the request, it was still formulating its budget proposals and estimates for 2020/21. It has said that the financial details requested by the complainant that related to this financial year would not have been available until after the HRA budget proposals were approved at the Full Council Meeting held on 19 February 2020. The council has been explicit in stating that, at the time of receipt of the request, it did not hold any information in addition to that which it provided to the complainant.

35. The Commissioner understands that some information about the estimated service costs for 2020/21 was sent to the complainant on 27 February 2020. The council has also advised her that if the request was made now, it would be able to provide a breakdown of the 2020/21 estimated service costs, as it does now hold this information. Therefore, the complainant may wish to consider making a request for such information, if it is still not in his possession.

36. The council has also stated that certain specific information is available through separate legislation, namely under section 22 of the Landlord and Tenant Act 1985 <sup>1</sup>(as amended). It goes on to say that a

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<sup>1</sup> <https://www.legislation.gov.uk/ukpga/1985/70/section/22>



leaseholder may request a summary of the service charges, and supporting documents, such as invoices and these must be released in response, and within specified statutory timescales. The council confirmed that the complainant always seeks this information, and it is always provided to him.

37. It would appear to the Commissioner that the council's initial response to the complainant was correct so far as it confirmed that, at the time of the receipt of the request, it did not hold the information relating to the breakdown of the estimated service charges for the year 2020/21. There is no evidence that has been made available to the Commissioner, or any other indication, which would lead her to conclude that such information should, or would, have been held at that point in time.
38. In summary, the Commissioner is satisfied that the council provided the complainant with all the information which it held at the time of the request and that, on the balance of probabilities, it did not hold the information relevant to the financial year 2020/21 at that time. The fact that it may have been held by the council at any time thereafter would not alter this decision.

### **Section 22-information intended for future publication.**

39. In order for the exemption set out within section 22 to apply, the public authority must, at the time of the request, hold the information.
40. In this instance, the Commissioner has already determined that the estimated service costs for 2020/21 were not available at the time that the complainant's request was received. The council has been explicit in stating that the figures were not calculated until the HRA budget was approved at the Full Council meeting held on 19 February 2020.
41. As a result, the Commissioner concludes that the council was not correct to have cited section 22 of the FOIA in its refusal notice. This is because it would appear that, on the balance of probabilities, the relevant information was not held at the time of the request, and therefore section 22 cannot apply.
42. As section 22 was not engaged, the Commissioner does not regard it to be necessary to consider further the concerns raised by the complainant that the council did not subsequently publish the information which he had requested.

### **Other matters**

43. As the Commissioner has determined that the estimated service costs for 2020/21 were not held at the time the council received the complainant's request, she does not require any formal steps to be

taken. However, she does regard it to be necessary to make further comment about the council's responses to the complainant in this case.

44. The council's initial response to the complainant dated 16 January 2020 failed to cite the exemption it was relying on when refusing to provide information in relation to part of the request. Whilst the council's subsequent revised response did then provide an exemption, it contradicted the reasons it had given in support of this; that the figures requested had not yet been calculated. The council also failed to set out any consideration of the public interest test when it applied section 22 of the FOIA.
45. The Commissioner has considered whether the council's actions have resulted in any procedural breaches of the FOIA. Primarily, she has considered whether there has been a breach of section 1, 10 or 17 of the FOIA.
46. It is noted that whilst the council initially failed to cite an exemption, and then subsequently applied one incorrectly, it did confirm to the complainant that the information was not available at the time of the request. The application of an incorrect exemption is, in itself, not a breach of the FOIA; it also would not be appropriate to find a breach in relation to a failure to consider the public interest test for an exemption that was not engaged.
47. As a result, whilst it is the Commissioner's view that the council's responses were not adequate, she has not found there to be a breach of the FOIA in this particular instance.
48. The Commissioner would hope that the council will accept that there have been some failings in the way that it has handled this particular request and that this has perhaps caused some confusion which could have been avoided. In saying this, she has found the council's response to her enquiries to have been detailed and helpful to her investigation.
49. The Commissioner would hope that the council will learn from the shortcomings which have been identified within this decision notice and take these into account when dealing with similar circumstances in the future.



## Right of appeal

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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@justice.gov.uk](mailto:grc@justice.gov.uk)

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

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
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