

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 January 2013

**Public Authority:** Liverpool City Council  
**Address:** Municipal Buildings  
Dale Street  
Liverpool  
L2 2DH

#### Decision (including any steps ordered)

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1. The complainant requested information from Liverpool City Council (the council) about approval by its appointed directors to the board of Liverpool Direct Limited (LDL) for third party work. The council said that it did not hold the requested information but this statement was not accepted by the complainant.
2. The Commissioner's decision is that, on the balance of probabilities, the requested information is not held and therefore the council responded appropriately to this request.
3. The Commissioner requires no further action to be taken.

#### Request and response

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4. On 27 October 2011 the complainant made the following request for information:

*"A recent response to an information request (<http://whatdotheyknow.com/request/in...>) stated because of the external work, 300 jobs had*

*been created at LDL that would not otherwise have existed. So around a quarter of the workforce is not working on LCC business and are generating wealth that is not visible in the LDL accounts. To clarify these matters:*

- 1) *Could you please provide a breakdown (salaries, pension costs, premises, utilities, etc etc) of the £40,156,000 expenses paid by LDL to LCC as "reimbursement of staff and other costs" reported in the annual accounts of LDL at 31 March 2011.*
  - 2) *Do the figures provided in the answer to the previous question include the additional costs of employing 300 people to work for third parties?*
  - 3) *Does the council receive any other consideration (reimbursement of costs, discounts, etc.) from LDL or BT in relation to this work?*
  - 4) *As a shareholder of LDL, LCC appoints at least two directors to the board of the company, whose approval is required for any third party work to be done. Please explain how the approval process works - who is consulted, who decides, who approves - and how this process is documented?*
  - 5) *What is the total value of the work done by LDL for third parties (i.e. how much do they pay for the work done)?"*
5. On 12 December 2011, the council responded, stating that it held some but not all of the requested information. It did not hold any information in relation to point 5 of the request but provided information in relation to the other 4 points. The complainant wrote back to say that the information she had received in relation to point 4 of her request was not what she had requested and she provided clarification. She explained that she wanted to know how the directors representing the council which has a minority shareholding in LDL discharge their legal duty as directors, who they consult, how the process is documented, how it operates, and not about service reviews.
  6. The council responded by stating that an internal review was necessary. The council identified further questions which it was eventually agreed could be logged as a new request/s.
  7. On 19 December 2011, the council provided a more detailed response to the request where it was repeated that the council held some but not all of the requested information. It provided what was described as a "*high level breakdown*" in response to point one and responses to points three and four. A response was also provided to point two which was later clarified by the council as accounting for council seconded staff only. The council confirmed that it held no information in relation to point 5.
  8. On 18 May 2012, the council provided an internal review regarding point 4 solely. It was confirmed that the council held some but not all of the requested information:

*"the Council does not hold a separate list of who was consulted and who made the final decision in relation to the 3rd party work, this information will be held by LDL."*

9. The complainant wrote on 21 May 2012 to say that she was not satisfied with the response, particularly that the council held no list of who was consulted and who made the final decision in relation to third party work as she argued that not holding this information would make the council in breach of certain provisions in the Joint Venture Agreement (JVA) between itself and BT.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 14 March 2012 to complain about the way her request for information had been handled.
11. The Commissioner considers the scope of this case to be whether there is any remaining information relating to the request that was held by the council at the time of the request that has not been provided to the complainant.

### **Reasons for decision**

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#### **Section 1(1)**

12. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request, and if that is the case, to have that information communicated to him.
13. On 9 August 2012 the Commissioner asked the council for details of the searches it had carried out in order to reach a determination concerning whether any further requested information was held.
14. The council answered the Commissioner's questions on 22 October 2012 as follows:
  - The council does not hold any further requested information.
  - The requested information is sent by email only.
  - Information regarding third party work is sent to a designated member of staff.
  - LDL provides a list of third party work bids for which it has submitted.

- In the council's response to the complainant of 18 May 2012 it had identified the criteria that LDL are instructed to measure when considering third party work.
  - The designated member of staff had undertaken a search of their mailbox to establish if any information was held regarding third party bids. All relevant drives were searched using the following search terms - "LDL 3RD party work", LDL 3rd Party Bids and "LDL Bid Work".
  - The search elicited no information. The designated officer stated that, if no queries arose from the bid list, the email/s are then deleted as there is no business need to keep the information. It was stated that there has been no business need for the bid list to be passed to any other officer in the council.
  - The council did not accept the complainant's view that it was not complying with the provisions set out in clauses 12, 16 and Schedule 4 of the Joint Venture Agreement (the JVA) that had established LDL. The clauses appear to contain the provision that LDL has to notify the council of any bids for third party work and the council can accept or reject these bids. The council stated that there is no requirement within those clauses that stipulate that the council has to keep a defined list of all the third party work undertaken by LDL. The council has no business or statutory need to keep the requested information. The council explained in its response of 18 May 2012 that any information regarding third party work would be held by LDL.
15. On 5 November 2012, the complainant wrote to the Commissioner expressing her disagreement with the council's arguments and explaining why she believed them to be inaccurate.
16. The Commissioner wrote back to the council on 13 November 2012 outlining the concerns that the complainant still held. He stated that, whilst it is not his role to question the council's contractual arrangements, those arrangements seemingly necessitated the holding of certain information. The Commissioner reproduced some of the contractual clauses provided by the complainant and asked further questions.
17. On 27 November 2012, the council responded again to the Commissioner's questions in the following terms:
- The council described its email deletion process from inbox to final irretrievable deletion.
  - It explained that, although the complainant held an opinion about how the JVA should be managed, the council was under no obligation to

agree with that opinion. It also stressed that it had no need to consider any information it did not hold for the purposes of the FOIA.

- It described the chain of responsibility as regards the management of the JVA from lead client officer to client officers responsible for the management of specific strands within the JVA – revenues, benefits, human resources and payroll, ITS, customer access, careline (children's and adult services).
  - The council stated that it had identified in its response of 22 October 2012 to the Commissioner that the list is provided by LDL for bids for third party work and that the lead client officer has no requirement to retain this information as it is held centrally by LDL. It maintained that it had no need to duplicate this information.
  - The Mayor of Liverpool and Chief Executive of the council sit directly on the Board of LDL.
  - Third party work is not solely dependent on a list supplied by LDL. Further discussions and meetings will be held by the Mayor and Chief Executive, these can be discussed either at the LDL Board meeting or the quarterly performance review meetings. However, no separate list is held by the Mayor or the Chief Executive.
  - The council's final accounts are audited by the District Auditor. There is no separate audit for the JVA. LDL has its own auditors and these have to be approved by the Board. Some of the information might "*interface*" with the council's final accounts. The council is clear that no issues have been raised by the District Auditor or LDL's auditors relating to third party work in itself.
  - The council stressed that all the information it holds in relation to third party work has been provided to the complainant. It has explained why it holds nothing further and it does not consider the retention of a list of third party work as essential because it is retained by LDL.
18. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. He will also consider the actions taken by the authority to check that the information was not held and he will consider if the authority is able to explain why the information was not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held. He is only required to make a

judgement on whether the information was held "*on the balance of probabilities*"<sup>1</sup>.

19. In deciding where the balance lies, the Commissioner considers the scope, quality and thoroughness of searches conducted by the public authority together with any reasons offered by the public authority or the complainant as to why the information is not held or should be held, where appropriate.

20. The Commissioner's approach is supported by the Information Tribunal in the hearing of Thompson and Dyke v Information Commissioner EA/2011/0164 and 0165. The Tribunal stated that the Commissioner is:

*"...entitled to accept the public authority's word and not to investigate further in circumstances where there is no evidence as to an inadequate search, any reluctance to carry out a proper search and any grounds for believing there is a motive to withhold information actually in its possession."*

21. The Tribunal referred to the Commissioner's national remit and limited resources and that to act otherwise might require a full scale investigation to be carried out in every case where a public authority is "*...simply not believed.*"

22. The Commissioner is satisfied that there is no evidence of an inadequate search by the council. The council has explained where the information would be held if it existed and it has checked these files thoroughly.

23. The complainant does not accept that the council does not hold this information as she believes that the council is obliged to do so. The Commissioner did not consider that there was sufficient evidence to support this allegation. Although the council probably held the requested information at some point in time, there is no evidence to support the view that it was held at the time of the request.

24. For the above reasons, the Commissioner has concluded in this case that, on the balance of probabilities, the requested information is not held.

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<sup>1</sup> This approach is supported by the Information Tribunal's findings in Linda Bromley and Others / Environment Agency (31 August 2007) EA/2006/0072

## Other matters

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25. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his '*Good Practice Guidance No 5*', published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that, in this case, the internal review took considerably longer than his recommended timescale, despite the publication of his guidance on the matter.

## Right of appeal

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26. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

27. 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.
28. 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**  
**Wycliffe House**  
**Water Lane**  
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