

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 October 2013

Public Authority: Wirral Borough Council
Address: Municipal Buildings
Cleveland Street
Birkenhead
Merseyside
CH41 6BU

Decision (including any steps ordered)

1. The complainant has requested information relating to the departure of an internal auditor from Wirral Borough Council (the council). The requested details included things such as whether there was any information on severance pay, disciplinary action, or a compromise agreement.
 2. The Commissioner's decision is that the council has incorrectly relied on section 14(1) to refuse to provide the requested information. The Commissioner has also found that the council has breached section 10(1) of the FOIA as it did not provide a response to the complainant within 20 working days from the date of the request.
 3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide a fresh response to the complainant's information request without relying on section 14(1) of the FOIA.
 4. The public authority 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.
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Request and response

5. On 18 October 2012, the complainant wrote to the council and requested information in the following terms:

"On 17th October 2012, it finally became public knowledge that disgraced Chief Internal Auditor [named officer] - who had perversely and inexplicably given the disgraced HESPE contract 3 stars – had received permission, to leave his employment with Wirral Council.

<http://www.wirralglobe.co.uk/news/999130...>

Above is a link to a news story published today in the Wirral Globe, which reported this matter, along with the departure of the suspended Director of Law, Bill Norman. Once again, the comments beneath the article indicate the strength of feeling amongst a still outraged public.

The former CEO, Jim Wilkie, who himself is the subject of another freedom of information request, currently breaching the FOI Act:

<http://www.whatdotheyknow.com/request/ag...>

...admitted to years of learning disabled abuse by the council. This was followed by the departure of two senior social services officers in January of this year. It is still not clear whether these two individuals WERE leaving as a result of their involvement in abuse AND whether they signed compromise agreements with gagging clauses. As of today, despite several assurances, Wirral have not responded to the following FoI request and are many months overdue and again in breach of the FOI Act:

<http://www.whatdotheyknow.com/request/da...>

Despite the fine words trotted out in Appendix S2 of the [name redacted] "Refresh and Renew" Supplementary Report, the Wirral public have still yet to see any sign of accountability or a reckoning towards the as yet anonymous employees who perpetrated this sustained abuse against learning disabled people over a period of several years - which totalled over £700,000 plundered from their bank accounts.

There were also abuses of power, as found by two independent investigations – but which remain unpunished, and an admission

to learning disabled abuse here (See 7.1):

<http://democracy.wirral.gov.uk/mgConvert...>

Please provide all information you have which is connected to the departure of [named officer]. This will relate to meetings, hearings, discussions, reports, and may be stored in the form of recorded minutes, verbatim and non-verbatim notes, emails, letters, memos, aide memoirs, documents, whether electronically or manually stored.

Please confirm and provide full details of the existence of any payments made to [named officer] in relation to his departure. This will include precise amounts, the method of payment and the budget from which the payment was / is to be derived.

Please confirm details of the existence of any "compromise agreement" or "confidentiality agreement" or "compromise contract" or "confidentiality contract" agreed and signed by [named officer] in relation to this departure or to his involvement in abuse or malpractice. This will include confirmation and description of any 'gagging clauses' and whether a positive / neutral / negative reference was provided regarding potential future employment.

In light of the [strangely] recent discovery by Wirral's NOW EX-Chief Internal Auditor [named officer] that "compromise contracts" were NOT being recorded but were being arranged behind closed doors, beyond any councillor scrutiny and beyond view of the public:

<http://democracy.wirral.gov.uk/documents...>

...please describe the exact process that was followed and supply the documents, reports, aide memoirs, notes, etc. that were created and recorded as part of the NEW process. Please take a deep breath before you do this, and ponder your overriding duty to act not out of self-interest, but fairly and impartially in the unbending service of us the public.

Please provide the names and addresses of all organisations / bodies involved in providing legal advice to [named officer]. Please also provide details of meetings which occurred including times, dates and matters discussed.

Please confirm the details of any disciplinary charges either

planned or levelled against [named officer] in relation to any failures / malpractice / abuse which may or may not have brought about his departure from the Council.

If [named officer] was provided with a "clean bill of health" regarding his time served at the council, please provide a copy of this / these document(s).

Please redact documents as you see fit, and remove any personally sensitive information in accordance with the requirements of the Data Protection Act."

Please confirm which meetings have taken place. Presumably there will have been at least one gathering called to scrutinise the so-called "compromise contract" that was drawn up and agreed".

On the same day the complainant added:

"I've noticed that a number of the links in the last message are not working. Here they are again in the same order,

1. <http://www.wirralglobe.co.uk/news/999130...>

2. <http://www.whatdotheyknow.com/request/ag...>

3. <http://www.whatdotheyknow.com/request/da...>

4. <http://democracy.wirral.gov.uk/mgConvert...>

5. <http://democracy.wirral.gov.uk/documents...>"

6. The complainant requested an internal review on the 15 December 2012 as he had not received a response from the council.
7. On the 18 March 2013 the council responded to the internal review request. It refused to provide the requested information relying on section 14(1) of the FOIA, stating the request is vexatious.

Scope of the case

8. The complainant contacted the Commissioner on 25 March 2013 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether the council correctly applied section 14 of the FOIA in this case.

Reasons for decision

10. Section 14(1) of the FOIA states that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious. There is no public interest test.
11. The term "vexatious" is not defined in the FOIA. The Upper Tribunal recently considered the issue of vexatious requests in the case of the *Information Commissioner v Devon CC & Dransfield*¹. The Tribunal commented that vexatious could be defined as the "Manifestly unjustified, inappropriate or improper use of a formal procedure." The Tribunal's definition clearly establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
12. In the Commissioner's view, the key question for public authorities to consider when determining if a request is vexatious is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
13. The Commissioner has identified a number of "indicators" which may be useful in identifying vexatious requests. These are set out in his published guidance on vexatious requests². The fact that the request contains one or more of these indicators will not necessarily mean that it

¹ GIA/3037/2011

²

http://www.ico.org.uk/for_organisations/guidance_index/~media/document/library/Freedom_of_Information/Detailed_specialist_guides/dealing-with-vexatious-requests.ashx

must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.

14. The council has provided its arguments to the Commissioner as to why it is relying on section 14(1) of the FOIA. It considers that the request is likely to cause an unjustified level of disruption, irritation or distress.
15. The council states having considered the Upper Tribunal case, the *Information Commissioner v Devon CC & Dransfield*, it considers the complainant's request to be vexatious. It refers to the first paragraph of the complainant's request:

"disgraced Chief Internal Auditor [named officer] – who had perversely and inexplicably given the disgraced HESPE contract 3 stars – had received permission to leave his employment with Wirral Council."

16. The council considers the tone of this first paragraph to be belligerent and unreasonable and offensive to [named officer]. Although he no longer works for the council, the council states that it has a duty of care towards employees which continues after they leave their employment, to ensure they are not victimised. The council also state that the language used by the complainant to describe a named individual and publishing it on the "What Do You Know" website means that the request has a characteristic, which is capable of being vexatious, as it goes beyond the level of criticism that a public authority or its employees should reasonably expect, and this accusation was unsubstantiated. The council quotes part of the Commissioner's guidance for vexatious requests:

"the tone or language of the requester's correspondence goes beyond the level of criticism that a public authority or its employees should reasonably expect to receive... The request makes completely unsubstantiated accusations against the public authority or specific employees".

17. The Commissioner considers that the complainant's use of wording such as "disgraced" to speak of the person he seeks information on is making an accusation about that person. The council have confirmed to the Commissioner that the [named officer] was not subject to any disciplinary proceedings. However, the Commissioner is aware that the council has received media attention with regards to departures of senior officers and so the council may encounter robust comments or accusations from the public around the subject of departures. The Commissioner does expect the council and its councillors to have a high

level of tolerance in respect to comments made by members of the public, but this would differ if comments were considered threatening.

18. The council also considered previous dealings with the complainant in determining the request to be vexatious, making reference again to the *Dransfield* case and quoting:

"The tone of this correspondence does not simply reflect understandable frustration; it suggests a pattern of aggressive and accusatory behaviour against the council itself and, at times, individual named officers."

19. The council state that the complainant was a former employee of the council, resigning in 2003, and states this is relevant background information to the course of dealings between the complainant and the council. The council does not expand on this statement.
20. [Paragraph redacted]
21. The council have provided the Commissioner with a copy of a "screen grab" of these comments for his consideration. As stated previously, when dealing with the public, the Commissioner does expect the council and council officers to have a high level of tolerance in respect of comments from the public, but the Commissioner has viewed what was written by the complainant and considers that the comment made in this instance would not be something a council officer should be expected to tolerate and goes beyond the level of criticism that an employee should reasonably expect to receive. The Commissioner considers this comment would bring an unjustified level of distress and offense to [name redacted]. The Commissioner does not feel it would be appropriate to quote the comment made by the complainant in this instance.
22. Although the Commissioner considers these comments to be inappropriate and does not condone any such remarks made about a councillor, regardless of their position. He also has to note that this comment was made on 8 February 2012 and the information request was made on 18 October 2012, some 8 months later, and the council did not provide a response, that being to refuse the request as vexatious, until the 18 March 2013, some 13 months after the 8 February 2012 comments by the complainant. The information request is also not directly related to the 8 February 2012 comments, but the Commissioner does recognise that the council is using this as an example of the complainant previously making unnecessary comments about council officers.
23. The council also argue that the complainant is making unwarranted allegations in connection with the departure of [named officer], and

trying to make links with other matters concerning the council as he tried to do in a previous case, about two officers, reference FS50438500 which the complainant appealed to the First Tier Tribunal, appeal number EA/2012/0264. It also states that after the First Tier Tribunal's decision the complainant emailed a councillor seeking further information about senior officers, including the two officers concerned in the Tribunal. The council state that this is evidence that the complainant will not be satisfied with any response it gives, and will still continue to seek information from the council even after it has gone through the Tribunal. The council provided the Commissioner with a copy of this email which is dated 8 June 2013. The Commissioner has published guidance on "dealing with vexatious requests"³ and at paragraphs 125 to 127, it advises how a public authority can only take into account evidence that happened before the request was made and cannot take anything in to account that happens after this cut off point. Therefore the Commissioner considers that this correspondence happened some 8 months after the original request was made and cannot be considered as a reason for applying section 14(1) of FOIA in this case. This is also the same for the council referring to any comments and findings in the First Tier Tribunal because the tribunal did not issue a decision until 2 May 2013, 7 months after this request was made.

24. The council considers that the complainant's previous requests in 2012 had particularly targeted chief officers at the council and two heads of service in connection with compromise agreements. The council state that the complainant is making unwarranted allegations in the departure of [named officer], and trying to make links with other matters concerning the council as he did in the First Tier Tribunal. However as mentioned previously, the Commissioner cannot take into account decisions found from the First Tier Tribunal decision in this case.
25. The council supplied the Commissioner with a list showing that the complainant has made 8 information requests between January 2012 and July 2012.

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/dealing-with-vexatious-requests.ashx

Conclusion

26. The Commissioner is of the opinion that the remarks made on a social media site about *[name redacted]* on 8 February 2008 are disproportionate and would cause unjustified distress to the individual, and no officer or councillor should be expected to tolerate such remarks. However, the Commissioner also needs to balance this with the fact that this remark was made 8 months before the request was made, that the request for information was about a different person, and the council have not supplied any other evidence of the complainant making any other inappropriate remarks between this and the request being made. Also the Commissioner notes that the complainant had made other information requests in-between the comment made and this request and these had not been deemed vexatious by the council. The Commissioner therefore considers that in light of the above, in relation to the request, its weight in the request being vexatious is lessened.
27. The Commissioner considers the wording and opening paragraph used in the complainant's request, to describe *[named officer]* as "*disgraced*", to be accusatory, given the fact that as the council confirmed to the Commissioner, *[named officer]* was not subject to any disciplinary proceedings. The Commissioner can see how this may cause some distress to *[named officer]* but at the same time the Commissioner is of the opinion council's and council staff may need to be robust when dealing with comments from the public, and with that, the level of criticism that may be expected increases on the seniority of the officer. The council have advised the Commissioner that *[named officer]* who was the chief internal auditor for the council, was not a chief officer or a designated head of service, and that the complainant would have had the opportunity to read the publicly available report concerning the reasons for *[named officer's]* departure, including the minutes published on the date of the complainant's request. From reading the opening paragraph of the request, the Commissioner does consider the tone to be provocative by referring to *[named officer]* as "*disgraced*", but does not consider this to carry significant weight alone to deem the request vexatious in this case.
28. The fact that the council believe many of the requests revolves around compromise agreements, the complainant has stated and the Commissioner is aware that many of the council's response times to the complainant's requests, and other members of the public, have been over the time allowed in accordance with the FOIA. This has resulted in responses to requests being given by the council after other requests have been made. This in turn would bring confusion to the complainant as he would not have had responses to these requests and therefore could have the result in him making more requests due to dissatisfaction of response times.

29. These response times also have a bearing on the council relying on the case of the First Tier Tribunal in demonstrating the complainant trying to continually obtain information around compromise agreements. In that the complainant made this request for information months before the First Tier Tribunal case was heard (and before a decision was reached by the Commissioner), and so the complainant would not have had a decision on that case, which was of a similar nature, to be able to gauge whether or not to make this request. This also lessens the weight that the request in this case is vexatious.
30. Also, of the list of 8 information requests made in 2012 supplied to the Commissioner by the council, only 3 or 4 appear to be related to requests revolving around compromise agreements, and they were for different people. The Commissioner does not consider this to be a disproportionate or an obsessive amount of requests being made to the council on this theme in this case.
31. The complainant has also made reference to the Commissioner's guidance for vexatious requests stating:

"under the heading , "Allow the requester an opportunity to change their behaviour", I've noticed that points 104 and 105 have not been explored or followed by the local authority. Point 106 then advises the data controller to "focus on the impact of the requests rather than the behaviour of the requester himself". "Labelling a requester with terms such as 'obsessive', 'unreasonable' or 'aggressive' may only serve to worsen relations....", however in this case, I was characterised as "obsessive" by Wirral Council ... as follows: "I consider that the volume and frequency of correspondence received from yourself concerning compromise agreements can be fairly characterised as obsessive" According to the ICO guidance, labels such as the above risk worsening relations between the respective parties and risk causing further disputes. As Wirral Council had not followed the carefully laid out ICO advice under "Allow the requester an opportunity to change their behaviour", and as this was their very first time of calling upon Section 14 with regard to my FoI requests, I believe they were incautious, inappropriate and possibly going against the spirit of the Act by resorting to the Section 14 "vexatious request" exemption."

32. The Commissioner in considering this has not received any correspondence from the council demonstrating that they have approached the complainant to address their concerns with his requests before relying on section 14(1) of the FOIA.

33. On considering the above, the Commissioner has decided that the council have not provided enough evidence to be able to rely on section 14(1) of the FOIA for this request. Therefore the Commissioner finds that section 14(1) of the FOIA is not engaged in this case.

Section 10 of the FOIA

34. Section 10(1) of the 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.
35. The complainant made his information request on the 18 October 2012 and did not receive a response until 18 March 2013, 5 months after the date of the request. Therefore the council have breached section 10(1) of the FOIA.

Right of appeal

36. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

37. 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.
38. 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

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