

Freedom of Information Act 2000

Decision notice

Date: 13 January 2014

Public Authority: Wirral Borough Council
Address: Wallasey Town Hall
Brighton Street
Wallasey
Merseyside
CH44 8ED

Decision (including any steps ordered)

1. The complainant requested information relating to Wirral Borough Council's (the Council) policy or strategy regarding a particular matter. The Council's position was that it does not hold information relevant to the complainant's request. However, the Commissioner's decision is that the Council is likely to hold relevant information so has breached sections 1 and 10 of the Freedom of Information Act (the Act).
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a new response to the complainant relating to the held information in accordance with the Act.
3. 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.

Background

4. In 2008 a local newspaper was approached by Mr Martin Morton, a former manager at the Council's Department of Adult Social Services, to raise his concerns over the management of the department and the treatment of adult social care clients.¹
5. One of the consequences of this was an independent report, referred to in this decision as the AKA report (after the company hired to conduct the investigation), to undertake an independent review of concerns raised by Mr Morton, together with any other issues of concern that were raised by the review. This report was highly critical of the Council's Department of Adult Social Services.²

Request and response

6. On 28 May 2012, the complainant wrote to the Council and requested information in the following terms:

"Please refer to the AKA Report Page 107

Point 6.20.119: [sic. Please see 6.20.120]

'...it is the consultants view that they [the Council's Department of Adult Social Services] could with the appropriate legal advice have brought the arrangements with service provider 2 to an end sooner and in a more managed and less traumatic manner for the service users. The strategy Employer 22 [name provided] refers to as destabilisation of business in the end led to the emergency support requirements and significant costs via the council's contribution to TUPE costs.'

1. Please disclose any minutes which outline [the Council's Department of Adult Social Services] policy and strategy to destabilise businesses

1

http://www.wirralglobe.co.uk/news/9467456.SPECIAL_REPORT_Demand_for_sackings_follows_review_that_has_shamed_Wirral_Council/

2

<http://democracy.wirral.gov.uk/documents/s50001387/Appendix%201%20AKA%20Final%20Report.pdf>

2. *Please disclose who authorised this policy or strategy*
3. *Please disclose which elected members sanctioned the policy or strategy*
4. *Please disclose who long this policy or strategy has been in place*
5. *Please disclose how many businesses suffered as a result of this policy or strategy*
6. *Please disclose if this was an official policy of Wirral Borough Council"*
7. The Council responded on 25 June 2012. It stated that there was no policy "in existence" relating to the destabilisation of business.
8. On the same day the complainant queried the response as it was written in the present tense and he was also interested in historical information. On 29 June 2012 the complainant followed this up and requested an internal review.
9. The internal review was issued on 7 August 2012 and the Council confirmed that it had never had a policy to destabilise business.

Scope of the case

10. The complainant contacted the Commissioner on 11 February 2013 to complain about the way his request for information had been handled.
11. The Commissioner considers the scope of the case to be whether the Council holds any information relevant to the complainant's requests.

Reasons for decision

Section 1 – information held

12. Section 1 of the Act states that if a public authority holds information relevant to a request it must confirm that information is held and then provide it, as long as no valid exemptions apply.
13. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner, in accordance with a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.

14. In its initial submissions to the Commissioner the Council made it clear that it had not conducted any searches to confirm whether information relevant to the complainant's request was held. The Council appeared certain it never held a "destabilisation of business" policy so did not think it necessary to conduct searches to find something it was confident was not there.
15. Unlike the Council, the Commissioner does not take such a literal approach to the complainant's request for a "destabilisation of business" policy. Whilst it is highly unlikely any official policy would have such a title, there are several references to a policy or strategy to destabilise business in the AKA report³ which the complainant has made reference to and clearly has an interest in. It follows that there might be information held relating to this informal policy or strategy relating to the actions and practices of Council Adult Social Services staff which led to the report being commissioned.
16. In response to the Commissioner's questions regarding whether relevant information is held (as per his interpretation of the request) the Council stated that to undertake searches in line with the Commissioner's interpretation of the request would take over 18.5 hours and that the Council would not do this. The Commissioner's view is that if it would take over 18 hours to identify whether relevant information was held then the request should have been refused under section 12(2) of the Act, as this is in excess of the appropriate limit, rather than stating the information is not held when this had not been verified by appropriate searches. Whilst the Council seems certain that no relevant information would be held the Commissioner does not consider it reasonable to be so certain when there have been no searches to verify its position.
17. Under section 12(2) a public authority may refuse a request if undertaking checks and searches to establish whether it holds requested information would itself exceed the 'appropriate limit' of 18 hours of work.
18. The Council's assertion that it would take 18.5 hours to search some of its records has not been supported by a reasonable estimate based on cogent evidence. To determine whether there was evidence to support the Council's position the Commissioner issued an information notice. This asked questions designed to identify the lengths the Council would need to go to in order to determine whether relevant information was held.

³ E.g. Point 6.20.42 on page 92

19. In its response to the Commissioner the Council confirmed that it was seeking to rely upon section 12(2) of the Act in order to refuse the request. However, the Council's response simply stated that it would be required to make a "huge general search" across the Department of Adult Social Services to retrieve "hundreds" of pieces of information which would then have to be manually searched. The Council further stated that "one or more overnight forensic searches" of former employee records would also be required, and any located information would then require a manual search.
20. In this response, no figures were provided showing the length of time that any of these activities would take so it was not possible to verify that these activities would exceed the 18 hour appropriate limit. The only mention of the time it would take was the reference to "overnight" searches, however an estimate under section 12 must only account for staff time, and as these overnight searches would be carried out by computers they could not be included. Whilst the Commissioner was prepared to consider whether establishing whether the Council holds information relevant to the request might exceed the appropriate limit and engage section 12(2), the Council has not provided sufficient evidence to support such an argument. Therefore the Commissioner is not prepared to accept that it applies to the request.
21. Crucially, in two of the Council's responses to the Commissioner's enquiries it stated:

"Wirral Council will hold information in emails, some reports and some draft information which has links to the reduction of funding and impacts on adult social care clients."
22. The complainant's request includes information showing who in the Council was responsible for the destabilisation strategy and the impact it had on local care providers. The Commissioner's view is that the AKA report makes clear that this strategy related to the reduction of funding to care providers, and that information relevant to at least part of the complainant's request would likely be held in emails or reports about the reduction of funding for care providers such as those referred to by the Council.
23. The scope of the Commissioner's investigation was to establish whether the Council was correct to say that it does not hold information relating to the complainant's request. For the reasons outlined above, the Commissioner considers that the Council does hold relevant information.
24. While the Commissioner acknowledges that it is feasible the Council may be entitled to refuse to comply with the request for the information it holds (by way of other provisions under the Act) – and indeed information may not be held in relation to all six parts of the request - it

should issue a fresh response to the complainant relating to the held information in accordance with the Act.

Section 10 – timeliness of response

25. Section 10 requires public authorities to comply with its obligations under section 1 promptly or at most by the twentieth working day after receipt of the request. As the Commissioner's decision is that the Council did not comply with its obligations under section 1 it follows that the Council also did not comply with the requirements of section 10.

Other matters

26. The Commissioner wishes to note the Council's poor level co-operation with his investigation in this case. In light of the Council's brief responses to his enquiries, the Commissioner deemed it necessary to issue an information notice requesting further information to assist his investigation. He also explained the reasons for his view that the Council ought to undertake checks and searches to locate information associated with the "destabilisation of business" policy/strategy referred to in the AKA report. In a subsequent response the Council stated that it felt the Commissioner had widened the scope of the request and to search for relevant information would be "impractical". It said it had "considered the effect of not supplying the information, against the considerable costs involved" and explained that it had decided not to provide responses to the Commissioner's questions. Again no clear evidence was provided to provide a reasonable estimate in support of its view that section 12(2) applied to the request. Consequently, the Council's approach to the Commissioner's investigation led to delays in the progression of the case.

Right of appeal

27. 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: GRC@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

28. 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.
29. 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

Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF