

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 September 2014

Public Authority: Wirral Metropolitan Borough Council

Address: Town Hall
Brighton Street
Wallasey
Merseyside
CH44 8ED

Decision (including any steps ordered)

1. The complainant requested the number of Discretionary Housing Payments made to EU migrants. Wirral Metropolitan Borough Council (the Council) stated that it does not collect this information. The complainant considered that information on the numbers must be held by the Council as it is asked for on the benefit forms. During the course of the investigation the Council changed its position and stated that to try and comply with the request would exceed the appropriate limit in costs set by section 12(1) of the FOIA. The Commissioner's decision is that the Council correctly applied section 12(1). He does not require any steps to be taken.

Request and response

2. On 12 May 2014, the complainant requested information concerning claimants for Discretionary Housing Payments (DHP):

"How many DHP claimants are EU migrants plus foreign nationals. The figures I require concern the period 01/04/13 – 01/04/14."

3. On 20 May 2014 the Council responded (under ref 793377) that

'Wirral Council can confirm that there is no legal requirement to ask claimants of Discretionary Housing Benefits to declare their ethnicity. The Council does not therefore collect or record the information requested.'

'The only requirement is that Claimants are entitled to Housing Benefit and as such, they must meet the qualifying criteria for that.'

4. The complainant made a further request on 27 May 2014:

'How many foreign and EU migrants claimed housing benefit and council tax benefit/council tax support since 1/4/13 to present day. I would also like to know how many of those people claimed DHPs as a top up...for the Wirral area.'

5. The Council responded on 4 June 2014 (under ref 803894) that the

'Wirral Council application form for Housing Benefit and Council Tax Support contain an optional Equal Opportunities section. In this section, people completing the form can choose to indicate their ethnicity, if they wish.'

'There is however no requirement for applicants to declare whether they are foreign or European Union migrants.'

'The Council therefore has no recorded information to provide to you in response to your enquiry.'

'Eligibility for Housing Benefit is dictated by the Government. Details of the criteria are available online at www.gov.uk/housing-benefit/eligibility. Details of the Local Council Tax Support Scheme 2014/15 (including eligibility criteria) are enclosed for your information.'

6. On 9 June 2014 the complainant requested an internal review of the response dated 4 June 2014 referring the Council to part 15 of the Wirral Welfare benefits and council tax support form (WB/CTS form) which asks for proof of identity.
7. The Council provided its internal review response (under ref 803894) on 19 June 2014. It maintained its original response to the request that *'there is no requirement for applicants to declare whether they are foreign or European Union migrants. Therefore there was no recorded information to provide to you.'*
8. It also reviewed the Proof of Identity Checklist (part 15 of the form) and stated that there is a wide choice of documentation (including

birth certificate, passport, medical card, recent gas bill) which can be supplied, in original form to the Council as proof of identification.

9. On 3 July 2014 the complainant contacted the Commissioner as he considers that the information must exist. He argued that the WB/CTS claim forms refer to '*nationality*' in 4 places on pages 3 (applicant coming from a country outside the UK), 23 (National Asylum Seeker Service number and support), 25 (items on identity checklist) and 26 (Equal Opportunities section).
10. On 31 July 2014 the Commissioner asked the Council to revisit the request. On 7 August 2014, the Council replied stating that it did not have a statutory duty or requirement to collect the requested information in relation to benefits.

*'If the eligibility criteria is satisfied then the claim is processed in the normal way and the fact they are a person from abroad who meets those tests **is not recorded**, as it is then irrelevant.*

The applicant either meets the requirements of the tests stated above, or they do not meet the requirements. If they do not meet the requirements of the tests then they are simply notified that they have no right to claim. The Council does not record their nationality from their responses to these questions as, once the benefit eligibility criteria is satisfied, there is no requirement/or need to do so.'

11. The Commissioner contacted the Council again as the Benefit Claim forms may still contain information about '*nationality*' even if it is not used as part of the benefit claim. On 22 August 2014 the Council wrote to the complainant stating that all forms are scanned onto a document management system and to search them manually would exceed the appropriate cost limit. The Council cited section 12(1) of FOIA to refuse the request.
12. In addition the Council also considered what advice could be offered but were unable to offer advice that would reduce the scope of the request and still make the resultant information meaningful.

Scope of the case

13. The Commissioner considers that the scope of the case is to determine if the Council holds any information on the number of foreign and EU migrants claiming housing benefit and council tax

benefit/council tax and if the Council correctly relied on section 12(1) of the FOIA.

Reasons for decision

Section 1

14. 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 within the scope of the request, and if so, to have that information communicated to him.
15. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. The Commissioner must decide whether, on the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request).
16. Following the intervention of the Commissioner, the Council revisited the request and on 22 August 2014 wrote to the complainant that it *'understands the point raised that there may be some claim forms, retained within the Benefits system which contain information relating to EU Migrants or Foreign Nationals.'*
17. The Commissioner has decided, on the balance of probabilities, that the public authority holds information within the scope of the request.

Section 12 – The cost of compliance

18. Section 12(1) of the FOIA states that:

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."
19. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") sets the appropriate limit at £450 for the public authority in question. Under the Regulations, a public authority may charge a maximum of £25 per hour for work undertaken to comply with a request. This equates to 18 hours work in accordance with the appropriate limit set out above.

20. A public authority is only required to provide a reasonable estimate or breakdown of costs and in putting together its estimate it can take the following processes into consideration:
- determining whether it holds the information;
 - locating the information, or a document which may contain the information;
 - retrieving the information, or a document which may contain the information; and
 - extracting the information from a document containing it.

Would the cost of compliance exceed the appropriate limit?

21. As is the practice in a case such as this, the Commissioner asked the Council to confirm if the information is held and if so, to provide a detailed estimate of the time/cost taken to provide the information falling within the scope of this request.
22. The Council explained to the Commissioner that for the requested period there are 23,789 claim forms which are electronically scanned onto a document management system. On page 3 of the form is the question:

'Have you or your partner come to live in England, Northern Ireland, Scotland, Wales, the Republic of Ireland, the Channel Islands or the Isle of Man from any other country?

If 'Yes', which country?'

23. The question is asked to establish eligibility for benefit but the Council has explained that once eligibility is established it does not need to use this information about the country of origin within Benefits: it has no way of knowing which, if any, of the claim forms it is held on. Therefore the Council would have to undertake a manual exercise to extract and read each form to establish if this information is held or not.
24. The Council undertook a sampling exercise to establish how many documents could be reviewed within an hour and out of these documents how many contained the requested information.

'The sample established that 42 cases could be reviewed within an hour; the sample was done by an experienced member of the Benefits team. The results were:-

No-one ticked YES

30 ticked NO = 71% of sample

12 didn't answer the question = 29% of sample.'

25. Therefore, in 18.5 hours 777 files could be examined from the base of 23,789 forms. The Council stated that this equates to only 3.3% of the total and *'would render the resultant information meaningless.'*
26. The Commissioner asked if a search could be made on the word 'country'. The Council explained that it could not search the management system for a specific word as the documents are scanned in 'flat' and the Council does not have OCR software.(optical character recognition).
27. The Council also considered the other areas of the form raised by the complainant where 'nationality' is referred to.

*'If a person has successfully obtained asylum status, then they are eligible for free school meals, but evidence of this is required. This evidence links to qualifying criteria for Housing Benefit/Council Tax and as with claims for Housing Benefit/Council Tax, an individual is either eligible or not eligible and their status **is not recorded.**'*

'The Identification checklist - This is a reminder to provide evidence to substantiate the statement made on Page 3 and as such, also applies to UK citizens. This Identification checklist is relevant to any and all applicants.'

'Equal Opportunity monitoring, to enable inclusivity and accessibility to service areas. This part of the form is optional for claimants to complete The majority of claimants who did complete this part of the form recorded that they were British....That section does not ask about foreign or EU migrants'.

28. The Commissioner accepts that the requested information is not more readily available from these parts of the form.
29. Having considered the Council's responses to the Commissioner's investigations, the Commissioner is satisfied that compliance with the request would far exceed the appropriate limit. The Council was therefore correct to apply section 12 of the FOIA to the complainant's request.
30. The Commissioner understands the reasons why the complainant considers that the information should be held, but the Commissioner can only consider what is held. It is outside the Commissioner's remit

to determine if it should be held, and even if it should be, he cannot require a public authority to create the information under the FOIA.

31. In the same way, the Commissioner understands that the complainant has offered, as a Councillor, that he could examine the Benefit Records himself (or nominate another Councillor) to access the data to prepare the response for himself. The Commissioner agrees with the Council when it responded that it

'cannot allow a 3rd party to examine records which contain Personal Data or Sensitive Personal Data, as defined by The Data Protection Act 1998.

The legislation is clear regarding disclosure and sharing of information and it states on our Data Protection Register Entry ".....We sometimes need to share information with the individuals we process information about and other organisations. Where this is necessary we are required to comply with all aspects of the data protection act...."

Procedural Requirements

Section 16(1) – The duty to provide advice and assistance

32. Section 16(1) of the FOIA provides that a public authority should give advice and assistance to any person making an information request. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice (the "code")¹ in providing advice and assistance, it will have complied with section 16(1).
33. In this instance, the Council consulted the Operational Manager for Benefits and explained to the complainant that it was unsure what advice could be offered to reduce the scope of the request and still make the resultant information meaningful. As stated above, to reduce the scope to 18.5 hours would result in an examination of only 3.3% of the total number of claim forms held for the time period.

¹ <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-ofpractice.pdf>

34. The Commissioner considers that this satisfies the requirements of the Secretary of State's Code of Practice issued under section 45 of the Act, and therefore the duty at section 16 of the Act.

Section 17(5) Refusal of request

35. Section 17(5) states that any public authority relying on section 12 must within the time limit for complying with section 1(1) give the applicant a notice stating that fact. The Commissioner finds that the Council breached section 17(5) because it did not apply section 12 within 20 working days of receiving the request.

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

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

Pamela Clements
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