

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 January 2022

Public Authority: Welwyn Hatfield Borough Council

Address: The Campus
Welwyn Garden City
Herts AL8 6AE

Decision (including any steps ordered)

1. The complainant has requested information about the legal process followed by Welwyn Hatfield Borough Council regarding decisions it made on 5 November 2019 and 10 March 2020 about the redevelopment of the Campus West Car Park. The Council refused the request as it considered that compliance with it would exceed the cost limit under section 12 FOIA.
2. The Commissioner's decision is that Welwyn Hatfield Borough Council (the 'Council') has correctly cited section 12(1) FOIA, in response to the request. It has also complied with its duty to provide advice and assistance in line with the requirements of section 16 FOIA. He finds that the Council breached section 10(1) FOIA by failing to respond to the request within the statutory time for compliance.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 8 December 2020, the complainant wrote to the Leader of the Council and requested information in the following terms:

"I am trying to understand the legal basis for the series of decisions the Cabinet made that led to the award of the Campus West contracts in March 2020. Perhaps you could help me.

I note that the decision you took on 5 November 2019 was flagged on the Forward Plan on 7 October 2019. As your officers have no doubt made you aware, Key Decisions should be recorded on the Forward Plan

4 months prior to the decision being made. Why was the requirement not followed?

It follows that, by not doing so, you chose not to fully consult prior to your decision - a matter underscored by the elliptical title of the item in the Forward Plan - "Welwyn Garden City North" and an early indication that it would be a Part II item. Why was that? You must have been aware that the Decision was to come to your Cabinet when the council obtained Homes England funding. What was the haste?

Turning to the award of contracts, these contracts total over £4 million. In November 2019, you knew that the Key Decision on the contracts would need to come before the Cabinet. You therefore had the full 4 months to place the cabinet's intention to make a Key Decision on the Forward Plan. Neither are in the Forward Plan at all. Why did you do that?

I would be grateful for precise answers to all my questions".

5. On 9 December 2020, the Leader of the Council advised the complainant that this would be treated as an FOI request and in response the complainant wrote to the Council again in the following terms:

"I am asking you for a clear straightforward explanation that your residents will understand to explain your thinking when you decided to step outside the legal process for making Key Decisions.

Your council defines a Key Decision as follows: "A Key Decision is one which is likely to result in expenditure or savings of above £100,000, or to have an effect on communities living or working in an area comprising two or more Wards of the Borough."

Clearly the decisions I refer to in my email [of 8 December] fall into this category.

I am still looking forward to a response from you as Leader of the Council concerning the questions I have asked. However as you have started the FOI ball rolling, please also take this email as a request for all emails, document, papers etc that relate to this matter".

6. On 8 January 2021, the Council responded providing the complainant with information about the decision making process and clarified how the key decisions were made within the framework set out by the Council's constitution. The Council provided a link to its website (<http://democracy.welhat.gov.uk/ieIssueDetails.aspx?IID=13313&Opt=3>) which set out the history and process for making this decision.

Information was also provided about the awarding of contracts related to the redevelopment of the Campus West Car Park.

7. On 8 January 2021 the Council also asked the complainant to clarify his request for *"all emails, document, papers etc that relate to this matter"* so the Council could better understand the specific information sought by the Complainant. The Council advised the complainant that his request may be exempt by virtue of section 12 FOIA (cost limit) or regulation 12(4)(b) EIR (manifestly unreasonable).
8. The complainant responded on 13 January 2021 expanding and elaborating on his information request in the following terms:

"For the avoidance of doubt let me expand on my original request dated 9 December.

I wrote that "as you Tony [Leader of the Council] have started the FOI ball rolling, please also take this email as a request for all emails, document, papers etc that relate to this matter". Tony and his Cabinet have made decisions based on information and advice from officers and colleagues leading up to cabinet decisions taken on 5 November 2019 and 10 March 2020 concerning the multi-storey Campus West Carpark.

I want to see all emails, documents, papers etc. that relate to the process, timing and scrutiny of those decisions taken by the Cabinet, specifically correspondence and guidance regarding Key Decisions and their timing and insertion into the Forward Plan and scrutiny of Key Decisions where it was impracticable to comply with time scales shown in the Constitution and also defined by statute. This will include background advice and correspondence between officers, councillors and office holders relating to this information.

I know, for example, that the Chairman of the Resources Overview and Scrutiny Committee has been given notice that it was impracticable to comply with the requirement that at least twenty eight days' notice must be given of the intention to make a key decision that is not in the Forward Plan and in the private section of the meeting in accordance with Regulations 5 and 10 of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 for items 17(a), (b) and (c) because they were urgent and could not reasonably be deferred for the reason specified. I want to see all the background advice and correspondence relating to this matter from everyone involved.

There must be other matters of this nature relating to the Campus West carpark Decisions of 5 November 2019 and 10 March 2020 that I am not aware of and I request that information as well.

People who might be involved and hold relevant information, emails, notes etc., include Tony Kingsbury [Leader of Council] and all other cabinet members, all members of the Resources Overview and Scrutiny Committee, all members of the Welwyn Garden City Town Centre Regeneration Board, [four names redacted] and her team, [two names redacted] (I assume that his emails and papers will be archived by his PA) and the staff that service cabinet meetings and maintain the Forward Plan.

Of course there might well be other people who will hold information but I do not know their names or their roles”.

9. The Council responded on 3 February 2021 explaining that the information request remained too broad and that it would exceed the cost limit in section 12 FOIA. He was provided with guidance on how to make effective information requests (and linked to ICO guidance) and asked to submit one clear and focused request.
10. On 7 February 2021, the complainant responded to the Council refining his information request in the following terms:

“I would like to see all the records that show that the Council has followed the correct legal process, timing and scrutiny to make the Key Decisions taken by the Cabinet on 5 November 2019 and March 2020 concerning the multi-storey Campus West carpark.

As in my original email to the Leader, I want to see all emails, documents, papers etc that related to this matter.

This does not mean Cabinet reports or information concerning contracts, funding or anything else, except information underpinning the Key Decisions that shows that the correct legal process, timing and scrutiny has been followed.

This will of course include correspondence and guidance between officer and members regarding the legality of Key Decisions and their timing and insertion into the Forward Plan and scrutiny of Key Decisions where it was impracticable to comply with time scales shown in the Constitution and also defined by statute.

I am sceptical that the Council has followed the correct process, timing and scrutiny and I am asking to see all the documentary evidence to show that the council has followed the process, timing and scrutiny correctly. The end result will be that I can fully understand if the Key Decisions were made lawfully or not.

I know, for example, that it is claimed that the Chairman of the Resources Overview and Scrutiny Committee has been given notice that it was impracticable to comply with the requirement that at least twenty

eight days' notice must be given of the intention to make a Key Decision that is not in the Forward Plan and in the private section of the meeting in accordance with Regulations 5 and 10 of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 for items 17(a), (b) and (c) because they were urgent and could not reasonably be deferred for the reason specified.

I want to see all the background advice, correspondence and records relating to this specific matter (i.e. impracticable to comply with the requirement that at least twenty eight days' notice) from everyone involved both at the time of the Chairman's action and following onwards.

It is for you to decide where the information is held. If the Council has acted properly and lawfully, all the emails, notices, advice and records will be properly recorded and easily available. Of course, if the Council has not got the information, you should clearly state this and not waste everyone's time and public money by employing smoke screen tactics."

11. On 11 March 2021, the Council refused to provide the requested information saying the request remained a 'catch-all' request and that section 12 FOIA applied.
12. The Council provided an internal review response on 28 April 2021 and maintained that the information request was not clear and focussed enough. It refused to provide the information on the grounds of cost under section 12 FOIA.

Scope of the case

13. The complainant contacted the Commissioner on 8 May 2021 to complain about the way his request for information had been handled saying:

"I am sceptical that the council has followed the correct process and I am asking to see all the documentary evidence to show that the council has followed the process, timing and scrutiny correctly. The end result will be that I can fully understand if the Key Decisions were made lawfully or not".

14. The complainant considers he had sufficiently refined his request on 7 February 2021 to enable the Council to provide the information he was seeking and disagrees with the Council's application of section 12 FOIA to his request.

15. During the course of his investigation, the Commissioner considered whether the request should have been handled under the equivalent regulation of the Environmental Information Regulations ('EIR'). The Commissioner's rationale for this is discussed in more detail below. This issue was not raised by the complainant.
16. In its submission to the Commissioner, the Council explained that it had also considered applying section 14 FOIA (vexatious requests) or in the alternative regulation 12(4)(b) EIR (manifestly unreasonable) should the Commissioner determine the access regime to be EIR, on the grounds of the excessive burden it would place on the Council to respond. However, as referred to below, the Commissioner is satisfied that the request was dealt with under the correct legislation by the Council.
17. The Commissioner considers the scope of this case to be to determine if the public authority has correctly cited section 12(1) FOIA in response to the refined request of 7 February 2021. He has also considered whether the Council complied with its duty to provide advice and assistance under section 16 FOIA.

Reasons for decision

The applicable access regime

18. Regulation 2(1) EIR provides a definition of 'environmental information' including *information on:*

'(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affecting the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements'

19. The Commissioner has not seen the requested information but at the start of his investigation considered it may have been information relating to 'land' and 'landscape' and 'measures... likely to affect the

state of land' (i.e. the decisions taken by the Council regarding the carpark proposal).

20. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
21. Further, the Commissioner considers that interpretation of the phrase '*any information... on*' in regulation 2 of the EIR will usually include information concerning, about, or relating to the measure, activity, factor etc., (i.e. the carpark plans) in question. It is not necessary for the information itself to have a direct effect on the elements of the environment, or to record or discuss such an effect. Information that would inform the public about the carpark proposal and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.
22. As part of his investigation, the Commissioner asked the Council to provide the Commissioner with submissions to support its refusal of the request under FOIA, rather than under EIR.
23. The Council argued in its response that the correct access regime to consider the request was FOIA. The request related primarily to the legality of the Council's internal decision making processes and how the key decisions were made by the Council within the framework set out by its constitution, not on the environmental information that may be contained within some of the requested information.
24. The Commissioner accepts the Council's view of the information requested by the complainant and that the correct access regime in this case is therefore FOIA. The Commissioner considers the scope of this case to be to determine if the Council has correctly cited section 12(1) of the FOIA in response to the refined request of 7 February 2021.

Section 12 – cost of compliance exceeds the appropriate limit

25. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate cost limit.
26. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') at £450 for public authorities such as the Council.
27. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that

section 12(1) effectively imposes a time limit of 18 hours for the Council to deal with this request.

28. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
- determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
29. A public authority does not have to make a precise calculation of the costs of complying with a request; instead, only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal decision in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/20017/0004*, the Commissioner considers that any estimate must be “*sensible, realistic and supported by cogent evidence*”. The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.
30. Section 12 is an absolute exemption and not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under the FOIA to consider whether there is a public interest in the disclosure of the information.
31. Where a public authority claims that section 12 of the FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of the FOIA.

Would the cost of compliance exceed the appropriate limit?

32. When dealing with a complaint to him under the FOIA, it is not the Commissioner’s role to make a ruling on how a public authority deploys its resources or how it chooses to hold its information.
33. Therefore, as set out in the Fees Regulations, the Commissioner has considered whether the estimated cost of responding to the request would exceed the appropriate limit of 18 hours.
34. The Council first provided a cost estimate to the complainant on 3 February 2021. It said:

"Discussions on Cabinet agendas and the Forward Plans happen frequently and by many officers and councillors. The group you identified above is a minimum of 36 people, some of whom no longer work for the council. Even assuming that we could limit the request to 36 people, if each of those people spent 30 minutes looking through and retrieving all relevant emails and files, this would reach the limit of 18 hours set out in guidance for dealing with a FOI request."

35. As is the practice in a case where the public authority has cited the cost limit under section 12, the Commissioner asked the Council to provide a detailed explanation of its cost calculation.
36. The Council explained to the Commissioner that to determine whether the information is held, to locate and then retrieve it, relevant members of staff would need to manually look through five months of their own emails and files.
37. This manual search was necessary because a centralised keyword search of the email accounts and other files was not possible as there was no standard word, phrase, reference number, or subject heading that could be used. Each of the relevant individuals would need to manually search for any documents relating to the cabinet, this particular key decision, and determine whether the document contained information about how the Council decided to treat this key decision. A central search by IT would not be specific enough to identify all information that was held.
38. The Council also confirmed to the Commissioner that it had now identified that more than 36 individuals may hold relevant information. The Council had determined that 46 individuals could hold emails and files, all of which would need to be manually searched.
39. The Council provided the Commissioner with a list of the 46 individual's names and roles and explained that these individuals were specifically identified by the complainant in his request by way of their role, or name.
40. The Council confirmed that it had performed a sampling exercise using two current members of staff (the Procurement Manager and the then Principal Governance Officer). The staff members were chosen as they had remained in the same position/team and were most likely to hold any relevant documents. These two individuals searched their emails and files to determine if they held any relevant documents specific to this request. On average it took the two staff members **22 minutes each** to search through their emails and files to confirm if they held any relevant documents.
41. The Council noted that 11 of the 46 individuals have left the Council. It estimated that of the 35 out of the 46 individuals still working at the

Council, at the average time of 22 minutes each to search through their emails and files to determine if they held any relevant documents specific to this request, this would take **770 minutes** or **12.8 hours**.

42. The Council noted that only 1 of the 11 individuals who have left the Council could have his email account retrieved by IT. It would take its IT Department **120 minutes** or **2 hours** to retrieve those emails and files from Council systems. Once retrieved, a Council governance officer would need to review them to establish if they were relevant to the request– this would take an additional **22 minutes (in total: 142 minutes or 2.3 hours)**.
43. In relation to the remaining 10 individuals who had left the Council, 3 were councillors and 7 were staff members. As the 7 staff members had not been employed for over 3 months, the Council explained that their email accounts were not retrievable centrally by IT. Therefore members of the Council's Governance team would need to manually search the relevant electronic and papers files of the 7 staff members. They estimate this will take **90 minutes per person or 630 minutes (10.5 hours)**. For the 3 councillors who had left, the Council estimated it would take a member of the Council's Governance team to **90 minutes (1.5 hours)** in total to manually search the relevant electronic and papers files of the 3 Councillors.
44. In total, to determine if any information is held, the Council estimates it will take **1,632 minutes or 27.1 hours or £677**.
45. Even if it were possible to reduce the amount of time taken to check the 7 staff who had left the Council considerably by half to, for example, **45 minutes per person**, (315 minutes/person or 5.25 hours) this would still be over the cost threshold limit at **1,266 minutes**, or **21.1 hours** or **£546**.
46. Section 1 FOIA provides a general right of access to information requested. However, a public authority has a duty to consider whether any information located is relevant to the request. For these reasons it is not a case of merely providing the information without reviewing it to determine if the information held is in scope. The Council estimates that its Governance team would take **60 minutes** (1 hour) to determine if the information located is in scope.
47. The Commissioner also notes that the Council have said that to extract the relevant information from a document containing it and to collate the in scope information into a suitable form for disclosure to the complainant it would take **300 minutes or 5 hours**.
48. A summary of the Council's cost estimate is as follows:

- Determining/locating whether the information is held: **27 hours**
- Retrieving the information, or a document which may contain the information: **1 hour**
- Extracting the information from a document containing it: **5 hours**

49. The Council's total costs estimate is **33 hours or £825**.

50. Having considered the estimates provided, the Commissioner's overall conclusion is that the Council has estimated reasonably and cogently that to comply with the complainant's request would exceed the cost limit of 18 hours. The Council was therefore entitled to apply section 12(1) of the FOIA to the complainant's request.

Section 16 – advice and assistance

51. Section 16(1) of the FOIA provides that a public authority is required to provide advice and assistance to any individual making an information request where it would be reasonable to do so. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice¹ in providing advice and assistance, it will have complied with section 16(1).
52. In general, where section 12(1) is cited, in order to comply with this duty a public authority should advise the requester how their request could be refined or reduced to potentially bring it within the cost limit.
53. The Commissioner notes that the Council suggested ways the complainant may wish to consider refining his request on 8 January and 3 February 2021 and provided guidance on making clear information requests, as well as linking to ICO guidance.
54. The Commissioner considers this was an appropriate response in the circumstances given the broad catch-all nature of the original request. He is therefore satisfied that the Council met its obligation under section 16 of the FOIA and does not require it to take any steps

Procedural Matters

55. Section 10(1) FOIA states that a public authority must respond to a request promptly and in any event not later than the twentieth working day following the date of receipt.
56. The refined request for information was made on 7 February 2021. The Council responded with a refusal notice on 11 March 2021. As this was more than 20 working days after the request was made, the Commissioner finds that the Council breached section 10(1) FOIA. However, as a response was issued to the complainant, no further steps are required by the Council.

Right of appeal

57. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

58. 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.
59. 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

Phillip Angell
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