

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 21 May 2012

**Public Authority:** Wigan Council

**Address:** Town Hall  
Wigan  
WN1 1YN

### Decision (including any steps ordered)

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1. The complainant requested information from Wigan Council ('the Council') as part of his ongoing concerns about the contents of his personnel file. The specific FOIA requests considered in this notice flowed from these matters.
2. The Information Commissioner's decision is that the Council is in breach of section 10(1) of the FOIA by not responding within 20 working days to the complainant's request.
3. The Commissioner requires no steps to be taken as the Council has now responded to the request.

### Request and response

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4. On 27 January 2011 the complainant requested the following information:

*"Finally, could you please supply, under the Freedom of Information Act, copies of all correspondence (including electronic) between [a named person] and the Director of Education (latterly Children and Young People's Services) for 2005, 2006 and 2007."*

At the same time the complainant repeated questions concerning his personal data which formed part of his subject access request and are included in a data protection case with the Commissioner.

5. The Council responded by letter on 23 February 2011 seeking clarification of the request. The complainant asserts that he did not receive the Council's letter.
6. On 19 August 2011 the Council provided the complainant with a copy of its letter of 23 February, by email.
7. At the time of this notice, the complainant has not provided the clarification sought by the Council.
8. On 12 May 2011 the complainant contacted the Commissioner in respect of the Council's non-response to his request.
9. The Commissioner explained to the complainant the provisions of section 1(3) of the Act. By virtue of section 1(3), a public authority is not obliged to comply with section 1(1) unless it is supplied with such further information as can reasonably be required in order to identify and locate the information sought by the applicant. Following the Commissioner's explanation the complainant made the following request to the Council on 5 July 2011, with reference to the letter which he had not received:

*"Can you please forward your complaint letter and the Royal Mail response to me as a hard copy as a request under the Freedom of Information Act."*

10. The Council responded to the complainant on 19 August 2011 stating that the information is not held. The Commissioner understands that the Council did not complain to the Royal Mail about the apparent loss of its letter.
11. On 6 October 2011 the complainant requested an internal review concerning several matters. Not all of the matters contained in his request for internal review concern the subject of this notice. The second element of his request for internal review did however seek a review in respect of the Council's letter of 23 February 2011. The second element stated:

*"Can you please initiate a review of the letter to me dated 23 February, namely:*

- *The authenticity of the date of its creation.*
- *The validity and reliability of evidence to support this (How can you prove it?)*
- *Is there any internal evidence that this letter was submitted for posting?*

*Please inform me of the name of the senior officer conducting the review and the nature of this person's independence."*

12. On 22 November 2011 the Council responded to the complainant's letter of 6 October 2011 confirming the date of creation and stating that the Council was not instigating a review to further prove the authenticity of its letter or evidence confirming the posting of the letter.
13. On 25 November 2011 the complainant requested further information as follows:

*"Please supply the following information requested under the Freedom of Information Act:*

*1. The documentation that explicitly states your authority to deny the right of appeal of a member of the public who has requested an independent internal review from a Senior Official.*

*2. Copies of all communications, including electronic, between yourself and any Wigan Council staff and officers on this specific matter from 1 February 2011 up to and including the day you receive this letter.*

*3. Copies of any instructions, advice and guidance that you have requested and received relating to this specific matter again using the timeframe of 1 February 2011 up to and including the day that you receive this letter.*

*Please inform me as soon as it is arranged the name of the senior officer conducting the internal review and the nature of this person's independence."*

## **Scope of the Case**

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14. The complainant first contacted the Commissioner on 12 May 2011 to complain about the Council's handling of his requests.
15. The complainant informed the Commissioner that he did not wish to pursue his request of 27 January 2011:

*"I have been advised by my solicitors not to pursue my request for information in relation to emails between [a named person] and the Director of Education or respond to [a named Council employee] request for clarification in this matter at this moment in time as this would explicitly and implicitly accept her 23<sup>rd</sup> February letter as factual and chronologically accurate record. The matter is contested."*

16. The Commissioner determined the scope his investigation to focus on the following issues.
- The Council not responding to the request of 25 November 2011.
  - Consideration of the complainant's allegations that the Council did not create the letter dated 23 February 2011 on 23 February 2011 and was created some time later, after the intervention of the ICO.
  - The conduct of the Council in its provision of internal reviews.

## Reasons for decision

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### Section 10 - Time for compliance with request

17. Section 10 (1) of the FOIA sets out the duty of a public authority to comply within 20 working days with section 1(1), which details the general right of access to information held by public authorities.
18. The request of the 25 November 2011 was contained in a letter from the complainant to the Council in which he comments on the Council's letter of 22 November 2011, which itself confirmed that the letter of 23 February 2011 was created on the 23 February 2011.
19. The complainant considers the Council's letter of 22 November 2011 to be an internal review. The Council does not consider this to be a review but simply its assertion that the letter of 23 February 2011 is not fraudulent; it is a response made to the complainant under the Council's normal course of business. The Council explained the following:
- "[the complainant] asked me to instigate a review of the letter, this is more of a service request and not something that would be governed by the FOIA, and certainly on considering this with my Line manager was something that we felt we did not need to prove further, as evidence had already been sent to [the complainant] to authenticate the letter."*
20. The Council went on to explain its view that the questions raised as an FOIA request in paragraph 12 above flowed from the complainant considering the letter of 22 November 2011 to be an internal review.
21. The Commissioner has concluded that irrespective of the parties' opinions regarding the Council's letter of 22 November 2011 the complainant's letter of 25 November 2011 contained an FOIA request which should have been handled by the Council in accordance with the FOIA. The Commissioner notes that the Council responded to this request on 16 May 2012. Notwithstanding this response, the

Commissioner considers that the Council is in breach of section 10(1) with respect to this request for information.

22. The Commissioner went on to consider the complainant's allegations in respect of the letter dated 23 February 2011.

23. The complainant explained his concern to the Commissioner as follows:

*"I believe that the hard copy provided to [an ICO member of staff] was produced as an expedient measure to provide 'proof' of compliance and only after he had contacted [a Council member of staff] directly about my complaint.*

*Since I had already questioned the length of time it had taken to respond to my requests, I became suspicious of the authenticity of both attachments as representative of a permanent archived record and I challenged these anomalies. I have since provided [the Council member of staff] with the option to confirm the origin of her letter by virtue of a check on the metadata contained within the hard drive on which it was written. While the 'properties' page of a document can be falsified by changing the clock and calendar on a computer, the metadata cannot be altered and this would demonstrate that the alteration had taken place. Only the destruction of the hard drive can erase such information."*

24. The Commissioner notes the complainant's concerns and has considered the points he raised.

25. As part of the Commissioner's regulatory function it is legitimate for him to consider whether there is evidence to suggest that records have been falsified in order to circumvent the requirements of the FOIA. In this case: whether there is evidence which suggests that the Council was relying on section 1(3) of the Act to enable it to 'not respond' to a legitimate request for information, in circumstances where it had not in fact asked for clarification of the complainant's initial request.

26. In this instance the Commissioner has not been provided with any hard evidence to suggest that this is the case. The Commissioner considers that the processes which the complainant believes to have taken place would require a disproportionate effort on behalf of the Council to fabricate the appearance of compliance with the legislation; particularly as there had been ongoing matters involving the Commissioner since April 2010. Consequently the Commissioner is satisfied that, with regard to his regulatory function, no further action is required.

27. The Commissioner acknowledges the points made by the complainant regarding the requirements placed on a public authority in providing an internal review. However, the position adopted by the complainant – his refusal to provide the Council with the clarification of a request,

legitimately sought under section 1(3) – effectively means that the complainant has not yet made a substantive request for recorded information.

28. The complainant's concerns regarding an independent review would have more weight if he had requested a review of the Council's response to a valid information request. However, in this case the complainant requested proof of the authenticity of a letter; this is not an internal review in respect of the FOIA. The Commissioner is therefore satisfied that, in this circumstance, it was appropriate for the same member of staff to respond to what was in effect an enquiry rather than a review.
29. The Commissioner has concluded that, by the complainant not responding to the legitimate enquiry by the Council for clarification (as detailed above in paragraph 14), a stalemate has arisen which prohibits any progress with the request of 27 January 2011.

## Other Matters

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30. In his letter of 15 March 2012 the complainant listed numerous speculative questions detailing his concerns. By way of example:
  - Is there a motivation (personal or corporate) to delay or avoid scrutiny?
  - If hard copies are taken at face value as factual evidence, is there an opportunity for the less scrupulous to feign compliance through the simple measure of producing a convenient document later?
31. The concerns raised are not within the remit of a section 50 complaint but are relevant to the Commissioner's regulatory function as covered in paragraphs 23 and 24.
32. The Commissioner notes the content of the complainant's letter of 6 October 2011 to his office in which he explains:

*"I believe that I have mentioned in the past that my solicitors produce case studies for sale to other practices and university law departments and my complaint against Wigan Council is being supported by them pro bono as part of their publishing arm. (Although I have no doubt they will more than recover their costs from the Council sometime in the future). The restrictions under which both the ICO and Local Government Ombudsman operate are integral aspects of this case study. Indeed, the study's working title is 'Who really guards the Local Authorities?' In some respects, the information I request is secondary to the processes on display. We wish to place a spotlight on the actions of some public*

*bodies to avoid publication of embarrassing information and the patience and determination required by a member of the public to obtain what is public information."*

33. Considering the extract produced in paragraph 32 the Commissioner questions whether the complainant's objectives are well served by requesting information as an exercise, at a significant cost to the public purse.

## Right of appeal

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34. 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)

35. 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.
36. 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** .....

**Jon Manners**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**