

FREEDOM OF INFORMATION ACT 2000  
("FOIA")  
REVIEW DECISION

DATE: 13 March 2014

Reference: 1734386

**1. Summary**

---

- 1.1 A request for information under the FOIA ("the Request") was made to Cheshire West and Chester Council ("the Council") on 2 January 2014. The Request was related to the Council's response to another earlier request for information Reference 1511854.
- 1.2 The Council failed to respond to the Request within the 20 working day statutory deadline i.e. by 30 January. On 31 January the applicant asked for an internal review.
- 1.3 On 31 January the Council sent its Response ("the Response") to the Request and apologised for the delay.
- 1.4 On 4 February the applicant confirmed his request for an internal review ("the Review") of the Response and the delay in providing it. He submitted detailed comments on the Council's answers to the questions he had raised in the Request.
- 1.5 On 5 March and 7 March the applicant e-mailed the Council about the time taken to conduct the Review, referring to ICO guidance on time limits.
- 1.6 The Review considered the Council's handling of the Request and the time taken to provide the Response and to conduct the Review. The Review was concluded on 13 March 2014.

**2. Details of the Review**

---

- 2.1 The request for the Review was made on 4 February 2014.
- 2.2 The Review was set up in accordance with the Council's FOIA procedure.
- 2.3 The Council officers undertaking the Review were:

- Catherine Gaukroger, Lawyer (Corporate), Legal and Democratic Services and
- Helen De Lemos, Senior Manager, Waste Strategy, the nominated Tier Four Senior Manager.

### 3. The Original Request for Information

---

#### 3.1 The Request made on 2 January said:

*I have read the Council's response to the FOI ref 1511854. It is worded in such a way as to strongly suggest that the only reason for refusing to release the identity of the debtor is the protection of the Commercial interests of that debtor, as quoted below:-*

*'9.3 In conducting the Review, the Council agrees that the exemption within s43(2) is engaged, in that, the Limited Company, who is named as the debtor, has commercial interests at stake which would be likely to be prejudiced by the release of the information.*

*It carries out commercial activities in the open and competitive market and as such has competitors who may use the information to their advantage and to the disadvantage of the Company. Also, there is a real risk that the reputation of the Company could be damaged or it could create a lack of business confidence in dealing with the Company. It is clear that it is the interests of the Company which are affected. The Council considers that there is a real and significant risk of prejudice and harm being caused to the commercial interests of the Company by releasing the name.'*

*Part of this judgement is based, in Para 9.4, 'Factors in favour of disclosure', on an assessment that the 'Public interest in the Company's transactions with other persons is only MEDIUM.'*

*No indication is given as to why this assessment is not rated more highly. This is public money that is being written off without exhausting the normal legal processes and members of the public who may consider employing this organisation would be assisted by knowing how they treat their creditors.*

*Of course, if the company has ceased trading, then there is no logical reason not to name it.*

#### 3.2 The applicant continued:

*".....I wish therefore to raise a NEW FOI request in which I would ask you to address the following specific points....."*

The applicant then set out 5 points numbered a) to e) which he asked the Council to address. The Review addressed each of these points which are set out in section 8 of this Decision Notice.

#### 3.3 The applicant concluded:

*"....Given the fact that you have already examined most parts of this enquiry, I would hope that you would be able to respond in less than the statutory 20 working days."*

#### **4. The Reasons for the request for the Review**

---

- 4.1 When the Council failed to respond to the Request within the statutory deadline, on 31 January the applicant asked for an internal review. He said  
*"By law you should have responded to my request within 20 working days or provided me with an explanation as to why that has not been possible. You have done neither, despite my belief that most of the information should have been readily to hand".*  
*I would therefore ask you to conduct an internal review as soon as possible, providing me with both the information originally requested and the reason for the delayed response."*
- 4.2 Following receipt of the Response, on 4 February the applicant confirmed his request for the Review, submitting,  
*"I am asking for an internal review because I am not satisfied with the Council's explanation of why the application was not dealt with within the 20 working day time limit. Also, you have given a demonstrably incorrect cost reason for some of the information being denied and you have failed to provide some of the information requested on the spurious grounds that it was 'comment' rather than a request for information. You have also failed to demonstrate that the exemption applied has been done on grounds which are in accord with the DCLG guidance on such issues.*  
*I have written more detailed comments below following each of the paragraphs of your response, having enclosed your previous replies in parentheses....."*
- 4.3 The applicant's comments to the Review on each of the paragraphs a) to e) of the Response are set out in section 8 below.

#### **5. Documents produced to the Review**

---

- 5.1 The following documents were read prior to the Review and discussed at the Review:
- The Request;
  - The Response;
  - The e-mails between the applicant and the Council concerning the Request and the Review.

- The Council's response to Freedom of Information request 1511854 "Bad Debt Write Off" and the Council's subsequent Review Decision dated 23 October 2013 re that request and
  - Internal e-mails relating to the Response, the Review and the response to request 1511854.
- 5.2 Reference was also made during the Review to Guidance from the Information Commissioner's Office, in particular
- The Guide to Freedom of Information
  - FOIA Awareness Guidance No. 5 – Commercial Interests.
- 5.3 Miriam Wallace, Solutions Officer, met with the Review officers to answer questions about the Council's handling of the Request and the processing of the Review.

## **6 Procedural Matters**

---

### **Responding to Requests**

- 6.1 The Council is required to respond to requests for information promptly and in any event within 20 working days after the request is received. If the Council has information in its records that answers questions asked of it, it should provide the information in response to the request, unless one of the reasons for refusing to do so applies. Unless the Council intends to apply an exemption under the FOIA which prohibits disclosure of the information, it must confirm whether it has the information requested, and if so, disclose the information. If it does not hold the information the applicant has asked for, it can comply with the request by telling them this in writing.
- 6.2 If the Council is relying on a claim that any provision of Part II of the FOIA relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information (because an exemption applies), it must, within the time for complying with the request, give the requester a notice which—
- (a) states that fact,
  - (b) specifies the exemption in question, and
  - (c) states (if that would not otherwise be apparent) why the exemption applies.

- 6.3 The Council can respond to a request outside the statutory 20 working day period if it is considering the use of an exemption which requires the public interest test to be applied, and extra time is needed to consider the exemption(s). However, even in these circumstances, it must still within the 20 working day period tell the requester what exemption is being relied upon; it is only the public interest test that may be considered outside the 20 working day period.
- 6.4 The Council is required to consider what recorded information it holds and whether such information should be disclosed. The FOIA does not require the Council to answer questions generally but only provide answers insofar as they are already held in recorded form. The Council does not have to create new information to answer a question. Requests which seek explanations for Council decisions or about Council policies are not requests for information and the Council is not required to make comments. However, the Council has a duty under section 16 of the FOIA to provide advice and assistance to individuals making requests.
- 6.5 The FOIA recognises that handling FOIA requests should not be so resource intensive, that they negatively affect the Council's normal public functions. Under section 12 of the FOIA, the Council is entitled to refuse a request where it estimates that complying with the request would exceed the cost limit. This cost limit is currently set at £450 (or approximately 18 hours work). The Council can refuse a request if deciding whether it holds the information would exceed the cost limit e.g. needing to search a number of locations. When calculating the costs of complying, the Council can aggregate the costs of related requests received within 60 days. The Council need only estimate whether the limit would be exceeded, following the rules in the Freedom of Information (Appropriate Limit and Fees) Regulations 2004.

### **Reviews**

- 6.6 There is no statutory obligation on the Council to provide a complaints process. However it is good practice to do so and in "The Guide to Freedom of Information" at page 52 the ICO says that if the local authority has an internal review procedure it should "... *ensure the review takes no longer than 20 working days in most cases, or 40 in exceptional circumstances*". This advice from the ICO has replaced Good Practice Guidance No.5 on time limits for carrying out internal reviews (now withdrawn) which was referred to in the applicant's e-mail of 5 March.

- 6.7 The role of the Review panel is to make a decision on whether any exemptions have been properly applied and whether the Council has complied with its statutory duties and timescales under the FOIA. In conducting a review of the Council's handling of a request for information, the content of the Council's response to the Request is reviewed as well as the way the Request has been handled. The Review also considers the representations from the applicant.
- 6.8 It is not the role of the Review in this case to revisit the decision in respect of the earlier Request 1511854, which was not made by the applicant. The Council's response to that request has already been the subject of an internal review and the individual who made it has been advised of their right to complain to the Information Commissioner if they are dissatisfied with the outcome. The role of the Review is to look at the Council's handling of the new FOI request 1734386, not its response to 1511854.

## **7. Exemptions**

---

- 7.1 No exemptions were considered relevant to disclosure of information in the Request.
- 7.2 However, in view of the representations made by the applicant, the Review considered the exemption under section 43 – commercial interests – see para 8.11 below.

## **8 Conclusions**

---

### **Exceeding time limits for responding to the Request and conducting the Review**

- 8.1 The Council failed to respond to the Request promptly and within 20 working days after it was received. A response should have been sent to the applicant no later than 30 January 2014. Accordingly, within the statutory time period, the Council failed to inform the applicant whether it held the information and/or failed to provide the information requested.
- 8.2 The Council therefore breached sections 1(1)(a) and (b) of the FOIA, as the Council had a duty to confirm or deny that the information existed and to provide the information within the 20 working day period following receipt of the Request (unless it considered an exemption applied) and it failed to do so. In

failing to respond within the statutory time period, the Council also breached section 10 of the FOIA.

- 8.3 The Council apologised to the applicant for the delay when the Response was sent on day 21, citing conflicting priorities.
- 8.4 There is no statutory requirement to conduct an internal review. However, in accordance with good practice it is the Council's policy to conduct internal reviews and these must be completed within 40 working days of receiving the review.
- 8.5 The Review was satisfied that the delay in sending the Response was due to workloads with competing priorities/deadlines and sickness absence within the Solutions Team.
- 8.6 In his request for review, the applicant said,

*"This is NOT a satisfactory explanation. I am afraid 'conflicting priorities' is meaningless in this context as you fail to indicate how your priorities are decided or by whom. This is clearly not the first time that responses from your department have failed to meet the statutory deadline which suggests either under-resourcing or incompetence. Please provide a copy of whatever procedures/ instructions have been put in place to prevent a recurrence.*

*You apologise for not advising me of the delay. Again, you have made such apologies before with other FOI's but the fact that it is a recurring issue indicates that there must be a fundamental procedural problem which has not been, or is not being addressed. Please confirm that procedures will be changed to ensure compliance with the regulations and supply me with a copy of the revisions.*

- 8.7 The points raised in 8.6 above by the applicant about case handling procedures amounted to new requests for information, strictly falling outside the ambit of the Review. However, the Council's response under the FOIA to these requests is that no information is held. The Review was informed that work is ongoing to address workloads and that with additional staff resources, response times on FOI requests are steadily improving. The Council is continually striving to meet its obligations and accord with best practice.

#### **Review of Response to Request**

- 8.8 As explained in paragraph 6.8 above, the role of the Review was to look at the Council's handling of the new FOI request 1734386, not its response to FOI request 1511854 which had been the subject of an earlier review. Its role was to consider what recorded information is held in connection with the Request and decide what to disclose. However, to provide context to the applicant's Request and the Council's Response, the Review noted the response and review decision in 1511854.

- 8.9 This concerned the decision by the Council to write off a bad debt of £62,193.09, relating to payment for a lease of an industrial warehouse by a limited company between June 2010 and March 2011. Although the Council had tried to recover the monies, it had been unsuccessful. The Council had not sought a County Court judgment against the company. On the advice of officers that there was no possibility of recovering the debt, the Executive Member for Resources Councillor Les Ford approved the write off.
- 8.10 The Review considered each of the issues raised in the Request together with the representations made by the applicant in his request for review. Where no information was held, the Review sought to assist the applicant with an explanation of the position.
- 8.11 The Council's decision on each point raised is set out below:

**Question (a)**

- i. The applicant raised the following point:

*"It is clear from the Guidance issued by the MOJ (Freedom of Information exemptions guidance May 2012, Section 43: commercial interests) that the Council should be 'alert to the differences between using this exemption to protect the interests of a third party and using it to defend a public authority's own interests'. All the evidence in your reply suggests that it is the third party that is being protected. Whilst the MOJ guidance correctly identifies issues of patents, trade secrets, commercial planning etc where it would be acceptable to protect the third party, nowhere does it suggest protection for debtors. Please advise specifically what part of the guidance you are using to justify your response."*

- ii. In his request for review the applicant submitted:

*"This was indeed a request for recorded information. I assume that Council procedures are indeed documented in written form. To be absolutely clear, what I was asking for was a copy of the procedures which allow, and show on under what conditions, protection can be offered to third party debtors."*

*Furthermore, in this particular case, I am asking for details of the decision making process which would confirm that the Council has indeed satisfactorily differentiated between the 'interests of a third party and those of the public authority'. If, as claimed, the Council has no ongoing business/ negotiation with the debtor then it is clear that the exemption has been applied for the benefit of the debtor and not the Council and Council Tax Payer."*

- iii. The Review concluded that this part of the Request was not a request for recorded information but a request for an explanation of the decision in 1511854 where the relevant recorded information was the Decision Notice which the applicant had read.



- iv. Each FOI request and review is dealt with on its own merits, taking account of all the circumstances and having regard to the statutory provisions, relevant guidance and, where required, balancing the public interest. Section 43 of the FOIA provides an exemption from the right to know if the release of information is likely to prejudice the commercial interests of any person. This may include the local authority itself or a company. The ICO's "FOIA Awareness Guidance No. 5 – Commercial Interests" provides further information and an indicative list of the types of information that may affect commercial interests.
- v. Whilst the Review considered that the question about procedures was a new request from the applicant, the Review concluded that no information was held regarding ".....[Council] *procedures which allow, and show under what conditions, protection can be offered to third party debtors*".

**Question (b)**

- i. The applicant raised the following point:

*"... The guidance also says 'Commercial sensitivity will often diminish over time - in some cases quite quickly.' Given that, according to your response, the debt was incurred over two and a half years ago, it seems that you are misinterpreting the guidance in refusing to reveal the debtor's identity."*

- ii. Requesting the review, he commented

*"... I think that you (wilfully?) miss my request for information here. Again, I rephrase it for you and ask for a copy of those Council procedures which should be a matter of record and which allow information of this nature to be withheld after a lapse of nearly three years. I assume that there is, within the procedures, some indication of the time over which any 'commercial sensitivity' is considered relevant. Please therefore send me a copy of the relevant instruction. I presume also that there are such written procedures in order to avoid the obvious possibilities of favouritism, prejudice and corruption."*

- iii. The Review concluded that, as for question a), this was not a request for recorded information but a request for an explanation of the decision in 1511854. Each request is assessed individually, taking account of relevant guidance. The passage of time may be a relevant consideration when considering applying the exemption for commercial interests. However, the Council does not hold information about any "relevant instruction" concerning lapse of time and commercial sensitivity. The Review considered the applicant's question about "*written procedures in order to avoid the obvious possibilities of favouritism, prejudice and corruption*" to be a new request. However, under the Council's duty to assist, the applicant is referred to the

Council's Anti-Fraud and Corruption Strategy (see below) and the Member and Officer Codes of Conduct in Part G of the Council's Constitution at

[http://www.cheshirewestandchester.gov.uk/your\\_council/policies\\_and\\_performance/council\\_plans\\_and\\_strategies/constitution.aspx](http://www.cheshirewestandchester.gov.uk/your_council/policies_and_performance/council_plans_and_strategies/constitution.aspx)



Anti-FraudandCo  
rruptionStrateg...

#### **Question (c)**

- i. The applicant asked

*"... Please confirm whether or not the debtor organisation is still trading."*

- ii. For the review, he submitted

*"... I was NOT asking for the Council's 'opinion' here. Whether the company is still a legal entity and whether it is actively trading is a matter of FACT and NOT of opinion. The status can be readily confirmed in less than 5 minutes, and at no cost, by the use of the CompanyCheck or DueDil websites. As long as you continue to withhold the name, I am clearly unable to carry out this search for myself. As such, I believe that you have an obligation to do so on my behalf."*

- iii. The Review concluded that the Council cannot state whether the company is still trading and this is not a request for information but amounts to passing an opinion on the status of the company. The Council does not have to find out information from elsewhere if it does not already have the information in recorded form. It has no obligation under FOIA to carry out research as suggested on behalf of the applicant.

#### **Question (d)**

- i. The applicant asked

*"..... Please advise whether the Council has any existing or ongoing contracts (or other commercial arrangements) with the debtor organisation or with any other with which there are directorships or senior personnel in common. I would expect such information to be readily available from your 'due diligence' processes."*

- ii. He submitted

*"... You mention a 'targeted search' but give no indication as to its size, scope or the parameters used to define the remit. As such, it gives no assurance that you have done anything meaningful to establish the true facts."*

- iii. In its Response, the Council had said that no existing or ongoing contracts with the debtor organisation had been identified by a targeted search of the relevant

departments. The Review was informed that the Council's electronic systems, including its Oracle supplier database, had been searched against the debtor company by Financial Management. Checks had also been made of officers in Asset Management about contracts relating to property and no information about current contracts with the company had been identified. The Review was satisfied that no information had been identified as held by the Council in respect of *"existing or ongoing contracts (or other commercial arrangements) with the debtor organisation..."*

- iv. Although no information had been identified, the Review concluded that, whether or not the Council held information about the debtor company or individuals involved with it as directors or senior personnel, the exercise of checking out the involvement of such individuals (through the debtor company or any other organisation) in contracts or other commercial arrangements with the Council would exceed the costs limit (£450) and section 12 applied (see para 6.5 above). The Council has over 42000 suppliers on its database and the task of identifying a company's directors and senior personnel and then comparing this information against the databases would exceed 18 hours staff time. Furthermore, Council databases will not necessarily hold details of directors and senior personnel in external organisations.
- v. Further, the Council is under no obligation to create new information or carry out research on behalf of the applicant and if information about individuals or other organisations is not held, then the Council would be entitled to respond that it does not hold any information in answer to Question d).

**Question (e)**

- i. The applicant asked

*"... Please advise whether the Council has had any discussions about future business with the debtor organisation or with any with which there are directorships or senior personnel in common. Again, I would expect such information to be readily accessible from your internal processes."*

- ii. He said

*".... Again you mention a 'targeted search' but give no indication as to its size or remit. Again, it gives no assurance that you have done anything meaningful to establish the true facts."*

*I consider that your approach here is unduly negative and obstructive, showing an amazing lack of knowledge and initiative in accessing the information. It would NOT be necessary to 'find out what discussions everyone in the Council is having with organisations'. That is a patronising and disrespectful response."*

*I am able to narrow down the work necessary to a couple of hours (maximum) of work for a junior member of staff by using the CompanyCheck website (<http://companycheck.co.uk/>). All that is necessary is to put the company number (which I would expect you to have in your records) or the company name into the search box. That will bring up the summary details for the Company. Then click on the 'Directors' tab. That will reveal the names of the directors and company secretary. Each of those is 'hyperlinked' and those links will show in which other companies they are involved. I presume that the Council has a list of 'approved' and 'blacklisted' suppliers against which that information could then be readily checked. If you do not carry lists of 'approved' and 'unapproved' suppliers, please advise on what basis and 'Due Diligence' the Council contracts with external organisations.*

*I am prepared to accept that the information searched by such means may not uncover every single link and that it is fair to restrict the overall scope of the exercise. It would one person take less than 2 hours to get down to the level of linkage that I have described above. It would also be easy and quick to search down through another 3 or 4 'levels' but I have limited my request to what I thought were likely to be the most significant linkages. To claim that it would be difficult or too expensive is nonsense and I would be quite happy to demonstrate to a member of your staff just how simple and quick it would be to make such an enquiry."*

- iii. The Review was satisfied that no information had been identified as held by the Council regarding *"discussions about future business with the debtor organisation or with any other with which there are directorships or senior personnel in common"*. Enquiries had been made of officers in Asset Management and no information on discussions about future business had been identified.
- iv. The Review was satisfied that the section 12 costs limit had been correctly applied, as explained for Question d) above, noting that these costs could be aggregated with related questions. A substantial search and cross-check of data and records by officers across the Council would be needed in order to establish whether it held information about any discussions with the debtor company or with any other organisations with directors or senior personnel in common. In the Response the Council had said it *"....considers that it is too difficult to quantify given that there are thousands of organisations with whom we do business. Therefore a detailed cost estimate cannot be provided"*. The Review was satisfied this approach was correct and that asking the applicant to narrow the parameters of his search would not bring the Request within the costs limit.
- v. Further, the Council is under no obligation to create new information or carry out research on behalf of the applicant and if information about such individuals

is not held, then the Council would be entitled to respond that it does not hold any information in answer to Question e).

- vi. Under the Council's duty to assist, the applicant is advised that, though the Council does have supplier databases, it does not have lists of 'approved', 'unapproved' or 'blacklisted' suppliers. Procurement activity within the Council is subject to its Finance and Contract Procedure Rules, providing for competition in the market. These rules are contained in Part G of the Council's Constitution which can be found at

[http://www.cheshirewestandchester.gov.uk/your\\_council/policies\\_and\\_performance/council\\_plans\\_and\\_strategies/constitution.aspx](http://www.cheshirewestandchester.gov.uk/your_council/policies_and_performance/council_plans_and_strategies/constitution.aspx)

## **9 Steps Required**

---

- 9.1 There are no further steps required in respect of the disclosure of information.

## **10. Right of Appeal**

---

If you are dissatisfied with the outcome of the Review or you remain dissatisfied with the way the Council handled the original request or the Review, you may complain to the Information Commissioner at:

The Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

Tel: 0856 30 60 60 or 01625 54 57 45

Website: [www.ico.gov.uk](http://www.ico.gov.uk)

