



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2019/0177

**Determined, by consent, on written evidence and submissions.
Considered on the papers on 18 November 2019**

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Ms Anne Chafer
and
Mr Roger Creedon

Between

John McGoldrick

Appellant

-and-

The Information Commissioner

Respondent

DECISION AND REASONS

THE REQUEST, THE DECISION NOTICE AND APPEAL

1. On 13 August 2018 the Appellant requested the following information from the Halton Borough Council (the Council) with regards to the Mersey Gateway Project:

Can we have the latest traffic figures split as per our previous requests and your last answer which was on the 26th July from [name redacted] which covered the period up to end of June.

2. The background to the request is that it relates to the Mersey Gateway which is a crossing over the River Mersey, opened in October 2017, for which a toll is charged. The request refers to 'previous requests' and the Appellant says that the first request to the Council was on 23 November 2017, and subsequent requests mainly referred back to it. It was worded, materially, as follows:-

Can we have the traffic figures from when the new bridge was opened...We would like the figures split according to the following categories - Class 1, Class 2, Class 3, Class 4, vehicles registered with Merseyflow by Blue Badge holders, vehicles registered with Merseyflow under the Local user discount scheme, other traffic. We would like the figures on a day by day basis.

3. On 15 August 2018, the Council responded and said that the statistics were intended for future publication and would be published quarterly. The Council said that the figures to the end of June 2018 had been published. The Council said that the next set of statistics would be published in October 2018 and would cover the period from July 2018 to September 2018. As part of the publication process, the Council said that it would prepare the analysis of the statistics that had been requested by the Appellant.

4. On 17 August 2018, the Appellant requested an internal review, noting that the Council had provided the information for earlier periods which it was now declining to disclose. The Appellant also noted that he assumed that the Council was relying on the exemption in s22 FOIA.
5. The Appellant also argued that the request concerned more detailed figures than those published by the Council. He said that the Council only commenced publication because of the requests for disclosure. His view was that the information should be made available at frequent intervals.
6. In its internal review of 24 August 2018, the Council accepted that it had previously only published some of the information requested, but confirmed that all the information would now be published though the Merseyflow website, and that therefore the exemption under section 22 FOIA applied.
7. In complaining to the Commissioner (which he did on 6 October 2018), the Appellant disagreed that s22 FOIA applied. He also told the Commissioner that the Council had said on 13 November 2018 that the information had been published on the website on 22 October 2018. The Appellant disputes that, pointing out that the webpage appears to have a date stamp of 12 November 2018. The Commissioner notes that the Council says that was the date of an update to correct a typographical error.
8. Section 22 FOIA states that:-
 - (1) Information is exempt information if—
 - (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
 - (b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

9. Section 22 FOIA is a qualified exemption, and is therefore subject to a public interest test.
10. In her decision notice dated 2 May 2019, the Commissioner noted that the information must be held with a view to publication at the time of the request for the information, but noted that there needed to be no set date for publication at that time. The Commissioner noted that the Council's response, now that there had been a number of previous requests for information about the Mersey Gateway, was to make a decision to publish the figures on a quarterly basis. The Council referred to an email dated 26 June 2018 between the Company Secretary of the Mersey Gateway Crossing Board and the council officer who dealt with various requests for information about the Mersey Gateway, which stated:-

"..as the Mersey Gateway Project receives many requests for data, the decision has been taken to publish the key data on a quarterly basis.... This information will be updated on a quarterly basis."
11. On that basis, the Commissioner was satisfied that at the time of the request (23 August 2018), the Council did have a settled intention to publish the requested information.
12. The Commissioner accepted the explanation that the information had been published online on 22 October 2018 and then updated because of a typographical error on 12 November 2018, and the Commissioner also saw details from the Council's system showing that this was the case.
13. For the purposes of s22(1)(c) FOIA the Commissioner was satisfied that it was reasonable in all the circumstances that the information should be withheld until it was published, accepting the Council's explanation that:-

29. ...the specific information requested has to be extracted and collated from the operator's computer system and is not prepared in this format for any other purpose, such as routine internal reporting purposes.
 30. At present this process is undertaken as a single exercise for the purposes of publication, usually within four weeks of a quarter period end and information is then uploaded to the website. The council considers that making the information available on a quarterly basis is therefore reasonable and proportionate.
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14. In relation to the public interest test, the main reason put forward by the Appellant in favour of disclosure was the public interest in the information being disclosed on a frequent and timely basis.
 15. However, the Commissioner decided that this was outweighed by the Council's argument that it was in the public interest to release the information quarterly in a way that ensured effective and efficient management of limited available resources and the use of public funds.
 16. The Appellant's appeal is dated 28 May 2019. The main points the Appellant makes are:-
 - (a) The information sought was never intended for publication and that the Council has 'resorted to this device in order to delay us getting the information', and therefore s22 FOIA should not apply.
 - (b) The information is being published but the 'main problem is when it is available'. The Appellant says that those interested in the information want it every month 'on a timely basis'.
 - (c) There is no good reason for delaying publication, and it is believed that the information is readily available.

(d) The Mersey Gateway scheme is controversial, given the number of penalty notices issued each month. The scheme has generated £58m in tolls and penalties in the last month, and so the additional cost of providing the information when requested 'must be infinitesimal' compared with the revenue generated.

(e) Disclosure of full and timely information is in the public interest 'so that an assessment can be made by those independent of the Council of what is happening'.

DECISION

17. The Council has provided evidence by way of the email described above that it had formed an intention to publish this information in June 2018 before the request was made in August 2018, and we accept that that is the position. It is clear that the Appellant and others had been requesting up to date information from time to time and we have set out the initial request from November 2017 above.
18. However, it seems to us that it is perfectly reasonable for a public authority to decide that it is going to publish information on a regular basis once it has realised that there are frequent requests being made for the information under the FOIA. Indeed, it may be seen as a success story for freedom of information where a public authority decides proactively to publish information rather than wait for requests for the information to be submitted.
19. In our view, the evidence does not support the case that the Council has relied upon s22 FOIA to enable it to avoid disclosing the information. We accept the Council's explanation that the statistics were published in

October as planned, although the correction of a typographical error made it appear they were disclosed the following month.

20. On that basis we agree with the Commissioner that the requirements of s22(1)(a) and (b) FOIA are met.
21. We also agree with the Commissioner that, for the purposes of s22(1)(c) FOIA, it is reasonable in all the circumstances that the information should be withheld from disclosure until the publication date. If the information requested had been disclosed in accordance with FOIA, then we accept that the Appellant would have received the information a few weeks earlier than it was published on the website. We also accept that timely disclosure of information is an important part of FOIA. However, although the Appellant has complained about the delay in receiving the information, there is nothing in the documents which explains why a few weeks delay is particularly detrimental to the Appellant and the purposes for which he wants the information. On the other hand, the Council's case is that quarterly disclosure is appropriate as it will mean that there are fewer occasions when the information has to be extracted and compiled, and this will mean a saving on the resources expended in providing the information.
22. On that basis, and given the information available to us, it seems to us that withholding the information for a short period pending publication is reasonable.
23. Likewise, in relation to the public interest test. The Appellant says that the information is required more frequently so that those interested could see what was going on in relation to the Mersey Gateway (and presumably the revenue it was producing, amongst other things). Timely disclosure is an important factor, but again the Appellant has not explained why, in particular, the public interest is served, for example, by monthly rather

than quarterly disclosure (as his appeal notice requests). The Council, as has been noted, has explained why the production of monthly figures would be more expensive, and the saving of resources is certainly in the public interest. Our view, therefore, is that the clear public interest in not disclosing the information on the basis that it will be published quarterly, outweighs the uncertain public interest in more prompt disclosure.

24. For those reasons, this appeal is dismissed.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 21 November 2019

Promulgated: 22 November 2019