

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 10 May 2017

**Public Authority:** London Borough of Lewisham

**Address:** Second Floor  
Lewisham Town Hall  
Catford Road  
London  
SE6 4RU

#### Decision (including any steps ordered)

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1. The complainant requested from the London Borough of Lewisham ("the council") information concerning its No Recourse to Public Funds ("NRPF") training material, guidance and other related documents. The council disclosed some information but withheld other information under section 36(2)(c). It also advised the complainant that it does not hold versions 1 and 2 of the NRPF guidance, only version 3 which was disclosed in a redacted format.
2. Commencing with versions 1 and 2 of the NRPF guidance, the Commissioner has concluded that, on the balance of probabilities, the council no longer holds this information. Therefore, in relation to this aspect of the complainant's request, no further action is required.
3. In terms of the application of section 36(2)(c), the Commissioner's decision is that this exemption is not engaged. The Commissioner therefore requires the council to take the following steps to ensure compliance with the legislation.
  - To disclose to the complainant the information that it has withheld under section 36(2)(c).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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5. On 28 January 2015 the complainant requested the following information from the council under FOIA:
  - *“Agendas and minutes of meetings relating to the provision of services for families with No Recourse to Public Funds*
  - *Documents relating to procedures for carrying out Child in Need Assessments for families with No Recourse to Public Funds*
  - *Documents relating to proposed changes to the provision of Child in Need Assessments for families with No Recourse to Public Funds.”*
6. The council responded on 20 March 2015. It provided some information within the scope of the request but refused to provide the remainder. It cited section 12 in relation to part of the request and applied the exemption in section 43 to some of the information falling within another part of the request.
7. Following judicial review proceedings involving the council, the complainant wrote to the council on 10 February 2016 and queried whether the council had provided a correct response to the request, including whether it had identified all of the information falling within the scope of the request.
8. Following the involvement of the Commissioner, on 25 July 2016 the council provided the complainant with the outcome of its internal review. It provided some further information within the scope of the request but withheld other information under section 36.

## **Scope of the case**

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9. The complainant initially contacted the Commissioner on 14 April 2016 to complain about the way the request for information had been handled. The complainant disagreed with the application of section 36(2)(c) of the FOIA and stated that she believed the council does hold versions 1 and 2 of the NRPf guidance but does not wish to release it.
10. The Commissioner's investigation has therefore focussed on:

- 1) whether section 36(2)(c) has been correctly applied by the council to the redacted information disclosed to the complainant on 25 July 2016; and
- 2) whether the council holds versions 1 and 2 of its NRPF guidance.

## Reasons for decision

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### Section 36 – Prejudice to the effective conduct of public affairs

11. The council relied on section 36(2)(c) to withhold some of the information falling within the scope of the complainant's request.

### The engagement of section 36

12. Section 36(2)(b) and (c) provides that:

*'Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act -*

*...(b) would, or would be likely to, inhibit –*

*(i) the free and frank provision of advice, or*

*(ii) the free and frank exchange of views for the purposes of deliberation...'*

*(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.*

13. For the Commissioner to agree that section 36(2)(c) of the FOIA is engaged she must:

- (i) ascertain who the qualified person was for the council;
- (ii) establish that an opinion was given;
- (iii) ascertain when the opinion was given; and
- (iv) consider whether the opinion given was reasonable.

14. The council informed the Commissioner that the qualified person for the purpose of section 36 of the FOIA is its Head of Law, who is also the council's Monitoring Officer. The Commissioner is satisfied that the council's Monitoring Officer is an appropriate qualified person for the purpose of section 36.

15. During the Commissioner's investigation it came to her attention that, in this particular case, the qualified person's opinion on the application of this exemption had not been sought. Usually, the Commissioner would expect to receive information detailing when the qualified person had been consulted, when the opinion had been obtained and what information the qualified person had seen in order to reach this opinion, as explained in paragraph 13 above. She would also usually expect this information to demonstrate that the qualified person's opinion was obtained prior to this decision being communicated to the complainant, whether this was in the initial response or internal review response.
16. In this case however the Commissioner notes that this did not happen. The exemption was applied to this request and communicated to the complainant at the internal review stage without seeking the qualified person's opinion first.
17. During her investigation, the Commissioner has afforded the council ample opportunity to provide this information. But to the date of this notice it hasn't done so.
18. As the council has not provided this information and, the application of this exemption is dependent upon it being authorised by the qualified person, the Commissioner has no alternative but to conclude that section 36(2)(c) of the FOIA is not engaged in this case.
19. The Commissioner therefore requires the council to disclose the information withheld under section 36(2)(c) of the FOIA to the complainant.

**Does the council hold versions 1 and 2 of the NRPF guidance?**

20. During the Commissioner's investigation the complainant made various submissions explaining why she is of the opinion that the council does hold versions 1 and 2 of the guidance. The co-operation of the council was also sought and there was protracted correspondence on this issue between the council and the Commissioner from October 2016 to the date of this notice.
21. The council explained that it believes version 3 of the guidance was in place at the time of the complainant's request although it cannot be absolutely certain due to the passage of time between the complainant's initial request and her appeal. It advised that versions 1 and 2 of the guidance were created in June to July 2014 and version 3 was finalised between November 2014 and early 2015 and was in force prior to April 2015. It stated that at the time it first responded to the request in March 2015 there was no deliberate attempt to mislead or deliberately withhold information from the complainant. The council acknowledges

now that clarification should have been sought to establish exactly what documents the complainant required with regards to bullet point two of the request if indeed it was unclear to the officer that handled this request at the time. However, the officer has since left the council and it is therefore unable to investigate or clarify this matter further.

22. It explained that FOIA appeals are handled by the Corporate Information team and it was at this time (February 2016) that it was acknowledged that it was the internal guidance that was being sought. The council confirmed that it had received numerous requests from the same organisation specifically requesting this guidance, so it became clear as a result, that this was the information the complainant was seeking. There was a delay in responding to the complainant's appeal of 5 months whilst the qualified person's opinion was being sought (the Commissioner wishes to highlight that this was in relation to another request the council has received; not the request the subject of this notice) and due to the other requests the council had received. The redacted copy of version 3 of the guidance was then subsequently released with the council's appeal response.
23. The Commissioner asked the council to explain exactly what searches had been undertaken to try and retrieve versions 1 and 2 of the guidance.
24. The council explained that it had consulted the manager of the NRPF team who had been specifically brought into the council to improve the service. The manager had said that she wrote the training guidance for her team and is the only person within the council that produces it. The manager creates and save documents on her desktop and when completed publishes them to SharePoint. It explained that SharePoint is a collaborative workspace where documents can be stored and accessed by all members of a team. It ensures the most up to date and accurate version of any document is available.
25. The council stated that it has searched the manager's desktop and the SharePoint environment but versions 1 and 2 of the guidance are no longer held. It stated that versions 1 and 2 of the guidance were older versions of the guidance disclosed to the complainant at the internal review stage and they were originally held by the council but have since been deleted. The council confirmed that it searched all files and folders on the manager's desktop using both the full title of the guides and a search for just any document with 'Decision Making Guide' in the title and nothing was found. A search was also undertaken under 'All files & folders' for training materials, again nothing was found.
26. With regards to the council's records management policy, the council explained that the destruction of the earlier versions of the guidance

was not formally recorded so it is unable to confirm when they were exactly destroyed. However, it can confirm that they have been deleted due to the simple fact that they are no longer held today. The council reiterated that it has double checked with the manager of the NRPF team to understand clearly how these documents were created, shared and deleted and it remains of the position that the manager created these documents alone without any additional input from other teams or departments. The documents were uploaded on to SharePoint by the manager for the specific time they were relevant. But as this guidance developed and was ultimately updated by a newer version, the earlier versions were deleted. It explained that it was a simple accidental oversight on the council's part that the destruction of these documents was not recorded and it assured the Commissioner that any future destruction of records will now be formally recorded.

27. The Commissioner asked whether copies were made of the earlier guidance and held in other locations within the team itself and the council as a whole. To this, the council responded no and referred to SharePoint again being a collaborative workspace and the manager instructing staff to ensure that they are working from the most up to date guidance in existence.
28. In terms of any statutory requirements to retain versions 1 and 2 of the guidance, the council informed the Commissioner that there were none. It argued that clients have up to 60 days to appeal any decision made. However, it advised that it must be stressed here that the documents requested are guidance only. The operation of the NRPF service is outlined in the Mayor and Cabinet report dated 13 May 2015. This is a public document and has been made available to the complainant separately. The report highlights that the service is a mix of statutory frameworks, relevant case law and the appropriate use of discretion whereby the statutory framework underpins the assessment but does not prescribe the entitlement.
29. The Commissioner asked again when the first version was created and whether at the time of the request it held one or more versions. The council advised (as earlier in the notice) that versions 1 and 2 were created around June to July 2014. It explained that these were very detailed as they were intended to provide staff with comprehensive information on the decision making process for the service. It explained further that as the staff became familiar with the processes the guidance was reduced, as the level of 'hand holding' detail was no longer required and new guidance was issued in July 2015. The council confirmed that this is a much shorter version of the guidance when compared to versions 1 and 2. It also stated again that versions 1 and 2 of the guidance have not been retained.

30. The council said that there is another version of the guidance held by the council – version 4, which is in draft form at this present time. It contains the detail held in versions 1 and 2 and is currently under development by the manager of the team. This version is in draft form so is not in use and is not available to staff.
31. The Commissioner asked the complainant to provide her comments to the council's responses.
32. The complainant stated in her view it seems completely at odds with any other working practice she has encountered for the manager to save all documents to their desktop and is an extremely poor practice from an information management and business perspective. She asked whether the manager has ever emailed the older versions of the guidance at any time to anyone within the council and whether she saved them elsewhere as well. The complainant also felt that the manager's statement that she produces all guidance alone without any input from anyone else or any other department seems at odd with a witness statement the manager provided during judicial proceedings and, in general, with what one would expect of normal working practice. The complainant stated that the witness statement suggested that the manager specifically worked with another member of staff (name of staff member given in statement) to develop the scope of the project, the operational guidance to be used by the team and recruitment and training of all caseworkers. The complainant advised that it had been confirmed by the council in separate correspondence that the operational guidance is the guidance which is the subject of this request (version 1 and 2 of the guidance). She therefore queried whether the council's legal team did not at least provide some input given that the guidance describes various cases and legal tests that apply.
33. The complainant also queried whether the council had searched their shared system more generally and not just the manager's desktop and asked specifically whether two employees within its legal team, one of which had the job titles of NRPF manager and lawyer for some time, had been consulted. She asked whether all of the manager's emails had been searched, the recycle bin and more generally her entire computer, as she understands that documents deleted from the recycle bin are even retained for quite a time afterwards until they are overwritten by other documents.
34. In addition, the complainant stated that she is aware of council reports which pre-date version 3 of the guidance that recall unprecedented levels of judicial review challenges being brought. The complainant is of the view that versions 1 and 2 of the guidance would be relevant to these challenges. Similarly, she stated that the limitation deadline for breach of the Human Rights Act is 1 year less a day or for a breach of

statutory duty or negligence where personal injury is alleged it is 3 years. The complainant believes the council's own complaints process allows for 1 year for making a complaint as well. She advised that one would expect the council to retain the guidance in operation when decisions were made until these limitations expired.

35. The complainant also commented on the council's statement that versions 1 and 2 of the guidance were replaced with a shorter version, as there was no longer a need to 'hand hold' those in the team processing applications. The complainant stated that it cannot be supposed that this will be the situation for ever. Clearly new staff will join the team and old staff will leave and to get rid of comprehensive guidance is nonsensical. The complainant also stated that it is important to note that she considers the *real* reason why new guidance was introduced (version 3) was because of the concerns raised in a pre-action letter from a party instigating judicial review proceedings. The pre-action letter pointed out the errors in law within the earlier guidance, the council accepted their policy and approach required change and it follows from that their guidance.
36. The council was asked to address the complainant's concerns further. It responded by saying that only the NRPf team within the council has access to the site where the guidance is held. It would have been possible for those on the team to print off copies of versions 1 and 2 of the guidance at the time they were in use, but the council stated that a management instruction had been issued to the team instructing them to only use the most relevant guidance and, to check that indeed it is, before using it. It therefore felt it was not necessary to consult members of the team to see if they have retained a copy of the older guidance. It explained that the legal department does not have access to SharePoint and only holds version 3 of the guidance and the Guidance for Assessment and Case Management July 2015 as a result of the judicial proceedings and the section 36 of the FOIA consideration.
37. The council stated that as the manager of the NRPf team has been interviewed 3 times at length, explained exactly how the guidance was produced and where it was held, it sees no need to search the manager's entire computer. The manager saved the documents where it had previously advised, does not retain hard copies and did not save the requested information anywhere else. The manager was also responsible for uploading the guidance onto SharePoint, so it was not circulated to another member of staff within the council to do that. It was also never circulated outside of the team, as it felt this would encourage individuals outside of the team to give advice on NRPf matters for which they are not qualified.



38. The legal department was consulted again in light of the complainant's further comments but the council maintains its position remains unchanged. No one within that department, including those mentioned by the complainant during her other dealings with the council over NRPf assessments, holds an electronic or hard copy of versions 1 and 2 of the guidance.
39. The council also advised the Commissioner that, following consultation with its IT department, it cannot recover deleted documents from the manager's computer. At the time versions 1 and 2 of the guidance were held and, at the time of the request, the backup solution in place only had capacity for 28 days. This solution was later replaced with a new solution but not until November or December 2016. The council confirmed that there is no way of recovering this old data now. It explained further that the information would have only been backed up if it had been saved to the manager's central shared area or central home area (network drives). The local computer drives are not backed up, so if the information was stored there, it would have been lost when all old computers were decommissioned.
40. With regards to the complainant's comments about challenges to assessment decisions, the council responded that its guidance was updated to keep abreast of the relevant changes. As a guidance document, it would be referred to primarily to assist caseworkers in the relevant NRPf framework. However, the guidance document does not determine the destitution assessment. This is an evidential based assessment undertaken on an individual basis. It explained that the team has dealt with over 70 judicial review challenges on all aspects of its decision making process and it is always a case specific process supported by the evidence that has been gathered and is contained in the case file.
41. In cases of this nature the Commissioner is limited to considering whether, on the balance of probabilities, the public authority holds the requested information. She can ask questions, question the searches undertaken and ask for further searches to be carried where appropriate. But this is the extent of the Commissioner's powers in such cases.
42. There has been lengthy correspondence between the Commissioner and the council and, the complainant has provided some very useful information to assist in this investigation. The Commissioner considers she has questioned the searches undertaken by the council as far as she can and challenged the council on why it may still hold this information considering the matters to which it relates and the importance of such information when NRPf assessments were carried out. Although in some cases the responses have been a little curt and the Commissioner has

had to push and push the council for answers, she now considers that she has exercised the extent of her powers in this case. The Commissioner has no alternative now but to conclude, on the balance of probabilities, the council no longer holds versions 1 and 2 of the NRPF guidance.

### **Other matters**

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43. The Commissioner wishes to remind the council of its obligations under the Section 45 Code of Practice. This advises public authorities to offer internal reviews and to carry them out within 20 working days. Whilst the Commissioner understands that the council had a number of requests for the same information to consider at the same time and, required the qualified person's opinion to apply section 36 of the FOIA in some cases, she considers a period of 5 months in this case excessive.
44. This particular case has taken months to finalise and at times the Commissioner considers the council's co-operation and willingness to answer her questions fully and comprehensively has fallen short of what she would generally expect. The Commissioner is of the view that had more thorough and accurate responses been supplied to her from the outset this complaint could have been resolved much sooner. The Commissioner would like to take this opportunity to remind the council of its obligations under the FOIA and of the need to co-operate and provide prompt responses during a section 50 investigation.

## Right of appeal

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45. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

46. 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.
47. 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 .....

**Samantha Coward**  
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**Information Commissioner's Office**  
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