Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **19 November 2018**

Public Authority: **Southend-on-Sea Borough Council**
Address: **Civic Centre**
Victoria Avenue
Southend-on-Sea
Essex
SS2 6ER

Decision (including any steps ordered)

1. The complainant requested copies of formal consultation responses made to Southend-on-Sea Borough Council (the 'Council') following a school catchment meeting held in September 2017. The Council aggregated the complainant's six previous requests, made on separate dates, as provided under section 12(4) of FOIA and refused to comply with the current seventh request, citing section 12(1) of FOIA, the cost of compliance. It said that the cost limit had already been exceeded in responding to the previous requests.

2. The Commissioner's decision is that the Council was entitled to aggregate the all seven requests in accordance with section 12(4) of FOIA. Therefore, she considers that the appropriate cost limit would be exceeded by responding to the current request. She finds that the Council has complied with section 16 of FOIA in providing appropriate advice and assistance to the complainant in relation to his current request.

3. However, by failing to respond to the request and issue a refusal notice within the statutory timescale of 20 working days, the Commissioner finds that the Council has breached sections 10 (time for compliance) and 17 (refusal of a request) of FOIA. The Commissioner does not require the Council to take any steps.

Request and response

4. The complainant submitted six requests prior to the request under consideration here. The wording of those requests is reproduced in the annex attached to this notice.

5. On 23 December 2017 the complainant wrote to the Council and requested information in the following terms:

> *"Re the Own Admission Leigh Catchment Meeting held on the 26th September 2017: I request a copy of each formal response provided to the council with respect to action outlined in section 4.1 of the meeting minutes."*

6. The Council did not respond until 7 March 2018. It cited section 12(1) of FOIA (cost of compliance), explaining that it had aggregated the cost of compliance to this request with the complainant's previous six requests *"concerning the school catchment consultation"*, all of which had been submitted within a 60 day period.

7. Following an internal review the Council wrote to the complainant on 6 April 2018. It maintained its original position but provided more detail about the estimated time spent on the eligible activities undertaken to respond to the complainant's requests falling within the 60 day period. It also apologised for the delay in responding to the current request and for not including an apology within its previous response.

Scope of the case

8. The complainant initially contacted the Commissioner on 15 July 2018 to complain about the way his request for information had been handled. The Commissioner did not receive all the relevant paperwork to enable her to commence an investigation until 23 August 2018.

9. The complainant expressed dissatisfaction with the delay in handling his request, the Council's aggregation of his requests, the time the Council said it had spent in responding to one of his earlier requests (made on 22 November 2018), and what he described as the Council's *"cherry picking"* of FOIA as it had elected to cite *"an optional condition within section 12(1)"* of FOIA.

10. The Commissioner has considered whether the Council was entitled to aggregate the requests under section 12(4) of FOIA and whether it was entitled to rely on section 12(1) to refuse to comply with the current request. She has also considered whether the Council has fulfilled its obligations under section 16 of FOIA.

11. She has also noted the delay in this case.

Reasons for decision

Section 12(4) – Aggregation of related requests

12. When a public authority is estimating whether the appropriate limit is likely to be exceeded, it can include the costs of complying with two or more requests if the conditions laid out in regulation 5 of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations") can be satisfied.

13. Section 12(4) of FOIA states:

> *"The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –*
>
> *(a) by one person, or*
>
> *(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,*
>
> *the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them."*

14. Regulation 5 of the Fees Regulations states:

> *"(1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply, are made to a public authority –*
>
> *(a) by one person, or*
>
> *(b) by different persons who appear to the public authority to be acting in concern or in pursuance of a campaign,*
>
> *the estimated cost of complying with any of the requests is to be taken to be the total costs which may be taken into account by the authority, under regulation 4, of complying with all of them.*
>
> *(2) This regulation applies in circumstances in which –*
>
> *(a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and*

(b) those requests are received by the public authority within any period of sixty consecutive working days.

(3) In this regulation, "working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom."

15. The Commissioner has reviewed the complainant's six requests aggregated by the Council (set out in Annex A of this notice). These requests were submitted on 22, 23, 30 and 31 October, and 22 and 25 November 2017, with the current request being made on 23 December 2017. She is satisfied that all seven requests were made by the same complainant and within 60 working days of each other, fulfilling the criteria at regulations 5(1)(a) and 5(2)(b).

16. The Commissioner must now consider whether these requests relate, to any extent, to the same or similar information. The Commissioner's view on aggregating requests can be found in her guidance on requests where the cost of compliance exceeds the appropriate limit[1]. Paragraphs 44 and 45 state:

> *"Regulation 5(2) of the Fees Regulations requires that the requests which are aggregated relate "to any extent" to the same or similar information. This is quite a wide test but public authorities should still ensure that the requests meet this requirement.*
>
> *A public authority needs to consider each case on its own facts but requests are likely to relate to the same or similar information where, for example, the requestor has expressly linked the requests, or where there is an overarching theme or common thread running between the requests in terms of the nature of the information that has been requested."*

17. The Fees Regulations' wording of *"relate, to any extent, to the same or similar information"* makes clear that the requested information does not need to be closely linked to be aggregated, only that the requests can be linked.

18. Having reviewed the wording of the complainant's previous requests made within a 60 day period, the Commissioner is satisfied that there is

[1] https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

an overarching theme in that they all request information directly relating to a review of school catchment areas and the associated public consultation. The Commissioner, therefore, finds that the Council was entitled to rely on section 12(4) of FOIA to aggregate these six earlier requests with the one currently under consideration here.

Section 12(1) – cost of compliance exceeds the appropriate limit

19. Section 1(1) of FOIA states that:

> *"(1) Any person making a request for information to a public authority is entitled –*
>
> *(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
>
> *(b) if that is the case, to have that information communicated to him."*

20. Section 12(1) of FOIA states that:

> *"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."*

21. The Fees Regulations set the appropriate limit at £450 for the Council; they also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that the appropriate limit for local government organisations equates to 18 hours.

22. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in:

    a. determining whether it holds the information;

    b. locating the information, or a document containing it;

    c. retrieving the information, or a document containing it; and

    d. extracting the information from a document containing it.

23. In determining whether the Council has correctly applied section 12 of FOIA in this case, the Commissioner has considered the Council's rationale provided to her during the investigation.

24. The Council has explained that it had responded to each of the complainant's previous requests and provided the Commissioner with copies of its responses. It had provided the complainant with the

requested information for each of the six requests, with redactions under section 40(2) for personal information and where the information was not in scope.

25. The Council also submitted a breakdown of the total time it had spent responding to each of the complainant's previous six requests, which it had subsequently aggregated.

26. It explained that the time taken into consideration and recorded on the spreadsheet includes only the four specified activities which can be taken into account under section 12 (as set out in paragraph 22 of this notice).

27. As the complainant had questioned the time spent on his request of 22 November 2018 (as referenced in paragraph 9 and as set out in Annex A of this notice), the Council also provided further details, having approached the officers involved in responding to that request for further details.

28. It explained that a total of seven hours had been spent on the request of 22 November 2018 as follows:

> *"There were several elements to* [complainant's name redacted] *request for information:*
>
> - *Communications between the council/councillors and the Yellow Advertiser newspaper ("YA")*
> - *A full description of the area to which the specified notification should have been delivered*
> - *Confirmation from the YA that delivery had been completed*
> - *Any communication where the YA 'admitted liability for failing to deliver to many parts of the impacted areas'*
>
> *I have spoken to a member of staff who was directly involved in obtaining the information requested by* [the complainant] *and have been advised as follows:*
>
> *The communications with the YA on the specified topic were stored in an electronic folder along with all the communications concerning the school catchment review. They were not stored in any particular order. The contents of the folder had to be examined to identify potentially relevant documents and then to establish whether their content answered the questions asked by* [the complainant]*. Officers took particular care to ensure that the e-mail trails were complete and consistent and that they had not inadvertently missed any communications…"*

"In addition to the e-mails with which [the complainant] *was supplied, he was also sent a spreadsheet containing data about the intended coverage of the specified YA deliveries and the actual deliveries (copy attached). This was to answer his request for information about the intended versus the actual delivery of information.*

The YA is a weekly free local newspaper. It offers a service where customers can pay to have leaflets or flyer type information delivered along with the newspaper. Delivery is made by hand by a network of YA agents whose individual coverage area is defined by postcode. The Council engaged with the YA for documentation regarding the proposed school catchment changes to be distributed in specified areas (those potentially affected by the changes).

While the Council was aware that there had been a problem with non-delivery in some areas, it did not know the specifics. [The complainant] *wanted confirmation of delivery and as this information was only held by the YA, officers decided to liaise with the YA in order to be able to provide the information to* [the complainant].

After consultation about what might be possible and what records would be held by the YA, staff of the YA went back to their individual distributers to ask them to confirm where they had and had not delivered the catchment information. I am advised that this necessitated lengthy telephone conversations between the Council and the YA to establish what information could be sourced and how.

The YA obtained data from their delivery agents and provided it to the Council. For clarity, I can confirm that the time of YA staff and agents has not been included in the seven hours attributed to this case.

Upon receipt of the YA information, Council officers cross referenced the data and compiled a spreadsheet, matching the intended distribution with the actual distribution. … they paid particular attention to detail … I am told this part of the exercise was highly time-consuming.

Given the above I submit that their estimate of seven hours spent in relevant activities regarding this request was reasonable."

29. The Commissioner notes that the Council spent 25 hours in responding to the complainant's six aggregated requests and that that it provided the requested information (with minor redactions) in each case. Given

the Council's expanded explanation above, she is satisfied that the Council's recorded time spent on each of those requests is reasonable.

Conclusion

30. The Commissioner finds that the Council was entitled to aggregate the six earlier requests submitted by the same complainant, within a 60 working days' period, because there is an overarching theme. She also finds that the 18 hours cost limit provided for by section 12 FOIA had already been exceeded by the Council in responding to those requests. She is satisfied that the current request also falls into the overarching theme.

31. Having reached the above conclusions, the Commissioner therefore finds that the Council was not obliged to respond to the current request by virtue of section 12(1).

Section 16 – duty to provide advice and assistance

32. Section 16 of FOIA states:

> *"(1) It shall be the duty of a public authority to provide advice and assistance, so far as would be reasonable to expect the authority to do so, to persons to propose to make, or have made, requests for information to it.*
>
> *(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case."*

33. Paragraph 14 of the section 45 Code of Practice[2] states:

> *"Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the 'appropriate limit' (i.e. the cost threshold) the authority should consider provide an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee."*

[2]https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235286/0033.pdf

34. The Commissioner's view is that, where a public authority refuses a requests under section 12(1) of FOIA, section 16(1) creates an obligation to provide advice and assistance on how the scope of the request could be refined or reduced to avoid exceeding the appropriate limit.

35. The Commissioner's guidance states that where it is reasonable to provide advice and assistance in the particular circumstances of the case, the minimum a public authority should do in order to satisfy section 16 is:

    - either indicate if it is not able to provide any information at all within the appropriate limit; or
    - provide an indication of what information could be provided within the appropriate limit; and
    - provide advice and assistance to enable the requestor to make a refined request.

36. The Council did not cite section 12 in relation to the previous six requests within the 60 day period; instead it provided the requested information, with redactions either for personal information or where the information was out of scope. Therefore, there were no section 16 obligations in relation to those requests.

37. In relation to the current request the Council stated:

> *"I have considered how to narrow the scope of your request (so that we may be able to provide information free of charge because it would cost less than the appropriate limit to do so). However, as eighteen hours has already been spent on your related requests, this is not possible.*
>
> *I understand that the proposed catchment changes are no longer to go ahead, and it may be that you no longer require this information. If however that is not the case, due to the lapse in time, you may if you wish make a fresh request which will be looked at anew."*

38. In the circumstances of this case, the Commissioner is satisfied that the Council has complied with its section 16 FOIA obligations.

Section 10(1) – time for compliance with a request

39. Section 1(1) of FOIA states:

> *"(1) Any person making a request for information to a public authority is entitled –*

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

40. Section 10(1) of FOIA states:

"(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

41. The complainant submitted his request on 23 December 2017. The Council did not confirm whether it held the requested information until 7 March 2018, which is 50 working days after receipt of the request.

42. The Commissioner notes the Council's explanation for the delay in relation to the impact of the proposed school catchment area review on its ability to deal with some FOIA requests in a timely manner.

43. However, as the Council did not communicate held information to the complainant within 20 working days it breached section 10(1) of FOIA. As the response has been issued no steps are required.

Section 17(1) – time for refusal of a request

44. Section 17(1) of FOIA states:

"(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, ***within the time for complying with section 1(1)****, give the applicant 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."

45. The Council's response to the complainant withheld the requested information under section 12(1) of FOIA. As this refusal notice was not issued within the time frame for complying with section 1(1) (ie 20 working days) the Council breached section 17(1) of FOIA. As the response has been issued no steps are required.

Other matters

46. Notwithstanding the Council's explanation that the delay in this case was as a result of the impact of the proposed catchment area changes outstripping its ability to meet the demands of some FOIA requests on time, the Commissioner would like to remind the Council that she routinely monitors the performance of public authorities and their compliance with the legislation. Records of procedural breaches are retained to assist the Commissioner with this process and further remedial work may be required in the future should any patterns of non-compliance emerge.

Right of appeal

47. 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
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

48. 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.

49. 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 .....

Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex A

50. The Council aggregated the following requests, together with the request under consideration in this notice:

Request – 22 October 2017

"In respect of the Leigh Primary School catchment area consultation, please provide all data used to determine the number of children and properties that are proposed to be moved under model K. Please provide all granular detail and all written justification regarding any subjective input. This should include all data, files and written reports created by, or reviewed by any member of the council or any councillors, regardless of whether they are ultimately provided to the public or not."

Request – 23 October 2017

"I write for information relating to the Summary Report from Phase 1 Public Engagement Review of Primary School Catchment Areas in Leigh-on-Sea – September 2017.

1. *For all of the tables in Section 5, it was stated that some responses were removed how many responses were removed from the published results?*

2. *Please provide all the tables in this section (5 12 2, 5.13.2, 5.14 and 5 17) updated to include the full set of responses the council received, including the response previously removed*

3. *The output (actual numbers) of the Southend forecasting as referenced is* [sic] *paragraph 3.12 including full details of the source of all numbers used or rationale for any subjective numbers*

4. *The Southend forecasting output (actual numbers) for the prior 8 calendar years. Please include the date the file for each year was last updated"*

Request – 30 October 2017

"With respect to the Primary School Admission consultation, can you please provide me with:

1. *A copy of the minutes from the meeting on 19 September 2017 where the 2019 Coordinated Admission Scheme was approve* [sic] *by the council, including attendees and declared conflicts of interests*

2. *A copy of the minutes from the Admission Forum meeting on the 26th September 2017, including attendees and declared conflicts of interests*

3. *Internal and External audit reports of the Schools Admission team for the past 4 years; both specifically on this department and where the department is referenced in a larger report*

4. *The dates, minutes and attendees of all meeting* [sic] *with the councils* [sic] *Chief Forecaster in respect of Primary School Admission in 2017"*

Request – 31 October 2017

"On the 7th of August 2017 a document titled 'address fraud report' was available on the council's website. The link was http:/www.southend.gov.uk/downloads/id/5024/address_fraud_report.pdf

This document has been removed

Can you please provide a copy of the report and an explanation as to why it has been removed"

Request – 22 November 2017

"The council had committed to informing all residents living within an area affected by the Primary School Consultation.

I understand that the transmission method of this communication was decided to be the Yellow Advertiser

Kindly provide me with a copy of all communications between the council (including councillors) and the Yellow Advertiser on this topic. This should include, but not limited to, a full description of the area for the notification to be delivered to and confirmation from the Yellow Advertiser that this has been completed. This should also include communication where the Yellow Advertiser admit liability for failing to deliver to many parts of the impacted areas"

Request – 25 November 2017

"I write regarding the Primary School Admission Consultation. Can you kindly provide me with a copy of. [sic]

1. *The Own Admission Authority Leigh Catchment Meeting minutes and a copy of the declared conflicts of interests that took place on 26th September 2017*

2. *Model E and Model L as referenced in the Admissions Forum meeting minutes held on the 26th September 2017*

3. *The three documents that the members of the Admissions Forum were provided for the Determined Admissions Arrangements – 2019/20 during the meeting held on the 26th September 2017"*

Request – 23 December 2017

See main body of this notice for details.