

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 24 May 2021

**Public Authority:** London Borough of Waltham Forest  
**Address:** Waltham Forest Town Hall  
Forest Road  
Walthamstow  
E17 4JF

#### **Decision (including any steps ordered)**

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1. The complainant submitted a request to the London Borough of Waltham Forest (the Council) seeking information about personal data breaches. It provided some of the information sought, explained that it did not hold other parts of the information and relied on section 12(1) (cost limit) of FOIA to refuse parts of the request.
2. The complainant disputed the Council's position that it did not hold some parts of the requested information and also challenged its reliance on section 12(1) of FOIA. She was also unhappy with the Council's delay in responding to her request and its failure to take into account, in line with section 11 of FOIA, her preference for the information to be disclosed in hard copy.
3. The Commissioner is satisfied that the Council does not hold parts of the requested information, has concluded that it can rely on section 12(1) to refuse to comply with parts of the request and is satisfied that it would not have been reasonable for the Council to disclose information in hard copy. However, the Commissioner has concluded that the Council breached section 10(1) of FOIA by failing to respond to the request within 20 working days.
4. No steps are required.

## Request and response

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5. The complainant submitted the following request to the Council on 24 February 2020:

*'Please will you provide me with the following:-*

*1) On Thursday 8 March 2018, the council held a Audit and Governance Committee meeting. Point 51 states... "A total of 39 data protection breaches were reported and investigated in 2017."*

*I would like to know how many personal data protection breaches under the GDPR and Data Protection Act 2018 have been reported to the council and investigated from 2010 to present.*

*2) In each case, I would like to know what action the council took by way of remedy to the affected Party (i.e. the complainant).*

*3) More broadly, what remedies are open to the LBWF to bring complaints to a close?*

*As per section 11 of the Act, I would like the above information to be provided to me in paper format and sent to the following address as per below [address redacted]'*

6. The Council responded, via email, to this request on 26 March 2020. In relation to question 1 the Council explained that it did not hold any data for the period 2010 – 2014. Rather it explained that it only held records on the number of 'suspect personal data breaches' reported and investigated going back to 2015. It provided the 'number of personal data breaches reported and investigated' for the years 2015 to 2018. The Council explained that during 2019 its reporting systems changed and therefore the figures for 2019 and 2020, which were also provided to the complainant, encompassed a wider spectrum of incidents. As a result the Council explained that not all incidents were necessarily indicative of personal data having been compromised. The Council explained that providing the information sought by question 2 would exceed the appropriate cost limit and therefore the Council was relying on section 12(1) of FOIA to refuse this part of the request. Finally, the Council provided a list of the remedies specific to a personal data breach

as sought by question 3 of the request, namely 'Apology, a change in process/operations, disciplinary action, training, compensation'.<sup>1</sup>

7. The complainant contacted the Council on 7 April 2020 and asked it to conduct an internal review. She raised the following grounds of complaint:
  1. She was unhappy that the Council had not responded to her request within 20 working days.
  2. She was unhappy that the Council failed to comply with her preference to have the response sent to her by post.
  3. In relation to question 1, she queried why the Council did not hold information from the period 2010 to 2014.
  4. Furthermore, in relation to question 1 she questioned why the Council used the terms 'suspected' breach and also argued that for the records of 2019 and 2020 the records concerning data protection breaches should not be conflated with other breaches.
  5. She disputed the Council's position that complying with question 2 would exceed the cost limit.
  
8. The Council informed her of the outcome of the internal review on 28 April 2020. The Council explained the short delay in it responding to the request was due to the impact of the Covid-19 pandemic, as was the fact that it was unable to meet her preference for a response to be sent in hardcopy. With regard to the point 3 of her complaint, the Council explained that there was no legal requirement for it to hold records for the period 2010 to 2014. The Council also upheld its response to the remainder of the question 1. The Council also upheld the decision to refuse to comply with request 2 on the basis of section 12(1) of FOIA.

### Scope of the case

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9. The complainant contacted the Commissioner on 29 April 2020 in order to complain the way her request for information had been handled. In doing so she raised the following grounds of complaint:
  1. The Council breached section 10(1) of FOIA by failing to respond to her request within 20 working days.

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<sup>1</sup> The request referred to breaches under the GDPR and Data Protection Act 2018 but these can only have occurred since May 2018. The Commissioner understands that it was accepted by all parties that the request should also include breaches under the Data Protection Act 1998.

2. The Council failed to comply with section 11 of FOIA.
3. She did not accept the Council's position that it did not hold information falling within the scope of question 1 for the period 2010 to 2014.
4. She explained that she is unclear why the Council recorded breaches as 'suspected'.
5. She explained that for the 2019 and 2020 data she has argued that the Council should not conflate personal data breaches with other security breaches.
6. She disputed the Council's reliance on section 12(1) to refuse to provide the information sought by question 2.

## **Reasons for decision**

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### Complaint 1

10. Section 1 of FOIA provides for a general right of access to information held by public authorities. Section 10(1) provides that a public authority must comply with section 1 promptly and in any event not later than the twentieth working day following the date of receipt of a request for information.
11. In the circumstances of this case the complainant submitted her request to the Council on 24 February 2020. In order to comply with section 10(1) of FOIA the Council needed to reply by 24 March 2020. The Council's response was not issued until 26 March 2020 and therefore the Council breached section 10(1) of FOIA. However, the Commissioner acknowledges that the Council's delay in responding to the request was due to the impact of the Covid-19 pandemic and that the response was still only sent two days late despite these challenging circumstances.

### Complaint 2

12. Section 11 of FOIA allows a requester to express a preference for having the information communicated by a particular means, including a preference to have the information provided in hard copy. The public authority must make the information available by the preferred means so far as reasonably practicable.
13. The Council's response to the request explained to the complainant that:

*'It is acknowledged that your FOI request stated that you wish to receive the FOI response in writing. Due to the government guidance in respect of home working to minimise COVID-19 transmissions, we are unable to fulfil your print request at this time. Your FOI request has*

*been fulfilled via email, utilising the mailbox address you provided when submitted your FOI request to the Council.'*

14. And that:

*'Council officers located in the office are tasked with priority frontline services to the community which cannot be fulfilled remotely.'*

15. The Commissioner notes that the response was issued on 26 March 2020 and that the restrictions imposed by the government in response to Covid-19 had come into force on 23 March 2020. Moreover, at that point in the initial stages of the response to the Covid-19 crisis the Commissioner fully understands the Council's position that the priority of its staff that were still located in its offices – and thus were able to potentially fulfil this request by post – was on delivering frontline services. In these circumstances the Commissioner accepts that it was not reasonably practicable for the Council to disclose the information to the complainant in hard copy.

### Complaint 3

16. In scenarios such as this where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.

17. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).

18. In response to the Commissioner's enquiries the Council confirmed that it did not hold any formal records for the period 2010 to 2014. By way of explanation the Council explained that it had an established retention schedule of 2 years in matters pertaining to data protection breaches and data complaints. However, it explained that as of 24 November 2020, not all records had as yet been deleted/destroyed as this exercise was ongoing (and hence why the Council held some information that was more than two years, but posted dated 2014, and was able to provide this in response to the complainant's request).

19. In light of the Council's retention policy in relation to records for data protection breaches the Commissioner is satisfied that on the balance of probabilities it does not hold any information dating from the period 2010 to 2014.

#### Complaint 4

20. As noted above, the complainant has queried why the Council referred to the data breaches as 'suspected'.
21. In terms of the Council's duties under FOIA, it is only under a duty to provide recorded information which it may hold which falls within the scope of a request. It is not under a duty to provide explanations or clarifications of the recorded information it does hold. In the Commissioner's opinion the complainant's query as to why the Council records data protection breaches falls into this latter category.
22. That said, the Commissioner notes that in its internal review response the Council referred the complainant to the ICO's guidance on Personal Data Breaches. The Council noted that it records and responds to 'suspected breach incidents' in order to determine whether a breach may / has occurred and argued that its response to data breaches is in accordance with requirements. In the Commissioner's opinion the complainant's query as to why the Council referred to data breaches as 'suspected' appears to be fully answered by this response.

#### Complaint 5

23. During her investigation the Commissioner explained to the Council that it was her understanding that the data disclosed for the period 2019 and 2020 encompassed a range of data breaches, some albeit not necessarily all, relating to personal data. However, the Commissioner noted that the complainant had only sought information about personal data breaches.
24. Therefore, the Commissioner asked the Council to clarify whether it could provide the complainant with the information she sought simply about personal data breaches that occurred between 2019 and 2020 within the cost limit.
25. In response the Council confirmed that it could and at the request of the Commissioner provided this information to the complainant on 9 February 2021. The Commissioner considers that it would be helpful if the Council had done this in response to the request or in its internal review.

#### Complaint 6

26. Question 2 of the request sought details of the action the Council took by way of remedy to the affected party in relation to each specific data breach recorded between 2010 and the date of the request. The Council explained that although it held information for the years 2015 onwards

this information could not be provided within the cost limit. It therefore refused this part of the request on the basis of section 12(1) of FOIA.

27. 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.'*

28. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') at £450 for public authorities such as the Council. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12 effectively imposes a time limit of 18 hours.
29. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) of the Fees Regulations states that an authority can only take into account the costs it reasonably expects to incur in:
- determining whether it holds the information;
  - locating the information, or a document containing it;
  - retrieving the information, or a document containing it; and
  - extracting the information from a document containing it.
30. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be *'sensible, realistic and supported by cogent evidence.'*<sup>2</sup>
31. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether, despite this being the case, there is a public interest in the disclosure of the information.

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<sup>2</sup> Paragraph 12 of EA/2007/0004.

*The Council's position*

32. In response to the request, the Council explained that it does not hold a unique document or report of the `remedy applied to breach incidents`. It also noted there is no statutory requirement to produce such a data set or report detailing such information. As such, the Council explained that its current business operations and ICT system are not customised to the degree that an automated outcome, report or data set may be extracted to fulfil question 2.
33. Instead, the Council explained that it had identified that the requested information was recorded within a free text journal entry field on its ICT system. The Council explained that the journal function is used for multiple purposes can contain hundreds of journal entries per suspected incident ticket.
34. The Council explained that in order to access the information sought by question 2, it had conducted a sampling exercise to estimate the cost of gathering the information from the free text entries for each incident. The Council noted that the sampling was carried out using the 2018 record as these were considered less complex due to the increase in reporting scope outlined from 2019 onwards. On the basis of this sampling exercise the Council estimated that the cost of complying with question 2 was as follows:

Activity: Locating the information, or a document which may contain the information.

- This involved identifying the personal data breach report reference numbers on the system going back to 2015 and collating a list of all reference numbers and then locating corresponding incident reports for each incident. Estimated time – 5 hours.

Activity: Retrieving the information, or a document which may contain the information.

- This involved reading the dialogue of each individual incident report to identify action taken and the remedy applied where applicable. Estimate time taken 30 minutes per case x 258 cases across the period covered by the request – 129 hours.

Activity: Extracting the information from a document containing it.

- This involved categorising the action and remedy taken. Estimated time taken – 5 hours.

35. Therefore, the Council estimated that it would take approximately 139 hours to fulfil question 2 of the request.



*The Commissioner's position*

36. In light of how the Council holds information that is relevant to question 2 of the request the Commissioner is satisfied that it has identified the quickest method of fulfilling this request. In terms of the Council's estimate, the Commissioner notes that this was informed by a sample exercise of incidents from a particular year. The fact that a sample exercise was undertaken gives the Commissioner added confidence in the validity of this estimate. She also notes that based on this estimate the appropriate cost limit would be significantly exceeded. Therefore, even if there were some marginal or small savings to be made to the process of gathering the requested information – particularly in respect of the 30 minutes per case figure described at the second bullet point above - this would still not bring it within the appropriate cost limit.
37. In view of the above the Commissioner is satisfied that the Council can rely on section 12(1) to refuse to comply with question 2 of the request.

## Right of appeal

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38. 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 123 4504

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

39. 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.
40. 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 .....**

**Jonathan Slee  
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