

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 2 October 2017

**Public Authority:** Hart District Council  
**Address:** Harlington Way  
Fleet  
Hampshire  
GU51 4AE

#### Decision (including any steps ordered)

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1. The complainant requested information held relating to the transfer of block booking arrangements at leisure centres between Hart District Council (the council) and Everyone Active.
2. The Commissioner's decision is that the council has breached section 10(1), 16 and 17(5) of the FOIA in the handling of the request. However, as she is satisfied that the council has now disclosed all the information that it holds relevant to the request and fulfilled its obligations under section 1 of the FOIA, she requires no steps to be taken.

#### Request and response

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3. On 25 May 2016 the complainant wrote to the council and requested information in the following terms:

*"With reference to Hart District Council's recent outsourcing agreement with Everyone Active, please could you address the following:*

1. *Please provide me with all recorded information (including emails and the relevant parts of the full HDC/EA contract) explaining how HDC intended to deal with existing block booking customers of its leisure centres to Everyone Active.*
2. *Please provide a copy of the novation agreement covering the transfer of the existing block booking contracts with HDC to Everyone Active.*

3. *If a novation agreement doesn't exist, please explain how HDC can assert these customers now have a contract with Everyone Active and provide a copy of this contract.*
4. *Please provide all recorded information that explains why fees payable to Hart District Council by the block booking customers should instead be paid to Everyone Active.*
5. *Please provide a copy of all communications between HDC and the ICO regarding whether the transfer of personal data from HDC to EA was in compliance with the Data Protection Act."*
4. The council responded on 1 July 2016. With regards to item 2, 3 and 4, the council advised that this information was not held. It went on to provide some information in response to items 1 and 5 and referred to information that had previously been supplied to the complainant, confirming that duplicates could be provided, if required.
5. The complainant contacted the council on 18 July 2016 to confirm that he wished to make no further comment with regards to items 2 and 5.
6. However, he asked the council to provide further clarification on a number of points in relation to items 1, 3 and 4.
7. The council responded on 28 July 2016 providing further details to the complainant.
8. With regard to item 1, the council advised the complainant that it had previously supplied a full version of the contract with Everyone Active, excluding the Method Statements. It also referred to the wording of his original request stating that he had asked for details of emails which had explained how the council had intended to deal with existing block bookings when it outsourced its leisure centres to Everyone Active. The council advised that, given the number of emails held between the council and Everyone Active, this 'is not data that is easily retrievable' and to identify emails that were relevant to the complainant's question would be 'time consuming and costly'.
9. The council advised the complainant that it had already provided a response to his question about item 3.
10. In response to item 4, the council directed the complainant to information held on its website.
11. The council also referred to its offer to the complainant to attend a meeting where he would have the opportunity to discuss his information requests, if he still felt matters were not resolved.

12. The complainant contacted the council on 10 August 2016 to request an internal review. He made specific reference to his dissatisfaction about how it had responded to item 1, 3 and 4 of his request.
13. With regards to item 1, the complainant again disputed that he had received a copy of the full contract between Everyone Active and the council. He was therefore still unsure what part of that contract contained information relevant to his request. The complainant was also concerned that the council had stated that it was too costly to identify emails relevant to his request and he suggested that a simple keyword search could be carried out to identify the relevant information.
14. With regards to item 3, the complainant stated that the council had not responded to confirm if correspondence from the legal department about the block booking issue was held.
15. With regard to item 4, the complainant stated that he had been unable to locate any relevant information on the council's website and requested explicit reference to where this was held.
16. The council wrote to the complainant on 1 September 2016 to confirm the outcome of the internal review.
17. With regards to item 1, the council now advised that it was not aware that any information was held in the way described within the request. However, it again referred to its contract with Everyone Active that it advised had been sent to the complainant.
18. The council also stated that, following a keyword search, 10,100 emails had been identified as being potentially relevant to item 1 of the request. It went on to say that a manual check would be required to ascertain which were pertinent and, using an estimate of 10 seconds to look at each email, would result in approximately 27 day's work. The council advised that, with the exception of what had already been released, the request was refused under section 12(1) of the FOIA.
19. With regards to item 3, the council now stated that it 'does hold this information.'
20. With regards to item 4, the council responded to advise that it could not confirm that it held the information in the form requested by the complainant. It then went on to provide further details of the transfer of the management and operation of the leisure centre to Everyone Active. It directed the complainant to additional information about the transfer that was available on the council's website.

## Scope of the case

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21. The complainant contacted the Commissioner on 1 September 2016 to complain about the way his request for information had been handled. He was concerned about the application of section 12(1) to part 1 of his request. He also believed that there was additional information held relevant to other parts of the request that had not been provided to him.
22. With regards to the application of section 12(1), the council's contradictory responses to the Commissioner about item 1 of the complainant's request cast some doubt as to whether this had been correctly engaged. However, during the Commissioner's investigation, the council revised its position and provided the complainant with information held relevant to item 1 of the request. Although it was not explicitly stated, the Commissioner takes this to be a withdrawal of section 12 by the council and an acceptance that it was no longer relevant to the request. Therefore, the Commissioner will not be considering the academic point of whether the engagement of section 12 was appropriate.
23. The complainant had advised the council that he wished to make no further comment with regards to items 2 and 5 of the request. Therefore, the Commissioner has considered whether the complainant has received all the information held that was relevant to the remaining parts of the request.
24. In addition, as per the complainant's request, the Commissioner has also considered whether the council has breached the procedural provisions of sections 1(1) (right of access), 10(1) (time for compliance), section 16 (advice and assistance) and 17(5) (refusal of request) of the FOIA in relation to the request.

## Reasons for decision

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### Section 12-cost of compliance

25. The council, in its internal review response, advised the complainant that it believed section 12(1) to be engaged in relation to part of item 1 of his request.
26. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

27. Section 12(1) provides an upper limit on how much time a public authority can spend on complying with a request.
28. This limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations) at £450 for local government organisations 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. When estimating whether disclosing the requested information would exceed the appropriate limit, a public authority may take into account the costs it reasonably expects to incur in disclosing the information. The estimate must be reasonable in the circumstances of the case. It is not necessary to provide a precise calculation.
30. The Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time:
  - determining whether the information is held;
  - locating the information, or a document which may contain the information;
  - retrieving the information, or a document which may contain the information; and
  - extracting the information from a document containing it.
31. The Commissioner noted that whilst the council had only referred to emails held when advising that it viewed section 12 to be engaged, the complainant had asked for all recorded information held relating to item 1 of his request. However, the Commissioner is satisfied from her subsequent communications with the council that it had conducted other searches in response to the request and that the only relevant information that was held was contained within emails. She has therefore gone on to consider whether the council has provided copies of all emails held relevant to item 1 of the request.
32. The council initially informed the Commissioner that when previously responding to the complainant, it had miscalculated the length of time it would take to search the 10,100 emails identified as being potentially relevant to item 1 of the request. It revised this from the 27 days it set out in its internal review response, to an estimated 5.6 days. The council's estimate was based on the following calculation:

4 emails viewed per minute

4 emails x 60 minutes = 240 emails per hour

240 emails x 7.5 hours per day = 1,800 emails searched per day

10,100 emails in total ÷ 1,800 searched per day = 5.6 days required

33. Using the council's figures, the Commissioner converted the 5.6 day calculation to an hourly rate which equated to 42 hours and therefore exceeded the appropriate limit.
34. When requesting an internal review, the complainant had suggested that a 'simple keyword search' would identify those emails relevant to his request. In response, the council had advised the complainant that a keyword search had been carried out when identifying 10,100 emails that might be relevant to the request.
35. During the Commissioner's investigation, the council clarified that its original search criteria had been limited to all email correspondence between itself and Everyone Active, and no alternative keyword searches were considered.
36. The council went on to advise the Commissioner that it had now carried out an alternative search of the email system using the key words 'booking' and 'bookings' and that this had identified 1,200 emails as being potentially relevant to item 1 of the request.
37. On 5 May 2017 the council then provided the complainant with copies of that information contained within the 1,200 emails which it believed to be relevant to his request.
38. However, the Commissioner noted that some of the information that had now been provided to the complainant fell outside the scope of the request as it had been created after the date of its receipt.
39. In addition, some of the details contained within the council's responses to the complainant and the Commissioner appeared to be ambiguous and contradictory, both in terms of the date parameters provided for the searches that had been carried out, and also the number of emails which had been identified as being potentially relevant to the request.
40. Given this, the Commissioner requested further clarification on all the email searches which had been carried out by the council to date.
41. On 13 July 2017 the council asked the Commissioner to disregard some of its previous submissions and provided the following revised calculations:
  - The original search covered the period March 2015 to August 2016 and identified 10,100 emails as being potentially relevant to the request.

- A revised search (which the council confirmed was carried out on 13 July 2017) for the period March 2015 to May 2016 (the date that the complainant's request was received) had now identified 3,888 emails as being potentially relevant to the request.
42. The council confirmed that the figures provided above were for all emails held that had been sent between the council and Everyone Active.
43. The Commissioner notes that the council had previously advised that it had calculated that it would take one minute to search 4 emails to ascertain if they were relevant to the request. This calculation does not appear to be unreasonable and therefore the Commissioner has used this search time when considering the council's revised figure of 3,888 emails as follows:
- 4 emails viewed per minute
- 4 emails x 60 minutes = 240 emails per hour
- Current figure of emails that council be relevant= 3,888
- 3,888 emails ÷ 240 per hour = 16.2 hours
44. The above calculation indicated that the council could carry out a full search of its email system for the relevant information held without the need to refine the search by key words in order to keep within the appropriate cost limits.
45. Given the above, the Commissioner contacted the council again. She offered the council one final opportunity to review the request in full and respond to the complainant, and the Commissioner, with its final stance on matters.
46. In the council's full and final response to the Commissioner, it confirmed that the 3,888 emails identified from the last search carried out had been reviewed and copies of those which were deemed to be relevant to the request had been supplied to the complainant on 2 August 2017.
47. However, the council now stated that these 3,888 emails had been identified following a search of the keywords 'booking' or 'bookings'. This did not correlate with the details the council had provided in its penultimate response to the Commissioner where it stated that the identification of 3,888 emails was an actual figure gained from a search of all emails between the council and Everyone Active.
48. The final copies of data supplied to the complainant also included all the information that had already been provided to him on 5 May 2017, as well as some additional information not previously supplied. As was the

case previously, some of this information fell outside the scope of the request as it post-dated the time of its receipt.

49. Given the above, it is still not clear what date parameters were used by the council when it conducted its final search for information, and also whether the key words 'booking' or 'bookings' were used, or whether this was referred to in its final letter to the Commissioner in error. If it is the case that these key words were used in the final search, then this would also lead to further ambiguity about how the council had reached the previous figure provided of 1,200 emails where it stated that it had used the same key word searches.
50. The Commissioner accepts that there is uncertainty as to the exact searches which were carried out. However, after consideration of all the information that has been made available to her, she is of the view that, on balance, the likelihood is that the complainant has now been provided with all that information that is held relevant to item 1 of his request.
51. If it is the case (as it appears to be) that the council has used different date parameters when conducting its various searches of the email system during the course of this investigation, ultimately, this has not been to the detriment of the requester. This is because it seems likely that this has resulted in him receiving a greater amount of information than that which falls within the scope of his request.
52. In addition, the Commissioner is also of the view that it would serve no useful purpose to attempt to obtain further clarification from the council as to whether the final search which identified 3,888 potentially relevant emails did, or did not, include the use of the key words 'booking' and 'block bookings'.
53. In the event that the key words were used, the Commissioner is of the view that the majority, if not all, of the data held that is relevant to the request which would be of any value would be captured by this search. Clearly, this would also have been the case if the keywords weren't used, as all of the emails were then falling to be considered.
54. Given that the Commissioner is satisfied that the council has now supplied the copies of emails held relevant to item 1 of the complainant's request, she does not require the council to take any further steps in relation to item 1 of the request.

### **Section 1(1)-General right of access to information held by public authorities**

55. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed whether the

public authority holds the information and, if the information is held, to have that information communicated to them, subject to the application of any exemptions.

56. With regards to item 1, the complainant had advised that he had not received a full copy of the contract as suggested by the council and had been unable to find anything within the information that was provided that would be relevant to the request.
57. Following the Commissioner's intervention, the council confirmed that upon review, it had determined that the contract did not contain information that would be relevant to item 1 of the request. The Commissioner had been provided with a copy of the contract in question when she dealt with another case (set out in Decision Notice FS50646448). She is satisfied after consideration of this information that it contains no detail that is relevant to item 1 of the request and therefore views the council's revised position to be correct.
58. With regards to the emails which the council had previously refused to provide under section 12(1), this information has now been supplied to the complainant.
59. With regards to item 3, the council has advised the Commissioner that it does not hold this information. The council has apologised for the error contained within its internal review response to the complainant which indicated that it did hold this information.
60. With regards to item 4, the council had originally responded to advise the complainant that it could not confirm that it held information in the form requested. However, the council then directed him to information contained within certain meetings published on its website. The council has subsequently confirmed that this information is not pertinent to the request and also that it holds no other data that would be relevant.
61. The Commissioner notes that the complainant remains dissatisfied after receiving the council's revised full and final response dated 2 August 2017, believing additional information relevant to his request is held.
62. 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 ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
63. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any additional information which falls within the scope of the request (or was held at the time of the request).

64. The Commissioner has considered the searches for information carried out by the council, the grounds presented by the complainant as to why it is reasonable to expect further information would be held and the interpretation of the request itself.
65. The Commissioner notes that some of the information that fell outside the scope of the request (because it was created after the date of the request) was the complainant's personal information. She is therefore also mindful of the possibility that it is this information which the complainant believes to be incomplete. If this is the case, then the complainant may wish to submit a further request to the council under section 7 of the Data Protection Act 1998 (DPA) for his personal information.
66. Having considered the submissions provided by all parties, the Commissioner views there to be no compelling evidence that further information relevant to the request is held. She is therefore prepared to accept that, on the balance of probabilities, the council has released to the complainant all the relevant information and that it is unlikely to hold further information within the scope of the request.
67. Given this the Commissioner is satisfied that the council has now fulfilled its obligations under section 1 of the FOIA and requires the council to take no further steps.

### **Section 10-time for compliance**

68. Section 10(1) of the FOIA provides that:

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

69. In this case the complainant made his request on 25 May 2016. The council responded on 1 July 2017 providing some information and advising other information was not held. It subsequently provided further information on 5 May 2017 and 2 August 2017.
70. The Commissioner is satisfied that, on the balance of probabilities, the council has now supplied the complainant with all that information held relevant to the request. However, given that the council failed to provide any information within the prescribed 20 working days of the date of the request, the Commissioner's decision is that the council has breached section 10(1).

## **Section 16 (1)-duty to provide advice and assistance**

71. Section 16(1) of the FOIA provides that a public authority should give advice and assistance to any person making an information request. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 Code of Practice<sup>1</sup> (the Code) issued by the Secretary of State, it will have complied with section 16(1).
72. The Code advises that, where an authority is not obliged to comply with a request for information because, under section 12(1) and the Regulations made for that section, the cost of complying would exceed the appropriate limit, it should provide the requester with reasonable advice and assistance.
73. The Commissioner's guidance<sup>2</sup> states that the minimum a public authority should do in order to satisfy section 16(1) is to indicate if it is able to provide any information at all within the appropriate limit. Communicating this to a complainant may avoid further and futile attempts to refine the request to bring it under the appropriate limit.
74. The Commissioner notes that the council originally responded to advise the complainant that it would be too costly to provide information relating to item 1 of his request and in the internal review response, advised that section 12(1) was engaged. However, it did not provide any advice or assistance as to how the request might be refined or narrowed in order to potentially bring it within the cost limits. The complainant had suggested to the council that a keyword search may identify relevant information but this was not considered at that time.
75. Whilst the Commissioner's view is that section 12(1) may not have been correctly engaged by the council, it should still, at the time of issuing the refusal notice, have provided reasonable advice and assistance to the complainant. Had the council done this, it may have prevented the protracted investigation which has subsequently ensued. Accordingly, the Commissioner concludes that the council breached section 16(1) of the FOIA.
76. Given that the council acknowledged early in the investigation that it did not provide appropriate advice and assistance when responding to the request and has now provided the complainant with the relevant information, she does not require the council to take any further steps.

<sup>1</sup>[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/235286/0033.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235286/0033.pdf)

<sup>2</sup><https://ico.org.uk/media/for-organisations/documents/1624140/duty-to-provide-advice-and-assistance-foia-section-16.pdf>

## **Section 17-refusal notice**

77. Section 17(5) states that:

*"(5)A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."*

78. The complainant made his request on 25 May 2016. The council initially responded on 1 July 2016 to provide copies of some information and confirmed that other information was not held. It was not until the council's response dated the 28 July 2016 that it informed the complainant that it did not intend to provide emails relevant to item 1 of the request because it would be time consuming and costly. The council then advised in its internal review response on 1 September 2016 that it had applied section 12(1) to the emails held relevant to item 1 of the complainant's request.
79. In this case the council issued a refusal notice specifying that it was applying the exemption where the cost of compliance exceeds the appropriate limit (section 12 of the FOIA) more than 20 working days after the date of the request.
80. The Commissioner is mindful of the fact that the information which had originally been refused under section 12 was subsequently supplied to the complainant. In circumstances such as this, ordinarily the Commissioner is very unlikely to investigate further any potential procedural breaches in relation to section 17. However, the Commissioner notes the complainant's specific request for a finding in regard to section 17 in this instance. She has also given consideration to the particular circumstances of this case and the council's handling of matters and has decided, in this particular instance, to record a finding that the council is technically in breach of section 17(5).

## **Other matters**

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81. In this instance, the Commissioner believes it to be appropriate to record her concern regarding the ambiguous and confusing content of some of the councils responses with regards to the figures and calculations provided in connection to the emails held relevant to the request. This has contributed to what has been a protracted investigation which has led the complainant to wait for an extended period of time before receiving copies of all the relevant information.

82. However, the Commissioner does note that the council has stressed throughout the investigation that it has never been its intention to withhold information that the complainant was entitled to receive. The council has also readily apologised for any confusion which it may have caused. The Commissioner also acknowledges that the council has been very responsive to the guidance she has provided during the investigation. She trusts that the lessons learned from this case will assist the council in preventing a similar occurrence in future.

## Right of appeal

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83. 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)

84. 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.
85. 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 .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**