

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

### **Decision notice**

**Date:** 19 December 2018

**Public Authority:** Lancashire County Council  
**Address:** PO Box 78  
County Hall  
Preston  
Lancashire  
PR1 8XJ

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

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1. The complainant has requested recorded information which relates to a loan made to Luneside East Ltd. The Council having initially refused to provide the complainant with information in reliance on section 43 of the FOIA, has subsequently relied on the provision of section 12 to refuse to comply with the complainant's requests in their entirety.
2. The Commissioner's decision is that Lancashire County Council has correctly applied section 12 to the complainant's requests. She has also decided that the Council has contravened section 16 of the FOIA by failing to provide the complainant with advice and assistance.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - In order to allow the complainant to attempt to bring his requests within the appropriate limit under section 12 of the FOIA, Lancashire County Council is required to provide the complainant with advice and assistance in respect of the requests he has made and the recorded information the Council holds which is relevant to those requests
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 27 July 2017, the complainant wrote to Lancashire County Council and requested information in the following terms:

"By way of security either as a whole or in part Lancashire County Council has registered a charge dated 21<sup>st</sup> March 2017 (Charge code 0553 5730 0002) and a legal charge and assignment dated 6<sup>th</sup> December 2012 with Luneside East Ltd.

Please provide full details and copies of all documents the Council holds relating Luneside East Ltd including:-

1. All valuations relating to the land by Title Number where possible,
  2. Copies of all valuations/values attributed to any asset or property
  3. The terms and conditions of all the lending,
  4. The amount and dates of all the lending
  5. All minutes and background documents of any meetings regarding Lancashire County Council's decision to lend money to Luneside East Ltd.
  6. Copies of all correspondence with Luneside East Ltd
  7. Copies of all correspondence with Lancaster City Council regarding Luneside East and Luneside East Ltd
  8. All correspondence with Keppie Massie LLP surrounding Luneside East and Luneside East Ltd"
6. The Council provided the complainant with an interim response to his request on 30 August 2017. The Council confirmed that it holds the information the complainant had requested and, in respect of the "rates of loan(s)" the Council refused to disclose that information in reliance on section 43(2) of the Act.
7. The Council informed the complainant that it had considered the public interest test and had determined the factors in favour of withholding the rates of loan(s) outweigh any benefit that would be gained by its disclosure
8. The Council further advised the complainant that it required more time to apply the public interest test in order to determine what, if anything, it would be able to disclose in compliance with the remaining elements of his request. To that end, the Council said that it was liaising with colleagues within the relevant services to ensure that the complainant's request is answered as fully as possible.
9. On 23 November 2017, the complainant wrote to the Council to complain about its failure to provide a substantive response to seven of

the eight parts of his initial request. The complainant also submitted an additional request in two parts:

9. "Please provide copies of all correspondence relating to the requirement for Affordable Housing at Luneside East?"
  10. Please provide copies of all correspondence relating to the Landmark St Georges Works Mill Building?"
10. The Council responded to the complainant's request on 21 December 2017. In its response, the Council confirmed that it holds information relating to its lending money to Luneside East Ltd but refused to disclose that information in reliance on section 43(2) of the FOIA, on the grounds that disclosure would, or would likely, prejudice the commercial interests of any organisation, person or company.
  11. The Council advised the complainant that disclosure of the information will impact the Council's ability to act competitively in the market now and in the future, and, due to the commercial sensitivity of the information in relation to this scheme, disclosure could prejudice the commercial interests of Lancashire County Council. The Council said, "It would undoubtedly be advantageous to competitors, allowing them to benefit unfairly from the organisations' efforts", and, disclosure would prejudice the commercial interests of Lancashire County Council and Lancashire Enterprise Partnership by diminishing its ability to obtain best value.
  12. On 6 February 2018, the complainant wrote to the Council to complain about the manner in which it had handled his request, and particularly, the Council's refusal to disclose all of the information he had requested. The complainant laid out his concerns in respect of the Growing Places Loan of £4m to Luneside East Ltd which is the developer the Council contracted to redevelop Luneside East at St George's Quay in Lancaster.
  13. On 9 April 2018, the Council wrote to the complainant to advise him of its final decision following the conclusion of its internal review. That decision was to advise the complainant that the Council is satisfied "that the decision to refuse disclosure by virtue of section 43(2) was appropriate". The Council informed the complainant that, "The terms of the loan are confidential, hence the refusal, though it may be that if you have queries specifically relating to the housing or planning aspect - these should be referred to Lancaster City Council".

## Scope of the case

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14. The complainant contacted the Commissioner on 9 March 2018 to complain about the way his request for information had been handled. The complainant stated that, "the Public have the right to obtain information that shows:-

- "Why despite contracts and planning policy No Affordable Housing is to be provided?
- Why despite being guaranteed by a £6 billion company Lancashire Council considered it appropriate to lend £4m to LEL?
- Justification of lending £4m on land valued at less than £57k?
- Why the contacts have been ignored?
- There is no wrongdoing or poor performance?"

15. The Commissioner initially investigated whether the Council is entitled to refuse the complainant's requests in reliance on section 43 of the FOIA. Following her first enquiry, the Council informed the Commissioner that it relied on section 12 of the FOIA to refuse the complainants requests in their entirety and therefore the Commissioner has been required to consider the Council's new position.

### **Reasons for decision**

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16. The Council has provided the Commissioner with two representations in respect of the complainant's requests and what is now its final position.

17. The Council has accepted that it did not deal with the complainant's requests accurately and, on reviewing its handling of those requests, the Council has informed the Commissioner that it should have refused to comply with the requests in reliance on section 12 of the FOIA.

18. The Council's reliance on section 12 is based on confirmation given by its senior solicitor that complying with the complainant's request would exceed the appropriate limit.

### **Section 12 – where the cost of compliance would exceed the appropriate limit**

19. Under section 12(1) of FOIA a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying would exceed the appropriate limit.

20. The appropriate cost limit is set out in section 3(2) of the Freedom of Information and Data Protection (Appropriate Limit and Fees)

Regulations 2004 ("the Fees Regulations) and this is currently set at £450.

21. The £450 limit must be calculated at the rate of £25 per hour. This effectively provides a time limit of 18 work hours. Additionally regulation 4(3) of the Fees Regulations only allows for four activities which can be considered in relation to complying with the requests. These activities are:
  - Determining whether the public authority holds the information requested;
  - Locating the information or documents containing the information;
  - Retrieving such information or documents; and
  - Extracting the information from a document or other information source.
22. The cost of redacting relevant but exempt information may not be taken into consideration for the purpose of calculating the appropriate limit.
23. To support its reliance on section 12 of the FOIA, the Council has informed the Commissioner that information which is relevant to the complainant's requests would be held by its legal services and would be contained within the department's Norwel electronic recording system.
24. The Norwel system contains emails, documents and attachments which relate to the Growing Places Fund loans and three specific projects. One of the projects concerns the loan made to Luneside East Ltd.
25. There are 3650 emails on Norwel system as well as attachments and other documents. The emails and documents are not held within separate files within the main file system and therefore to determine whether they relate to the Luneside East project would require the Council to undertake a manual search to extract those which are relevant to the complainant's requests.
26. The Council conducted a small sampling exercise from its Norwel system which resulted in the speedy identification of some emails relevant to the complainant's request, whereas the identification of others required a much longer period.
27. On the basis that there are 3650 potentially relevant emails, and the only way to determine whether the email falls within the terms of the complainant's requests is to read each one, the Council concluded that it would need to spend at least twenty seconds per email to locate and retrieve those which are appropriate.

28. That process would require the Council to spend in excess of 405 hours of work to comply with the complainant's request. This is far in excess of the appropriate limit of 18 hours provided by the Fees Regulations<sup>1</sup> and therefore the Council asserts that section 12 is engaged.
29. The Commissioner notes the large number of emails held on the Council's Norwel system and she accepts the Council's assurance that it would be necessary to read each one to determine if it is relevant to the complainant's requests.
30. Even if she was to allow just 5 seconds to read each email and attachment for relevance, the Commissioner would find that the time required to locate and retrieve relevant information would still exceed the appropriate limit provided by the Fees Regulations. It is therefore easy for the Commissioner to conclude that the Council is entitled to refuse to comply with the entirety of the complainant's request in reliance on section 12 of the FOIA.
31. Having determined that section 12 applies to the complainant's requests in their entirety, the Commissioner's attention must be given to the whether the Council has provided the complainant with appropriate advice and attention under section 16 of the Act.
32. The Council acknowledges that it has not handled the complainant's requests "accurately" and further, that its late reliance on section 12 of the Act has meant that it has not contacted the complainant to provide him with advice and assistance as to how he might refine his request. The Council's acknowledgement is a clear admission of a breach of section 16 which the Commissioner is obliged to record in this decision notice.
33. That said, the Council's position needs to be explained further. This is because the Council carried out a second search for relevant information. This second search was undertaken to determine whether the Council holds any information relevant to parts 8, 9 and 10 of the complainant's request. The Council's search involved an examination of its electronic Local Enterprise file and an additional check was made with those members of staff who might have been involved in the Luneside East project.
34. The results of the Council's second and precautionary search was that no information relating to parts 8, 9 and 10 of the complainant's

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<sup>1</sup> <http://www.legislation.gov.uk/uksi/2004/3244/contents/made>

requests was discovered. This result confirmed the Council's initial response to the complainant which was based on the following rationale:

- Lancaster County Council did not use Keppie Massie LLP in its involvement in the Luneside East project. It used a different firm of solicitors and therefore it had no correspondence with Keppie Massie.
  - Lancashire County Council is not the planning authority for the Luneside East project and therefore it would have no influence as to whether affordable housing was included as part of the planning consent process. That was entirely a matter for Lancaster City Council, which is the planning authority.
  - Pages 49 and 50 of the St Georges Mill Building amended facility agreement do not form part of the agreement and therefore the Council holds no correspondence related to that matter.
35. The Council has assured the Commissioner that any documents, if they are held, would be held electronically. It has advised the Commissioner that no information has been deleted or destroyed where there is a requirement for such information to be retained.
  36. Generally, the Council would hold information until the repayment of all monies by Luneside East Ltd is made, plus an additional period of six years for financial and tax purposes.
  37. The Council has provided the complainant with confirmation that it holds information falling within the scope of his requests. The Council considers that some of this information attracts the exemption to disclosure provided by section 43 of the FOIA on the grounds that it relates to commercial interests.
  38. Likewise, the Council has informed the Commissioner that it holds information within the scope of the requests which it considers is subject to the section 41 of the Act – where the information has been provided in confidence.
  39. The Commissioner's decision in respect of the Council's application of section 12 (at paragraph 30 above) does not require her to consider the Council's application of sections 43 and 41 to the information which it has acknowledged it holds.
  40. The Commissioner acknowledges the fact that the Council has provided her with its detailed rationale for its application of these exemptions; and having read the Council's rationale, the Commissioner feels obliged to note the Council's application of sections 41 and 43 appears to engage with the information it has identified.

41. That said, the Commissioner must make clear that she has not been required to analyse whether the Council has properly applied sections 41 and 43, and the application of those exemptions does not form part of this decision notice.
42. Following the Council's provision of appropriate advice and assistance, and in an attempt to bring his request within the appropriate limit, it will be open to the complainant to make a new request the information which might include the documents which the Council has already identified would be subject to an application of section 41 and 43.

## Right of appeal

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43. 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)

44. 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.
45. 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**