

Freedom of Information Act 2000 (Section 48)

Practice Recommendation

Date: 14 July 2020

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

Foreword

Following a number of recent complaints regarding freedom of information requests made to the London Borough of Waltham Forest (LBWF), the Information Commissioner has reached the view that the LBWF's request handling practices do not conform to the [Freedom of Information Code of Practice](#), issued by the Cabinet Office in July 2018 (the Code).

In particular, the Commissioner considers that the LBWF's practices have not conformed with the following parts of the Code:

- Part 1 – Right of Access, *Information*
- Part 1 – Right of Access, *Means of communication*
- Part 4 – Time limits for responding to requests
- Part 5 – Internal reviews
- Part 6 – Cost limit

Therefore, in accordance with section 48(1) of the Freedom of Information Act 2000 (the FOIA), the Commissioner has elected to issue a practice recommendation (hereafter "recommendation").

In the 'Other matters' section of this recommendation, the Commissioner has highlighted matters which do not fall within the scope of the Code, but which bear, more generally, on the LBWF's compliance with the FOIA. Accordingly, those elements of her recommendation are issued under section 47(2) of the FOIA.

Summary

In the summer of 2019, the Commissioner received the first in a series of applications made under section 50 of the FOIA, concerning the handling of requests for information made to the LBWF.

The applications were made by a single member of the public, who was concerned that individual matters brought to the Commissioner's attention were part of a long-standing pattern of non-compliance with the FOIA. The applicant wished for the Commissioner to take enforcement action against this alleged pattern of non-compliance.

Whilst the Commissioner considered that enforcement action (beyond the issuing of a decision notice) taken on the basis of a single section 50 application would not be reasonable or proportionate, she has continued to accept further applications made by the member of the public..

Throughout the remainder of 2019 and the first months of 2020, the Commissioner continued to monitor any persistent trends or themes in the LBWF's handling of requests for information.

This recommendation is issued on the basis of these multiple applications, the Commissioner's monitoring of relevant trends and themes, and the overarching procedural nature of errors made by the LBWF. An illustrative table is provided below, drawing on data from the 12-months preceding the date of this recommendation. A more detailed list of decision notices is provided in Annex A to this recommendation.

Total Number of decision notices issued	18
FOIA section 10 - upheld	13
FOIA section 11 - upheld	2
FOIA section 12 - upheld	2
FOIA section 16 - upheld	1
FOIA section 17 - upheld	2

Chronology

1. In June 2019 the Commissioner received the first in a series of applications made under section 50 the FOIA by a concerned member of the public.
2. Between 20 June 2019 and 14 October 2019, the Commissioner received a total of 26 complaints concerning the LBWF by the member of the public. A number were formally considered by the Commissioner under section 50 of the FOIA, and a number were "*historic concerns*"

which the member of the public wished the Commissioner to note. These "*historic concerns*" were not formally considered under section 50.

3. Between August 2019 and 8 November 2019, a total of five decision notices were issued in which the Commissioner found the LBWF to have breached section 10 of the FOIA.
4. On the basis of two particular "*historic concerns*", the Commissioner wrote to the LBWF on 15 November 2019 to provide informal compliance advice, concerning section 11 and section 8 of the FOIA.
5. The Commissioner explained two particular concerns:
 - The LBWF did not appear to be, in the first instance, providing requested information to the applicant in accordance with their ostensibly reasonable form and format preferences.
 - The LBWF had invited the requestor to provide any "*medical reasons*" why they would be unable to use an online FOIA portal available to them. It said such an explanation could be considered as grounds for an "*exception to your ongoing requests for the information to be provided to you in a printed format.*"
6. The Commissioner advised the LBWF to pay careful attention to section 11 themes at the outset of a request for information.
7. She advised the LBWF of the low-bar set by section 8 of the FOIA, and that requestors could not be *forced* to use an online portal. She strongly advised the LBWF to stop requesting unnecessary medical explanations; an action which would, in her view, likely contravene the General Data Protection Regulations and the Data Protection Act 2018.
8. The Commissioner received no acknowledgement of this correspondence, nor a substantive response. Whilst the Commissioner had not specifically invited a response from the LBWF, she had hoped that a concerned, pro-active public authority would respond to such intervention.
9. Following her informal intervention, the Commissioner continued to issue decision notices on the applications before her. Ten such notices had been issued by 28 February 2020. Nine upheld, or partly upheld the complaint put to the Commissioner. Three applications were still under investigation as of 28 February 2020.
10. By this time, the Commissioner had received a *further* nine applications from the member of the public, three of which were eligible complaints and which are now awaiting allocation to an investigating Case Officer.

11. The Commissioner has decided to issue this recommendation for the following reasons: the scope of the issues brought to the Commissioner's attention; the linked nature of the issues; the outcome of the formal decisions reached; and the nature of the LBWF's engagement with her Case Officers.
12. In essence, and as set out within a recent decision notice, the LBWF are "*making minor but avoidable errors which are resulting in complaints to her office.*"
13. Because section 48 of the Act empowers the Commissioner to issue a practice recommendation where it appears to her that the practice of a public authority does not conform, specifically, to the Code of Practice, some of her concerns are addressed in the "Other matters" section of this recommendation.

Nature of non-conformity

14. The Commissioner considers that the practices of the LBWF in relation to the exercise of its functions under the Act do not conform to the following provisions of the section 45 Code of Practice (the Code). They are addressed in the order in which they appear within the Code.

Part 1 – Right of Access

Information

15. Section 1.1 of the Code sets out requestors' rights to be informed whether or not the public authority "holds information meeting *the description set out in the request*" [emphasis added].
16. A direct consequence of this requirement is the need for a public authority to adequately and precisely "scope" the request. Put another way, the public authority must read the request and ask itself "*what, precisely, is being requested?*"
17. In one case brought to the Commissioner, the LBWF failed to address a particular part of a request for information. This was not corrected until the completion of an internal review. The timely completion of this review required the Commissioner's intervention. Thus, a basic but avoidable error resulted in a complaint to the Commissioner.
18. In a further case, the requestor asked for information about how many payments of a certain type had been made by the LBWF. Rather than address the request, as worded, the LBWF provided information about "*the last five*", and thus failed to adequately scope the request.

19. Closely related to the Right of Access, section 10.2 of the Code states that initial responses to requests for information should include "*Confirmation that the requested information is held or not held by the public authority or a statement neither confirming or denying whether the information is held*".
20. In a further case, a requestor asked for information about noise complaints. In responding to the request, the LBWF neither stated whether or not the information was held, nor whether it was issuing a "neither confirm nor deny" response.
21. It did, however, provide vague explanations as to why it would not provide information to the requestor. In doing so, it (again) failed to comply with section 10.2 of the Code, which requires that public authorities specify which section of the FOIA it is relying on to refuse a request.
22. The behaviour at point 20 and 21 above is not isolated; the Commissioner has observed this behaviour in more than one case brought to her attention.

Means of Communication

23. Section 1.24 of the Code explains the obligations placed on public authorities by section 11 of the FOIA. It states that when "*an applicant states a preference for receiving information in a specific format a public authority shall, if they are required to disclose information, aim to meet this preference as far as is reasonably practicable.*"
24. In two decision notices issued by the Commissioner, the LBWF was found to have breached section 11 by failing to provide the requestor with information in hard-copy as had been requested.
25. In other cases, the Commissioner has noted the LBWF's issuing of two simultaneous responses to individual requests; a response is sent via surface mail, in compliance with their section 11 obligations, and a copy is sent via email.
26. In such cases, whilst the Commissioner could not find that a public authority had breached the FOIA by *twice* discharging its obligations – providing the same information to a requestor in two formats – she considers that such action may, despite best intentions, create confusion. Such action may give, to the requestor, the *appearance* of a breach of section 11 when the email is invariably received by before the surface mail.

Part 4 – time limits for responding to requests

27. Section 4.1 of the Code highlights the "*clear*" requirement that public authorities respond to requests for information promptly, and within 20 working days of receipt.
28. In total, between September 2019 and February 2020, the Commissioner recorded 15 concerns around the timeliness of the LBWF's responses to requests for information. 12 decision notices found the LBWF to have breached section 10 of the FOIA. In a number of cases, these notices were necessitated by the LBWF's non-engagement with the Commissioner's Case Officers.

Part 5 – Internal reviews

29. Sections 5.2, 5.3 and 5.4 of the Code set out that a reasonable time for the completion of an internal review is 20 working days following the receipt of the request for review, and that, usually, no more than 40 working days will be required.
30. Between October 2019 and February 2020, the Commissioner recorded 5 concerns about the timeliness of the LBWF's internal reviews. As the FOIA does not set out a timeline for the completion of an internal review, the Commissioner has been unable to find that the LBWF "*breached*" the Act with respect to its delayed internal reviews. However, the Commissioner is satisfied that the LBWF failed to conform with the Code and recommended best practice.
31. Section 5.8 of the Code sets out that internal reviews should provide "*a fair and thorough review*" of relevant matters.
32. In one case brought to the Commissioner, the LBWF's internal review provided, within the single document, three different dates for the initial request for information. This review was completed on 10 September 2019, before the initial response to the 21 July 2019 request was even issued (the review addressed only the timeliness of the response).
33. In another case brought to the Commissioner, the LBWF allegedly failed to respond to a request for information in a timely manner. After being asked to respond to the request by the Commissioner's Case Officers, the LBWF completed an unsolicited internal review, which claimed that a response had in fact been issued. The Commissioner had sight of this "*response*", which turned out to be a holding email explaining that the relevant service area was closed for the summer.
34. In another case, following a decision notice finding a breach of section 10 of the FOIA, the LBWF completed an unsolicited internal review. This "*review*" simply re-stated their position; a position which was unsupported by the conclusion of the Commissioner's decision notice. On this point, the Commissioner notes that the LBWF did not elect to

appeal the notice, as one might expect from a public authority that disputed the Commissioner's conclusion.

35. In other cases, the Commissioner has identified procedural errors in the handling of requests – errors which have not been corrected by the LBWF's internal reviews. Specifically: failing to confirm if the information is or is not held; and failing to consider the public interest in applying qualified exemptions.
36. The Commissioner has also had sight of internal reviews, completed by the LBWF, which invite requestors to bring a complaint to the Commissioner if they are *"dissatisfied with the Council's response in respect of your personal data"*. As at point 1.5 of the Code, *"request for a person's own personal data should be dealt with under the subject access provisions of the Data Protection Act 2018."* In the context of a review into the handling of a request for information under the FOIA, the LBWF's invitation is strange and irrelevant.
37. These basic errors do not demonstrate a particularly fair or thorough internal review process, in breach of section 5.8 of the Code.

Part 6 – Cost limit

38. Section 6.3 of the Code sets out the three activities which public authorities may include in their calculations when estimating whether responding to a request would breach the cost limit.
39. Section 6.4 of the Code explicitly precludes any further activities from being included in public authorities' calculations. It specifically precludes activities like *"redaction time"*.
40. In one case brought to the Commissioner, the LBWF explicitly included the estimated time spent reviewing and redacting information in its calculations.
41. Section 6.7 of the Code states that, when estimating the cost of responding to a request, *"public authorities are not under any obligation to make a precise calculation although estimates should be **sensible and realistic.**"* [emphasis added]
42. In the same case (as at point 40 above), the LBWF provided estimates which lacked credibility and were not supported by evidence.
43. In another case concerning the cost limit, the LBWF made submissions to the Commissioner which provided no sampling exercise in support of their unrealistically high estimates.

Action recommended

44. As at points 15 to 22 above, the LBWF should pay careful attention to the wording of requests for information, be sure to discharge its obligation to confirm whether the requested information is or is not held, assuming a "neither confirm nor deny" is not being issued.
45. As at points 23 to 26 above, the LBWF should pay careful attention to stated preferences for the form and format of requested information.
46. As at points 27 and 28 above, the LBWF should ensure that requests for information are responded to in a timely manner. When chased to issue responses by the Commissioner's Case Officers, the LBWF should respond in a timely and appropriate manner.
47. As at points 29 to 37 above, the LBWF should ensure that its internal review process offers a truly fair and thorough assessment of the handling of the request for information.
48. As at points 38 to 43 above, the LBWF should ensure that it makes sensible estimates when seeking to rely on section 12 of the FOIA, and that it conducts appropriate sampling exercises when doing the same.
49. The Commissioner invites the LBWF to participate in a consensual audit of its FOIA policies, practices and procedures.

Failure to comply

50. A practice recommendation cannot be directly enforced by the Commissioner. However, failure to comply with a practice recommendation may lead to a failure to comply with the Act, which in turn may result in the issuing of an enforcement notice. Further, a failure to take account of a practice recommendation may lead in some circumstances to an adverse comment in a report to Parliament by the Commissioner under section 49 of the Act.
51. The Commissioner will have regard to this recommendation in her handling of subsequent cases involving the LBWF.

Other matters

52. As at point 13 above, some of the Commissioner's wider concerns will be addressed in this section of her recommendation.

Engagement with the Commissioner's staff

53. In cases noted at points 38 through 43 above, the LBWF has made inadequate submissions to the Commissioner's Case Officers during the course of their investigations.
54. In two cases brought to the Commissioner, because correspondence from the Commissioner's Case Officers had gone ignored by the LBWF, it was necessary to issue decision notices compelling responses to requests for information.
55. In one case brought to the Commissioner, the LBWF only stated that it had responded to a request *after* a decision notice had been issued, despite being given the opportunity to state its position.
56. In another case, the LBWF stated that it had responded to a request for information. When pressed by a Case Officer to provide the date on which this response was apparently sent, the LBWF failed to provide the date.
57. In one case brought to the Commissioner, it took the LBWF 10 working days to respond to a relatively simple question: "*Is a response to [the complainant]'s request still outstanding?*"
58. Going forward, the LBWF should engage with the Commissioner's Case Officers in a timely and constructive manner. If it wishes to provide the Commissioner with information relevant to a complaint, it should do so at the appropriate time.

Evidencing compliance

59. The Commissioner takes this opportunity to, again, remind the LBWF that it is the responsibility of the public authority to keep appropriate records so as to demonstrate compliance with the FOIA.
60. In more than one case brought to the Commissioner, the LBWF has maintained the position that a request has been responded to, but has been unable to provide the Commissioner with a copy of the relevant piece of correspondence sent to the requestor.
61. The Commissioner cannot accept, at face value, a public authority's claim that it has responded to a request, particularly when that is the entire scope of the complaint before her.
62. These concerns are only compounded by errors such as those identified at point 32 above.
63. When responding to requests, the LBWF should ensure that appropriate records of the responses are kept. If, for example, a letter is being sent to the complainant, a scanned copy could be retained.

Signed

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Annex A

64. The table below details the individual decision notices (and outcomes) of cases involving the LBWF in the 12-months preceding the date of this recommendation. Pending upload to the ICO website following their service on a public authority, individual notices are viewable at www.ico.org.uk/action-weve-taken

Case Reference	Section	Upheld/Not Upheld
FS50878392	FOI s1	Not Upheld
	FOI s10	Not Upheld
	FOI s11	Not Upheld
FS50866483	FOI s10	Upheld
	FOI s11	Upheld
FS50901214	FOI s10	Upheld
FS50870006	FOI s10	Upheld
FS50873225	FOI s10	Upheld
FS50875647	FOI s10	Upheld
FS50878058	EIR s5(2)	Not Upheld
	EIR s6(1)	Not Upheld
FS50878089	FOI s11	Upheld
FS50877458	FOI s10	Upheld
FS50871948	FOI s10	Upheld
FS50874679	FOI s17	Upheld
	FOI s14(2)	Not Upheld
FS50862681	FOI s1	Not Upheld
	FOI s10	Upheld
FS50868467	FOI s10	Upheld
FS50861020	FOI s10	Upheld
FS50860466	FOI s10	Upheld
FS50860467	FOI s10	Upheld
FS50874705	FOI s12	Upheld
	FOI s16	Upheld
	FOI s17	Upheld
FS50881028	FOI s10	Upheld
	FOI s12	Upheld