

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 31 January 2011**

**Public Authority:** Gravesham Borough Council  
**Address:** Civic Centre  
Windmill Street  
Gravesend  
Kent  
DA12 1AU

### Summary

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The complainant asked the Council to release copies of all emails, memorandums, letters, notes and other forms of communication relating to Urban Gravesham that had passed between three council employees during the 12 month period preceding the date of his request. The Council replied advising the complainant that the cost to comply with his request would exceed the appropriate limit prescribed by the Act and therefore his request had been refused under section 12. As the complainant remained dissatisfied he approached the Commissioner. The Commissioner investigated the complaint and determined that some of the requested information would be of an environmental nature. He therefore concluded that the request should have been considered under both the Act and the EIR. As the Council did not deal with the request under the EIR, the Commissioner cannot make any judgement under this legislation. He has, however, considered the Council's application of section 12 of the Act. The Commissioner concluded that the Council's calculation of costs was unreasonable and not supported by evidence and therefore section 12 of the Act is not engaged. The Commissioner has therefore requested the Council to reconsider the complainant's request and either release the requested information to him or issue a further refusal notice which complies with section 17 of the Act and regulation 14 of the EIR within 35 days of the Notice.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the

requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## The Request

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2. The complainant contacted the Council on 12 July 2009 to request the following information:

"I also request copies pursuant to the Freedom of Information Act of all emails, memorandums, letters, notes or other records of communication relating to myself and Urban Gravesham that have passed between [the names of three employees have been redacted] during the last 12 months. I am content to receive scanned or electronic copies."

3. As the complainant received no response, he sent further emails to the Council to chase this matter up on 6 and 26 August 2009. In his email of 26 August 2009 the complainant also advised the Council that he would be contacting the Commissioner to complain about its failure to comply with the requirements of the Act within the statutory time limit.
4. The complainant received further acknowledgements from the Council on 7 and 27 August 2009 advising that a reply would be sent soon.
5. The complainant referred all correspondence to the Commissioner.
6. The Council issued its response on 28 August 2009. It stated that it was unable to answer the complainant's request without further clarification, as the request was too broad and general in nature. It asked the complainant to consider narrowing the scope of his request and to provide more specific information on what sort of information he wished to obtain.
7. The complainant contacted the Council on 29 August 2009 to request an internal review.
8. The Commissioner wrote to the Council on 29 September 2009 to outline the Council's obligations under the Act. He also informed the Council that the complainant requested copies of all communications which related to himself, which is a request for personal data which should be considered as a Subject Access Request under the Data Protection Act 1998 ('the DPA'). The Commissioner requested the Council to reconsider the request and to issue a further response within 20 working days.

9. The Council wrote to the complainant on 7 October 2009 to outline the outcome of the internal review. A copy of this letter was then forwarded to the Commissioner on 15 October 2009. The Council explained that it was refusing the complainant's request under section 12 of the Act, as it had estimated the cost to comply to exceed the appropriate limit prescribed by the Act, which for local authorities is £450.00. It again referred to the request being too broad and general in nature for the Council to be able to comply within the cost limit.
10. The complainant contacted the Council on 9 October 2009 to ask for assistance in refining his request. In order to bring compliance under the cost threshold, he suggested breaking down his original request into separate FOI requests each to deal with one component, for example, one case to deal with his request for emails, a second case to deal with his request for memorandums and so on.
11. The complainant contacted the Council by email again on 9 and 28 November, as he had received no response to his email of 9 October 2009.
12. The Council responded on 2 December 2009. It confirmed that it would not be able to provide the requested information in accordance with the complainant's suggestion, as separate requests for the same information would be aggregated under the Fees Regulations and it would still be the case that the cost limit would be exceeded. The Council explained in more detail how it arrived at its estimate that compliance would exceed £450.00.

## The Investigation

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### Scope of the case

13. The Commissioner first considered the complaint under the DPA as a Subject Access Request. He issued his findings under the DPA on 24 February 2010 and the Council subsequently provided the complainant with copies of any information which constituted his own personal data. In March 2010 the Commissioner began a further investigation to consider the remaining information under the Act and the EIR.

For clarity, the remaining information is all recorded information that is held by the Council which is not the complainant's personal data i.e. copies of emails, memorandums, letters, notes or other records

relating to Urban Gravesham between the three officers named in his request within the timeframe he specified.

## **Chronology**

14. The Commissioner wrote to the Council on 23 June 2010 to request a detailed explanation and breakdown of how the Council arrived at its estimation that the cost to comply with the complainant's request would exceed the appropriate limit.
15. The Council responded on 24 June 2010. It explained the search it had undertaken, the volume of information this search brought up and why it was of the view that the cost of compliance would exceed the appropriate limit.
16. The Commissioner wrote to the Council on 20 July 2010 to request some additional information regarding its application of section 12 of the Act.
17. As he received no reply, the Commissioner wrote to the Council on 10 August 2010 chasing its response.
18. The Council contacted the Commissioner by telephone on 17 August 2010 providing some of the additional information he requested.
19. The Commissioner wrote to the Council on 17 August 2010 to request that all outstanding information is provided by 14 September 2010.
20. As the Commissioner did not receive the outstanding information he requested, he wrote to the Council on 15 September 2010 to chase the matter up.
21. The Council contacted the Commissioner by telephone on 20 September 2010 to clarify what information was outstanding.
22. The Commissioner received the outstanding information on 5 October 2010.
23. The Commissioner reviewed the complaint in further detail and requested additional information from the Council on 16 November 2010.
24. As he received no response, the Commissioner chased the matter up on 1 December 2010. He again sent a further reminder to the Council on 7 December 2010.

25. Although briefly, the Council finally responded on 9 December 2010.

## Analysis

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### Substantive Procedural Matters

26. The Commissioner has considered the wording of the complainant's request, reviewed a sample of emails the Council identified from its initial search which then led to the calculation that compliance would exceed the cost limit and considered what Urban Gravesham does as a civic society. It is the Commissioner's view that the scope of the complainant's request will include some information which is of an environmental nature and therefore that the Council should have considered the request under the EIR as well as the Act. The Commissioner will now explain why.
27. Urban Gravesham is a civic society for Gravesend and Northfleet which deals and involves itself in any matters which affect the character and environment of the urban areas in Gravesham. It takes an interest in all new developments in the area and aims to engage the Council, developers and other interested parties in debate about the future of Gravesend and Northfleet.
28. It is not possible to state exactly how the requested information falls within the definition of environmental information, as prescribed by the EIR (please refer to the Legal Annex at the end of this Notice for the full description) because the Council calculated that the cost limit under the Act would be exceeded prior to identifying all the recorded information it holds relevant to the request. However, considering the aims of Urban Gravesham, the issues it gets involved in and the broad scope of the complainant's request, it is more than likely that some, if not a large majority, of the information held which falls within the scope of the request will be of an environmental nature.
29. The complainant asked for copies of all communications between Urban Gravesham and a selection of Council officers over a 12 month period. It is the Commissioner's view that some of these communications will relate to new developments in the local area. A new development would be considered to be a 'measure', as defined in regulation 2(c) of the EIR which would or would be likely to affect the elements described in regulation 2(a), for example, the land and landscape.
30. It may be that some of the requested information would fall within other categories of environmental information described in regulation

2(a) to (f) of the EIR. However, as stated above, it is not possible to confirm this without doubt, as the Council estimated the cost limit would be exceeded before it collated all the information it does hold relevant to the request. The Commissioner is, however, satisfied from the description of the complainant's request and the matters Urban Gravesham involves itself in that some of the information will at least fall within regulation 2(c) of the EIR, which then would or would be likely to affect the elements of the environment described in 2(a) of the EIR.

### **The legislation under which the complainant's request should be considered**

31. In circumstances where it is reasonable to reach the view that a request will involve a mixture of information which should be considered under the Act and the EIR, it is the Commissioner's approach to consider the public authority's application of section 12 of the Act to all the information in the first instance.
32. It is then the Commissioner's approach to consider the request under the EIR. This is because the applicant still has a legal right to request information under the EIR whether the matter is addressed under the FOIA or not. Usually a public authority will have identified, whether at the outset or at a late stage during the Commissioner's investigation, that the request incorporates a mixture of information which should be considered under both regimes. Usually a public authority will also claim a reliance on regulation 12(4)(b) of the EIR for that information which is of an environmental nature.
33. However, in this case the Council has not to date identified that the complainant's request covers both sets of legislation. It has therefore not, to date, considered the complainant's request under the EIR. The Commissioner can therefore only address the Council's application of section 12 of the Act in this Notice and determine whether he considers it applies. The fact that the request should be considered under the EIR as well will be addressed in more detail in the 'Steps' section of this Notice.

### **Section 12 of the Act – cost of compliance**

34. Section 12(1) provides a costs threshold for the Act. As long as the Council can prove that its estimate of the work required to answer the request for information is reasonable and exceeds the statutory limit, then it is not required to provide any information in respect of the request.

35. The Information Tribunal in *Quinn v Information Commissioner & Home Office* [EA/2006/0010] explained this point in this way:
- “The fact that the rules drafted pursuant to s.12 have the effect of defining what is a reasonable search and the amount of time and money that a public authority are expected to expend in order to fulfil their obligations under the Act, serves as a guillotine which prevents the burden on the public authority from becoming too onerous under the Act”.
36. The Council has consistently stated that its position is that the work required to process this request would exceed the costs limit. It does not doubt that it holds recorded information relevant to the complainant’s request but it is unable to locate it without exceeding the costs threshold.
37. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the “Regulations”) provide that the cost limit for local authorities is £450. This must be calculated at the rate of £25 per hour, providing an effective time limit of 18 hours. If a public authority estimates that complying with a request would exceed 18 hours, or £450, section 12(1) provides that the request may be refused.
38. Section 12(1) is not qualified, so it has no public interest component that can be considered. This means the costs limit can be relied upon irrespective of whether the public interest would have favoured the disclosure of the information.
39. The Commissioner must determine whether he believes that the estimate provided by the Council was reasonable. The issue of what constitutes a reasonable estimate was considered in the Information Tribunal case of *Alasdair Roberts v the Information Commissioner* [EA/2008/0050] and the Commissioner endorses the following points made by the Tribunal at paragraphs 9 -13 of the decision:
- “Only an estimate is required” (i.e. not a precise calculation);
  - The costs estimate must be reasonable and only based on those activities described in regulation 4(3);
  - Time spent considering exemptions or redactions cannot be taken into account;
  - The determination of a reasonable estimate can only be considered on a case-by-case basis; and
  - Any estimate should be “sensible, realistic and supported by cogent evidence.”

40. The above extract references regulation 4(3) of the Regulations referred to in paragraph 25 above, which states that the only activities that are allowed to be considered are those where it is:
- (a) determining whether it holds the information;
  - (b) locating the information, or a document which may contain the information;
  - (c) retrieving the information, or a document which may contain the information; and
  - (d) extracting the information from a document containing it."
41. The Council stated that it began with a search of what emails are held. It confirmed that it searched its systems using the timeframe specified by the complainant in his request, the names of the employees he quoted and the words 'Urban' and 'Gravesham'. The Council advised that these search criteria revealed a total of 1339 emails and from this search alone (it had not begun to search for the other elements of the request i.e. memorandums, notes, letters etc) it estimated that compliance would exceed the 18 hour threshold and therefore the appropriate limit prescribed by the Act.
42. The Commissioner made further enquiries to the Council in relation to this search to satisfy himself that only those activities listed in paragraph 40 above were taken into account when reaching its estimate. The Commissioner drew the Council's attention to the differences between manual searches and electronic searches and highlighted that items (a) to (c) would be met within minutes once the criteria was entered into the search engine of its email system.
43. The Council clarified that the email system search did indeed locate and retrieve the 1339 relevant emails in several minutes. Its estimate was based on the fact that due to the volume of emails the search identified it would take the Council in excess of 18 hours to extract the requested information from these emails. It explained that the majority of these emails are chain emails containing information which is not relevant to the request.
44. The Commissioner reminded the Council that an estimate must be sensible and realistic and therefore based upon cogent evidence. In view of this he requested a sample of the emails revealed by the search and further more detailed arguments to support the Council's estimation.
45. The Council supplied a sample of 10 emails as requested, each a chain of emails of varying length and some with attachments. The Council explained that due to the broad nature of the complainant's request



the search would reveal a lot of irrelevant information. As an example, it pointed out that the search brought up every email with the word 'Gravesham' and every email with the word 'Urban' in it between the officers and dates specified. The search did not necessarily reveal emails relating to 'Urban Gravesham' alone.

46. The Commissioner reviewed the sample of emails provided and the additional information provided. He accepted that the sample of emails provided were chain emails as the Council suggested and that they did demonstrate that the initial search and how this was undertaken revealed irrelevant information. However, the Commissioner was concerned having reviewed the case in further detail about the way in which the initial search had been undertaken. The Commissioner felt that a more sophisticated search could be carried out which may eliminate some of the irrelevant emails. He therefore asked the Council to carry out a revised search using the same search criteria but using quotation marks at the beginning and end of the phrase 'Urban Gravesham' He suggested to the Council that the use of quotation marks in this way may limit the search to just emails about Urban Gravesham rather than reveal every email with the word 'Urban' and 'Gravesham' in it.
47. The Council agreed to undertake the revised search using the quotation marks as suggested. The Council confirmed that the revised search revealed only 108 emails as opposed to the previous search which revealed 1339. The Commissioner asked the Council to reconsider the request and to provide a revised cost calculation but it failed to do so and simply referred the matter back to the Commissioner to consider.
48. The Commissioner has considered the cost of compliance himself based on the revised search results provided by the Council. As stated in paragraph 42 above, the activities described in (a) to (c) of paragraph 40 will have been met within a matter of minutes, as the search was an electronic search of the Council's email system. The issue is whether it would take the Council in excess of 18 hours to consider these emails with a view to extracting irrelevant information from the information which is relevant to the complainant's request (activity (d), paragraph 40).
49. If the Council was to review the emails revealed by the revised search it would have to review 6 emails per hour to be within the 18 hour limit. Considering the fact that the revised search itself eliminated a considerable amount of irrelevant information, the Commissioner does not consider that it would take the Council in excess of 18 hours to review the emails revealed by the revised search. The Council would have 10 minutes to consider each email chain to decide whether it is

relevant to the complainant's request or not and the Commissioner is of the view that this is reasonable.

50. The Commissioner notes that there were other elements to the complainant's request; in addition to emails, the complainant requested copies of all other forms of communications as well. It may be the case that the cost limit would be exceeded if the Council were to consider the other elements. However, the Commissioner cannot make any judgement of this kind at this stage, as the Council has not provided a revised cost calculation. It only provided the results of the revised email search and the Commissioner can only consider whether section 12 applies to these results.
51. For the reasons explained above, the Commissioner has concluded that section 12 of the Act does not apply in this case. Based on the revised email search, he does not consider the Council's calculation that the cost limit is exceeded is reasonable or realistic and the Commissioner has received no cogent evidence to support this claim.

### **Section 16(1)**

52. Section 16(1) provides an obligation for a public authority to provide advice and assistance to a person making a request, so far as it would be reasonable to do so. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in any particular case if it has conformed with the provisions in the Section 45 Code of Practice in relation to the provision of advice and assistance in that case.
53. Whenever the cost limit has been applied, the Commissioner must consider whether it would be possible for the public authority to provide advice and assistance to enable the complainant to submit a new information request without attracting the costs limit in accordance with paragraph 14 of the Code. If a public authority provides an indication of what, if any, information could be provided within the costs limit it will have complied with the requirements of the Code of Practice and therefore section 16(1) of the Act.
54. In this particular case, the Commissioner notes that the Council provided no indication to the complainant of what information could be provided within the cost limit. He notes that it asked the complainant to refine his request but provided no advice or assistance on how the complainant could do this. In the circumstances the Commissioner has concluded that the Council failed to comply with section 16(1) of the Act in this case.

## Procedural Requirements

55. The Commissioner notes that the Council failed to issue its refusal notice citing section 12 of the Act within 20 working days of the complainant's request. The Commissioner therefore finds the Council in breach of section 17(5) of the Act in this case.

## The Decision

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56. The Commissioner's decision is that the Council did not deal with the following aspects of the request for information in accordance with the Act:
- it incorrectly relied on section 12 of the Act for the non disclosure of the requested information;
  - it failed to identify that some of the requested information would be environmental information and therefore failed to consider the complainant's request under the EIR;
  - it breached section 17(5) by failing to issue a refusal notice to the complainant citing section 12 of the Act within 20 working days.

## Steps Required

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57. The Commissioner requires the Council to take the following steps to ensure compliance with the Act and the EIR:
- the council should reconsider the complainant's request under the Act and the EIR. It should either release the requested information to the complainant or issue an appropriate refusal notice, which complies with both section 17 of the Act and regulation 14 of the EIR.

## Failure to comply

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58. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Other matters

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59. Although it does not form part of this Decision Notice the Commissioner wishes to highlight the following area of concern.
60. Concerning the complainant's request for an internal review, the Commissioner notes that the Council took over five weeks to respond. The complainant's request was made on 29 August 2009, which would have been received by the Council on 1 September 2009. However, the Council did not respond until 7 October 2009; over 5 weeks later.
61. There is no timescale laid down in the Act for a public authority to complete an internal review but the Commissioner has since issued guidance which recommends 20 working days from the date of request as a reasonable time for completing an internal review and (in exceptional circumstances) no later than 40 working days. Also, Part VI of the Code of Practice issued under section 45 of the Act states in this regard:
- "41. In all cases, complaints should be acknowledged promptly and the complainant should be informed of an authority's target date for determining the complaint. Where it is apparent that determination of the complaint will take longer than the target time (for example because of the complexity of the particular case), the authority should inform the complainant and explain the reason for the delay."*
62. The Commissioner notes that, in failing to advise the complainant of the estimated date for completion of the internal review and in failing to complete the internal review within a reasonable timescale the Council failed to conform to Part VI of the section 45 Code of Practice.
63. The Commissioner would also like to draw the Council's attention to the unacceptable delays throughout this investigation in providing additional information or further explanations to the Commissioner and the Council's lack of engagement. Although reasonable timeframes were given, the Commissioner had to repeatedly chase the Council for outstanding information. Responses were not provided within the timeframes set and when the Council did respond it often failed to provide the necessary detail the Commissioner requested. The Commissioner would therefore like to remind the Council of its obligations under the Act and the EIR and the level of co-operation required during such investigations. The Council should also familiarise itself with the Codes of Practice associated with the Act and the Commissioner's guidance available on his website at [www.ico.gov.uk](http://www.ico.gov.uk).

## Right of Appeal

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64. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 31<sup>st</sup> day of January 2010**

**Signed .....**

**Andrew White**  
**Group Manager – Complaints Resolution**

**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

## Legal Annex

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### **Freedom of Information Act**

#### General right of access

##### Section 1(1)

Provides that -

“Any person making a request for information to a public authority is entitled

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(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.”

#### Exemption where cost of compliance exceeds appropriate limit

##### Section 12(1)

Provides 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.”

##### Section 12(2)

Provides that –

“Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

##### Section 12(3)

Provides that –

“In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.”

#### Section 12(4)

Provides that –

“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.”

#### Section 12(5)

Provides that -

“The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated.

#### Duty to provide Advice and Assistance

#### Section 16(1)

Provides that -

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.

#### Refusal of request

#### Section 17(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.

## **Environmental Information Regulations**

### **Regulation 2(1)**

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

### **Regulation 12(4)**

For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant’s request is received;
- (b) the request for information is manifestly unreasonable;



- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.