

CHESHIRE EAST COUNCIL

REPORT TO: AUDIT & GOVERNANCE COMMITTEE

Date of Meeting: 17TH March 2016
Report of: Customer Relations and Compliance Manager
Subject/Title: Compliance with Data Protection Act (1998),
Freedom of Information Act (2000) and Environmental
Information Regulations (2004)
Portfolio Holder: Councillor Paul Findlow

1.0 Report Summary

1.1 This report provides an update on the performance of Cheshire East Council in responding to requests for information under the Data Protection Act (1998) and the Freedom of Information Act (2000) (including the Environmental Information Regulations (EIR)), highlighting volumes, trends and current and future issues.

2.0 Decision Requested

2.1 That the Committee notes the performance of the Council in responding to requests for information and notes ongoing and future developments.

3.0 Wards Affected

3.1 All wards.

4.0 Local Ward Members

4.1 Not applicable.

5.0 Policy Implications

5.1 Compliance with Freedom of Information (FOI) and Data Protection (DP) legislation is integral to effective management of information within the Authority. FOI legislation and Environmental Information Regulations make public bodies open and transparent, whilst DP legislation protects personal data from improper use. It is essential, therefore, that all relative policies and procedures take account of these regulations.

6.0 Financial Implications

6.1 Failure to comply with the legislation can lead to large fines being imposed on the Council. The current maximum penalty for breach of Data Protection or non-compliance is £500,000. Non-compliance with Freedom of Information can lead to enforcement action by the Information Commissioner or possibly costly court proceedings and reputational damage.

7.0 Legal Implications (authorised by the Borough Solicitor)

7.1 These are set out in the report.

8.0 Risk Management

8.1 The risks of non-compliance are significant (as outlined in 6.1). Additionally, the penalties which may be imposed under the forthcoming European Data Protection Regulation are significantly greater than the current maximum penalty for non-compliance (see 15.1).

9.0 Background

9.1 The tables below show the number and sources of requests received in 2015 (January – December) and the services to which they relate. Figures are provided for 2014 for comparison. Any company wholly owned by one or more public authorities is subject to FOI legislation. Therefore, most of the new ASDV's (Alternative Service Delivery Vehicles) established by the Council in recent years are also subject to FOI. If a Freedom of Information request relates in any way to the environment, then it is classed as an Environmental Information Request, and is subject to the Environmental Information Regulations 2004 (EIR), rather than the Freedom of Information Act.

Table 1

TYPE OF REQUEST	2015	2014	2013	2012
FOI/EIR requests	1625	1598	1614	1487
DP Subject Access requests	820 ¹	554	619	467
TOTAL	2445	2152	2233	1954

Table 2

SOURCE	2015	2014	2013	2012
Individuals	45%	46%	50%	37%
Commercial	18%	20%	18%	18%
Press/Media	15%	14%	10%	13%
Public Sector	9%	8%	9%	20%
'What do they know' ²	6%	6%	6%	5%
Pressure Groups	5%	4%	5%	5%
MP's/Councillors	2%	2%	2%	2%

¹ 418 of the requests were requests directly to Council Tax from various public authorities (224 in 2014)

² Website dedicated to Freedom of Information requests

Table 3

SERVICE/ DEPARTMENT	2015	2014
Children's and Adults Services	29%	27%
Communities	23%	26%
Chief Operating Officer Services	17%	17%
Economic Growth & Prosperity	15%	15%
Highways	8%	8%
ASDV'S	8%	7%

10.0 Freedom of Information/Environmental Information Requests

- 10.1 Freedom of Information and Environmental Information requests increased marginally in 2015 to 1625. Over 87% of the requests were responded to within 20 working days (compared to 94% in 2014). New internal authorisation processes were introduced during 2015, which led to longer processing times. All responses now have to be authorised by a Head of Service and any withholding of information requires additional authorisation. Information is withheld in only a small number of cases (63 out of 1625 requests in 2015). However, this is an increase on 2014, when information was withheld in 39 cases out of 1598.
- 10.2 Most of the exemptions available to public authorities to withhold information are subject to a public interest test, i.e. does the public interest in disclosure outweigh the public interest in withholding it? There is a presumption in favour of disclosure, i.e. that it is in the public interest generally to disclose information in order to promote transparency and accountability. The Information Commissioner requires cohesive and comprehensive arguments from the Council for withholding information should requestors submit an appeal.
- 10.3 A new system – i-Casework – for processing FOI and DP requests was procured in 2015 and will be operational by April 2016. It is anticipated that this will significantly increase the efficiency of the processes both within the Compliance and Customer Relations Team and within individual departments, ensuring an improved service for requestors.
- 10.4 The implementation of i-Casework will also enable the production and publication of a FOI Disclosure Log on the Council's website, detailing requests received by the Council and the responses issued.

11.0 Referrals to the Information Commissioner

- 11.1 The Information Commissioner received 8 complaints about Cheshire East Council during 2015, compared with 4 in 2014 and 13 in 2013. Three of these are ongoing, one was withdrawn by the requestor, three were upheld in the Council's favour and one was upheld in the requestor's favour (this related to a request which had not been responded to within the statutory timescales).

12.0 Independent Commission on Freedom of Information

- 12.1 The Commission was set up in July 2015 to review the Freedom of Information Act. It considered the balance between transparency, accountability and the need for sensitive information to be protected. The Terms of Reference required the Commission to 'consider the implications for the Freedom of Information Act 2000 of the uncertainty around the Cabinet veto and the practical operation of the Act as it has developed over the last 10 years in respect of the deliberative space afforded to public authorities'. The Commission also considered the balance between transparency and the burden of the Act on public authorities more generally.
- 12.2 The key recommendations from their report³, published on 1st March, 2016, are summarised in **Appendix 1**, but it was concluded that "the Act is generally working well, and that it has been one of a number of measures that have helped to change the culture of the public sector. It has enhanced openness and transparency....There is no evidence that the Act needs to be radically altered, or that the right of access to information needs to be restricted. In some areas, the Commission is persuaded that the right of access should be increased."

13.0 Transparency

- 13.1 The Council has stated its commitment to being open, honest and accountable regarding all decisions, actions and outcomes. A Transparency Officer was appointed in January 2015, the 'Transparency Project' was re-launched and significant progress was made during the year towards achieving this aim. The Freedom of Information Act 2000 provides an outline Publication Scheme which public authorities must adhere to and the Local Government Transparency Code 2015 makes it mandatory to publish certain information sets at prescribed intervals. The Council has achieved compliance with all mandatory requirements, except for information about certain contracts exceeding £5000. Information is published on all contracts exceeding £50,000 and some contracts between £10,000 and £50,000. Work is currently in progress to identify all contracts exceeding £5000.
- 13.2 It is the Council's intention to publish information over and above the mandatory requirements and ensure that all published information is meaningful, easily accessible and in a re-usable format. Frequently requested datasets are being identified and steps taken to proactively publish this information. Some service areas, such as School Admissions, Business Rates, Council Tax and Waste Services are already doing this.
- 13.3 A new data portal has been implemented to facilitate the internal process of uploading information and to make it more user-friendly for the public. It will also be of use internally and should make access to information easier and faster for employees and Members.

³ <https://www.gov.uk/government/publications/independent-commission-on-freedom-of-information-report>

14.0 Data Protection Subject Access Requests

14.1 There was a significant increase in Subject Access Requests from 2014 (554) to 2015 (820). 73% of the increase was in requests to Council Tax, which typically come from other public authorities. The Compliance and Customer Relations team received an additional 72 requests in 2015 compared to 2014. Requests into this team typically originate from individuals (including care leavers requesting access to their social care records), public authorities (including the Police) and commercial organisations (including insurance companies requesting CCTV footage and solicitors.)

15.0 Forthcoming changes to Data Protection regulations

15.1 The European Commission is planning to replace the previous Data Protection Directive with a European Data Protection Regulation, with the aim of harmonising current data protection laws in place across the EU member states. The fact that it is a “regulation” instead of a “directive” means it will be directly applicable to all EU member states without a need for domestic legislation. It is anticipated that this will take effect in 2018. The main changes are:

- Higher fines – fines of up to 4% of a company’s worldwide turnover or €20,000,000 (whichever is higher) can be imposed. The maximum the Information Commissioner can currently impose is £500,000.
- Mandatory notification – it will be mandatory to report all data protection breaches to the Information Commissioner within 72 hours of becoming aware of the breach. Currently this procedure is voluntary.
- Sensitive personal data – stricter rules will apply to the processing of sensitive personal data such as medical information. ‘Sensitive’ personal data will also include genetic and biometric data.
- Consent – consent must be freely given, specific, informed and unambiguous, provided by clear affirmative statement or action.
- Additional rights for data subjects – new right to transfer data from one service provider to the other. There will also be a wider right to be forgotten than currently exists.
- Mandatory Data Protection Officers
- Data Processors – the Data Protection Act currently only regulates data controllers but the directive seeks to impose certain direct legal obligations on data processors also.

16.0 Training and Awareness

16.1 Refresher FOI training is currently being arranged for senior officers to ensure that all teams are fully aware of their obligations under the Freedom of Information Act, the Environmental Information Regulations and the Local Government Transparency Code. It is expected that this will be complete by May 2016.

16.2 Data Protection training is a mandatory requirement for all members of staff through the Performance Management process. Training and awareness in Data Protection,

including data handling, record keeping and security is delivered at Induction and across the organisation at regular intervals. In addition, refresher training is currently being arranged for all senior officers, to take place in Spring 2016.

17.0 Access to Information

17.1 The background papers relating to this report can be inspected by contacting the report writer:

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Report of Independent Commission on Freedom of Information

Key recommendations affecting Local Authorities

- Faster response times – authorities must keep to the 20 days’ statutory limit unless the request involves information that is complex or high volume or requires consultation with third parties who may be affected by the release of the information.
- Statutory time limit of 20 days to be imposed where a request is refused and the requestor asks the public authority for a review of its decision.
- Prosecution powers of the Information Commissioner (IC) to be strengthened to make it easier for him to prosecute offences relating to destroying information that has been requested under the Act and to increase the penalty for this offence.
- Increase in the amount of information that is released proactively by public authorities.
- All public authorities who employ at least 100 full time equivalent staff will be required to publish their compliance statistics in relation to their duties under the Act and to publish responses to requests where information is given out.
- More information to be proactively published about the expenses and benefits in kind paid to senior public sector executives.
- Information Commissioner to be given responsibility and powers of enforcement to ensure that public authorities are meeting their obligations to proactively publish information.
- Section 36 exemption which affords protection to information where its release would ‘prejudice the effective conduct of public affairs’ will no longer require the reasonable opinion of a qualified person to be obtained before the exemption can be applied.
- The number of appeal stages to be reduced. The right of appeal to the First-tier Tribunal against decisions of the IC to be removed. If someone remains dissatisfied with the IC decision, an appeal would still lie to the Upper Tribunal. However, this is limited to a point of law.
- With regard to the burden on public authorities, it is not considered appropriate to impose an up-front charge. However, Section 14 of the Act, which allows the refusal of vexatious or repeated requests, can be used to refuse requests which are disproportionately burdensome.

Provisional views (not recommendations)

- The Freedom of Information Act (2000) should be extended to those who are providing public services under contract. It is suggested this should be done by treating information about the performance of the contract as being held on behalf of the contracting public authority, although it is considered that this should be limited to new contracts only, and only those contracts where the annual value is £5m or greater.
- Changes to the cost limit. Currently an authority is able to issue a fees notice if it is considered that the effort involved in responding to a Freedom of Information request (not a request under the Environmental Information Regulations) is greater than 18 man hours. It is suggested that additional tasks (i.e. any necessary redaction for certain exemptions) should be included as a permitted activity in the 18 hour time limit (subject to the IC being able to overturn the refusal where there is a strong public interest in the request being responded to).