

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 September 2011

Public Authority: Cardiff Council
Address: County Hall
Atlantic Wharf
Cardiff
CF10 4UW

Summary

The complainant requested information regarding the cost to the Council of employing barrister's chambers or solicitors at employment tribunals over a period of nine years. The Council refused to comply with the request on the basis that to do so would exceed the appropriate cost limit. It therefore applied section 12(1) of the Act. The Commissioner's decision is that the Council has not demonstrated that section 12(1) of the Act is engaged and he therefore orders the Council to comply with the request or issue a valid refusal notice. The Commissioner is also concerned at the Council's approach to offering advice and assistance to the applicant under section 16(1) of the Act, and he has made further reference to the Council's general approach to request handling in the 'other matters' section of this notice.

The Commissioner's Role

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

2. On 14 January 2011, the complainant made the following request to Cardiff Council (the "Council"):

"I would like to know how much the Council has spent outsourcing to either Barristers Chambers or Solicitors at Employment Tribunals

for all Council Staff (including Teaching Staff). Any combination of those below, between 1st August 2000 and the 31 October 2010:

- 1) For constructive dismissal
- 2) Unfair dismissal
- 3) One (or more) of the various discrimination claims and/or under the Protection from Harassment Act
- 4) Public Interest Disclosure Act 1998
- 5) Any other Employment issues, I may have omitted.

Please name the Solicitors/Barristers that the Council have outsourced to: For example, 2010 Number (which is the cost spent) Name (Name of Solicitor/Barrister). Please provide the figures in the following format e.g. 2006 – NUMBER HERE AND SOLICITOR OR BARRISTERS NAME HERE; 2007 – NUMBER HERE AND SOLICITOR OR BARRISTERS NAME HERE; 2008 – NUMBER HERE AND SOLICITORS OR BARRISTERS NAME HERE ; 2010 – NUMBER HERE AND SOLICITORS OR BARRISTERS NAME HERE; etc, thus making it easier for one to read and to ensure there is no misunderstandings.

I would request that you include VAT in the figures. Not a before and after VAT, a figure which included total cost including VAT.

Please also send this information as "calendar years" not financial years.

Please note that I do not seek or require any personal information such as names and addresses – only the total figures and name of the law firms to whom the Council outsourced.

I would ask that you remember the statutory duty imposed upon public authorities by virtue of Section 16 of the Freedom of Information Act to provide advice and assistance to requesters. If for any reason you are leaning toward rejecting any part of this request or if you plan to argue that it is unmanageable or unanswerable in any way then I would expect you to contact me promptly to find ways to answer this request to our mutual Satisfaction [sic]."

3. The Council responded on 1 February 2011. It said that the cost of complying with the request would exceed the £450, or 18 hours work, limit set out in the Freedom of Information and Data Protection

(Appropriate Limit and Fees) Regulations 2004 (the "Fees Regulations"). The Council's estimate of the time it would take to comply with the request included the following factors:

- Minimum of 2 hours to complete indents to retrieve files.
- 16.5 hours at 30 minutes per file to check against the requirements of the request.
- 6-7 hours for a solicitor to check identified files are appropriate for information to be released.
- 2 hours to put appropriate data into a spreadsheet.

The Council therefore said that section 12 of the Act was engaged and refused to comply with the request.

4. On 2 February 2011, the complainant emailed the Council to express her dissatisfaction with the Council's decision. On 21 March 2011, the complainant emailed the Council and specifically stated that she was seeking an internal review of the Council's handling of her request.
5. The Council provide the complainant with the findings of its internal review on 26 March 2011. The Council apologised for the delay in responding to the complainant's email of 2 February but upheld its decision to refuse the request. The Council amended its estimate of the time it would take to comply with the request – for example it discounted the 6-7 hours for a solicitor to check information before it was released – but concluded that to comply with it would exceed the appropriate limit set out in the Fees Regulations.

The Investigation

Scope of the case

6. On 15 April 2011, the complainant contacted the Commissioner to complain about the way her request for information had been handled. No specific areas of complaint were set out but it was apparent that the complainant was unhappy with the Council's decision to refuse her request.
7. The Commissioner has therefore considered whether the Council appropriately applied section 12(1) of the Act when it refused to comply with the request on the basis that the appropriate limit had been exceeded.

Chronology

8. The Commissioner informed the Council that he had received a complaint about its handling of the request of 14 January 2011. The Council responded on 27 May 2011 by providing a copy of the findings of its internal review. It stated that it had nothing further to add.

Analysis

Substantive Procedural Matters

Section 12 – cost of compliance exceeds appropriate limit

9. Section 12(1) of the Act provides that public authorities do not have to comply with requests where the estimated cost of complying exceeds the appropriate limit as specified by the Fees Regulations. All sections of the legislation are reproduced in the attached legal annex.

10. Section 4(3) of the Fees Regulations sets out the basis upon which an estimate can be made:

“(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only the costs it reasonably expects to incur in relation to the request in –

- (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.*

(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per hour.”

11. The fees Regulations state that the appropriate cost limit is £600 for central government, legislative bodies and the armed forces and £450 for all other public authorities, which includes the Council. This is equivalent to 18 hours work.

Would compliance with the requests exceed the appropriate limit?

12. The findings of the Council's internal review sets out the detail of its position. The Council said that the information requested cannot be

extracted from any electronic database and that for the period in question the payment and invoicing system was largely paper based. The Council said that, whilst payments would be recorded and held on the Council's financial database, there would be no way of knowing whether an individual payment fell within the category specified in the request.

13. The Council said that the only way to approach the request would be to:
 - Search its legal case management system to locate cases of the relevant type for the relevant period. The Council stated that it is able to search the database using case category codes to identify particular types of cases.
 - Retrieve from storage case files that match the categories specified in the request for the period in question.
 - Physically search each file to identify whether they hold information relevant to the request.
14. The Council went on to say that it had undertaken the work set out in the first bullet point under paragraph 13, above. The result was that the Council identified 36 paper files that potentially held information relevant to the request. Three of the files were held in the Council's main office and 33 were held by an external records storage company.
15. The Council said that to retrieve the three files held in its head office would take 20-30 minutes. This allowed for the physical transfer to and from storage and updating the relevant records management systems. The Commissioner does not dispute this estimate.
16. The Council then went on to deal with the 33 files held by an external record storage company, which it said would take far longer to locate, retrieve and extract. The Council stated that records are held by the external provider in storage boxes that contain anywhere from one to a maximum of ten physical files. The Council stated that an electronic search would only show that a file was with the external provider and would not clarify the specific storage box in which it was held. A separate physical search of a separate filing system would be required to identify the specific storage boxes in which the 33 files were stored. The Council stated that it would take 1 hour and 50 minutes to make the relevant searches to identify the specific storage boxes in which the 33 files were stored and to complete the relevant forms that would allow retrieval from the external provider. It is not the Commissioner's role to comment on the efficiency or lack of efficiency of a public authority's record management systems but he considers that the estimated of time required to complete these tasks is high. Nevertheless, the

17. The Council then said that its contract with the external provider allows for the retrieval of a maximum of six storage boxes at one time. Requests for retrieval are made through the Council's internal post room and six separate requests would need to be submitted to that department. The Council estimated that each request would take approximately 10 minutes of administrative time to organise. The Commissioner is unclear why this additional time would be required, given that the Council included some time for the preparation of the relevant forms in the 1 hour and 50 minutes it referred to above. The Council's view is that each trip to the external provider, including loading and internal transfer would take approximately 20 minutes. The Council said that to complete these tasks would take 4 hours.
18. The Council then stated that it would take 45 minutes to update relevant documentation to ensure that the location of the 33 files was updated accordingly.
19. In the findings of its internal review of 26 March 2011 the Council revised its estimate of the time it would take to review the 36 files in order to determine whether they held relevant information and to extract that information. It revised its estimate down from 30 minutes per file to 15 minutes per file. The Council therefore estimated that it would take 9 hours to review the files and extract relevant information.
20. The Council estimated in total it would take around 15 hours to locate the relevant files, retrieve them from storage, review them to determine whether they held any relevant information and extract any such information. At the rate of £25 per hour referred to in the Fees Regulations this equals £375. The Commissioner is unsure how the Council arrived at this figure, as its estimate of the time required to retrieve the files from storage would appear to exceed 6 hours but, as he considered some of the estimates – particularly in relation to the estimate of the time required to complete administrative tasks such as updating filing records – to be high he has accepted the Council's estimate. To this the Council added £59.50, which, under the Council's contract for retrieving files from storage, would be the amount payable to the external provider. The Council's total estimate of the costs required for complying with the request was £434.50, which is under the appropriate limit of £450.
21. However the Council said that the estimate applied to its Legal Services Department only and that it was likely that additional relevant information was held by other areas, such as the Human Resources Department. The Council said that this was because, for the time period

covered by the request, budget holding services were able to commission their own legal advice from external providers. The Council said that to conduct a target file enquiry and search across 20 service areas would take approximately 30 minutes per area and the total cost of complying with the request would therefore clearly exceed the appropriate cost limit.

22. The Commissioner does not accept this view. He considers the Council's suggestion that it would need to search each budget holding area of the Council to be a disproportionate approach. He considers that the Council must have a reasonable idea of the areas likely to hold relevant information and that these are likely to be its Legal Services Department and Human Resources Department. The Commissioner notes that the Council could have undertaken a target files enquiry and search of its Human Resources department in approximately 30 minutes and that this would still be within the appropriate cost limit; 30 minutes equates to £12.50 bringing the total cost estimate to £446.50. The Commissioner accepts that, based on the Council's estimates of the time required to retrieve and target files from storage, search them and extract relevant information, to provide any relevant information held by its Human Resources Department might exceed the appropriate limit. However, the Council has not undertaken any such search and it is not therefore aware whether information is potentially held by its Human Resources Department.
23. In reaching his decision, the Commissioner was mindful of the remarks of the First-tier Tribunal (Information Rights) (formerly the Information Tribunal) in the case of *Alasdair Roberts & The Information Commissioner* (EA/2008/0050), in which it stated that any estimate should be "*sensible, realistic and supported by cogent evidence*". The Commissioner does not consider the Council's assumption that relevant information could be held in any part of the Council to be supported by cogent evidence, nor does he consider it to be realistic. The Council did not undertake a search of its Human Resources department when it could have done so within the appropriate cost limit and it has not provided reasonable evidence that searches of other budget holding areas would be required. Consequently, the Commissioner has concluded that the Council did not apply the exemption at section 12 correctly.

Procedural Requirements

Section 16 – Advice and assistance

24. Section 16(1) of the Act 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.

25. The Code of Practice issued under section 45 of the Act (the Code) provides guidance on good practice to public authorities in carrying out their duties in relation to the Act. The Code includes suggestions in relation to the nature of the advice and assistance that public authorities should provide in relation to section 16 of the Act. Paragraph 14 of the Code recommends that:
- "14. Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the "appropriate limit" (i.e. cost threshold) the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee."
26. The Council's refusal notice of 1 February 2011 advised the complainant that a revised request covering files held within the Legal Department for a period of three years would be manageable. The Council's internal review found that this was a reasonable suggestion.
27. While the Commissioner considers that the Council explored the possibility of narrowing the scope of the request he does not consider that it has given appropriate consideration the areas within the Council that are likely to hold relevant information. For example, he considers that it would have been reasonable for the Council to conduct a target file search of its Human Resources Department and – assuming files with a potential to hold relevant information were identified – advise the complainant regarding the possible refinement of her request. For example, the complainant could have been advised that it would be possible to limit her request to a particular department or time period. The Commissioner considers the Council's approach did not afford it the opportunity to offer an appropriate level of assistance.
28. The Commissioner also considered that the Council sought to place the burden for revising the request onto the complainant and that the form of words it used when issuing the findings of its internal review could be considered an attempt to dissuade the complaint from submitting a refined request or pursuing the matter further. The Commissioner has made further reference to this matter in the 'other matters' section of this notice. Taking into account the above, the Commissioner found that the public authority breached section 16(1) of the Act in this case.

The Decision

29. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

Steps Required

30. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- Comply with the request and either disclose the requested information to the complainant or issue a valid refusal notice under section 17(1) of the Act.

31. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

32. 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

33. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

34. The Council determined that it was able to provide information relevant to the request held by its Legal Services Department within the appropriate cost limit. It would also have been able to undertake a search of files held by its Human Resources Department that potentially held information relevant to the request but failed to do so. The Council then broadened the scope of the departments that it would need to search to cover the whole Council. The Commissioner is concerned that this is a disproportionate approach and that this is not the first instance in which the Council has followed this formula. For example, in case reference FS50366306 the Council stated that in order to be sure that it had identified all information relevant to the request it would need to conduct a wide ranging search, which would result in the appropriate cost limit being exceeded.

35. While the Commissioner recognises that it is theoretically possible for information relevant to any request to be held in any part of the Council, he considers the Council's approach in this case to be unreasonable and disproportionate. The Commissioner is also concerned that the Council's approach in this case and case reference FS50366306 may be indicative of an attempt to invoke the provisions of section 12 of the Act when it is not necessary to do so.
36. The Commissioner is also concerned about the form of words used in the findings of the Council's internal review, in which it stated that it considered it had offered appropriate advice and assistance regarding potential revision of the request to bring it within the cost limit. It suggested that it might be able to provide information held within its Legal Services Department for a period of three years but it had already demonstrated that it would be able to provide all information held by that department for the period referred to in the request.
37. The Council went on to question the value and purpose of the request and speculated that the information requested might be of academic interest only. The exact same form of words was used in the Council's response in case FS50366306 and the Commissioner is concerned that the Council may be attempting to dissuade applicants from making revised requests. It is widely accepted that the Act is applicant and purpose blind and the Commissioner does not consider that the form of words used by the Council is appropriate. He would expect the Council to consider the way it has engaged with the complainant in this case and in case reference FS50366306 to ensure that it is operating within the spirit of the Act.
38. The Commissioner also notes that there was a delay in the Council conducting an internal review of its decision to refuse the request. The Council has acknowledged this delay and the Commissioner will consider any subsequent complaints he receives to determine whether there is any evidence of a pattern of delays.

Right of Appeal

39. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

40. 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.

41. 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 20th day of September 2011

Signed

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

Legal Annex

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."

Section 16(2) provides that –

"Any public authority which, in relation to the provision of advice and assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.