

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 June 2012

Public Authority: Nottingham City Council

Address: Loxley House
Station Street
Nottingham
NG2 3NG

Decision (including any steps ordered)

1. The complainant requested information in relation to the Audit Commission's report into the allocation of properties to council tenants and related matters at Nottingham City Council (the council) between 2003 and 2005. He also requested information concerning discussions between the council and Nottinghamshire Police (the police) about responsibility for investigating these matters.
2. The Commissioner's decision is that the council was entitled to rely on section 12(1) of the FOIA (costs of compliance exceed the appropriate limit) to refuse to comply with the complainant's request. He considers that the council failed to provide advice and assistance in accordance with section 16 of the FOIA.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation:
 - Provide advice and assistance to allow the complainant to reformulate their request to bring it within the cost limit.
4. The council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Request and response

5. On 7 May 2011, the complainant requested the following:

'Please will you provide me with a copy of any internal reports produced into the alleged housing allocations irregularities as described in the District Auditor's public interest report. Please include in this reports prepared by the much publicised recent internal investigation said to have cost £100k.

Please will you also provide any minutes of meetings or reports/documents between the City Council and Notts Police where the responsibility of investigating this matter was discussed.'

6. The council responded on 23 May 2011. It refused the request as vexatious under section 14(1) of the FOIA.
7. The complainant requested an internal review on 24 May 2011.
8. The council provided its internal review decision on 23 September 2011. It overturned its original decision and withdrew its reliance on section 14(1) of the FOIA. The council provided the complainant with some information that it had disclosed in response to a previous request which included redactions. These redactions were not explained to the complainant. It also provided the complainant with a link to the Audit Commission's report which it stated was exempt under section 21 of the FOIA (information accessible to applicant by other means). The council then stated that it was not obliged to comply with the request as the costs of compliance exceeded the appropriate limit for the purposes of section 12(1) of the FOIA. In the alternative it relied on section 30(1)(a) of the FOIA (investigations and proceedings conducted by public authorities), section 31(1)(a) of the FOIA (prejudice to the prevention or detection of crime), section 36(2)(b)(i) of the FOIA (the free and frank provision of advice) and section 42 of the FOIA (legal professional privilege).

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He asked the Commissioner to consider:
 - the council's application of section 12(1) of the FOIA;
 - the council's application of the further exemptions cited in the internal review response;
 - whether the council holds any further correspondence that would fall within the scope of the request and, in particular, whether it

held correspondence concerning a request for a meeting from the police to the leader of the council;

- the council's failure to cite an exemption for the redactions it made to the information in two of the three email chains that were disclosed; and
 - the council's delay in conducting its internal review.
10. In the course of the Commissioner's investigation, for the avoidance of doubt, the Commissioner asked the council to confirm whether it was relying on section 12(1) of the FOIA in relation to all of the information within the scope of the complainant's request. The council confirmed that it was. It also confirmed that the redactions it made to the information disclosed to the complainant were made under section 40(2) of the FOIA (third party personal data). However, it considered that this information was also covered by section 12(1) of the FOIA.
11. The Commissioner has first considered the council's interpretation of the complainant's request. He has then gone on to consider the council's application of section 12 of the FOIA.
12. In the course of his investigation the Commissioner has taken into account all of the arguments made by the complainant and the council including those not specifically referenced within this decision notice.

Background

13. In January 2009 the Audit Commission published a report concerning the allocation of properties to council tenants and related matters at the council between 2003 and 2005.¹ The report sets out the findings of the Audit Commission's investigation. The report examined two main areas:
- the way in which properties were allocated to tenants; and
 - the use of an in-house council employment agency to recruit staff into the Housing Department.
14. The complainant's request relates to the way in which council properties were allocated to tenants.
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¹ Audit Commission, '*Report under Section 8 of the Audit Commission Act 1998*', January 2009.

15. The Audit Commission's report explains the approach to its investigation as follows:

'The cases investigated were identified both through third party allegations and from audit work undertaken in the follow up to the 2005 Inspection Report. Because of the large number of these potential investigations (nearly 70), our detailed work has concentrated on a sample of cases. We selected the sample after taking into account the quality of the information already available to us and the issues evident in our initial analysis.'

16. The report addresses nine individual cases and summarises its findings in relation to those individual cases. It draws on those cases to make overall conclusions about the operation of the council's housing services between 2003 and 2005. It states the following:

'Below we summarise findings from the individual cases that were examined in detail.

The overall conclusions that we draw from these cases are that:

- there is evidence that allocations of properties were not made in accordance with the points system or the policies of the Council;*
- there is evidence that repairs were arranged outside of the repairs system;*
- there has been inadequate management review; and*
- record keeping was inadequate to support decisions.'²*

Reasons for decision

Objective reading of the request

17. The council has interpreted the scope of first part of the complainant's request to only include any information contained in internal council reports concerning the nine cases considered in detail in the Audit Commission's report published in January 2009. It does not consider
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² Audit Commission, 'Report under Section 8 of the Audit Commission Act 1998', January 2009, p 12.

that any information contained in internal council reports into the other cases of 'alleged housing allocations irregularities' are within the scope of the complainant's request. The Commissioner does not consider that this is an objective reading of the complainant's request.

18. The Commissioner accepts that it would be possible to interpret the wording 'as described' included in the complainant's request to mean internal reports 'as described' in the Audit Commission's report. However, the Audit Commission's report does not describe any internal council reports in relation to the nine cases it considered in detail. Therefore, it is clear that 'as described' in the context of the request refers to the description of the 'alleged housing allocations irregularities' in the Audit Commission's report.
19. As outlined in the background section above, the 'alleged housing allocations irregularities as described in the District Auditor's public interest report' are not limited to the nine cases considered in detail. The report draws on these nine cases as examples to make wider observations and conclusions. Therefore, the Commissioner considers that any 'internal reports produced into alleged housing allocations irregularities', would include within its scope any information included in internal council reports concerning those cases not considered in detail in the Audit Commission's report.
20. The Commissioner contacted the complainant concerning the interpretation of his request. He explained the council's interpretation of his request and the Commissioner's interpretation of his request and asked the complainant to confirm which interpretation he had intended. The complainant confirmed that he had intended the request to cover any internal reports into 'alleged housing allocations irregularities' and that he did not intend the request to be limited to internal reports into the nine cases considered in detail in the Audit Commission's report.
21. Therefore, the Commissioner considers that the council misinterpreted the complainant's request. He does not consider that the request can be objectively read in the way the council has suggested. The Commissioner notes that the council disputes this but has nevertheless provided a revised costs estimate based on the Commissioner's interpretation of the complainant's request. The Commissioner has gone on to consider the council's application of section 12(1) of the FOIA on this basis.
22. It should be noted that the council's narrower interpretation of the complainant's request does not assist the complainant in terms of the costs limit in this case. The council has estimated that the costs limit would be exceeded on either reading of the request.

Section 12 of the FOIA

23. Section 12(1) of the FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.
24. The appropriate limit for the council is £450.³ In estimating the cost of complying with the request the council may only take into account those costs it reasonably expects to incur 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*
25. In calculating the cost of these activities the council must estimate the time it would take the council to comply with the request at a rate of £25 per person per hour.⁵ If it would take the council longer than 18 hours to comply with its obligations under section 1 of the FOIA it is not obliged to comply with the request.
26. The council has stated that in order to comply with the complainant's request it estimates that the costs limit would be exceeded. It also explained that the information is not centrally held in one location and that a number of separate searches would need to be conducted, including the need to recall records from its archive. The council has stated that it has based its estimates on the quickest available method of gathering the information.
27. The council informed the Commissioner that there were further requests which the council considered could be aggregated with this request for the purposes of section 12(4) of the FOIA. The Commissioner made enquiries on more than one occasion concerning which requests the council considered could be aggregated. These enquiries were not addressed by the council. Therefore, no other requests have been taken

³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, Regulation 3(3).

⁴ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, Regulation 4(3).

⁵ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, Regulation 4(4).

into account for the purposes of section 12(4) of the FOIA in determining the costs of compliance.

28. The Commissioner accepts that the council was entitled to aggregate the costs in relation to the two separate requests contained within the complainant's email of 7 May 2011, the first part relating to internal reports into 'the alleged housing allocations irregularities' and the second part relating to communications between the council and the police concerning responsibility for investigating these matters. He considers that these requests relate to the same or similar information for the purposes of Regulation 5(2) of the Fees Regulations.
29. The complainant has stated that he would expect all of the information concerning the investigation to be located in one central file and that it would not take the council long to locate this file.
30. The council provided the following estimates based on the Commissioner's reading of the request:

	Task	Mins	Hrs	Days
	General			
a	Request, locate and retrieve boxes from the archive	180		
	Review of all cases (as per Commissioner)			
b	Obtain and familiarise oneself with electronic log of cases recorded throughout the investigation (71cases)	10		
c	Review log and highlight relevant case, i.e. those featuring housing allocations irregularities	30		
d	Identify location of each investigation file (hard copy or electronic) by reference to electronic log. Estimate 95% of cases or 67 cases will be allocations-related, 10 mins each to identify location of the investigation files and obtain (from boxes / electronic working paper system / 'c' or 'u' drives for 3 Auditors).	670		
e	Review each case file (67). Identify conclusions drawn, how the conclusions were reported and obtain and collate reports in each case. 15 minutes each	1005		

	Task	Mins	Hrs	Days
	Internal Reports			
	Review of files in boxes for evidence of reports (formal, briefing notes, notes of verbal briefing) as follows:-			
f	9 files identified within boxes that will contain summary reports. These are lever arch and from memory were bulging. Estimated min 1 hour each to retrieve and collate reports on file. 9 x 60 mins in total	540		
g	22 files identified within boxes that may contain reports. Min 30 mins each to review and collate reports. 22 x 30 mins	660		
	Double check / reconciliation			
h	Check that all summary reports highlighted in f) reconcile with all separate reports in d) and g) (double check). 180 mins	180		
	Check electronic records to ensure all reports included. This Includes:			
i	Galileo electronic working paper system for reports, 120 mins	120		
j	u drives for 3 Auditors (2 hours per Auditor x 3 = 360 mins)	360		
	Police Meetings etc			
k	Determine location of meeting notes	120		
l	Retrieve and collate 9 meeting notes	30		
m	Collate duplicates of 3 lever arch files (passed to police July 2009) No additional time required; included in f) above			
	TOTALS	3905	65	8.8

31. The council has explained that since it relocated to new offices it has very limited storage facilities and has a large quantity of archived off site material. The relevant individual in the council's internal audit

department has not viewed the contents of most of the boxes that were sent to offsite storage in relation to this matter since 2007. It has explained that this individual was heavily involved in the matter at the time and has a good understanding of the records the council holds which would contain information relevant to the complainant's request.

32. The council has informed the Commissioner that in addition to 31 boxes containing manual files, throughout the investigation, these cases were logged and monitored electronically. It has explained that in order to fully comply with the request it would also have to search these electronic records in addition to the manual files as outlined in the table above. It has also explained that throughout the duration of the investigation there were many examples of internal reporting. The internal audit team included within its definition of reports, formal audit reports, briefing notes, summaries of progress and notes of verbal updates. The Commissioner considers that this was a reasonable approach.
33. The Commissioner asked the council to provide some further details about the size and/or weight of the boxes and what they contain. It has stated that the archive boxes will have a mix of lace files (max 11) or lever arch files (max 4) in them. The council has estimated how many manual files would have to be reviewed in order to respond to the request as outlined in part f and g of the table above. It did so with reference to the council's archive record which includes a reference and a brief description of each file in each box.
34. The council has stated that it has already exceeded the costs limit in relation to this request having spent four days on the matter. The council referred to activities which are irrelevant to the determination of costs, such as formulating responses to the request, and did not differentiate these from the activities it is entitled to take into account for the purposes of section 12 of the FOIA. The Commissioner explained to the council that, as the council could not provide a breakdown of the time taken to deal with the request so far, he would not take this into account.
35. The Commissioner has considered whether the estimate provided by the council is sensible and realistic. The estimates provided by the council include estimates of the time it would take to search electronic and manual records. The Commissioner considers that it is reasonable for the council to include searches of both electronic and manual records in its estimate of the time it would take to fully comply with the complainant's request to ensure all relevant information was identified. He considers that the council has appropriately narrowed down the areas it would need to search electronically and in manual records based on the internal audit team's knowledge of the records containing the

information and based on the brief descriptions of the content of the relevant files in the archive record. The council has not taken into account any costs associated with activities that it is not permitted to take into account under Regulation 4(3) of the Fees Regulations.

36. The time it would take to undertake each of the activities in the table is based on an estimate provided by an employee in the council's audit department that was actively involved in the investigation and has a good knowledge of the records concerned. The Commissioner considers that these estimates are reasonable and are not excessive. However, he is not convinced that the council has provided cogent evidence that the estimates provided for the activities under the heading 'Double check / reconciliation' would be necessary in order to respond to the request. These activities appear to duplicate other activities included within the estimate which, if prudently conducted, would not require double checking. However, if the activities under the heading 'Double check / reconciliation' are discounted then complying with the request would still take the council considerably longer than 18 hours.
37. The Commissioner is satisfied that the estimates provided by the council, notwithstanding the above, are sensible, realistic and supported by cogent evidence. He considers that they are based on the knowledge and expertise of an employee that has a detailed understanding of the relevant records that the council holds and has provided a reasonable estimate of the time it would take for the council to comply with the request. Therefore, he is satisfied that section 12(1) of the FOIA is engaged and the council is not obliged to comply with the complainant's request.
38. It is not necessary to go on to consider the council's reliance on section 21 of the FOIA, section 30(1)(a) of the FOIA, section 31(1)(a) of the FOIA, section 36(2)(b)(i) of the FOIA, section 40(2) of the FOIA and section 42 of the FOIA although this is referred to in the other matters section of this decision notice.

Section 16 of the FOIA

39. Section 16 of the FOIA states:

'16(1) 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.

(2) Any public authority which, in relation to the provision of advice or 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.'

40. The Code of Practice issued under section 45 of the FOIA states:

'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.'

41. The council has stated that it did not provide the requester with any advice and assistance because it considered that the work it had already carried out in relation to the request, at the time of the internal review, had exceeded the costs limit. However, the council could not provide a breakdown of the four days it said had already been spent on the request and it was not entitled to take into account some of the activities it conducted within that time for the purposes of section 12(1) of the FOIA.

42. The Commissioner considers that it would have been possible for the council to provide the complainant with advice and assistance to reformulate his request and bring it within the costs limit. Therefore, the Commissioner considers that the council failed to comply with section 16 of the FOIA. The council is required to provide the requester with advice and assistance in order to reformulate his request to bring it within the costs limit.

Other matters

Time for Internal Review

43. The Commissioner is concerned about the delay in the council providing the complainant with an internal review decision. The Commissioner has issued guidance on the time limits for carrying out internal reviews.⁶ He

⁶ Information Commissioner's Office, 'How Long do I have to do an internal review?', February 2007.

considers that a reasonable time for completing an internal review is 20 working days and in no case should it exceed 40 working days.

44. The internal review was requested on 24 May 2011. The council did not provide its internal review decision until 23 September 2011. This is more than double the maximum recommended time scale for carrying out an internal review and is unacceptable. The council should put in place measures to ensure that these delays do not reoccur in the future.

Citing exemptions as alternatives to section 12 of the FOIA

45. As outlined above, the council's internal review decision on 23 September 2011 cited a number of exemptions that the council considered applied in the alternative to section 12(1) of the FOIA. The Commissioner is concerned that the council cited these exemptions without determining what information it held within the scope of the request and without having retrieved the information. The internal review response was also unclear as to whether section 12(1) of the FOIA was being applied to the whole request or only part of it.
46. The Commissioner considers that in order to assess whether these exemptions were engaged, and where applicable whether the public interest balance favoured maintaining the exemption(s), it would be necessary to consider the specific content of the information concerned. The reference to a number of exemptions as alternatives to section 12(1) of the FOIA was confusing and cannot have been based on a detailed analysis of whether the relevant exemption(s) applied to the specific information that the council holds within the scope of the request. The council should ensure that in future any exemptions cited in a refusal notice are based on a detailed analysis of the application of the exemption to the specific information within the scope of the request.

Right of appeal

47. 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

48. 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.
49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

**Pamela Clements
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Wycliffe House
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