

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 July 2015

Public Authority: Hertfordshire County Council
Address: County Hall
Pegs Lane
Hertford
SG13 8DQ

Decision (including any steps ordered)

1. The complainant has requested information relating to complaints made under the Equality Act 2010. The Commissioner's decision is that Hertfordshire County Council has correctly applied the exemption at section 12 of the FOIA where the cost of compliance exceeds the appropriate limit. However, the Commissioner has also decided that Hertfordshire County Council did not provide adequate advice and assistance under section 16 of the FOIA.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Provide the complainant with appropriate advice and assistance with regard to the requested information that can be provided, to enable him to make an appropriate refined request if necessary.
3. The public authority must take this step 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 Act and may be dealt with as a contempt of court.

Request and response

4. On 29 December 2014, the complainant wrote to Hertfordshire County Council ('the council') and requested information in the following terms:

"[Named individual] claims that she consulted with the Council's Chief Legal Officer about my complaint, and I would therefore like **i) copies of any written correspondence between [named individual] and the Chief Legal Officer that relate to my original Stage 1 complaint, along with any file notes and records of telephone conversations or face-to-face conversations that took place...**

...I would also like to request **ii) copies of the files relating to every complaint that has been made to the Council under the Equalities Act since September 2011. These files should include all correspondence that relates to each case – although I understand that any personal information must be redacted."**

5. The council responded on 30 January 2015. In relation to request i) the council said that it did not hold the specific requested information but did hold emails on the topic which it provided subject to redactions for personal data and information subject to legal professional privilege. In relation to request ii) the council applied the exemption where the cost of compliance exceeds the appropriate limit at section 12 of the FOIA.
6. The complainant requested an internal review in relation to request ii) on 30 January 2015.
7. The council provided an internal review on 25 February 2015. It maintained its original position in relation to section 12 of the FOIA. However, it provided the number of complaints to the Environment Department which have been recorded as 'discrimination', and therefore identified as falling under the Equality Act 2010, but did not disclose those complaint files relying on the exemption for personal data at section 40(2) of the FOIA.
8. In the letter requesting an internal review, the complainant also made the following new requests for information:

"1) Please provide me with every 'equality impact assessment' that has been completed by the council since 2011. Surely there must be a separate file for all of these documents; as, if these 'assessments' are really so difficult to find, they are clearly of limited value to the Council in terms of proving that you provide 'responsive services and customer care' (Theme 4 of the Council's 'Equality Strategy 2013-2015').

2) Please provide me with the 'equality related evidence' from customer satisfaction complaints that has been 'shared' 'across and between services' since 2011. Again, there must surely be copies of this 'evidence', and I would imagine much of it has been communicated via email – so will be quick and easy to forward on to me."

9. The council responded on 27 February 2015 and applied the exemption where the cost of compliance exceeds the appropriate limit at section 12 of the FOIA. However, it provided some information held by the Equality and Diversity Team subject to redactions for information exempt under sections 40(2) and 31(1)(a) of the FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 11 March 2015 to complain about the way his request for information had been handled.
11. The Commissioner telephoned the complainant on 6 March 2015 to clarify the scope of his complaint. It was agreed that because the complainant had not yet requested an internal review of the requests made on 30 January 2015, the Commissioner would not, at this stage, investigate the application of section 12 to relation to the requests made on 30 January 2015.
12. The Commissioner has considered the application of section 12 in relation to the request for "copies of the files relating to every complaint that has been made to the Council under the Equalities Act since September 2011. These files should include all correspondence that relates to each case – although I understand that any personal information must be redacted."
13. The Commissioner has also considered whether the council was in breach of its obligation under section 16 to provide advice and assistance.

Reasons for decision

Section 12 – Exemption where cost of compliance exceeds appropriate limit

14. Section 12 of 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 cost limit which, in this case, is £450 as laid out in section 3(2) of the fees regulations.
15. Regulation 4(3) of the Fees Regulations states that an authority, when estimating whether complying with a request would exceed the appropriate limit, can only take into account the costs it reasonably expects to incur in:

- determining whether it holds the information;
 - locating the information, or documents containing it;
 - retrieving the information, or documents containing it; and
 - extracting the information from any documents containing it.
16. As the costs are calculated at £25 per person per hour for all authorities regardless of the actual cost or rate of pay, in this case the limit will be exceeded if the above activities exceed 18 hours.
17. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate and what amounts to a reasonable estimate has to be considered on a case by case basis. The Information Tribunal in the case of *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency*¹ said that a reasonable estimate is one that is "...sensible, realistic and supported by cogent evidence".
18. In his guidance on this subject², the Commissioner states that a sensible and realistic estimate is one which is based on the specific circumstances of the case and should not be based on general assumptions.
19. In the aforementioned guidance, the Commissioner also states that;
- "A public authority is not obliged to search for, or compile some of the requested information before refusing a request that it estimates will exceed the appropriate limit. Instead, it can rely on having cogent arguments and/or evidence in support of the reasonableness of its estimate. It is good practice to give these arguments or evidence to the requestor at the outset to help them understand why the request has been refused. This reasoning is also likely to be required if a complaint is made to the Information Commissioner.
- However, it is likely that a public authority will sometimes carry out some initial searches before deciding to claim section 12. This is because it may only become apparent that section 12 is engaged once

¹ Appeal number EA/2006/0004, 30 October 2007

² https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

some work in attempting to comply with the request has been undertaken.”

20. The council provided the complainant with the following breakdown of its estimate that responding to the request would exceed the appropriate limit:

“We would need to check every complaint file to see if the Equalities Act was quoted, or if the complaint referred to equalities in some form. To do this would require a manual check of every complaint file since Sept 2011, for every department.

For the time period requested, Hertfordshire County Council received 2153 formal complaints. We estimate it would take one officer 30mins to check each file, therefore taking 1,076 hrs and 30mins to locate, identify and extract the information you have requested.

Furthermore, to provide a further breakdown to just the Environment Department for 2014/15, it would require one officer to carry out the same checks on 134 formal complaint files, which would take 67hrs and exceeds the appropriate limit.”

21. The Commissioner sought further information from the council in relation to the costs estimate undertaken, in order to assess whether its estimate was reasonable and based on cogent evidence. He specifically asked for clarification as to whether a sampling exercise had been undertaken to determine the estimate provided, whether an exercise was carried out to establish that it would take one officer 30 minutes to check each file, and whether it is possible to say how large each complaint file is. In addition, the Commissioner asked whether the estimate had been based upon the quickest method of gathering the requested information and whether the Environment Department is the only department that has an electronic record of complaints. He also enquired as to whether there are any requirements on the council to record complaints made under the Equality Act.
22. The council said that it does not have one single department that deals with complaints, instead each directorate has a team or officer that is responsible for logging, managing and responding to that complaint. It said that the following departments have a team that deal with complaints:
- Childrens Services
 - Libraries & Heritage Services
 - Hertfordshire Fire and Rescue Service
 - Resources and Performance
 - Health and Community Services

- Environment Services

23. The council explained that all departments deal with complaints in line with its complaints procedure, regardless of the subject matter, and that there is no requirement for the subject matter to be recorded anywhere but in the relevant complaint file or to record if the complaint is in relation to the Equality Act. It said that each department is responsible for the recording and responding to the complaints that they receive and as a consequence there is no general requirement for information to be recorded or held electronically. It explained that the information that is recorded about each individual complaint will be in line with that department identifying if it has met the key performance indicators set by their directors, for example the date received and date responded to.
24. The council further explained that although there is no centralised process in relation to recording the subject of the complaint, some information in relation to the subject of the complaint maybe recorded but this will depend on the opinion of the officer responding to the complaint. It said that a complaint concerning the Equality Act maybe logged against that subject or it may be listed as discrimination or any other subject title the officer feels is relevant. It gave an example of cases where the complainant did not mention the Equality Act in their complaint, but it was considered as applicable to this Act by the responding officer, which would mean that this would not originally have been recorded against that Act and could only be traced by reading the complete file.
25. In relation to the estimate provided, the council said that when the original estimate was compiled, not all complaints departments were contacted and that in order to provide a full insight of the way that complaints are recorded across the council, each department has now been contacted as any department could conceivably receive a complaint in relation to the Equality Act. The number of complaints that all the departments have received since 2011 is 4,754. In order to respond to the Commissioner's enquiries, the council said that each department carried out a sampling exercise to determine the time required to read through a file and the average time was 16 minutes per file which would equate to 1,267 hours of officer time to determine if each complaint it holds is applicable to the request and to extract that information. The council confirmed that the original estimate of 30 minutes was based on an officers estimates and not a sampling exercise.
26. The council said that it does not believe that it is possible to determine the approximate size of a complaint file as they will differ in size in relation to the subject or stage of the complaint. It gave the example that a complaint that has gone to the Ombudsman may consists of 100s

of pages while another file may consist of 4 pages. It also said that the number of complaints it receives would not make it possible to get an average without taking an appropriate sample which would be a high number of files and high level of work.

27. It was confirmed by the council that three of its departments use an Excel Spreadsheet for the logging of complaint details and three have a departmental database for logging complaints. It said that while it may be possible to discern some complaints that could be applicable to this request by searching these systems, to provide all complaints concerning the Equality Act would require each file to be read (for the reasons listed above).
28. The council has submitted that there is no way of being in a position to provide a full and concise response to this request without the manual checking of each complaint across the time period requested. It said that it is for that reason that the estimate that has been provided in relation to this complaint is based on a sampling of a file held by each complaints department/officer. It confirmed that there is no requirement on the council to record if a complaint is made under the Equality Act.
29. The Commissioner accepts the council's arguments as to why each of its complaint files would need to be manually checked to identify if a complaint was made under the Equality Act, that being that such information isn't always specifically recorded and there is no requirement to do so. He notes that in order for the average time of 16 minutes to be arrived at, each department was asked to choose a file at random. The Commissioner considers that choosing a file at random would not necessarily produce a realistic estimate. However, even if the council took a conservative time of 2 minutes to check each file, the time taken to comply with the request would exceed 158 hours.
30. The Commissioner therefore finds that the council correctly refused the complainant's request on the grounds of cost for compliance under section 12(1) of FOIA, as complying with the request would exceed the appropriate limit.

Section 16 - Duty to provide advice and assistance

31. Section 16 of the FOIA states that it shall be the duty of a public authority to provide advice and assistance to requesters, so far as is reasonable, and where a public authority conforms with the code of practice under section 45 in relation to the provision of advice and assistance, it will be taken to comply with the duty imposed.
32. Where a public authority cites section 12, paragraph 14 of the section 45 code of practice indicates that the authority should consider providing

an indication of what, if any, information could be provided within the costs limit. This allows the applicant to choose how to refine the request to successfully obtain a more limited piece or section of the requested information.

33. The Commissioner asked the council to clarify the nature of any advice and assistance given to the applicant in this case. The council said that it is satisfied that it had on this occasion met its obligation under section 16 throughout its consideration period. It said that in its first response, it offered the complainant the chance to receive his own complaint files and at the internal review stage it provided the complainant with further information that it had obtained in relation to the subject matter of the request. It said that it does not feel that it is in a position to provide any further advice or assistance and that in light of the way that the information is held, and the processes required to retrieve and extract information relevant to this request, it is entirely possible that it may not be able to provide any meaningful information to the complainant within the cost limit.
34. The Commissioner considers that the council did not fulfil its duty to provide advice and assistance by disclosing certain information in response to the request. The council had, in effect, removed the choice from the complainant as to what information was of most interest to him and the Commissioner considers that the choice of where to direct limited resources should always be made by the requester.
35. The Commissioner considered that it would have been reasonable for the council to explain to the complainant that although not all complaints are recorded as being made under the Equality Act, three of its departments log complaints using an Excel Spreadsheet and three departments use a database and therefore the complainant could refine his request to complaints recorded as being made under the Equality Act on those systems, which may have enabled the council to provide information held within the appropriate limit.
36. By not sufficiently indicating what information could be provided within the appropriate limit, the Commissioner considers that the council breached section 16 of the FOIA.

Right of appeal

37. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

38. 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.
39. 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

Andrew White
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