

## Freedom of Information Act 2000 ('FOIA')

### Decision notice

**Date:** 25 July 2016

**Public Authority:** Nottinghamshire County Council  
**Address:** County Hall  
West Bridgford  
Nottingham  
NG2 7QP

### Decision (including any steps ordered)

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1. The complainant has requested information regarding complaints of harassment and bullying at work.
2. The Commissioner's decision is that Nottinghamshire County Council has not provided sufficient reasons for applying the exemption where the cost of compliance exceeds the appropriate limit at section 12 of the FOIA. He has also decided that Nottinghamshire County Council did not provide adequate advice and assistance under section 16 of the FOIA.
3. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation:
  - Issue a fresh response under the FOIA without relying on section 12 of the FOIA, providing appropriate advice and assistance if necessary.
4. 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

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5. On 12 November 2015, the complainant wrote to Nottinghamshire County Council and requested information in the following terms:

"This request is being made to make the public at large and people in each authority aware of which councils are the worst offenders or the better examples when it comes to bullying in the workplace. All councils have very similar anti-bullying / dignity at work policies, but there seems to be a difference in the level of bullying. This is intended to statistically show those differences.

- 1) How many employees of your authority have made an official complaint of harassment and bullying at work since the 1st April 2009?
  - 2) How many of these complaints were upheld in favour of the complainant?
  - 3) How many of those which were not upheld in favour of the complainant went on to Appeal?
  - 4) How many of those that went to Appeal were found to favour the complainant?
  - 5) How many complaints went on to an Employment Tribunal?
  - 6) How many of these were found to uphold the complaint?
  - 7) Out of how many of those allegations (the number given to question 1) did the complainant of bullying claim that the bullies were telling lies?
  - 8) How many staff does your authority have and what is the current population within your authority's area?
6. On 24 November 2015 the council asked for clarification as to whether the request is in relation to just bullying or relates to all harassment cases. It also explained that it only has consolidated records for this information from April 2012 and to provide the information from 2009 would entail a manual search of older casework files. It estimated that it will take one officer in excess of 18 hours to extract the information requested from the case files and that under section 12 of the FOIA it is not obliged to process requests that exceed this limit.
  7. The complainant replied on 25 November 2015 stating that he wants the request to include harassment and to take the date from April 2012 instead of 2009.
  8. The council responded on 10 December 2015. In relation to question 1, it said that since April 2012 there have been 53 cases raised by directly employed staff of the authority and that all cases were resolved through

mediation without recourse to further formal proceedings. It answered 'not applicable' to questions 2 – 6, said that the information is not recorded for question 7 and provided the information requested at question 8.

9. On 12 December 2015 the complainant requested an internal review. He asked for clarification as to why question 2 is not applicable and provided answers from other local authorities to the same request.
10. The council provided an internal review response on 7 January 2016. It said that the original response was correct but it should have explained more clearly why it could not provide the detail requested. It then stated the following:

"There are two stages to this procedure: an informal stage and a formal stage. If the complaint cannot be resolved to the complainant's satisfaction at the informal stage, it will be dealt with under the formal stage. It is only under the formal stage that cases can progress to appeal.

All of the 53 cases of harassment and bullying that have been raised since 1 April 2012 have been dealt with at the informal stage.

During the informal stage all parties agree to set aside their differences and try to find a way to move forward. Although line managers should keep local records of any meetings and decisions (for 3 years), the procedure does not require an outcome to be defined and recorded as upheld or not upheld. I did consider whether it would be possible to ask all the managers involved to check their records to see whether any outcome was recorded in this way or whether it could be determined from the notes if the allegation was accepted or not, however, this would require a great deal of officer time.

You may be aware that there is a statutory limit to the amount of time authorities are required to spend retrieving and collating information in order to respond to a request. This is defined in the Fees and Appropriate Limit Regulations and currently stands at 18 hours. I believe that it would take longer than this to determine whether there was an outcome in each case that could be defined as either upheld or not. Under Section 12 of the Freedom of Information Act we are not obliged to process requests that exceed this limit.

I can confirm that as none of these cases progressed to the formal stage, there were no appeals and no cases went on to an Employment Tribunal."

11. On 9 February 2016, the complainant asked the council to add the following question to his request:

“Q9) Out of the number in the response to question 1, how many of the complainants said that they had been called "a loner"?”

12. The council replied on 17 February 2016. It refused to provide the information citing the exemption at section 12 of the FOIA.

### Scope of the case

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13. The complainant contacted the Commissioner on 19 February 2016 to complain about the way his request for information had been handled.

14. The Commissioner has considered the council's application of the exemption where the cost of compliance exceeds the appropriate limit at section 12 of the FOIA to the information requested at parts 2, 7 and 9 of the request.

15. He has also considered whether the council was in breach of its obligation under section 16 to provide advice and assistance.

16. The complainant asked the Commissioner to note the guest response on the WhatDoTheyKnow thread as follows:

“Speaking from personal experience, the following statement: 'All cases were resolved through mediation without recourse to further formal proceedings.' is untrue. Unless Nottinghamshire county council deems resignation in response to unlawful demands to be 'resolved' and in which case formal proceedings were involved and far from 'resolved'.

17. The Commissioner asked the council to consider the above statement and provide details of the formal proceedings referred to, or any comments on the matter. The council replied that it does not know what this relates to and can only assume that it was posted by someone who worked for the council and resigned because of some unresolved issues. It said that without further details it cannot comment further.

18. The Commissioner does not consider that a comment by a 'guest' on a WhatDoTheyKnow site is sufficient evidence to affect the decision in this case. The comment may relate to an incident outside the scope of this request.

## Reasons for decision

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### Section 12 – Exemption where cost of compliance exceeds appropriate limit

19. Section 12(1) 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.
20. Section 12(2) allows a public authority to refuse to confirm or deny whether it holds information of the nature requested if simply to do so would in itself exceed the appropriate limit.
21. 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.
22. 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.
23. 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*<sup>1</sup> said that a reasonable estimate is one that is "...sensible, realistic and supported by cogent evidence".

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<sup>1</sup> Appeal number EA/2006/0004, 30 October 2007

24. In his guidance on this subject<sup>2</sup>, 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.
25. 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 some work in attempting to comply with the request has been undertaken.”
26. In its initial responses, the council said it would require a great deal of officer time to establish if the information was held and that it would exceed the appropriate limit but did not provide any further details or breakdown.
27. 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 also specifically asked for clarification as to whether a sampling exercise had been undertaken and whether its estimate had been based upon the quickest method of gathering the requested information.
28. The council reiterated that all of the complaints were resolved at the informal stage of its process and that there is no requirement to record the outcome of the informal process in terms of upheld or not upheld or to keep detailed notes of any discussions. It explained that no records of the process are held centrally and whether any notes are taken and the

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1199/costs\\_of\\_compliance\\_exceeds\\_appropriate\\_limit.pdf](https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf)

level of detail included in those notes is at the discretion of the employees and their manager who would have facilitated the process.

29. The council further explained that it did consider whether it might be possible, if there were notes held on the individual's personnel file, to determine whether the outcome could be deemed to be in favour of the complainant. However, because the informal process is about putting differences aside and agreeing to move forward, it said that it is unlikely that a conclusion in favour of either party could be drawn from any notes and to reach any such conclusion would involve an element of judgement on the part of the person reviewing the file. It also said that there is no guarantee that any notes will have been made at all and therefore carrying out this exercise could only provide a very partial response.

30. In relation to the estimate specifically, the council stated the following:

"To begin to determine whether there are any notes, we would first need to identify the individual employee and whether the employee is still employed by the council. This will allow us to decide where any personnel file is most likely to be held. We will also need to determine who the current line manager is and also who the manager was at the time of the incident. Managers keep operational personnel records in different ways: some may archive day-to-day personnel files when the employee no longer works in their team and others pass those files on to the new team manager. We estimate that identifying the employees, locating the managers and confirming where the file is held will take at least 15 minutes per record.

Once the file is located, each manager will need to undertake a manual search of the employee record to see if there are any notes of the informal process, and if some notes are held, these will need to be read to decide whether it is possible to conclude that the outcome was upheld in favour of the complainant, whether there were claims that the alleged bully was telling lies and whether the employee referred to themselves as a loner. We estimate that this will take an average of 30 minutes per record and possibly considerably longer depending on the size of the file.

Therefore, we estimate that it will take an average of at least 45 minutes per record which equates to 39.75 hours to determine whether any information is held."

31. The council confirmed that it did not undertake a sampling exercise. It also said that a manual search is the only method of gathering the information because it is not recorded centrally or electronically and if it is recorded at all it is likely to be in typed or handwritten documents in

individual personnel files. Therefore, it is not possible to search any database on such words as “upheld”, “loner” or “lies”.

32. The Commissioner has considered the council's estimate. Given that the council must have carried out an exercise to determine the number of complaints falling within the scope of the request as 53, he does not follow why the first step would be to identify the individual employees and therefore doubts whether the estimate of 15 minutes per record to identify the employees, locate the managers and confirm where the file is held is realistic.
33. In relation to the 30 minutes to conclude whether the outcome was upheld or not upheld and whether there were claims of telling lies and whether the employee referred to themselves as a loner, the Commissioner notes that the council has expressed that determining the outcome will involve an element of judgement. As per his guidance on determining whether information is held<sup>3</sup>, the Commissioner considers that if answering a request involves exercising sophisticated judgement, the information will not be held, but if only a reasonable level of judgement is required the information will be held. Given the council's explanation that the aim of the informal process is to put aside differences and agree to move forward, he considers that making a judgement on whether the outcome was upheld or not upheld could require exercising a sophisticated judgement and therefore it would not be appropriate to include time spent making such a judgement, only time spent for a reasonable level of judgement would be appropriate.
34. The Commissioner also notes that the council has stated that there is no guarantee that any notes will have been made at all. Therefore, it is not appropriate to estimate that 30 minutes would need to be spent for each of the 53 potential records. If no records were held in relation to a particular complaint then it follows that no time would need to be spent reading them.
35. As stated above, the council said a manual search is the only method of gathering the information. However, the Commissioner notes that the council has also said that some of the notes could be typed. If these typed notes are on an electronic system, such as Word, those notes could be searched using keywords such as 'upheld, 'loner' or 'lies' which would reduce the reading time necessary to establish if the information is held.

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<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1169/determining\\_whether\\_information\\_is\\_held\\_foi\\_eir.pdf](https://ico.org.uk/media/for-organisations/documents/1169/determining_whether_information_is_held_foi_eir.pdf)



36. The Commissioner notes that the council has neither carried out a sampling exercise nor explained what the estimate is based on, for example whether it is based on previous experience or whether it is a 'best guess'. Therefore, and in conjunction with the reasons stated in the preceding four paragraphs, he cannot conclude that the estimate is "sensible, realistic and supported by cogent evidence". The Commissioner therefore has no choice but to conclude that the exemption is not engaged.
37. The Commissioner considers that the council has been provided with sufficient opportunity to provide its rationale for withholding the requested information. The rationale should have been in place since the request was refused and therefore opportunities for providing this existed at the original refusal, at the internal review and when requested by the Commissioner.

### **Section 16 - Duty to provide advice and assistance**

38. 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.
39. 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.
40. The Commissioner asked the council to clarify the nature of any advice and assistance given to the applicant in this case.
41. The council said that it did not offer any further advice or assistance to the complainant as part of the internal review because its view was that the information was not held and undertaking the exercise was unlikely to produce any useful information. Therefore, reducing the scope of the request even further, for example, to just those cases recorded in the last year, would yield even less. It also said that it did not offer advice or assistance when it applied section 12 to the second request because the officer dealing with the requests took account of the fact the complainant had stated that the reason for his request was to highlight the statistical differences between authorities and the view was taken that any limited information that it might be able to provide in this one area would be of little use for comparative purposes. It further explained that if it was a requirement of its mediation process to record and retain

full and extensive notes of discussions and outcomes and, therefore, it knew that it could answer for all 53 cases, then a different view would have been taken and it would have suggested to the complainant that it could confine its search to those cases recorded in the last year. The council also said that it should have offered further advice to the complainant about how the mediation process is carried out, and its purpose, and the likelihood of the information requested being found in any records so that the complainant could then have decided whether it would have been useful to refine the request in any way.

42. By not sufficiently indicating what information, if any, could be provided within the appropriate limit, the Commissioner considers that the council breached section 16 of the FOIA.

## Right of appeal

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43. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

44. 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.
45. 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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