

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 June 2017

Public Authority: Staffordshire County Council
Address: County Buildings
PO Box 11
Martin Street
Staffordshire
ST16 2LH

Decision (including any steps ordered)

1. The complainant has requested information regarding claims made to Staffordshire County Council (the Council) for incidents involving potholes.
2. The Commissioner's decision is that the Council is entitled to rely on section 12(1) of the FOIA but has breached section 16 of the FOIA.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation:
 - Provide appropriate advice and assistance to the complainant pursuant to the duty provided at section 16 of the FOIA. The advice and assistance should be given with the view to determining what, if any, information relevant to the request can be provided within the appropriate costs limit and allowing the complainant to make a new request should this be possible.
4. The public authority 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 Act and may be dealt with as a contempt of court.

Request and response

5. On 13 June 2016, the complainant wrote to the Council and requested information in the following terms:

Can you please provide the following information for the last five full years for pothole incidents reported to Staffordshire County Council.

- 1. The total number of claims/incidents reported*
 - 2. The number of claims/incidents that were dealt within the 90 days required by Gallagher Bassett.*
 - 3. The number of claims that were settled in part or in full by the Council/the insurance company at the time.*
 - 4. Confirmation of who the insurance company were for that year.*
6. The Council responded on 6 July 2016 and provided the complainant with responses to parts 1, 3 and 4 for the past five financial years.
7. The Council explained that the information requested in part 2 of the request was interpreted as claims reported where a liability decision had been provided by Gallagher Bassett within 90 days of acknowledging the claim. The Council confirmed that another insurance company handled the claims for the years 2011/12, 2012/13 and 2013/14.
8. The Council informed the complainant that it would need to examine each file in order to ascertain whether it had been resolved within 90 days. The Council explained that for the two years that Gallagher Bassett had provided the service, there has been 1355 claims relating to potholes.
9. The Council informed the complainant that it considered that each file would take two minutes to locate, retrieve and examine in order to collate the information requested in part 2 of the request. The Council confirmed that this would take an overall time of 45 hours and therefore exceeded the appropriate limit at section 12 of FOIA.
10. Following an internal review, the Council wrote to the complainant on 17 August 2016 and maintained its reliance on section 12 of the FOIA.

Scope of the case

11. The complainant contacted the Commissioner on 16 September 2016 to complain about the way his request for information had been handled. The complainant set out that he considered the requested information should be easily accessible in order for the Council to monitor the service contracted to Gallagher Bassett.
12. The Commissioner's remit does not extend to commenting on or issuing decisions on what information should be held by a public authority or how it should be held. The Commissioner is only able to issue decisions on whether a public authority has handled a request for recorded information in accordance with the relevant legislation.
13. The Commissioner considers the scope of this investigation to be whether the Council is entitled to rely on section (12) of the FOIA in response to part 2 of the complainant's request.

Reasons for decision

Appropriate legislation

14. Regulation 2(1) of the EIR provides a definition of what constitutes environmental information¹.
15. The request to the Council is about claims made following an incident involving a pothole.
16. Having considered the nature and wording of the request, the Commissioner does not consider that it constitutes or relates to measures which are likely to impact upon the matters identified in regulation 2(1)(a) or 2(1)(b). Although she acknowledges that the definition of environmental information is subject to a wide interpretation in respect of the EIR, she considers that the request is several steps removed from the definition of environmental information as claims and the associated service time frames in isolation do not constitute a measure as defined in regulation 2(1)(c); consequently she does not consider that the specific request falls within the scope of regulation 2(1)(e).

¹ <http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made>

17. The Commissioner is satisfied that the Council was correct to handle the request under the FOIA.

Section 12 – Cost of compliance exceeds the appropriate limit

18. Section 12(1) of the FOIA states 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.

19. In other words, section 12 of the FOIA provides an exemption from a public authority's obligation to comply with a request for information where the cost of compliance is estimated to exceed the appropriate limit.
20. The limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 at £600 for central government departments and £450 for all other public authorities. The fees regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively creates an appropriate limit of 18 hours for this public authority.
21. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) states that an authority can only take into account the costs it reasonably expects to occur in:
- Determining whether it hold the information;
 - Locating the information, or a document containing it;
 - Retrieving the information, or a document containing it; and
 - Extracting the information from a document containing it.
22. The four activities are sequential, covering the retrieval process of the information from the public authority's information store.

Would compliance exceed the appropriate limit?

23. Section 12 explicitly states that public authorities are only required to estimate the cost of compliance with a request, not give a precise calculation. In the Commissioner's view, an estimate for the purposes of section 12 has to be 'reasonable': she expects it to be sensible, realistic and supported by cogent evidence.
24. The Council confirmed that the records were held by Gallagher Bassett who has a contract with the Council to administer claims relating to

various matters. The Council confirmed that Gallagher Bassett would be required to extract the requested information in order for the Council to meet its obligations under the FOIA.

25. The Council confirmed that in order to collate the information, it would have to review each of the 1355 claim files identified as pothole incidents in the two years that Gallagher Bassett were identified as the insurance company.
26. The Council explained to the Commissioner that it did not record the length of time a claim took to be resolved and could not, therefore, search by this parameter.
27. The Council explained that it would be required to review the open and close dates of each file to ascertain whether it had been resolved within 90 days.
28. The Council set out that if it allowed two minutes per file to locate the correct files, review the relevant dates and note whether it was resolved within 90 days, this would take an overall time of 45 hours and exceed the appropriate limit of 18 hours for this public authority.
29. The Commissioner returned to the Council to request further detail and the Council provided a submission in which its estimate for the time required per file doubled.
30. The Council confirmed that it had contacted Gallagher Bassett to conduct a thorough search of the records and provide an estimate of the time required to comply with the request.
31. Gallagher Bassett stated that 179 of the claim files were in paper format and stored in archive. Gallagher Bassett informed the Council that the cost of retrieving a claim from the archive is £50.
32. The Council also confirmed that the compiling the requested information would require undertaking the following tasks:
 - Generate a report listing the claims submitted during the relevant period
 - Recall the 179 claims in paper format
 - Review each of the 1355 claims and establish:
 - The date of acknowledgement
 - The date the 90 day period would expire
 - The date when the decision was conveyed to the claimant

33. Gallagher Bassett estimated that it would require four minutes per file creating an overall estimated time of 90 hours in addition to the cost of retrieving the paper files, £8950.
34. The Council confirmed that its original estimate of two minutes had been based on the time taken to comply with previous similar requests but having pressed Gallagher Bassett for a more detailed figure, it had doubled to four minutes per file.
35. The Commissioner set out to the Council that the complainant had concerns regarding the recording of Gallagher Bassett's service standards and raised that the complainant considered this information should be held in an easily accessible format in order to assess Gallagher Bassett's performance as a contractor.
36. The Council confirmed that the contract is managed by a set of standards which are monitored and are deemed reasonable to enable the contract to be performance managed when necessary. The Council confirmed there was no statutory or business requirement to hold the requested information and no obligation on the Council to incorporate additional measures into the contract.

The Commissioner's position

37. The Commissioner is not persuaded by the Council's increased estimate of four minutes per file in addition to the £8950 quote to retrieve the paper files from storage.
38. The Commissioner considers that an average of two minutes is a more reasonable estimate and is mindful that, even if the estimate was halved to 1 minute per file, the overall time required to comply with the request would be more than 22 hours which still exceeds the appropriate limit of 18 hours for this public authority.
39. The Commissioner is not persuaded that the £50 fee to recall each paper file is necessarily a reasonable cost to include in the estimate. Although this type of activity may be one that falls within the permitted activity of 'retrieving the information or a document containing it', the Commissioner considers that the decision to include the particular fee here has not been sufficiently supported .
40. Paragraph 18 and 20 of the Commissioner's guidance on section 12 state:

18. Sometimes, a public authority may expect to incur costs other than those relating to staff time when carrying out the permitted activities. The Key to deciding whether or not these costs can be included in the estimate is whether it would be reasonable to include those charges.

20. If the public authority uses off-site storage, it will depend on the terms of the contract between the public authority as to whether the costs of locating, retrieving and transporting the information from deep storage can be included in the estimate. Public authorities should note that the Commissioner may want to see the contract in order to be satisfied that such costs can be correctly included".

41. In the circumstances of this case, the Commissioner has not returned to the Council for information regarding the £50 fee to retrieve a paper file from the archive as it would be disproportionate to continue an investigation once it is clear that the appropriate limit is exceeded on staff time alone.
42. Nevertheless, the Commissioner would like to make clear that although she has accepted that the appropriate limit would be exceeded in complying with this request, she could not have accepted all of the costs presented by the Council based on the strength of the submissions provided. The Council should therefore consider future applications of section 12 of the FOIA carefully should it include the retrieval fee of £50 per individual file.
43. The Commissioner's decision is that the Council is entitled to rely on section 12 of the FOIA to refuse to comply with the complainant's request for information.

Section 16: Advice and Assistance

44. The Commissioner is of the view that, where section 12 is engaged, the public authority ought to provide advice and assistance to the applicant so that he or she may make a request that does not exceed the appropriate limit. Consequently, the Commissioner has considered whether the Council provided advice and assistance, insofar as it was reasonable in the circumstances of this case.
45. The Commissioner notes that in its original response, the Council provided the complainant with an explanation of why the appropriate limit was exceeded by informing him that an estimate of two minutes per file for 1355 files would take more than 45 hours.
46. The Council also stated at internal review *"If you are able to narrow down your request we may be able to provide a response"*
47. The Commissioner considers that the Council did not provide adequate advice and assistance to enable the complainant to meaningfully refine his request for information.
48. Although the Council did explain why the appropriate limit would be exceeded, it did not inform the complainant of what the appropriate limit

is for this public authority, effectively rendering the explanation meaningless.

49. The Council also did not provide any assistance on how to refine the request so that it could fall under the appropriate limit. The Commissioner considers that it would have been reasonable for the Council to provide a refined timeframe that may be useful to the complainant.
50. The Commissioner, therefore, considers that the Council has breached section 16 of the FOIA and requires the Council to provide the complainant with the appropriate advice and assistance as set out in paragraph 3 of the notice .

Other matters

51. The Commissioner would like to remind the Council that information held by third party contractors for the purposes of carrying out a function of the public authority is deemed to be held by the contractor on behalf of the Council for the purposes of the FOIA.
52. When investigating complaints, the Commissioner expects the same level of detail to be provided to her regardless of whether the information is held by a public authority directly or on its behalf by a third party.

Right of appeal

53. 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

54. 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.
55. 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

Alun Johnson
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