

## Freedom of Information Act 2000

### Decision notice

**Date:** 25 October 2017

**Public Authority:** Sandwell Metropolitan Borough Council

**Address:** Sandwell Council House

Freeth Street

Oldbury

B69 3DE

#### Decision (including any steps ordered)

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1. The complainant requested information from Sandwell Metropolitan Borough Council (the Council) relating to the tending of a contract. The Council refused the request under section 12(1) of the Freedom of Information Act 2000 (the Act) as compliance would exceed the appropriate limit.
2. The Commissioner's decision is that the Council has not demonstrated that compliance with the request would exceed the appropriate limit and so cannot refuse the request under section 12(1) of the Act. The Council also breached section 16(1) of the Act as it failed to provide sufficient advice and assistance to the complainant.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Issue a new response to the complainant which does not refuse the request under section 12(1) of the Act.
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

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5. On 11 November 2016 the complainant made the following request for information under the Act for:
  - 1) *All documents, data, written records and notes of conversations between staff relating to any and all of procurement processes that were operated to recruit the Public Health Business Manager in August and September of this year.*
  - 2) *All documents, data and information held by the Council relating to the investigations by Mark Stanley and Neil Whitehouse, this should include but not limited to, records of conversations held, when, where and the outcomes, any emails between Council officers and any third parties, all and any internal documents referencing the investigation and its findings.*
  - 3) *Any award notice for the position of Public Health Manager, this must include, when selected, when interviewed, when offered, salary and date appointment accepted. The return must also include what process was used to recruit the post, including supplier details, include evidence as to when and how the supplier was engaged with the process, evidencing how and when the eventual supplier had engaged with any of the processes running, if via In-Tend, please include the In-Tend data file showing when the expression of interest was made by the supplier and all notification messages thereafter, including the final award.*
  - 4) *All In-Tend activity relating to the bid process, this must include identification of all other parties involved in the process, including any records, data sent between those parties and the Council.*
  - 5) *Information related to the Framework agreement relating to the recruitment of the Public Health Business Manager and the Framework agreement referred to in the 4th November 2016 letter by Neil Whitehouse. This should include but not limited to, any document, data or information between frameworks that relate to the recruitment of this post.*
  - 6) *Copies of any signing in reception visitor books or passes that evidence the finally recruited individual when attending council premises during the Months of August and September of 2016.*
6. The Council responded on 30 November 2016 and refused the request under section 12(1) of the Act.

7. The Council upheld this refusal in its internal review of 18 April 2017. The review also stated that it might be able to comply with the request if the complainant limited the scope to only one of his six requests. The review did not make it clear whether more than one of the requests could be complied with, or whether compliance with any one of the requests would exceed the appropriate limit by itself.

## Scope of the case

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8. The complainant initially contacted the Commissioner on 28 November 2016 to complain about the way his request for information had been handled. At this time the complainant alleged the Council had been responsible for a serious data breach, and that it had deleted information that had been requested under the Act.
9. The Commissioner is the regulator for the Data Protection Act 1998, and investigates data breaches. However, the Commissioner found that no breach had occurred. The Commissioner's decision notice will not go into the reasoning for this, as the decision must focus on whether a public authority handled a request in accordance with Part I of the Act.
10. The Commissioner is also responsible for investigating allegations that requested information has been deleted, as this is an offence under section 77 of the Act. The Commissioner determined that no offence had occurred. This will not form part of her decision, as section 77 offences are not part of a public authority's obligations under Part I of the Act.
11. The complainant confirmed after the outcome of the Council's internal review that he wanted an investigation into the refusal under section 12(1) of the Act. The Commissioner considers the scope of the case to be whether the Council can refuse the complainant's request under section 12(1) of the Act. She will also consider whether the Council met its obligations under section 16(1) of the Act to provide advice and assistance to the complainant.

## Reasons for decision

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### Section 12(1) – cost of compliance exceeds appropriate limit

12. Section 1(1) of the Act states that:

*(1) Any person making a request for information to a public authority is entitled –*

- (a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) *if that is the case, to have that information communicated to him.*

13. Section 12(1) of the Act states that:

*(1) 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.*

14. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') at £450 for local government organisations such as the Council. 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 imposes a time limit of 18 hours (or 1,080 minutes).

15. 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 incur in:

- determining whether it holds 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.

16. 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. In accordance with the First-Tier Tribunal in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be "sensible, realistic and supported by cogent evidence".<sup>1</sup>

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<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf> - see paragraph 12

17. In the Council's submissions it made it clear that not all parts of the request would exceed the appropriate limit by themselves, and that it was aggregating the request as per regulation 5 of the Fees Regulations. This provides that a collective estimate can be applied to a series of requests providing that they are:
- made by one person, or by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign;
  - made for the same or similar information; and
  - received by the public authority within any period of 60 consecutive working days.
18. In the Commissioner's view the Council is entitled to aggregate the requests for the purposes of relying on section 12(1). They were all made by the same person and on the same day, and all relate to the recruitment of the Public Health Business Manager. Therefore, the Council only need show that compliance with all of the requests exceeds the appropriate limit, rather than each of the requests exceed the appropriate limit.

*Council's estimate for request 1)*

19. The Council's submissions to the Commissioner stated that compliance with this request alone would exceed the appropriate limit. The Council stated that the scope of the request was wide ranging, as it would be required to interrogate over 10 individuals' emails accounts, and that other individuals might be identified once the work began and emails copied in other individuals.
20. The Council stated that there was no consistent heading or key word that would apply to the information and so the searches would have to be wide, covering current and archived material. The Council also stated that a manual scan through the information identified in its searches was required to ensure that the information was within scope due to the lack of consistent headings and key words.

*Council's estimate for request 2)*

21. The Council stated that compliance with this request would not impact on the cost limit. It did state if this request was asked in isolation it would be exempt under section 30 of the Act as the information relates to an internal investigation. However it did not claim any time for this in its estimate as the consideration of exemptions is not permitted for an estimate under section 12(1).

*Council's estimate for request 3)*

22. The Council stated that only part of this information is held, but as with request 2) compliance would not impact on its estimate for the cost limit.

*Council's estimate for requests 4) & 5)*

23. The Council stated that the information for these requests was held but compliance with them would not impact on its estimate for the cost limit.

*Council's estimate for request 6)*

24. The Council stated that this request in isolation would exceed the appropriate limit. It stated that there were over 30 Council buildings and the individual concerned may have visited any of those buildings during the months of August and September. The Council argued that each of these books would need to be located and then searched through to find the requested information.

*Commissioner's view of estimate*

25. The Commissioner has only considered the Council's arguments for requests 1) and 6), as these are the only two that the Council has concluded would exceed the appropriate limit. However, as mentioned, that is sufficient for the purposes of relying on section 12(1) with respect to the request in full (i.e. items 1 – 6 inclusive).
26. Regarding item 1) of the request, the Commissioner is not convinced that the Council's evidence has been based on cogent evidence. Whilst the complainant's request does seem wide ranging in that it asks for "all information" this is then modified to only being relating to "procurement processes" used to recruit the Public Health Business Manager in a two month period.
27. The Commissioner's view is that the procurement processes for the recruitment of a single role might be relatively simple to identify, and is not convinced that the Council provided adequate justification for searches it described in its submissions.
28. The Commissioner informed the Council of this and asked for further evidence on why the searches were necessary and why the request was difficult to comply with. The Commissioner also provided the Council with an example of a decision notice which contained the sort of evidence she required. The Council provided a second set of submissions but these did not provide information to demonstrate that the Council's estimate was realistic and based on cogent evidence. The only additional point it raised was that a further two hours per individual concerned

would be required to go through workbooks or other manual written records. No detail was given as to how much manual written information these individuals create or why two hours would be necessary to search for what is relatively distinct information from a two month period.

29. Whilst it might be the case that the Council has valid grounds for refusing the request because compliance with item 1) would exceed the appropriate limit, the Commissioner can only make her decision on the evidence provided. The Council had two opportunities whilst handling the complainant's request to determine why compliance would exceed the appropriate limit, as well as two opportunities to provide detailed submissions to the Commissioner. Despite this the Council has failed to adequately explain why compliance with the requests would exceed the appropriate limit. The Commissioner's decision can therefore only be that the Council has not demonstrated the exemption applies based on the evidence available for item 1) of the request.
30. Regarding item 6) of the request, the Commissioner similarly finds that the Council has not provided sufficient information to justify refusing the request under section 12(1). The Commissioner is not convinced that the Council's search strategy is the simplest way to identify what information is held. The request asks for the records of one individual signing into Council premises over a two month period. The Council's strategy is working on the basis that the fastest way to determine what information is held is to search the sign in books for every single one of its properties.
31. The request was made in November 2016 for information relating to August and September 2016, so it seems reasonable that the individual concerned could be asked which buildings they visited during the two month period. Whilst the individual might not be able to provide a definitive list of every meeting, it seems likely that they reduce the searches necessary from the 30 buildings listed by the Council.
32. Further, the individual concerned would seemingly be attending the premises with the intention of meeting another person, so a search of the calendars and records of those individuals concerned could provide the necessary information. This would reduce the need for laborious searches such as those outlined by the Council.
33. For these reasons, the Commissioner does not consider that the Council has provided realistic and cogent evidence to show that compliance with the request would exceed the appropriate limit. Therefore, her decision is that the Council is required to issue a new response to the complainant which does not refuse the request under section 12(1) of the Act.

## Section 16(1) – advice and assistance

34. Section 16(1) of the Act states:

*(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.*

35. The Commissioner's view is that where a public authority refuses a request under section 12(1) of the Act, section 16(1) creates an obligation to provide advice and assistance on how the scope of the request could be reduced so that the request might be complied with.

36. The Commissioner's guidance informs public authorities of the minimum that is required to meet with section 16(1) in this regards:

- indicate if it is not able to provide any information at all within the appropriate limit; or
- provide an indication of what information could be provided within the appropriate limit; and
- provide advice and assistance to enable the requestor to make a refined request.

37. The Council did not provide any assistance to the complainant in its refusal notice but did provide assistance in its internal review. In the internal review it stated that the complainant could limit himself to one of the six requests rather than all of them.

38. However, the Council's submissions state that compliance with either requests 1) or 6) would exceed the appropriate limit. The Council also confirmed that compliance with requests 2) – 5) would not exceed the appropriate limit even if aggregated together. If this is the Council's position then it is not sufficient for it to state to the complainant that he should only select one request because it should have known at the time that this was incorrect. Were the complainant to take the Council's advice and ask only for information relevant to request 6) then the Council would have no doubt maintained its section 12(1) refusal, despite the complainant having followed its advice.

39. The Commissioner decision is that the Council failed to provide the complainant with advice and assistance which is adequate to meet with the minimum requirements and so breached section 16(1). As the Commissioner has also found that the Council has not demonstrated that section 12(1) applies the Commissioner cannot require any steps for the section 16(1) breach, as there is no requirement for the Council to indicate what information could be provided within the cost limit.



However, the Commissioner asks that the Council take greater care in providing advice that is practical when refusing requests under section 12(1) of the Act.

## Right of appeal

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40. 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 123 4504

Fax: 0870 739 5836

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

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

41. 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.
42. 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** .....

**Terna Waya**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**