

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 March 2018

Public Authority: Colchester Borough Council

Address: Rowan House
33 Sheepen Road
Colchester
CO3 3WG

Decision (including any steps ordered)

1. The complainant has requested information about the housing of offenders released from custody. Colchester Borough Council stated that some of the information requested was not held. With regard to the remainder of the request it stated that it was unable to establish whether it held this information within the cost limit and therefore refused the request under section 12(2) of the FOIA (cost of compliance exceeds appropriate limit).
 2. The Commissioner's decision is that on the balance of probabilities Colchester Borough Council do not hold the stated information and that it is entitled to rely of section 12(2) in relation to the remainder of the request. However it breached section 10 in failing to respond to all elements of the request within 20 working days.
 3. The Commissioner does not require Colchester Borough Council to take any steps.
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Request and response

4. On 29 May 2017, the complainant wrote to Colchester Borough Council ('the Council') and requested information in the following terms:

"My request relates to the activity of Colchester Borough Homes.

- 1. From 1 July 2015 to the present, how many adult offenders have applied for the local authority to house them on release from custody?*
- 2. How many of those offenders were subject to MAPPAs i.e. required to provide probation and the police with an approved address under the terms of their licence conditions?*
- 3. How many offenders were offered temporary accommodation by the authority whilst their full application was processed?*
- 4. How many of the offenders subject to MAPPAs were offered such accommodation?*
- 5. For how many offenders did the local authority accept there was a duty to house them permanently under the Housing Act?*
- 6. For how many of the offenders subject to MAPPAs did the local authority accept there was a duty to house them permanently under the Housing Act?*
- 7. Where the authority made a decision that there was no duty under the Housing Act, for how many offenders was this decision on the basis that they were intentionally homeless?*
- 8. The same question for the offenders subject to MAPPAs.*
- 9. Where the decision was based on them being intentionally homeless, for how many was the deliberate act found to be the offence they committed which had resulted in a custodial sentence?*
- 10. The same question for offenders subject to MAPPAs.*
- 11. Of the offenders who were told by the authority that there was no duty to house them, how many asked for a review of the decision?*
- 12. The same question for offenders subject to MAPPAs.*
- 13. Where offenders asked for a review, for how many offenders did the authority continue to provide temporary accommodation whilst the review was concluded?*
- 14. The same question for offenders subject to MAPPAs.*
- 15. How many of the reviews requested by offenders overturned the original decision that no duty was owed?*
- 16. The same question for offenders subject to MAPPAs.*
- 17. How many offenders lodged an appeal with the county court because the review upheld the original decision that no duty was owed?*

18. *The same question in relation to offenders subject to MAPPA.*
 19. *How many offender appeals to the county court were successful?*
 20. *The same question for the offenders subject to MAPPA.*
 21. *Over the same period, how many threats of public law challenge in relation to their housing duty did the authority receive: a) from all applicants; and b) from offenders released from custody; and c) from offenders subject to MAPPA; and d) from legal advisers of a)b) or c).*
 24. *Over the same period, how many judicial review challenges were issued against the authority in relation to its housing duties a)by or on behalf of all applicants; and b) by or on behalf of offenders released from custody and c) by or on behalf of offenders subject to MAPPA?*
 25. *What were the outcomes of all and any judicial review challenges made – as referred to in 24.*
 26. *Please provide a copy of all and any internal guidance issued to housing advisers employed by the authority with regard to: a) the authority's criteria for refusing housing applications from offenders including offenders subject to MAPPA and b) the criteria for conducting and deciding reviews of first decisions requested by offenders including those subject to MAPPA.*
 27. *Please provide a copy of all key performance indicators applying to staff with responsibility for deciding on housing applications and those responsible for carrying out reviews of first decision that a housing duty is not owed.*
 28. *How many offenders who made applications to the housing authority over the stated period were street homeless at the time of the application?*
 29. *The same question for offenders subject to MAPPA?*
 30. *How many offenders whose applications were ultimately refused by the authority became or returned to being street homeless?*
 31. *How many of those referred to in 30 were subject to MAPPA and therefore were considered to present a risk to the public?*
 32. *How many of those offenders referred to in 31 were returned to prison for breach of licence conditions as a result of becoming or returning to being street homeless?"*
5. The Council responded on 27 June 2017. It stated that some information could be extracted by manual examination of applications for housing however the data would be incomplete and the cost of the work would exceed the limit set down in section 12 of the FOIA.
 6. Following an internal review the Council wrote to the complainant on 30 June 2017 and maintained its position. It further explained that it did

not have the necessary reportable fields within its systems and therefore a manual search and examination would be required of every application or homeless approach, some 1,667 files.

7. Following enquiries by the Commissioner, the Council refined its response to explain that in relation to questions 1 to 25 and 28 to 32 to confirm or deny whether or not it holds any information would exceed the cost limit at section 12(2) of FOIA.
8. Furthermore the Council advised that it does not hold any information in relation to questions 26 and 27 about internal guidance documentation and performance measures. The Council communicated this update to its response to the complainant at the Commissioner's request.

Scope of the case

9. The complainant contacted the Commissioner on 3 August 2017 to complain about the way the request for information had been handled. She also identified that the Council had not answered questions 26 and 27 in either of its responses to her.
10. The Commissioner considers the scope of the case is to determine: whether the Council is entitled to reply upon section 12(2) - costs would exceed the appropriate limit to confirm whether or not the requested information is held; whether it holds the information requested in questions 26 and 27; and if it has complied with its obligations under the FOIA.

Reasons for decision

Section 12 – cost of compliance

11. Section 12(2) provides that a public authority is not obliged to confirm or deny whether requested information is held if it estimates that to do so would incur costs in excess of the appropriate limit. In other words, if the cost of establishing whether information of the description specified in the request is held would be excessive, the public authority is not required to do so.
12. The appropriate limit in this case is £450, as laid out in section 3(2) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations"). This must be

calculated at the rate of £25 per hour, providing an effective time limit of 18 hours' work.

13. The Fees Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time:

- determining whether the information is held;
- locating the information, or a document which may contain the information;
- retrieving the information, or a document which may contain the information; and
- extracting the information from a document containing it.

14. Section 12(2) requires a public authority to estimate the cost of confirmation or denial, rather than to formulate an exact calculation. The question for the Commissioner here is whether the cost estimate by the Council is reasonable. If it is, then section 12(2) is correctly engaged and the Council is not obliged to confirm or deny whether the requested information is held.

Can all parts of the request be aggregated?

15. In its response to the request, the Commissioner observes that the Council has considered all parts of the request together. Section 12(4) can be engaged where one person makes two or more requests. It allows for the aggregation of these requests for the purpose of calculating costs in circumstances which are set out in Regulation 5 of the Fees Regulations. This Regulation provides that multiple requests can be aggregated where two or more requests relate, to any extent, to the same or similar information.

16. Given the effect of section 12(4), the Commissioner first considered whether the complainant's request constituted a single request with multiple elements or multiple requests.

17. The Information Tribunal considered a similar issue in *Fitzsimmons v ICO & Department for Culture Media and Sport* [EA/2007/0124]. Taking the Tribunal's decision in *Fitzsimmons* into consideration, the Commissioner would characterise the complainant's request as containing multiple requests within a single item of correspondence.

18. Having established that the complainant has made multiple requests in a single letter, the Commissioner went on to consider whether those requests could be aggregated for the purpose of calculating the cost of compliance. The Commissioner notes that questions 1 to 25 and 28 to

32 of the request relate to statistics about the housing of offenders and therefore relate to a similar subject area.

19. Consequently the Commissioner has concluded that it is reasonable for questions 1 to 25 and 28 to 32 to be aggregated for the purpose of calculating the cost of compliance because they follow an overarching theme. Having reached this conclusion, the Commissioner will next consider the application of section 12(2).

Is section 2(2) engaged?

The complainant's position

20. The complainant's view is that at least some of the information should be retrievable because *"recent release from a custodial sentence is one of the criteria that places an individual in priority need for housing. Therefore, all offenders will disclose this when seeking housing and it is inconceivable that the council will not record relevant criteria electronically in relation to each applicant."*

The Council's position

21. The Council explained that the key criteria required to undertake a search of the Colchester Borough Homes ('CBH') systems in order to fulfil the request are not available. Specifically adult offenders, MAPPA cases, probation cases, or the identification of agency involvement such as the police or probation service are not *"reportable field(s) in our systems."*
22. Consequently, in order to identify whether it holds the information, a manual search of every application or homeless approach made to CBH since July 2015 would need to be undertaken.
23. The Council reports that this would require the examination of all documents linked to individual case files of which there are approximately 1667 files from the required period. It estimates that *"a reasonable estimate of the average time likely to be taken to examine each set of records would be five minutes, amounting to a total of 133 hours."*
24. Furthermore the Council explains that the *"random incidence of relevant information could mean that extensive searches might need to be undertaken to determine whether any relevant information is held relating to a given period of time. A stay in prison will only have to be recorded if it is relevant to the decision to be made and a record of such a stay may be contained in any one of numerous documents."*

25. The Commissioner enquired whether a sampling exercise had been undertaken in order to determine the estimate. The Council advised that *"A sampling exercise has not been undertaken as the systems which would need to be searched are, or in the case of older records were until last year, in everyday use by the staff who would be required to undertake the searches. Staff are therefore familiar with the length of time routinely taken to access information of all types."*
26. The Council confirmed that there are no alternative, more rapid methods to search for the information required to fulfil the complainant's request.

The Commissioner's conclusion

27. It is clear, in line with the complainant's view, that some information will be held and retrievable that is relevant to questions 1 to 25 and 28 to 32. However the issue under consideration is the cost of compliance.
28. The Commissioner has considered the Council's submissions and recognises that due to its lack of electronic search and reporting functionality the identification of the information sought by the request would require the manual review of individual electronic records.
29. The Council has provided the estimated total time and cost that it considers compliance with the request would take. The Commissioner notes that the estimates the Council provided are based on staff experience, and not on a sampling exercise.
30. However, it remains evident that compliance with the request would require the manual review of 1667 files against the various questions raised in the information request. It is of the view of the Commissioner that the time required to do this would vastly exceed the appropriate limit. On this basis, the Commissioner is satisfied that section 12 (2) is engaged and that the Council are not obliged to confirm or deny holding any of this information.

Section 16 –the duty to provide advice and assistance

31. Section 16(1) of the FOIA provides that a public authority should give advice and assistance to any person making an information request. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the Section 45 Code of Practice ("the Code") issued by the Secretary of State, it will have complied with section 16(1).
32. The Code advises that, where an authority is not obliged to comply with a request for information because, under section 12(1) and the

regulations made for that section, the cost of complying would exceed the appropriate limit, it should provide the complainant with reasonable advice and assistance.

33. In her guidance the Commissioner states that the minimum a public authority should do in order to satisfy section 16(1) is indicate if it is able to provide any information at all within the appropriate limit. If the complainant understands the way in which the estimate has been calculated to exceed the appropriate limit, it should help them decide what to do next.
34. The Council states *"Unfortunately, we cannot see a way in which this request could be refined to produce any meaningful result. The personal recollections of the staff who handle the type of information requested are that there are fewer than five such cases in any year, in some years maybe only one. It is not therefore possible to say that confining searches to a shorter period would produce any results at all. Our view is that to remain within the cost limit the number of files which could be searched would equate to a period of around three or four months. Given the known infrequency of MAPPA cases, in any such period the files searched might be found to contain no relevant information at all. It has therefore not been possible to offer the requester this option."*
35. In the circumstances of this case, the Commissioner recognises that the information sought by the request is not held in a manner that allows it to be directly retrieved. The Commissioner concludes therefore that as the Council do not record the requested information in a searchable form, they are unable to provide advice on how to refine the request sufficiently enough to bring it within the 18 hour time limit. On this basis the Commissioner finds that the Council has complied with section 16(1).

Section 1 – general right of access

36. Section 1(1) of FOIA says that an individual who asks for information from a public authority is entitled to (a) be informed whether the authority holds the information and (b) if the information is held, to have that information communicated to them.
37. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner, in accordance with a number of First-Tier Tribunal decisions, applies the civil standard of the balance of probabilities.

38. In response to the Commissioner's questions the Council clarified that it does not hold any information in regard of questions 26 and 27.
39. It explained that it does not hold internal guidance or policies because *"We apply the legislation governing the management of housing applications and pay regard to the code of guidance on the allocation of accommodation. It is not lawful for local authorities to have a blanket policy dictating how they will process either homeless applications or housing applications from specific groups."*
40. Regarding key performance indicators applying to decision making on housing applications and reviews it states *"All applications are processed on their merit and treated individually. Neither do we have any performance indicators which relate to specific groups of any kind; we have not set up any performance indicators relating to the decision process."*
41. The Council confirmed that there are no statutory reasons or business purposes for which the information should be held.
42. Having considered the response from the Council, it is the Commissioner's view that, on the balance of probabilities, it does not hold the information requested.

Section 10 – Time for compliance

43. Section 10(1) of the FOIA states that: *Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.*
44. In this case the Commissioner has identified that the Council failed to answer questions 26 and 27 until the onset of her investigation and therefore the Commissioner finds that it breached section 10(1) of the FOIA.
45. As the Council has now responded no further steps are required.

Right of appeal

46. 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

47. 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.
48. 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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