

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

### **Decision notice**

**Date:** 13 September 2018

**Public Authority:** Sunderland City Council

**Address:** Freedom.Information@sunderland.gov.uk

#### **Decision (including any steps ordered)**

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1. The complainant requested information from Sunderland City Council (the Council) about salary spend within the Council.
2. The Council refused to provide the requested information, citing section 12(1) (cost of compliance) of the FOIA.
3. The Commissioner's decision is that the Council has provided a reasonable estimate of the costs associated with complying with the request and has therefore correctly applied section 12 of the FOIA.
4. However, the Commissioner considers that the Council has not complied with its obligations under section 16 of the FOIA to provide the complainant with reasonable advice and assistance.
5. The Commissioner requires the Council to take the following step to ensure compliance with the legislation:
  - provide the complainant with advice and assistance to allow him, if it is possible to do so, to formulate a request seeking information about salary spend within the Council which can be answered within the appropriate cost limit.
6. The Council 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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7. On 16 December 2017, the complainant wrote to the Council and requested information in the following terms:

*"For each of the last seven complete financial years how much money was spent on salary costs for the portion of salaries over £65,000? To be clear I am wanting to know the total amount of money spent to pay the portion of salary (including related pension contributions and NI costs) over £65,000 for those paid over £65,000.*

*For the purposes of this exercise any payments to self-employed individuals and/or consultants who are working exclusively for the council shall be counted as salary".*

8. At the request of the Council, the complainant clarified what he meant by 'salary costs' on 7 January 2018.
9. The Council responded, in correspondence apparently dated 4 January 2018. It refused to provide the requested information, citing section 12 (cost of compliance) of the FOIA as its basis for doing so.
10. Following an internal review, the Council ultimately wrote to the complainant on 9 March 2018. It stated that while the Council held information on self-employed individuals, consultants and agency workers working for the Council, it did not hold information on whether those individuals worked exclusively for the Council, as specified in his request.
11. It confirmed, therefore, that its application of section 12 of the FOIA was based on the time it would take to provide a response to his request including *"all self-employed, consultants and agency workers"* working for the Council and not just the ones working exclusively for the Council.

## **Scope of the case**

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12. The complainant contacted the Commissioner on 17 March 2018 to complain about the way his request for information had been handled.
13. He disputed the Council's response, advising the Commissioner:

*"Given that all the data should be electronically held and that we are only talking about the sum total of values over a threshold paid to an individual within a financial year I found it very hard to believe there was any manual intervention outside writing the query which should be of an exceedingly minor nature".*
14. With respect to the information within the scope of the request, the complainant told the Commissioner:

*"...they stated that they couldn't give me any of the information as they couldn't... identify whether self-employed individuals or consultants worked exclusively for the council (A clause in the initial query designed to prevent the obscuring of salaried employees via self-employed status). This response was despite my statement in the request for review that if there were deficiencies in their record keeping that they should be identified and the rest of the data provided".*

15. He also raised the issue of the date of the Council's response and disputed the timeliness of the Council's internal review response.
16. In correspondence with the Commissioner, the Council apologised that its initial response was wrongly dated. The Council explained that the response must have been sent on or after 17 January 2018:

*"... as that was the date the relevant manager confirmed its content".*
17. In that respect, the Commissioner is satisfied that the complainant wrote to the Council on 20 January 2018 to request an internal review.
18. During the course of the Commissioner's investigation, the Council maintained its grounds for refusal, namely that section 12 of the FOIA applied. It also confirmed that it was unable to distinguish between those self-employed individuals and consultants who were working exclusively for the Council. The Commissioner notes that the Council told the complainant that whether such individuals work exclusively for the Council is not information that is given to the Council.
19. The Commissioner is mindful of the wording of the request in this case, including the complainant's guidance that any payments to self-employed individuals and/or consultants working exclusively for the Council should be counted as salary.
20. However, she is also mindful that the complainant told the Council that *"in order to make progress on this"* he was willing to take the data it could identify, provided it was clear where the data was deficient and why it could not identify it.
21. In light of the above, the analysis below considers the Council's application of section 12(1) of the FOIA to the withheld information, namely information within the scope of the request including information relating to **all** self-employed, consultants and agency workers working for the Council and not just ones working exclusively for the Council.
22. The Commissioner has also considered whether the Council provided reasonable advice and assistance under section 16 of the FOIA.

## Reasons for decision

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### *Section 12 cost of compliance*

23. 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".*

24. This limit is set in the fees regulations 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 imposes a time limit of 18 hours in this case.

### *Would complying with the request exceed the appropriate limit?*

25. 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.

26. The four activities are sequential, covering the retrieval process of the information from the public authority's information store.

27. In correspondence with the complainant, the Council confirmed it held relevant information, but that it was unable to provide it to him. By way of explanation it said:

*"The 7 years reporting period is not held in a unified system in an electronic format that allows for straightforward retrieval and analysis".*

28. It explained that, in order to provide the information, the Council would need to undertake extraction of data from multiple systems with detailed manual manipulation and analysis of individual's data.

29. During the course of the Commissioner's investigation, the Council was asked to provide more detail in respect of its application of section 12.

30. In its submission to the Commissioner, the Council explained that relevant information is primarily held within electronic records across four independent systems. It confirmed that the work to identify relevant information took account of the need:
- "... to identify employee payments in scope, and rework individual direct salary costs and associated on costs of national insurance and pension for each of the years identified within the request".*
31. In support of its application of the section 12 exemption, the Council told the Commissioner that the initial sampling exercise carried out for the initial reply provided to the complainant was based on an informed view of the issues.
32. It confirmed, however, that, following the Commissioner's intervention:
- "... [the sampling exercise] has accordingly been repeated for the purpose of this response at a more granular level. This has confirmed the council's initial view regarding application of the fees limit was correct".*
33. The complainant disputes that a lot of systems should be involved in resolving his request or that any manual calculation would be required:
- "... apart from simple addition of values output from relevant systems".*
34. In that respect, the Council explained in its submission to the Commissioner why bespoke reports would need to be created for the 'yearly positively identified employees' and would require an individual assessment for each year.
35. The Council provided the Commissioner with a breakdown of the work that would need to be undertaken in order to respond to the request.

#### *The Commissioner's view*

36. When dealing with a complaint to her under the FOIA, it is not the Commissioner's role to make a ruling on how a public authority deploys its resources, on how it chooses to hold its information, or the strength of its business reasons for holding information in the way that it does as opposed to any other way. Rather, the Commissioner's role is simply to decide whether the requested information can, or cannot, be provided to a requestor within the appropriate costs limit.
37. In essence, therefore, this case turns on whether the estimate provided by the Council was reasonable.

38. While acknowledging that it is not a statutory requirement to explain how the estimate has been calculated, the Commissioner considers it is beneficial to a public authority to do so:

*"... to enable the requestor to assess the reasonableness of the estimate".*

39. In this case, the Commissioner acknowledges that, in correspondence with the complainant, the Council described his request for details of payments as *'wide ranging'*. It also told him that the information was not held by the Council in a format which is easily accessible.
40. However, it was not until the Commissioner's investigation that the Council addressed the arguments put forward by the complainant and explained the nature of the searches involved and quantified the number of records that would need to be reviewed.
41. The Council provided the Commissioner with details of the sampling exercise it had undertaken, together with a copy of its calculation in support of its estimate that it would take significantly more than 18 hours to respond to the request in this case.
42. The Council confirmed that the number of records that fell in the *'test year'* for the sampling exercise was 35. In respect of those records the Council told the Commissioner:

*"... the council believes a 'non-complex' (i.e. record with no variations in year) would take about 10 minutes. With variations, this would increase to around 20-30 minutes.*

*Averaging a conservative 15 minutes per record for these 35 records would take 8.75 hours to complete. That would be for this period only as different calculations and reference tables for ER [Employer pension] rates would be required for each year".*

43. It concluded:

*"Multiplying 8.75 hours by 7 (years) = 61.25 hours.*

*This is considered a low estimate as the number of over 65k would be higher in previous years, as potentially are the variations in pay due to different T's and C's".*

44. Having considered the complainant's arguments and the submission provided by the Council during the course of her investigation, the Commissioner is satisfied that the Council has demonstrated that it would exceed the appropriate limit to locate, retrieve and extract the requested information to the extent that it relates to all self-employed

individuals, consultants and agency workers working for the Council and not just ones working exclusively for the Council.

45. Section 12(1) does therefore apply and the Council is not required to comply with the request.

*Section 16 advice and guidance*

46. Section 16(1) of the FOIA provides that a public authority is required to provide advice and assistance to any individual making an information request "so far as it would be reasonable to expect the authority to do so".

47. In her guidance<sup>1</sup> 'Requests where the cost of compliance exceeds the appropriate limit', the Commissioner considers the provision of advice and assistance. She states:

*"In cases where it is reasonable to provide advice and assistance in the particular circumstances of the case, the minimum a public authority should do in order to satisfy section 16 is:*

*- either 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".*

48. In general where section 12(1) is cited, in order to comply with this duty a public authority should advise the requester as to how their request could be refined to bring it within the cost limit.

49. The Commissioner acknowledges that the complainant told the Council:

*"... I am willing to take as many years as you can gain access to.*

*... I am willing to take the data you can identify provided you are very clear where the data is deficient and why you cannot identify it.*

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<sup>1</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)



*I would also request in your response to this request for review that you are clear, as per section 16 requirement to provide advice and guidance, as to where your information or access to it is deficient and why my above compromises do not address any issues”.*

50. The Council accepted that, on receipt of the complainant’s request for a review of its handling of his request for information, it had not contacted him in person with a view to clarifying the information it was able to provide and/or assisting him in refining his request.
51. It confirmed, however, that it provided the complainant with the link to a contract register on its procurement internet page which provides details of self-employed individuals and consultants delivering services to the Council.
52. The Commissioner has considered the Council’s submissions and the circumstances of this request. Given her findings in relation to section 12(1) of FOIA, the Commissioner accepts that it may not be possible to comply with a request on this subject matter without both restricting the timeframe and refining the employee status.
53. Nevertheless, the Commissioner considers that the Council could have provided the complainant with guidance as to how he could refine his request so that compliance fell within the parameters of section 12. The Council’s failure to do this amounts to a breach of section 16 of the FOIA.
54. The Commissioner requires the Council to provide the complainant with relevant advice and assistance as to what, if any, information can be provided within the appropriate limit.

## **Other matters**

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55. In their correspondence with the Commissioner, both the complainant and the Council provided context to the request in this case and made reference to other requests for information from the same complainant.
56. The Commissioner’s website includes a section entitled ‘*Information request dos and don’ts*<sup>2</sup>. She recommends that quick reference tool to requesters who are considering making a request for information.

### *Internal review*

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<sup>2</sup> <https://ico.org.uk/your-data-matters/official-information/>



57. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA. However, the Commissioner has issued guidance in which she has stated that in her view internal reviews should take no longer than 20 working days to complete, and even in exceptional circumstances the total time taken should not exceed 40 working days.
58. In this case, the internal review that the complainant requested on 20 January 2018 was not completed in accordance with that guidance.
59. The Commissioner understands from the complainant that the Council sent him "*two postponement letters*". The Council confirmed that it wrote to the complainant informing him of the delay.
60. The Commissioner expects the Council to ensure that the internal reviews it handles in the future adhere to the timescales she has set out in her guidance.

## Right of appeal

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61. 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)

62. 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.

63. 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 .....**

**Deborah Clark  
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