

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

### **Decision notice**

**Date:** 3 February 2014

**Public Authority:** Sandwell Metropolitan Borough Council

**Address:** Sandwell Council House  
Oldbury  
Sandwell,  
West Midlands  
B69 3DE

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

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1. The complainant has requested information relating to outsourcing arrangements between Sandwell Metropolitan Borough Council (the "council") and BT. The council refused the request under the exemption for prejudice to commercial interests (section 43(2) of the FOIA). During the Commissioner's investigation the council revised its position, citing section 12 of the FOIA and confirming that the request was being refused on cost grounds.
2. The Commissioner's decision is that Sandwell Metropolitan Borough Council:
  - Correctly applied section 12(2) to refuse the request;
  - failed to comply with the duty to provide advice and assistance under section 16(1) of the FOIA at the time of the request.
3. The Commissioner does not require the public authority to take any steps.

#### **Request and response**

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4. On 3 June 2013 the complainant made the following request for information:

*"Minutes of meetings between officers of the council and BT regarding the outsourcing arrangements for financial services. Internal reports and memoranda regarding the above. Copies of any emails sent either internally within the council or to BT concerning any aspect of the outsourcing arrangements. I required this information for the period since 1 April 2012."*

5. The council responded on 28 June 2013 and refused the request, citing the exemption for prejudice to commercial interests (section 43(2) of the FOIA).
6. Following an internal review the council wrote to the complainant on 12 July 2013. It stated that it was maintaining its decision to refuse the request under section 43(2).

### **Scope of the case**

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7. On 19 July 2013 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld the requested information.
9. During the course of the Commissioner's investigation the council confirmed that it wished to revise its position to rely on section 12(1) of the FOIA to refuse the request. At the Commissioner's direction it wrote to the complainant to confirm this and provided the complainant with an opportunity to refine the terms of their request.
10. The Commissioner has considered whether the council has correctly applied section 12(1).

## Reasons for decision

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### Section 12 – cost of compliance exceeds the appropriate limit

11. Section 12 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."*

12. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the 'Regulations') sets the appropriate limit at £450 for the public authority in question. Under these Regulations, a public authority can charge a maximum of £25 per hour for work undertaken to comply with a request. This equates to 18 hours work.

13. A public authority is only required to provide a reasonable estimate or breakdown of costs and in putting together its estimate it can take the following processes into consideration:

- (a) determining whether it holds the information,
- (b) locating the information, or a document which may contain the information,
- (c) retrieving the information, or a document which may contain the information, and
- (d) extracting the information from a document containing it.

14. In investigating complaints which involve the application of section 12(1) the Commissioner asks public authorities to provide detailed estimates of the time/cost it would take to provide the information falling within the scope of a request. The Commissioner directs authorities to include descriptions of the nature of work that would need to be undertaken (including any relevant calculations).

15. A number of Information Tribunals have made it clear that an estimate for the purposes of section 12 has to be "reasonable", which means that it is not sufficient for a public authority to simply assert that the appropriate limit has been met; rather the estimate should be realistic, sensible and supported by cogent evidence.

16. The council has explicitly confirmed to the Commissioner that, when determining the cost threshold, it only took the processes identified at paragraph 13, above, into consideration.

17. The council explained that it understood that the request was asking for information relating to financial services in respect of the outsourcing

arrangements involving the council and Transform Sandwell ("TS" - the delivery vehicle set up between the council and British Telecom ("BT") under the terms of a Strategic Partnership Agreement (the contract) between the council and BT. On the basis of this understanding, the council carried out an assessment of information potentially caught by the request.

18. The council has confirmed that it maintains a principal contract monitoring unit who are in regular contact with TS and BT in relation to the running of the contract. Members of this team, as well as several council directors were asked to review the volume of emails held in regard to internal communications and communications with BT and TS. At this stage, the council explained that parties were only asked to ascertain the volume of emails rather than to review the contents of individual emails.
19. The council provided the Commissioner with a breakdown of the volume of communications identified as a result of this process. This shows that for the time period identified in the request, over 80, 000 emails which fit the relevant parameters were sent or received.
20. The council explained that, whilst not every email will fall into the category of the request, a high percentage will. The council confirmed that it would be necessary to manually review each email in order to ascertain whether it fell within the scope of the request. In order to demonstrate how long this process would take, the council provided the Commissioner with the following calculation:  
  
$$80,000 \times 10 \text{ (10 seconds per email to review it)} = 800,000 \text{ seconds}$$
$$800,000/60 = 13,333 \text{ minutes}$$
$$13,333/60 = 222 \text{ hours}$$
21. The council confirmed that it considered that 10 seconds was a reasonable estimate for an individual to review an email (including any attachments) and assess whether it fell within the scope of the request or not. In explaining why a manual review of each individual officer's email correspondence would be necessary, the council confirmed that it does not have a corporate filing structure for emails. According to the council, therefore, the identified approach is the fastest way to locate, retrieve and extract the relevant information.
22. In addition to the email search, the council confirmed that it conducted a similar assessment in relation to the request for reports, minutes, agendas and any other documentation relating to the outsourcing arrangements. It explained that its contract monitoring group was directed to identify but not to extract the volume of likely documents held.

23. The council explained that the primary body overseeing the contract is the Joint Programme Board and that there are in excess of 75 reports, minutes and agendas falling within the requested time period. The council confirmed that, sitting under the Joint Programme Board is the Programme Monitoring Board. This meets every 2 weeks and approximately 200 reports, minutes and agendas were potentially identified. The council confirmed that a variety of other relevant meetings and reports have been generated internally and by external agencies on its behalf.
24. In relation to the above exercise, the council confirmed that it had arrived at a conservative estimate of 2,000 documents that would need to be extracted and assessed to see what information falls within the scope of the request. Based upon an estimate of 5 minutes per document to carry out this exercise, the council provided the Commissioner with the following calculation:  
  
$$2,000 \times 5 = 10,000 \text{ minutes}$$
$$10,000/60 = 166 \text{ hours}$$
25. When combined with the projected time it would take to carry out the same activity in relation to relevant emails, the council's estimate of the time it would take to comply with the request is a total in excess of 350 hours.
26. In view of the explanations provided by the council the Commissioner is satisfied that the council has shown that its calculation of the cost of complying with the request is realistic, sensible and supported by cogent evidence.
27. The Commissioner is satisfied that in this case, the cost of complying with the request would exceed the appropriate limit. He has, therefore, concluded that the council correctly applied section 12(1) to refuse the request.

## **Section 16 – advice and assistance**

28. Section 16 places a duty on public authorities 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.
29. Under section 16(2) a public authority is considered to have met that duty if it follows the section 45 code of practice (the "code"). The code sets out what is expected from a public authority in terms of advice and assistance when a request is refused under section 12.

30. Paragraph 14 of the code states that where a public authority is not obliged to comply with a request because it would exceed the appropriate limit to do so, then it:

*"...should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee."*<sup>1</sup>

31. During the Commissioner's investigation the council confirmed that it was relying on section 12 to refuse the request. It contacted the complainant and advised that they may wish to submit a refined version of their request and suggested how they might go about doing this.
32. The Commissioner has concluded that, at the time of the request, the council failed to take the actions identified that it, therefore, breached section 16(1) of the FOIA. As the council has now remedied this, the Commissioner does not require it to take any steps.

## **Other matters**

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33. Although they do not form part of this decision notice the Commissioner would like to note the following matters of concern.

## **Late application of exemptions**

34. In this case the council did not apply section 12(1) to the request until the Commissioner's investigation was underway.
35. Where public authorities introduce grounds for refusing requests during the Commissioner's investigation it raises concerns that a request might not have been properly considered when it was originally received or at the time of the internal review.
36. The Introduction to the code of practice issued under section 45 of the FOIA (the "code") states:

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<sup>1</sup> <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

*"All communications in writing to a public authority, including those transmitted by electronic means, may contain or amount to requests for information within the meaning of the Act, and so must be dealt with in accordance with the provisions of the Act. While in many cases such requests will be dealt with in the course of normal business, it is essential that public authorities dealing with correspondence, or which otherwise may be required to provide information, have in place procedures for taking decisions at appropriate levels, and ensure that sufficient staff are familiar with the requirements of the Act and the Codes of Practice issued under its provisions."*<sup>2</sup>

37. Whilst the introduction does not form part of the code itself, the Commissioner echoes its recommendations and directs the council to ensure that future requests for information are handled in accordance with the code and with the Commissioner's guidance.

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<sup>2</sup> <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

**(a) Right of appeal**

38. 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: 0116 249 4253

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)

39. 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.
40. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**