

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 August 2014

Public Authority: Welwyn Hatfield Borough Council

Address: The Campus
Welwyn Garden City
Hertfordshire
AL8 6AE

Decision (including any steps ordered)

1. The complainant requested information about guidance to managers on sickness absence from Welwyn Hatfield Borough Council (the Council). The Council stated that to try and comply with the request would exceed the appropriate costs limit set by section 12(1) of the Freedom of Information Act 2000 ("the FOIA"). The Commissioner's decision is that the Council correctly applied section 12(1) to the refined request and considered that section 40 (personal data) was also applicable. The Commissioner found a number of procedural breaches by the Council.

Request and response

2. There is considerable correspondence on this case (summarised below) as the original request was later refined twice.
3. On 23 January 2014 the complainant made a request for information under the FOIA:
 - *'Have Human Resources provided any advice, guidance or clarification to managers on the use of the Council's sickness absent management policy since 1 April 2012 to date. For clarification, my request is for all forms of communication, including emails, written memos or other forms of communication with managers, including reports to management, (such as advice*

contained in regular sickness absence monitoring reports sent to managers.)

- *My request also includes meetings with Unison, such as Joint Consultative Committee (JCC).*
 - *My request includes written records of any verbal advice e.g. recorded in the form of minutes/notes*
 - *If Human Resources have issued any advice or guidance, please provide me with copies of this, and details of: the name of the person who provided the advice: the name/s of the person's it was given to; and the date the advice was provided.'*
4. On 20 February 2014 the Council responded. It refused to provide the requested information citing Section 12(1) of FOIA as it estimated that the cost of determining whether it held the information would exceed the cost threshold of £450.
 5. On 20 February 2014 the complainant requested an internal review. On 13 March 2014 the Council confirmed that it did hold information of the type requested and upheld its original position. It also suggested that it may be able to comply with a new request for a narrower category of information and provided an example.
 6. On 19 March 2014 the complainant reduced the scope of the request to:
'I would therefore be grateful if you would consider my request to be for advice provided by HR to managers in the Strategy and Development Directorate, on the application of the Council's sickness absence management policy for the period January 2013 to December 2013.'
 7. This is the subject of the complaint to the ICO and is treated as a new request.
 8. On 15 April 2014 the Council provided a response. The Head of Human Resources had stated that she had been through her emails (8 hours) to establish if advice had been provided and whether it related to the Council's Managing Sickness Absence Policy and Procedures: and would go through 4 other staff accounts before looking at the sickness absence case files. At this stage, 'no in depth analysis of any information had been conducted'.
'It is therefore clear that this will take some time as she has other deadlines to meet. It is also clear that to complete the task will take in excess of 18 hours. To enable this to be done quicker will require a further refinement of your request. Failing this it is likely that completion of your request will take some time. Your comments are welcome.'

9. On 17 April 2014, the complainant further refined her request:

1. To clarify, I am happy to receive the information in "batches", rather than incur the delay that would result from waiting for the Head of Human Resources to complete the whole task, as you have stated that it will take her some time to do so. I would therefore be grateful to receive copies of the advice provided on the use of the Council's sickness absence management policy that the Head of Human Resources has already identified from searching her own emails now.

2. In searching further, it would be helpful if the Head of Human Resource could focus on advice relating to escalating staff from Stage 1 to Stage 2 of the sickness absence process. It is my understanding that as of September 2013 there were only 5 members of staff on Stage 2, so this will considerably reduce the scope of my request.

3. I also requested any general advice on the use of the Sickness Absence Management Policy in reports to management, such as the Exec board, Heads of Service and Planning Management team, and I would expect that these should be readily retrievable.'

10. On 25 April 2014 the Council responded:

'A search has now been completed on emails relating to the Head of Human Resources and one other member of staff. These contain a lot of personal information about the individual concerned. They will be informed that a request has been made for this information and their views sought on whether they do or do not object to release of their information. If they do object then the Council may not release the information or it may be subject to the redaction of information.

Similarly, reports containing general advice to management will also be subject to the redaction of any personal details

You will therefore note that a further search needs to be undertaken on other members and former members of the HR section together with appropriate redactions and this work is being undertaken solely by the Head of Human Resources. You will appreciate that this work is being carried out in addition to her normal workload. Accordingly, it is extremely difficult to estimate the time this will take.'

11. On 2 June 2014 the complainant requested an update on progress as she had previously agreed to accept the information in batches but had not yet received any information.

12. On 6 June 2014 the Council stated that the Head of Human Resources had

'identified that there were 111 sickness absence cases that were at stage 1(the review meeting) of the Council's Managing Sickness Absence Policy and Procedure in the Strategy & Development Directorate since April 2012'.

13. The Council explained that it was highly likely that Human Resources colleagues would have provided some advice to managers, as all the cases identified a member of staff with a total of 6 days absence in any 12 month rolling period. A further analysis identified that there were 72 cases in 2013.
14. The Head of Human Resources started the process of looking through all Human Resources colleagues' emails focusing on the members of staff escalating from stage 1 to stage 2. There were 607 emails identified and *'printed so that these could be read'*. The Human Resources Manager ceased the process as the limit would be reached.
15. The Council explained to the complainant that *'this exercise has taken far beyond the Appropriate Limit allowed under the Act. The Council are not obliged to search for this information any more.'*
16. On 12 June 2014 the complainant wrote that that had *'lead me to believe that the Head of HR was continuing to work on providing me with the information that I had requested'* but to date had not received any information and no indication of what could be provided within the cost limit.
17. On 20 June 2014 the Council refused the refined request under section 12, referring to the email of 6 June 2014 for resource implications and noting that *'although emails have been identified, these have not been read thoroughly and that case files have not yet been reviewed.'* An internal review was not offered.

Scope of the case

18. On 20 June 2014 (received 23 June 2014) the complainant complained to the Information Commissioner.
19. The complainant asked the Commissioner to consider whether the Council had correctly relied on section 12 (including the late application of section 12), section 16 (appropriate advice and assistance), and sections 10 and 17 (procedural) of the FOIA.

Reasons for decision

Section 12 – The cost of compliance

20. 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."

21. 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 the Regulations, a public authority may charge a maximum of £25 per hour for work undertaken to comply with a request. This equates to 18 hours work in accordance with the appropriate limit set out above.
22. 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:
 - determining whether it holds the information;
 - 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.
23. The Commissioner has discretion over whether to accept a late claim of section 12. That is, where a public authority does not claim that it would be too costly to comply with a request until after the time by which the public authority should have originally complied with that request, usually 20 working days, the Commissioner is not obliged to consider the application of section 12. This is because, usually, the public

authority would have already incurred the cost of gathering the requested information together in order to consider whether any of the exemptions apply.

24. In this case, the Council cited section 12 in response to the original request on the 20th working day but outside of 20 working days for the refined requests. The Commissioner has exercised his discretion to accept the late application of section 12 for the refined requests.

Would the cost of compliance exceed the appropriate limit?

25. As is the practice in a case such as this, the Commissioner asked the Council to confirm if the information is held and if so, to provide a detailed estimate of the time/cost taken to provide the information falling within the scope of this request.
26. In his assessment of whether the Council has correctly relied upon section 12 of the FOIA, the Commissioner has considered the submissions provided by the Council to him, as well as the refusal notices and other correspondence provided by the Council to the complainant.
27. The Council has explained to the Commissioner that when the Head of Human Resources identified the 607 emails subject to the revised request, *'it was estimated that to review the content of each email would take at least five minutes equating to 50 hours work'*.
28. The Commissioner is not convinced that it would take 5 minutes to review the content of each email to determine if it was caught by the request. Nevertheless even if this was reduced to 2.5 minutes this would equate to 25 hours work and still exceed the cost limit. It should be noted that this does not take into account the original cost of locating the relevant case files although this may be small.
29. In light of the above the Commissioner is satisfied that complying with the complainant's revised request would still exceed the appropriate cost limit. He therefore considers that the Council was correct to apply section 12 to the refined request.

Section 40(2) Personal information

30. With the further refinement of the information request on 17 April 2014 to the advice and guidance provided on those cases that had been escalated from Stage 1 to Stage 2, there were only 5 cases at Stage 2 of the Council's Managing Sickness Absence Policy and Procedures.
31. The complainant knew this at the time of the refined request in April: *'It is my understanding that as of September 2013 there were only 5*

members of staff on Stage 2'. Therefore the Council believe that it is 'highly likely that even with Human Resources redacting personal data those members will be identified.' This is explained further in a confidential annex to be provided to both parties only.

32. The Human Resources Manager had previously communicated concerns relating to this and had contacted the individuals for consent to disclose the redacted information under the FOIA but this was refused.
33. The Council provided to the Commissioner some examples of emails requesting sickness review meetings and Occupational Health reviews. The Commissioner is of the view that it would be very difficult to redact the personal content of these emails and even the fact of the referral letters, if linked to a person, would be disclosing personal data.
34. The Commissioner is mindful of its duty under the Data Protection Act 1998 (DPA) and therefore will consider Section 40(2) under the FOIA which provides that information is exempt if it is personal data and its disclosure would breach the data protection principles of the DPA. Section 40 under the FOIA is an absolute exemption.
35. The issue to be considered is if disclosing the requested information would breach the data protection principles of the DPA. In particular if disclosure would breach the first data protection principle which states that information can only be processed, which includes disclosing information in response to FOIA requests, if the processing is fair and lawful and in particular shall not proceed unless certain conditions are met. These conditions are set out in schedules 2 and 3 of the DPA.
36. The first thing to be considered is whether any personal data would be disclosed when responding to the request. Personal data is information that both identifies and relates to a living individual. It is defined in section 1(1) of the DPA. The refined request refers to five individuals, all of whom have a sickness at Stage 2 of the Council's Managing Sickness Absence Policy and Procedures. If the disclosure would be unfair it would breach the first principle and section 40(2) FOIA would be engaged.
37. The Commissioner understands that the complainant has requested guidance to managers on the use of the Council's sickness absence management policy in relation to the second stage. However, having viewed some emails that requested referrals it is difficult to see how any of these can be redacted so that the sensitive personal data of the individuals concerned is not disclosed. These all contain very personal and sensitive information about the history and reasons for an individual's absence and the advice and guidance sought about this.

38. The Commissioner notes that the individuals were contacted to seek their consent (and refused) and accepts that these employees would not reasonably expect this sort of information to be disclosed under FOIA.
39. In light of this the information itself would be exempt under section 40(2) on the basis that its disclosure would be unfair to those individuals at Stage 2 of the Council's Managing Sickness Absence Policy and Procedures and so breach the first data protection principle of the DPA.
40. In light of the above the Commissioner is satisfied that the Council, ultimately responded to the request correctly and does not require it to take any action.

Procedural Requirements

Section 10(1) Time for compliance

41. Section 10(1) of FOIA states that on receipt of a request for information a public authority should respond to the applicant within 20 working days.
42. The Council responded to the refined request of 19 March 2014 within 20 working days on 15 April 2014. The Commissioner has therefore found that the Council has not breached section 10(1) of FOIA.

Section 17(5) Refusal of request

43. Section 17(5) states that any public authority relying on section 12 must within the time limit for complying with section 1(1) give the applicant a notice stating that fact. The Commissioner finds that the Council breached section 17(5) as it did not apply section 12 to the refined request of 19 March 2014 until June 2014.

Section 17(7) Internal review

44. The Commissioner notes that although there was correspondence between the Council and the complainant, the refusal notice of 20 June 2014 for the refined request of 19 March 2014 did not include an offer of an internal review of the decision but referred the complainant to the Commissioner.

Section 16(1) – The duty to provide advice and assistance

45. 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")¹ in providing advice and assistance, it will have complied with section 16(1).

46. The Commissioner has considered the provision of advice and assistance by the Council in this case. The Council provided advice in response to the original request of January 2014. However, when dealing with the refined request of 19 March 2014 the Council stated the reasons for not supplying the information under section 12, but did not make suggestions as to how this could be achieved.
47. The Commissioner considers that this does not satisfy the requirements of the Secretary of State's Code of Practice issued under section 45 of the Act, and therefore the Council breached the duty at section 16 of the Act.

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

Right of appeal

48. If 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

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

49. 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.
50. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF