

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 March 2020

Public Authority: London Borough of Waltham Forest
Address: Town Hall
Forest Road
London
E17 4JF

Decision (including any steps ordered)

1. The complainant has requested information about an unreasonable behaviour policy. The London Borough of Waltham Forest ("the London Borough") responded to part of the request but refused the remainder, relying on section 12 of the FOIA (costs) to do so.
2. The Commissioner's decision is that the London Borough has failed to provide a reasonable estimate of the cost of complying with the request and is therefore not entitled to rely on section 12 of the FOIA. She also finds that it failed to issue a response within 20 working days and thus breached section 10 of the FOIA.
3. The Commissioner requires the London Borough to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to elements [3], [4], and [5] of the request which does not rely on section 12 of the FOIA.
4. The London Borough 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

5. On 25 July 2019, the complainant wrote to the London Borough to request information in the following terms:

"Please will you provide me with the following:-

- [1] A copy of your Vexatious Complaints Procedure.*
- [2] What date did the council begin to hold a Vexatious Register? Is it held centrally or by department?*
- [3] Since the Vexatious Register began, how many residents have been placed on it? And why?*
- [4] What is the average length that residents are placed on the Register?*
- [5] How many letters have been sent to residents informing them that their access to the complaints process has been restricted, when their vexatious status will be reviewed and the method in which they are expected to make contact in the future (e.g. letter only)?*
- [6] Have there ever been any instances where Waltham Forest have used the Register to punish a resident for speaking out (e.g. poor workmanship, defects and refurbishment works)?*

"I would like the above information to be provided to me in paper format and sent to the following address."

6. On 11 September 2019, the London Borough responded. It provided information in respect of element [1], [2] and [6]. In respect of elements [3], [4] and [5], it stated that it could not provide the information as *"there is no central record held."*
7. The complainant sought an internal review of the London Borough's response on 13 September 2019. The London Borough completed that review on 11 November 2019. It now changed its position in that it recognised that it *did* hold the information, but argued that the request could not be responded to without exceeding the cost limit.

Scope of the case

8. The complainant contacted the Commissioner on 29 September 2019 to complain about the way her request for information had been handled. At that point, the London Borough had yet to complete its full internal review and the Commissioner's intervention was necessary to get it to do so.

9. Once the review had been completed, the complainant contacted the Commissioner again on 26 November 2019 because she did not agree that her request could not be answered within the cost limit.
10. The Commissioner commenced her investigation on 28 January 2020 with a letter to the London Borough. She asked it to provide a detailed justification for its use of section 12 of the FOIA to refuse the request. The Commissioner made clear in her letter that the London Borough would have one opportunity to set out its position and that, should it fail to justify the use of section 12 to her satisfaction, she reserved her right to issue an adverse decision notice.
11. The London Borough provided its submission on 24 February 2020 and this is discussed in more detail below.
12. The Commissioner considers that the scope of her investigation is to consider whether the London Borough was entitled to rely on section 12 of the FOIA to refuse the request.

Reasons for decision

Section 12 – Cost of Compliance Exceeds Appropriate Limit

13. Section 1(1) of the FOIA states that:

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.*

14. Section 12 of the FOIA 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.*
- (2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.*

15. The "Appropriate Limit" is defined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") and is set at £450 for a public authority such as the Council. The Regulations also state that staff time should be notionally charged at a flat rate of £25 per hour, giving an effective time limit of 18 hours.
16. When estimating the cost of complying with a request, a public authority is entitled to take account of time or cost spent in:
 - (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.
17. 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. The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.

The London Borough's position

18. At the outset of her investigation, the Commissioner wrote to the London Borough, highlighting the four tasks above and asked it to demonstrate how it had arrived at its estimate.
19. The London Borough reiterated that it held no central register of those to whom its "Policy on Dealing with Unreasonable Behaviour" had been applied and thus it would only be able to respond to the request by collating the information from across its various service areas.
20. In order to determine what information it held, it argued that:

"the enquiry would need to be sent to all head of service within the council. There is no definitive list, so this would require investigation and liaison with HR to obtain job titles and email address. [sic] Once a definitive list can be compiled, the work involved would include sending an initial email to make the enquiry and then ensuring that a response is received from each head of service."

21. The London Borough stated that it would take three hours to "exchange emails with HR", an additional two hours for the HR department to extract a list of the Heads of Service and a further five hours to contact each Head of Service and chase them if they did not reply.

22. The London Borough then argued it would need to spend a further 40 hours locating and retrieving relevant information:

"Within the services, there would have to be a search of records or officer knowledge to find out whether such a policy was ever used by the service and implemented. Each service area would need to search their own records, databases and records held by team managers"

23. Undertaking this work would, the London Borough argued, require two hours per service area. It estimated (it did not seem to know for sure) that it had 20 distinct service areas and thus the two hours' work would need to be multiplied by a factor of 20.

24. Finally, having located the relevant information, the London Borough argued that a further two hours' work would be required, per service area, because:

"Once located, the documents would need to be reviewed and redacted of any personal information. Statistics of returns from all service areas would then need to be compiled to provide council wide figures as requested in this FOI in terms of the numbers on any lists. Then an analysis of the length of time and the reason would need to be undertaken to provide council wide statistics."

25. In total, the London Borough claimed, it would require some 90 hours of staff time to respond to the request, at a notional cost of £2,250.

26. In response to the Commissioner's enquiry about the details of any sampling exercise, the London Borough responded to say that:

"A sampling exercise has been undertaken with one service area. This involved searching for information on their shared drive going back to financial year 2015-2016 (this was the earliest record they had as previous years have been deleted in line with their retention policy); The service would then need to locate the appropriate folder and extract the letter or letters sent to customers; They would then need to create a list of customers if there is more than one and read through each letter to see what type of ban was imposed (e.g. telephone ban or premises ban) and how long that was for. Finally, they would then need to work out an average time on that. Their estimate was that these activities would likely to take at least 4 hours."

27. Finally, the London Borough stated that there was no quicker way of way of locating the information and that there was no possible advice and assistance it could offer which would have enabled the complainant to refine her request such that it would fall within the cost limits.

The Commissioner's view

28. The Commissioner recognises that, where a public authority does not hold certain records centrally, responding to an information request can be burdensome, because work must be duplicated across departments. The particular request in question could not be answered easily. Whether or not the London Borough's methods of storing this information are fit for purpose is not for the Commissioner to consider. She is only required to consider whether the estimate is reasonable, given the way information is, as a matter of fact, stored.
29. Nevertheless, the Commissioner simply cannot accept that the London Borough's estimate of the cost of complying with the request is reasonable for three reasons:
- She does not consider that the London Borough has identified the quickest way of finding the requested information;
 - its time estimates lack credibility and are not supported by evidence;
 - by its own admission it has included the costs of impermissible activities in calculating its estimate.
30. The Commissioner finds it difficult to believe that, should one particular service area choose to apply the policy to an individual, that that service area would not share that information with relevant departments. Not least because not doing so would likely undermine the purpose of the policy – which is to manage an individual's contact across the organisation on a consistent basis.
31. Even if each service area were to keep its own records, the Commissioner finds it difficult to believe that, where a premises ban was applied to an individual, for example, that information would not be shared with the Head of Security – who would be responsible for ensuring that it was enforced. If a single point of contact restriction were imposed, with emails being intercepted and redirected to a specific mailbox, that is clearly going to require the IT department being informed.
32. The Commissioner considers that the London Borough's main customer contact centre, in particular, would need to know about any contact restrictions – as this department would be the most likely port of call for

any individual trying to circumvent a restriction applied by another service area. She notes that the most recent edition of the London Borough's Policy states in chapter 26 that:¹

*"A spreadsheet containing a **contact log** and templates for issuing warning or ban letters to customers are available for staff on the Council's Intranet."* [emphasis added]

33. Whilst these examples would not necessarily provide *all* the requested information, they would be a useful starting point for a search – which the London Borough does not appear to have considered.
34. Turning to the estimates which the London Borough has provided, the Commissioner considers them to be grossly inflated beyond a level supported by evidence.
35. The Commissioner finds it difficult to believe that it would take three hours to contact HR to ask for a list of the various heads of service area. Such an astonishing estimate would require solid supporting evidence yet the Commissioner is invited, by the London Borough, to accept the assertion at face value.
36. The statement that it would then take HR two whole hours to compile a list of around 20 names and email addresses is, again, an extraordinary assertion that the Commissioner is apparently required to accept at face value. HR would require such information to be relatively easily accessible because they would need to know about lines of management within the organisation.
37. Finally, the Commissioner is apparently expected to accept that it would take a full five hours to contact the individual service areas to ask for relevant information. If the Commissioner accepts the London Borough's estimate of 20 service areas, that means 15 minutes would need to be spent per area.
38. However the Commissioner considers that the request could be sent out to all areas simultaneously and chased via a group email. That email admittedly might take 15 minutes or so to draft, so that it was clear what information was required but, even if each service area *were*

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<https://www.walthamforest.gov.uk/sites/default/files/LBWF%20Policy%20on%20Unreasonable%20Behaviour%20updated%20Jan%202020.pdf>

contacted individually, the text could be copied and pasted into each individual email.

39. The Commissioner is therefore being invited to accept, without any supporting evidence, that it will take a total of ten hours for the London Borough to work out which twenty people it needed to contact, contact them and follow up if any of them failed to respond. This estimate does *not* include any time that the individual service areas might spend identifying relevant information. Nor does it include the time the information governance team might need to spend collating the information that was provided by the service areas. According to the London Borough's submission, it would take ten hours *to merely ask its service areas whether information was held*.
40. In considering whether ten hours might be a reasonable amount of time to spend on contacting twenty people, the Commissioner notes that, according to Google Maps, it would take a reasonable individual two and a half hours to traverse the entire length of the Borough.
41. Moving on to the time taken in the individual service areas, the Commissioner notes from the London Borough's website that it has 23 individuals with the job title "director." It is not clear whether there are more heads of service than directors or fewer but, in the absence of any explanation from the London Borough, the Commissioner accepts that an estimate of 20 heads of service is reasonable – though she finds it somewhat concerning that she has to accept an *estimate* of such a basic piece of information about a public authority.
42. The London Borough claims that it would take four hours, per service area, to locate and extract relevant information and prepare it for disclosure. Because this work would have to be duplicated across all 20 service areas, that adds up to 80 hours of work overall.
43. The Commissioner considers that the individuals to whom the policy has been applied will, by definition, be well known to those working in the service area. Whilst the right of access under the FOIA is to information held in recorded form, not to information contained in the minds of staff, she does consider that this "local knowledge" should make finding the relevant information a relatively straightforward task.
44. The Commissioner accepts that some service areas may have applied the policy to several individuals. In those circumstances, it may require some time to locate all the relevant information within the scope of the request. However four hours is still extravagant for a policy that is supposed to be applied sparingly.

45. Furthermore, the Commissioner is not convinced that every service area would need to spend a large amount of time searching for relevant information. Whilst some areas, such as Planning, Parking or Refuse Collection often, in the Commissioner's experience, have more of a tendency to attract the types of individual for whom the policy is designed, she finds it difficult to believe that the "Director of Return on Investment" (or the service areas sitting underneath that individual) would need to spend a similar amount of time searching for information. She therefore cannot accept four hours as being the *average* time that each service area would need to spend on searching.
46. In this instance, a proper sampling exercise would have helped the London Borough support its estimate. Unfortunately the information it has provided gives little support. The London Borough gives no indication of which service area was consulted, no indication of why this particular area was chosen, or whether or not it was likely to be typical example and no proper indication of the processes that the service area had actually followed to arrive at its answer.
47. Indeed, the only point at which the London Borough pointed to a specific figure that had arisen out of its sampling exercise was:

*"Their **estimate** was that these activities would likely to take at least 4 hours."* [emphasis added]
48. The whole point of a sampling exercise is to supply raw data, based on actual live experience, which can then be used as a basis for providing a robust estimate. If the London Borough actually did carry out a sampling exercise, it has not provided the data from that exercise and so, once again, the Commissioner is asked to accept an estimate with no solid basis in evidence.
49. The Commissioner is not convinced that the process that each individual service area would apparently need to follow itself would be necessary if the original call for information was done competently. If each service area were to be sent a spreadsheet with individual fields to capture all information within the scope of the request, that would reduce the time need to collate the information considerably. Each service area could simply enter the information from its own sector and a member of the information governance team would only have to copy and paste the individual spreadsheets into a master copy – which could be done in under half an hour. Pre-populating the spreadsheet with a simple formula would enable the average to be calculated automatically.
50. Finally, the Commissioner notes that some of the time the London Borough claims it would need to respond to the request would be necessary because:

"the documents would need to be reviewed and redacted of any personal information... then an analysis of the length of time and the reason would need to be undertaken to provide council wide statistics."

51. Redacting information is explicitly *not* a task that a public authority can consider when calculating an estimate of the cost of complying with a request. Nor is any form of data validation. All the London Borough is required to do is compile the returns from each service area into a simple spreadsheet and use the spreadsheet to calculate an average. This is something that an individual with a basic knowledge of Microsoft Excel could accomplish in around half an hour.
52. The obligation under section 1(1) of the FOIA is to provide the information which the public authority holds in recorded form. If the individual service areas respond using different terminology (such as one saying "telephone ban" and another saying "banned from calling"), the London Borough could merely supply that information and still comply with the request. It may *prefer* to supply the data in a form that is more consistent, but the London Borough is not permitted to include any time spent on this activity in its estimate, as this is an activity it is undertaking voluntarily.
53. In accordance with the First-Tier Tribunal in *Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency* EA/2007/0004, the Commissioner considers that any estimate submitted by a public authority must be "sensible, realistic and supported by cogent evidence".²
54. The Commissioner does not consider the estimate the London Borough has offered to be "sensible" because of the unrealistic amount of time it claims it needs to contact the service areas. She does not consider the estimate to be "reasonable" because it includes time spent on activities other than the ones it is permitted to include and if the London Borough has "cogent evidence" to support its estimate, it has not provided it to the Commissioner.
55. It follows that the Commissioner cannot consider that the London Borough's has made a reasonable estimate of the cost of complying with the request and therefore she does not consider that it is entitled to rely on section 12 of the FOIA to refuse the request.

² <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf>

Section 10 – Timeliness

56. Section 10 of the FOIA states that responses to requests made under the Act must be provided “*promptly and in any event not later than the twentieth working day following the date of receipt.*”
57. From the evidence presented to the Commissioner in this case, it is clear that, in failing to issue a response to the request within 20 working days, the London Borough breached section 10 of the FOIA.

Other matters

Internal review

58. The London Borough should have responded to the request on 22 August 2019. When it failed to do so, the complainant asked for an internal review of the handling of the request on 30 August 2019, to address the issue of timeliness. After the London Borough issued its formal response on 11 September 2019, the complainant sent a further request for internal review on 13 September 2019, this time addressing the substance of the response she had been provided with. In that request, she set out a number of perceived deficiencies in the London Borough’s response. Some of these deficiencies related to alleged breaches of the FOIA, others related to the quality of the service she had received. However the complainant was very clear in her correspondence that this later request for a review superseded her previous request.
59. On 25 September 2019, the London Borough informed the complainant that it had completed its internal review – but only in relation to the request for a review the complainant submitted on 30 August and not her request for a substantive review of the response provided.
60. The Commissioner’s guidance states that internal reviews should normally be completed within 20 working days and should never take longer than 40 working days. The Commissioner notes in this particular case that the London Borough took in excess of 50 working days to complete its internal review of its substantive response – and only completed it after she intervened. She considers this to be poor practice.

Advice and assistance – Section 16

61. Because the Commissioner has found that the London Borough was not entitled to rely on section 12 to refuse the request, she need not make a formal decision on section 16 – a public authority does not need to provide advice and assistance where it is able to provide information in

response to the request. However, the Commissioner still feels it necessary to comment on the advice and assistance that the London Borough offered.

62. In its submission, the London Borough argued that, because of the way information was held:

"We were unable to provide any advice or assistance in terms of refining the request to allow it to be answered, as irrespective of whether the request is refined or not, we would still be in the same situation, i.e. that there is no central database that we can search on and a manual search would be required."

63. Even if the Commissioner had found that the London Borough's estimate of the cost of complying with the request *was* reasonable, it is likely that she would have found that the advice and assistance it offered was *not* reasonable.
64. By its own claim, the London Borough estimated that a single service area could identify and extract all the information it held within the scope of the request in four hours. If that is the case, then plainly it could have advised the complainant that she might wish to restrict her request to particular service areas – four service areas could each take four hours and still comply with such a request without exceeding the cost limit. The complainant may or may not have been willing to refine her request in such a way, but that does not affect the obligation on the London Borough to offer reasonable advice and assistance.

Right of appeal

65. 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@justice.gov.uk

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

66. 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.
67. 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

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