

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 July 2020

Public Authority: Shropshire Council
Address: Shirehall
Abbey Foregate
Shrewsbury
SY2 6ND

Decision (including any steps ordered)

1. The complainant has requested information about alleged criminal offences committed by councillors. Shropshire Council did not comply with the request and cited section 12(1) (cost of compliance exceeds appropriate cost limit) of the FOIA.
2. The Commissioner's decision is that although section 12 of the FOIA applies, Shropshire Council should have applied section 12(2) ('neither confirm nor deny' on cost grounds) of the FOIA.
3. The Commissioner does not require Shropshire Council to take any steps as a result of this decision.

Request and response

4. On 12 August 2019, the complainant wrote to Shropshire Council (the council) and requested information in the following terms:

" Can I ask:

- 1. How many alleged criminal offences under the Localism Act councillors have been reported to the Monitoring Officer?*
- 2. How many of these were factually or appeared a criminal offence?*
- 3. How many of these has the Monitoring Officer referred to the police?*
- 4. How many have the police taken action on?*

5. The council responded on 21 August 2019. It refused to provide the requested information, explaining that it was not held in a way that can be retrieved from its system electronically. It also explained that to respond would require manual extraction and collation of information and estimated that this would take longer than 18 hours of staff time to collate, which would exceed the appropriate cost limit of £450.
6. The complainant requested an internal review on 22 August 2019 and asked for information up to the cost limit. Following an internal review the council wrote to the complainant on 2 October 2019. It answered the questions.

Scope of the case

7. The complainant contacted the Commissioner on 11 October 2019 to complain about the way his request for information had been handled. He explained that he knew that there have been a significant number of complaints made against Shropshire councillors alleging criminal activity and was aware of the details of about 20 such complaints. The complainant also explained that he considered that the council would not like the figures released to the public in a formal manner and this was the real reason for refusing the request.
8. Additionally, the complainant explained that it was inconceivable that the information was not more available and does not believe that it would take more than 18 hours to collate the information. The complainant also explained that the council did not confirm whether the requested information was available, or provide any advice or assistance to refine the request.
9. The complainant also explained that he had made four complaints to the council's monitoring officer concerning councillors, which had been referred to the police.
10. During the Commissioner's investigation the council explained that it was going to disclose the requested information to the complainant and therefore was no longer relying on section 12(1) (cost of compliance exceeds the appropriate cost limit) of the FOIA.
11. The Commissioner contacted the complainant who explained that he was still dissatisfied. He explained that he considered that the response was either disingenuous or that the council was deliberately blocking disclosure of the information.

12. The complainant also explained to the Commissioner that, in relation to a subsequent related request, he wanted to draw her attention to the following as it applied to both requests:

"Simply put, there was no need to collate information from several accounts as all of the information would be funnelled through the Monitoring Officer as required by Part 5 of the Council's Constitution:

4. Procedure with Regard to Breaches of Protocols/Codes

4.1 Any concerns regarding Members' conduct in relation to the relevant protocols listed at paragraph 1 above should be considered in the first instance by the Monitoring Officer. If the conduct gives rise to s.151 statutory officer issues, the Monitoring Officer will consult with that officer. Where the concerns relate to potential criminal actions, the Monitoring Officer shall make an immediate referral to the Police."

13. The Commissioner contacted the council and explained that the complainant was dissatisfied with the disclosure. The council explained that it would be relying on section 12 again as compliance with the request would exceed the cost limit.

14. During the Commissioner's investigation, the complainant alleged the following:

"Therefore, at best the latest response from Shropshire Council is disingenuous, and at worst an offence under Sect 77 of the FOIA 2000 in that information held by the local authority is being blocked."

15. The case was reviewed by the Commissioner's Criminal Investigations Team with a view to establishing whether an offence under section 77 of the FOIA¹ had been committed. The review concluded that there was no evidence that such an offence had been committed.

16. The Commissioner will consider the council's application of section 12. She notes that it has cited section 12(1) but considers that it should cited section 12(2) ('neither confirm nor deny' on cost grounds) of the FOIA. She will also consider whether it provided the complainant with any advice and assistance.

¹ Section 77 of the FOIA provides that it is a criminal offence, punishable by a fine, where a request for information has been made to a public authority (PA) and the requester would have been entitled (in accordance with section 1 FOIA or section 7 DPA) subject to payment of any fee, to communication of any information requested but either the PA, an employee or officer of the PA, or any person subject to the direction of the PA alters, defaces, blocks, erases, destroys or conceals any record held by the PA, with the intention of preventing the disclosure of all, or any part, of the information to the requester.

Reasons for decision

Section 12 – cost of compliance exceeds appropriate cost limit

17. 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."

18. Section 12(2) of the FOIA states that:

"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."

19. This limit is defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations) as £600 for central government departments and £450 for all other public authorities. This means that the appropriate limit will be exceeded if it would require more than 24 hours work for central government, legislative bodies and the armed forces and 18 hours work for all other public authorities. In the present case the appropriate cost limit is £450 and the appropriate time limit is 18 hours.

20. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the costs it reasonably expects to incur in carrying out the following permitted activities in complying with the request and:

- 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.

21. Section 12 provides that public authorities are only required to estimate the cost of compliance with a request. The Commissioner considers that the estimate must be reasonable and has followed the approach set out by the Information Tribunal in *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency* (EA/2006/004, 30 October 2007) which states that a reasonable estimate is one that is *"sensible, realistic and supported by cogent evidence"*.

22. Section 12(2) requires a public authority to estimate the cost of complying with the request, rather than provide an exact calculation. The Commissioner must therefore consider whether any estimate provided by the council is reasonable. If it is, then section 12(2) is engaged and the council does not have to comply with the request.

Aggregation of requests

23. The council explained to the Commissioner that the first question: *"How many alleged criminal offences under the Localism Act councillors have been reported to the Monitoring Officer?"*, informs the response to all the other questions.
24. Multiple requests within a single item of correspondence are considered to be separate requests for the purpose of section 12. In the present case this means that there are four requests to be considered. If they relate to the same overarching theme, public authorities can aggregate two or more separate requests in accordance with the conditions laid out in the Fees Regulations. Any unrelated requests should be dealt with separately for the purposes of determining whether the appropriate limit is exceeded. In the Commissioner's guidance (the guidance) on exceeding the cost limit² she explains that:

'Regulation 5(2) of the Fees Regulations requires that the requests which are aggregated relate "to any extent" to the same or similar information. This is quite a wide test but public authorities should still ensure that the requests meet this requirement.

A public authority needs to consider each case on its own facts but requests are likely to relate to the same or similar information where, for example, the requestor has expressly linked the requests, or where there is an overarching theme or common thread running between the requests in terms of the nature of the information that has been requested'.

25. The Fees Regulations wording of *"relate, to any extent, to the same or similar information"* makes clear that the requested information does not

² https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

need to be closely linked to be aggregated, only that the requests can be linked.

26. The Commissioner notes that the council explained to her that the first request informs the response for the other requests. The Commissioner has considered the wording of the requests. She is satisfied that there is an overarching theme. This is because the four requests all relate to alleged criminal offences being reported to the monitoring officer.

Application of section 12(2)

27. The council explained that the requested information is not held centrally and would therefore have to be searched for and retrieved by searching through the monitoring officer's emails. There are 1400 councillors and parish councillors in total across the region and therefore to get an exact figure for question one would require the council to search the monitoring officer's inbox for all 1400 councillors names to see what came up.
28. The council also confirmed that it had carried out a sampling exercise in relation to an inbox, based on the searches and search terms that would be required. It explained that it had searched for councillors names by doing a search in Outlook for full names and also using the following search term , "Councillor" together with a relevant a surname. This is because a member of the public, a staff member, anyone referring to a councillor or making a complaint about a councillor in email correspondence, may refer to "Councillor" and then a surname, rather than using the councillor's full name.
29. It also confirmed that the sampling exercise had involved searching folders in Outlook, together with the full inbox in question and also deleted items.
30. Additionally, the council explained that a wider search than the sampling exercise, would involve searches across all Outlook items and also in multiple folders. There would also need to be an additional search using the terms above in any other relevant sub-folders within Outlook that may be relevant or that may contain relevant information about the councillors.
31. Based on the sampling exercise and the fact that it would have to search for names in more than one way and in different folders, it explained that the average came out at between 30 seconds to 1 minute.
32. The council also explained that it had aggregated the time between 30 seconds – 1 minute, which is 45 seconds and this is what it has based its calculations on. Therefore, it would take approximately 45 seconds

per initial search. The council provided the following estimate: 1400 councillors x 45 seconds per search = 63000 seconds or approximately 17.5 hours of staff time.

33. Furthermore, the council explained that it would have check each email that the search produced; as the monitoring officer would be in contact with councillors all the time, there would be numerous emails to and from councillors in that officer's inbox. It would be impossible to say exactly how many emails there would be, but it would be likely to be hundreds. The council would have to examine each email the initial search produced, to pick out the relevant ones. It explained that on the basis of 100 emails, it would take approximately 2 minutes to search through each one to see if any part of it referred to an alleged offence. The council provided the following estimate: 100 emails x 2 minutes = 200 minutes or approximately 3 hours.
34. The council explained that this was a conservative estimate of the number of emails because it could not be sure how many would be returned from the search but believed there would be 100 at least but probably a lot more.
35. The council also explained that in order to answer question 1, it would take approximately 20.5 hours and therefore section 12 is engaged.

Conclusion

36. The Commissioner has considered the council's estimate regarding how long it would take to carry out an initial search. She notes that each email resulting from the initial search would also have to be considered to see if any contained any relevant information and that until the council carried out a search, it would not know how many emails would have to be considered.
37. The Commissioner notes that the council has provided her with a sampling exercise. She also notes that the total estimate for the time taken to search for the requested information would be 20.5 hours for the first request.
38. Taking the above into account, the Commissioner considers that the time estimate provided by the council is reasonable.
39. The Commissioner therefore considers that section 12(2) is engaged and that the council does not have to comply with the request.

Section 16 – Duty to provide advice and assistance

40. Section 16(1) of the FOIA provides that -

"It shall be the duty of a public authority 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".

41. Section 16(2) of the FOIA provides that -

"Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is taken to comply with the duty imposed by subsection (1) in relation to that case."

42. 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 appropriate cost limit.

43. In his request for an internal review, the complainant asked the council the following: *"If the council maintain that the information requested is not easily accessible and would take 18 hours of staff time to collate, then can I please have 18 hours worth of the information requested i.e. the information supplied by each year since November 2011 until the 18 hours limit is reached?"*

44. In her guidance, the Commissioner explains that paragraph 14 of the section 45 Code of Practice 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."

45. The Commissioner explains that it is also important for two reasons: firstly, because a failure to do so may result in a breach of section 16; secondly, because doing so is more useful than just advising the requestor to 'narrow' the request or be more specific in focus. Advising requesters to narrow their requests without indicating what information a public authority is able to provide within the limit, will often just result in requesters making new requests that still exceed the appropriate limit.

46. The Commissioner considers that the council did not provide the complainant with advice or assistance, as it did not indicate what information could be provided within the cost limit.

47. She therefore considers that the council has breached section 16.

Other matters

48. The complainant requested an internal review on 22 August 2019. The council responded on 2 October 2019.
49. Part VI of the section 45 Code of Practice (the code) makes it good practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information.
50. While no explicit timescale is laid down in the code, the Commissioner has decided that a reasonable time for completing an internal review should normally be within 20 working days of receipt of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
51. The Commissioner notes that the council did not provide her with any reasons regarding exceptional circumstances. She is therefore concerned that it took approximately 1½ months for the council to complete the internal review.
52. The Commissioner also notes that the complainant wanted information up to the appropriate cost limit. In her guidance, the Commissioner explains a public authority is not obliged to search up to the appropriate limit. She also explains that as a matter of good practice, public authorities should avoid providing the information found as a result of its searching and claiming section 12 for the remainder of the information. It is accepted that this is often done with the intention of being helpful but it ultimately denies the requestor the right to express a preference as to which part or parts of the request they may wish to receive which can be provided under the appropriate limit.

Right of appeal

53. 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

54. 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.
55. 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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