

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 August 2020

Public Authority: Birmingham City Council

Address: Council House
Victoria Square
Birmingham
B1 1BB

Decision (including any steps ordered)

1. The complainant has requested various information relating to herself, her employment, and business areas within Birmingham City Council ("the Council"). The Council originally refused the request on the grounds of cost (under section 12), but later clarified that it was refusing the request on the grounds that it would impose a grossly oppressive burden (under section 14(1)).
2. The Commissioner's decision is that the Council is entitled to rely upon section 14(1). However, in applying section 14(1) outside the time for compliance the Council has breached section 17(1).
3. The Commissioner does not require the Council to take any steps, but refers it to other matters.

Request and response

4. On 25 June 2019, the complainant wrote to the Council and requested the following information under the terms of the Data Protection Act 2018 ("the DPA"):
 - 1) *My PDR documents and appraisals.*
 - 2) *A copy of my electronic/manual diary.*

- 3) *A copy of the full case file related to any specific allegation made in [redacted subject].*
- 4) *All supervision notes and records.*
- 5) *A copy of my case list for all cases conducted by me since 2013, including closed.*
- 6) *A copy of my current case list for KIL number of files closed per year and the number of hours charged in total on the closed matters per each year, 2014-2019.*
- 7) *A full IT audit log relevant to evidential investigations carried out on my case files and/or on the case management system.*
- 8) *A copy of the documents alleged to have been retrieved by BCC [redacted subject], and copies of screen grabs.*
- 9) *Internal LSO emails and emails to/from HR/other Council colleagues and departments and other related and relevant documents, related to me or that mention or concern me and the allegations made in this investigation.*
- 10) *A copy of all relevant emails to/from [redacted name], [redacted name], [redacted name], [redacted name], [redacted name], [redacted name], [redacted name], [redacted name].*
- 11) *Any personal data held about me by the Council. This request is specifically made under DP/GDPR.*
- 12) *My supervision file or any related and relevant documents. My HR file.*
- 13) *All documents on the workflow created by [redacted name] for Housing Service charge recovery.*
- 14) *All documents related to job applications, short listings, interviews, deliberations and decisions made that relate to me, including exchanged emails.*
- 15) *All relevant communication and documents concerning the allocation of Birmingham Markets lease renewal work to [redacted name] barrister and external call off partners and costs incurred by the Council (this request is also made under FOI).*
- 16) *All communication and documents related to my regrading request and application.*

- 17) *All communication and documents related to my grievance and minutes of the meeting of the first meeting held with [redacted name] and [redacted name] and any exchange of emails.*
- 18) *IT Trail audit trail to confirm the [redacted subject].*
- 19) *All emails sent from members of Litigation team to everyone within the team from 1 October 2018 regarding social gathering/birthday parties/Christmas lunches/evening meals to ascertain the dates and also email exchanged by the civil team including [redacted name] related to [redacted name] from 1 November to present date.*
- 20) *IT Audit trail to confirm who deleted my workflow and which Manager authorised the deletion.*
- 21) *All client performance indicators received by [redacted name] after May 21014 relating to [redacted name] files.*
- 22) *Details of all minutes of meeting held by managers relating to [redacted name] after May 2014 to present date.*
- 23) *Details of any deleted documents and data from [redacted name]'s laptop after 5 July 2019.*
- 24) *[Redacted name]'s file spreadsheet for Housing and [redacted name]'s Files, together with closure tabs.*
- 25) *All emails exchanged between [redacted name] and [redacted name] or his managers from November 2017 to present date.*
- 26) *All emails exchanged relating to [redacted name] on the case of [redacted name] between [redacted name] and [redacted name] (Housing) and [redacted name] and [redacted name].*
- 27) *All emails exchanged between [redacted name] and [redacted name] relating to [redacted name] on file of [redacted name].*
- 28) *All emails exchanged between [redacted name] and [redacted name] from October 2013 to present date.*
- 29) *All emails exchanged between [redacted name] and [redacted name] and [redacted name] relating to [redacted name] from 1 January 2013 to present date. Including appraises and recovering statistical data for service charge and ground rent.*
- 30) *All meetings held by [redacted name] and [redacted name] relating to the implementation of workflow and Housing service*

charge recovery and ground rent and recovering of Council Tax.

31) All meetings held and minutes or notes between [redacted name] and Council Tax office [redacted name] and [redacted name] from 1 August 2013 to 31 May 2014 for recovering of Council Tax and Business Rates.

5. On 4 October 2019, the complainant wrote to the Council and requested the following information under the terms of the FOIA.

I would also like to make a formal request for the same information as set out in my Subject Access request of 25 June 2019 but this time also under the Freedom of Information Request.

I would also like to add to this FOI request:

32) The amount it has cost the Council so far to instruct an Investigating Officer from [redacted name], out of the public purse to deal with my [redacted subject].

33) The Cost of instructing Barristers on the Litigation markets work from May 2014 to present date.

34) How many files each fee earner has in Legal Services from the period May 2014 to present date.

35) The Report from [redacted name] with regards to Civil Team being outsourced in or around 2016/2017/2018.

36) How many Grade 5 posts that were advertised internally in Legal Services from May 2014 to present date.

37) How many Grade 5 posts advertised in Litigation both externally and internally between May 2014 to 5 July 2018.

38) How many Grade 5 posts advertised in Litigation both externally and internally between 5 July 2018 to present date.

39) How many applications made by [redacted name] from May 2014 to present date for Grade 5 positions and reason for refusal.

40) All Legal Services fee earner's chargeable hours achieved for each period May 2014 until 5 July 2018.

6. The Council responded on 7 November 2019. It stated that the request was refused on the grounds of cost (section 12) but advised that it

would be able to consider a more refined request based on what the complainant considered to be most relevant.

7. On 25 November 2019, the complainant wrote to the Council and asked it to undertake an internal review in respect of its refusal.
8. The Council responded on 26 November 2019. It declined to provide an internal review on the basis that a 'final response' had not been issued.

Scope of the case

9. The complainant contacted the Commissioner on 12 November 2019 to complain about the way her request for information had been handled, and specifically that the Council was not entitled to refuse the request.
10. During the course of the Commissioner's investigation, the Council advised that it was unsure of how to calculate the total cost for section 12, due to the volume of held information that would fall within the scope of the request, and the necessity of considering exemptions. The Council subsequently informed the Commissioner that it should have refused the request on the grounds of oppressive burden (section 14(1)). This position was relayed to the complainant, who confirmed they wished the Commissioner to make a determination on this revised position.
11. The Commissioner will therefore consider whether the Council is entitled to rely upon section 14(1) to refuse the request on the grounds of oppressive burden.

Reasons for decision

12. Section 14(1) of the FOIA states that:

Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

13. The Commissioner has published guidance on vexatious requests¹. As discussed in the Commissioner's guidance, the relevant consideration is whether the request itself is vexatious, rather than the individual submitting it. Sometimes, it will be obvious when requests are vexatious, but sometimes it may not. In such cases, it should be considered whether the request would be likely to cause a disproportionate or unjustified level of disruption, irritation or distress to the public authority. This negative impact must then be considered against the purpose and public value of the request. A public authority can also consider the context of the request and the history of its relationship with the requestor when this is relevant.
14. In the circumstances of this case the Council applied section 14(1) on the basis of the grossly oppressive burden that it considers the request would impose upon it.
15. Ordinarily, where the concern of a public authority is about the burden of a request, the relevant provision of the FOIA would be section 12(1). This section provides that a public authority is not obliged to comply with a request where the cost of doing so would exceed a limit. However, a public authority cannot claim section 12(1) for the cost and effort associated with considering exemptions or redacting exempt information, which was the concern of the Council in this case.
16. A public authority may apply section 14(1) where it can make a case that the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden upon it. This can include time spent on considering exemptions and making redactions.
17. However, the Commissioner considers there to be a high threshold for refusing a request on such grounds. This means that a public authority is most likely to have a viable case where:
 - The requestor has asked for a substantial volume of information **and**

¹ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

- The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the ICO **and**
- Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.

18. The Commissioner has considered the representations received from both the complainant and the Council.

The complainant's position

18. The Commissioner understands that the complainant is an employee of the Council and is currently in dispute with the Council in respect of their employment. The complainant has explained to the Commissioner that they require access to all of the information outlined in the request in order to defend themselves in any related hearing.
19. The complainant argues that the Council would not be required to undertake significant work to obtain the specific information, as the information can be retrieved from the relevant databases and systems used. An example of this being the costs to instruct external solicitors, which can be easily accessed from Council's accounting system. As such, the information can be printed out and provided.

The Council's position

20. The Council has referred the Commissioner to the request, as made under the terms of the FOIA.
21. The Council has explained that questions 1-31 of the FOIA request are repeats of those previously asked under the terms of the DPA, and that the Council was still attempting to comply with those questions when the FOIA request was made; this includes 7 of the questions that the Council had sought clarification from the complainant about, but which was not received. The Council asserts that the information that would relate to these questions would require the Council to extensively consider the application of section 40 to ensure that the information was suitable for public disclosure under the FOIA. The Council has stated that 14 hours and 59 minutes of chargeable time has already been spent by Legal Services to address the DPA request, and that to address the same information anew under the FOIA would be likely to exceed this due to the necessity of considering exemptions under section 40.
22. In respect of questions 32-40, the Council has estimated that compliance under the FOIA would add significantly to the total time for compliance,

due to the volume of recorded information that would need to be searched through.

23. To provide an example of this significant total time, the Council has explained that for question 33 it has consulted with the Legal Practice Management team to determine how feasible compliance is. This question seeks the cost of instructing barristers on "*litigation markets work*" from May 2014 to the date of the request. To address this question, the Council has electronically searched its central case management system ('IKEN') for all legal files containing the search term 'Market', to which 162 electronic files were retrieved, ranging in size from several emails to many hundreds. Five of these legal files were randomly sampled to retrieve the requested information, which took on average 30 minutes per file. This would equate to an estimated 81 hours to review all 162 files.
24. In addition to question 33, the Council has estimated the following estimated time requirements for the following questions:
- Question 35: The extraction and presentation would take 1 hour.
 - Questions 36-38: These parts would take 16 hours. The majority of the information relating to internal recruitment is likely to be contained within emails deriving from specific staff (rather than centrally recorded), and will therefore need to be manually reviewed.
 - Question 40: The extraction and presentation of the information would take 4 hours.
25. The Council considers that the total time that would be required to comply with the request would impose a significant burden upon the Council and would cause an unjustifiable level of disruption.

The Commissioner's view

19. The Council has applied section 14(1) on the basis that compliance with the request would impose a grossly oppressive burden.
20. The Commissioner has considered the Council's position and recognises that the request is significantly wide in its scope; meaning that a substantial volume of information will be caught within its parameters. Part of this information will be that which the Council has previously considered under the terms of the DPA, and which the complainant has specifically stated they wish to be considered anew under the terms of the FOIA.

21. The Commissioner further recognises that, due to the nature of the information and the circumstances in which it is held, the Council has real concerns about potentially exempt information, of which a significant part is likely to be the personal data of both the complainant (section 40(1)) and of third parties (section 40(2)). Total compliance with the request would therefore require not only all information to be collated, but also a substantial amount of it to be manually reviewed in order to identify the potentially exempt information. The Council would then need to undertake the necessary actions to decide whether the cited exemptions are engaged.
22. The Commissioner's guidance for section 40(1)² explains that information representing the personal data of the applicant will be exempt from disclosure under the FOIA. Additionally, the Commissioner's guidance for section 40(2)³ explains that information representing the personal data of third parties can only be publicly disclosed under the FOIA subject to the terms of the DPA. Having considered the nature of the information that complainant has sought, the Commissioner is satisfied that this information will require the Council, out of necessity, to consider the application of sections 40(1) and 40(2).
23. Having noted that the Council has previously spent 14 hours and 59 minutes on addressing questions 1-31 under the DPA, the Commissioner recognises that considering the information anew under the FOIA – and specifically under the exemptions previously explained - is highly likely to exceed that time. In addition to those questions, it is also evident to the Commissioner that compliance with questions 32-41 may in itself require a total time in excess of 100 hours of officer time.
24. Having considered the complainant's submissions, as well as the detail included within the request (of which the Commissioner has considered it necessary to redact for publication), it is evident that that the request has been made in connection to a private matter relating to the complainant. Whilst the Commissioner appreciates the importance of

² <https://ico.org.uk/media/for-organisations/documents/1209/personal-data-of-both-the-requester-and-others-foi-eir.pdf>

³ <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-regulation-13.pdf>

this to the complainant, it is difficult to envisage any wider public value in the request that would justify the significant diversion of public resources that would be required to address it. The Commissioner notes, for the benefit of the complainant, that the FOIA is a public access regime; when information is requested under the FOIA, any subsequent disclosure is to the general public, and in cases where such disclosure would impose a significant cost, the Commissioner would expect to see an equivalent public value being provided to justify this.

25. It is also reasonable for the Commissioner to note that the complainant is likely to have alternative, and more appropriate means, by which to pursue her employment concerns. Additionally, the Commissioner is considering her rights under the DPA in a separate case under that legislation.

The Commissioner's conclusion

26. In conclusion, all information requests impose some burden and public authorities have to accept that in order to comply with their FOIA obligations. However, in some cases the burden imposed by a request will be disproportionate to its value.
27. In this case, the Commissioner recognises that that the request, which is composed of 40 individual parts, would require the Council to devote significant public resources to both the collation of the information and the application of exemptions.
28. The FOIA does not contain a limit at which a request is considered to impose a grossly oppressive burden, and any such request is considered by the Commissioner based on the individual circumstances of a case. In this case, the Commissioner is mindful that the estimated total time is far in excess of the appropriate limit of 18 hours (or £450 at a flat rate of £25 per person, per hour) that Parliament set for section 12(1) in *The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004*. It is reasonable for the Commissioner to consider that compliance with the request would therefore represent a substantial diversion of the Council's resources, and no public interest has been evidenced that would justify this.
29. The Commissioner has therefore concluded that the request would impose a grossly oppressive burden, and that the Council is entitled to refuse the request under section 14(1).

Section 17(1) – refusal of request

30. Section 17(1) specifies that a refusal notice must be provided no later than 20 working days after the date on which the request was received.

31. In this case the Council did not seek to apply section 14(1) within the time for compliance, and therefore breached section 17(1).

Other matters

32. In the circumstances of this case the Council declined to undertake an internal review on the basis that a 'final response' had not yet been issued (which the Commissioner interprets would be a new response based on any refined request made by the complainant).
33. The Commissioner considers that the complainant clearly sought an internal review based on the Council's refusal under section 12, and that it was not appropriate for the Council to decline to provide an internal review. The Commissioner refers the Council to her guidance:

<https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/#20>

Right of appeal

34. 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

35. 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.
36. 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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