

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 15 June 2011

Public Authority: Bury Council
Address: Town Hall
Knowsley Street
Bury
BL9 0SW

Summary

The complainant asked the Council to release a copy of the budget set for each civic hall, baths and health and fitness centre together with the detailed methodologies used for the administration and recharge mechanism with detailed data for each site. The Council responded refusing to disclose the requested information under section 43 of the Act. As the complainant remained dissatisfied, he approached the Commissioner. During the Commissioner's investigation the Council withdrew its application of section 43 of the Act and released the budgets for the various halls and health and fitness centres. It also released some information addressing the complainant's request for data relating to the administration and recharge mechanism. The complainant continued to complain about this element of his request stating that the information released relating to the administration and recharge mechanism was not the information he requested. The Council decided to then claim a late reliance on section 12 of the Act. The Commissioner has considered the application of section 12 to the remaining element of the request and he has concluded that it does not apply in this case. He has therefore requested the Council to either releasing the outstanding information to the complainant or issue a further refusal notice in accordance with section 17 of the Act within 35 days of this Notice.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant contacted the Council on 19 July 2010 to request:
"a copy of the budget set for each individual Civic Hall, plus the Baths and Heath & Fitness Centres also detailed methodologies used for the admin recharge mechanism, with detailed data for each individual Suite".
3. The Council responded on 18 August 2010 refusing to disclose the requested information under section 43 of the Act.
4. The complainant requested an internal review on 19 August 2010.
5. The Council responded on 20 September 2010 advising the complainant that it upheld its application of section 43 of the Act.

The Investigation

Scope of the case

6. On 4 October 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the Council had acted appropriately by withholding the requested information under section 43 of the Act.
7. During the course of the Commissioner's investigation the Council released the budgets for the various civic halls, health and fitness centres to the complainant. As this aspect of the complainant's request was resolved, it will not be addressed any further in this Notice.
8. On receipt of this information, the complainant reminded the Council that it had not addressed the second element of his request; his request for the "detailed methodologies used for the admin recharge mechanism, with detailed data for each individual Suite". The complainant clarified what information he expects to see and explained that he requires the Council to release a detailed analysis of its admin recharge mechanism, which provides activity based costs, officer time and cost allocation for each unit of work or transaction.
9. During the Commissioner's investigation the Council released further information addressing this element of the request. On receipt of this, the complainant complained further advising the Council that the information disclosed did not provide the level of detail he required. The Council responded to this further correspondence withdrawing its

application of section 43 of the Act and claiming a late reliance on section 12.

10. This Notice will therefore address the late application of section 12 of the Act to the remaining element of the request, which is the complainant's request for:
 - the “detailed methodologies used for the admin recharge mechanism, with detailed data for each individual suite”.
11. The Commissioner notes that the complainant also requested to inspect information held by the Council under the provisions of the Audit Commission Act 1998 at the time of his request of 19 July 2010. As the Audit Commissioner Act 1998 is not within the Commissioner's jurisdiction, he cannot comment or indeed adjudicate on the Council's handling of this matter.

Chronology

12. The Commissioner wrote to the Council on 12 November 2010 to inform it that he had received a complaint from the complainant and to request a copy of the withheld information.
13. The Council responded on 25 November 2010. It forwarded a copy of two spreadsheets, which detail the budgets set for the various civic halls, health and fitness centres and advised the Commissioner that it considered this information was exempt from disclosure under section 43 of the Act.
14. The Commissioner reviewed this information and the Council's application of section 43 of the Act. He wrote to the Council on 10 January 2011 to ask it to reconsider releasing this information to the complainant.
15. The Council responded on 2 February 2010. It forwarded a copy of a further response it had issued to the complainant on 1 February 2010. The Council confirmed that it had now released the requested information to the complainant.
16. The Commissioner reviewed the Council's response of 2 February 2010 and noted that it had not released the correct information to the complainant. The Commissioner therefore wrote to the Council again on 15 February 2011 to ask that it consider releasing the two spreadsheets he received on 25 November 2010 to the complainant.
17. The Council responded on 21 February 2011. It confirmed that it had now released the spreadsheets it provided to this office on 25 November 2010 to the complainant.

18. The complainant contacted the Council and the Commissioner on 25 November 2011. He confirmed that the Council had not to date addressed the second element of his request, which was a request for the "detailed methodologies used for the admin recharge mechanism, with detailed data for each individual Suite" and explained that he expects to receive a detailed analysis of the administration and central recharges figures for the halls and centres broken down to show each unit of work and each transaction, officer time and activity based costs.
19. The Commissioner wrote to the Council on 28 February 2011 to ask whether it held any further information to address the remaining element of the complainant's request.
20. The Council responded directly to the complainant on 7 March 2011 releasing further information.
21. The complainant replied to the Council the same day (7 March 2011) and forwarded a copy of his response to the Commissioner. The complainant stated that the additional information did not address his interpretation of the remaining element of his request, as detailed in his previous correspondence of 25 November 2011. He confirmed that he had only received summative totals for entire areas of work not detailed figures, showing the cost per unit or transaction, which is what he required. He used a heading in the spreadsheet provided on 7 March 2011 as an example; 'Customer Accounts' to illustrate this point. He stated that 'Customer Accounts' was charged with the figure of £800 per invoice. However, there was no record of the number of invoices processed.
22. The Council responded on 10 March 2011. It advised the complainant that it now considered section 12 of the Act applied to his request. It informed the complainant that it had already provided him with information about this issue and on an aggregated basis it felt it had now exceeded the 18 hour limit.
23. The Commissioner contacted the Council by telephone on 5 April 2011 to discuss the complaint in further detail. Two issues were discussed; whether the Council held the detailed cost information the complainant required and the Council's late application of section 12. Concerning the former, the Council confirmed that it did not hold the detailed cost analysis the complainant required but wished to check one area of the Council before it confirmed this for definite. The Council confirmed that if it located additional information, it would consider disclosing this to the complainant. Concerning the latter, the Council first stated that it had applied section 12 on an aggregated basis taking into other requests it had received from the complainant and then informed the Commissioner towards the end of the conversation that the application of section 12

also took into account the cost of creating the information for the complainant.

24. The Commissioner contacted the Council again on 13 April 2011. The Council confirmed that it had now identified one further spreadsheet, dating back to 2003/2004, which provides some of the background analysis the complainant requires to the figures he received on 7 March 2011. However, the Council confirmed that it was minded to continue with its late application of section 12 of the Act, due to time already invested by the Council in dealing with the complainant.
25. The Commissioner forwarded a copy of his section 12 guidance to the Council on 13 April 2011, which clearly outlines the factors that can be taken into account when considering the cost limit under the Act. He asked the Council to consider releasing the 2003/2004 spreadsheet recently identified to the complainant or alternatively to inform him how the Council wished to proceed within the next 7 working days.
26. As the Commissioner received no further response from the Council, he sent reminders on 26 April and 9 May 2011.
27. The Council responded on 12 May 2011 by forwarding a copy of its further response to the complainant of the same date. It reiterated that it considered the cost to comply with the complainant's request to exceed the appropriate limit under the Act, as it estimated the cost to provide this information would exceed 18 hours. It then informed the complainant that the requested information is not held in one single document, so it would take 15 hours of officer's time to create it advising the complainant that this would cost £375 (15 hours at £25 per hour).

Analysis

Section 12 – cost of compliance exceeds the appropriate limit

28. Section 12(1) provides a costs threshold for the Act. As long as the Council can prove that its estimate of the work required to answer the request for information is reasonable and exceeds the statutory limit, then it is not required to provide any information in respect of the request. The Information Tribunal in *Quinn v Information Commissioner & Home Office 9EA/2006/0010*) explained this point in this way:

"The fact that the rules drafted pursuant to s.12 have the effect of defining what is a reasonable search and the amount of time and money that a public authority are expected to expend in order to fulfil their obligations under the Act, serves as a guillotine which prevent the

burden on the public authority from becoming too onerous under the Act”.

29. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the “Regulations”) provide that the cost limit for local authorities is £450. This must be calculated at a rate of £25 per hour, providing an effective time limit of 18 hours. If a public authority estimates that complying with a request would exceed 18 hours, or £450, section 12(1) provides that the request may be refused.
30. Section 12(1) is not a qualified, so it has no public interest component that can be considered. This means the cost limit can be relied upon irrespective of whether the public interest would have favoured the disclosure of the information.
31. The Commissioner must determine whether he believes that the estimate provided by the Council was reasonable. The issue of what constitutes a reasonable estimate was considered in the Information Tribunal case of *Alasdair Roberts v Information Commissioner (EA/2008/0050)* and the Commissioner endorses the following points made by the Tribunal at paragraphs 9-13 of the decision:
 - “Only an estimate is required” (i.e. not a precise calculation);
 - The costs estimate must be reasonable and only based on those activities described in regulation 4(3);
 - Time spent considering exemptions or redactions cannot be taken into account;
 - The determination of a reasonable estimate can only be considered on a case-by-case basis; and
 - Any estimate should be “sensible, realistic and supported by cogent evidence.”
32. The above extract references regulation 4(3) of the Regulations referred to in paragraph 29 above, which states that the only activities that are allowed to be considered are those where it is:
 - (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.
33. As stated in paragraphs 9 and 22 above, the Council claimed a late reliance upon section 12 of the Act during the Commissioner’s investigation. He notes that section 12 was only claimed when the Council was asked to deal with the second element of the complainant’s

request (his requested for the “detailed methodologies used for the admin recharge mechanism, with detailed data for each individual Suite”). The first element of the complainant’s request (for copies of the budgets) was resolved prior to section 12 of the Act being raised.

34. The Council first informed the Commissioner that it estimated the cost to comply with the complainant’s request for a detailed breakdown of the administration and central recharges figures would exceed the cost limit under the Act. It explained that it considered the 18 hour limit had been exceeded on an aggregated basis when taking into account the complainant’s previous requests.
35. In later correspondence, the Council advised the Commissioner that it considered the cost to determine whether it holds the information, locate and retrieve it and extracting the requested information from documents containing it for the remaining element of the request alone would exceed the cost limit.
36. As stated in paragraph 31 above, any estimate that the cost limit is exceeded needs to be supported by cogent evidence. For the Commissioner to agree that the cost limit is exceeded on an aggregated basis he would need to see evidence that the requests aggregated are for the same or similar information, were received by the Council within a 60 working day period and that the estimated cost of compliance exceeds the £450 limit.
37. Alternatively, for the Commissioner to agree that section 12 of the Act is engaged on the basis that the cost of compliance is exceeded in determining, locating, retrieving and extracting the information for the remaining element of the request alone, he would need to see a detailed breakdown of this estimate for each activity and for this to be supported by cogent evidence.
38. Despite the Commissioner forwarding to the Council a copy of his internal guidance on the application of section 12 and discussing this matter with the Council in detail during two telephone calls, he has not to date been furnished with such detail or evidence for either argument.
39. During the Commissioner’s investigation he received conflicting information from the Council on the application of section 12 and why it considered the cost limit had been exceeded. As stated above, the Council first claimed that the cost limit is exceeded on an aggregated basis. It then changed its view and argued that the cost limit is exceeded for determining it holds information, locating, retrieving and extracting it for the remaining element of the request alone. At times the Commissioner was also informed by the Council that it had taken into account activities which are not permitted by regulation 4(3) of the

Fees Regulations (as detailed in paragraph 32 above) when arriving at its estimate. For example, the cost of creating the information for the complainant. Such inconsistencies raise further doubt on the validity of a section 12 claim.

40. In addition, it appeared to the Commissioner that section 12 was only raised by the Council once it had released the budget spreadsheets to the complainant and then identified the spreadsheet from 2003/2004, which provided some background analysis to the administration and central recharges figures. The late claim of section 12 therefore appeared to stem from the Council's reluctance to release the 2003/2004 spreadsheet to the complainant. During telephone calls to the Council the Commissioner was informed that the Council was reluctant to release this additional information because of its past experience with the complainant and it concerns that its disclosure would generate further requests for information and explanations, as it is not in a format that the complainant would easily understand. These are all factors which are not relevant to the application of section 12 of the Act.
41. Concerning the Council's first argument that the cost limit is exceeded on an aggregated basis, the Commissioner cannot make any judgement on whether the cost limit is exceeded in this case on an aggregated basis because he has not been furnished with the necessary evidence that is required to demonstrate that section 12 applies in this way, as detailed in paragraph 38 above.
42. In respect of the Council's second argument that the cost to determine whether it holds the information, locate, retrieve and extract it exceeds the cost limit, again the Commissioner cannot make any assessment on whether section 12 of the Act applies in this way as the Council has failed to provide any detail or evidence to support this estimate. The Commissioner has been furnished with very limited information on this estimate but he cannot agree from this that it has taken the Council 18 hours to release the budget spreadsheets (in relation to part 1 of the request), disclose the information it has released relating to the administration and recharges mechanism and to locate the 2003/2004 spreadsheet, which provides more background analysis to these administration and recharges figures. The provision of the released information will only have required a little time to simply send this to the complainant attached to an email. The time taken to locate these spreadsheets and the 2003/2004 spreadsheet which is yet to be disclosed can only have taken the Council a few hours maximum to locate and retrieve. The Commissioner finds it difficult to accept that the simple task of either printing or sending the spreadsheet from 2003/2004 (which is the remaining relevant information which the

complainant has not to date seen) would bring the cost of compliance up to the cost limit threshold.

43. For the reasons explained above, the Commissioner has concluded that the Council's cost estimate and how this was arrived is not reasonable, realistic or supported by cogent evidence. He has therefore concluded that section 12 of the Act does not apply in this case.

Section 16 – duty to provide advice and assistance

44. Section 16(1) provides an obligation for a public authority to provide advice and assistance to a person making a request, so far as it would be reasonable to do so. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in a particular case if it has conformed with the provisions in the Section 45 Code of Practice in relation to the provision of advice and assistance in that case.
45. Whenever the cost limit has been applied, the Commissioner must consider whether it would be possible for the public authority to provide advice and assistance to enable the complainant to submit a new information request without attracting the costs limit in accordance with paragraph 14 of the Code. If a public authority provides an indication of what, if any, information could be provided within the costs limit it will have complied with the requirements of the Code of Practice and therefore section 16(1) of the Act.
46. Although section 12 of the Act was claimed late by the Council in this case, the Commissioner notes that both the Commissioner and the complainant were informed of this late application. None of the responses the Council issued which informed the complainant of the late application of section 12 provided any advice and assistance to enable him to consider submitting a new request for information which would not attract the cost limit.
47. The Commissioner considers the Council should have explained clearly to the complainant exactly what additional information it holds addressing the remaining element of his request and what information it felt it could provide, if any, within the cost limit prescribed by the Act. As it failed to do so, the Commissioner finds the Council in breach of section 16(1) of the Act.

Procedural Requirements

48. The Council failed to inform the complainant that it wished to rely on section 12 of the Act in the refusal notice it issued because this was not claimed until a later date. It therefore failed to inform the complainant that it wished to rely on section 12 of the Act within 20 working days of

his request. The Commissioner finds the Council in breach of section 17(5) of the Act.

The Decision

49. The Commissioner's decision is that the Council did not deal with the request in accordance with the requirements of the Act for the following reasons:

- it inappropriately relied on section 12 of the Act;
- it breached section 16(1) of the Act by failing to provide advice and assistance; and
- it breached section 17(5) by failing to inform the complainant of its application of section 12 of the Act within 20 working days of his request.

Steps Required

50. The Commissioner requires the Council to take the following steps to ensure compliance with the Act:

- the Council should reconsider the remaining element of the complainant's request under the Act. It should either release the 2003/2004 spreadsheet to the complainant; this being the only remaining recorded information the Council holds addressing the complainant's request for a detailed breakdown of the administration and central recharges figures. Or, alternatively, the Council should issue a further refusal to the complainant in accordance with section 17 of the Act detailing why this information cannot be released.

51. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

52. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Dated the 15th day of June 2011

Signed

**Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled

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(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."

Section 12(1) provides 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."

Section 16(1) 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".

Section 17(5) provides that –

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."