

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 March 2013

Public Authority: Liverpool City Council
Address: Municipal Buildings
Dale Street
Liverpool
L2 2DH

Decision (including any steps ordered)

1. The complainant requested information from Liverpool City Council (the council) concerning an organogram, pay scales and staff numbers in a particular format for the council and Liverpool Direct Ltd (LDL). The council responded by stating that it held some, but not all, of the requested information. At internal review stage, and subsequently, the council provided further information. After the Commissioner began his investigation the council applied section 40(2) to some of the requested information which it later disclosed. The council also applied section 12(1) at a late stage. The Commissioner has decided that the council has relied inappropriately on section 12(1). He has concluded though, on the balance of probability, that the council does not hold any information regarding the salary of the Chief Executive of LDL.
2. The Commissioner requires the council to take the following steps to ensure compliance with the legislation:
 - Issue a fresh response under the FOIA that does not rely on section 12(1).
3. The public authority 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 to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 30 December 2011, the complainant made the following request for information under the FOIA:

"Could you please provide an organogram, pay scales and equivalent staff numbers for the following structures:

1) Liverpool City Council as a whole;

2) Liverpool City Council staff seconded to Liverpool Direct Limited delivering Council services, by function (i.e. Revenues & Benefits etc etc.)

and where not covered by the above:

3) all areas of responsibility for the current Chief Information Officer.

Please make the formats similar to the datasets provided by Central Government on the data.gov.uk website - an example of which is available at <http://data.gov.uk/dataset/staff-staff-o...>"

5. The council responded on 6 February 2012, explaining that it held some, but not all, of the information within the scope of the request. The information it held was provided by way of attachments. However, an organogram was not provided for LDL, though the numbers of staff seconded from the council to LDL were provided, broken down by function.

6. On 6 February 2012, the complainant asked for an internal review on the basis that she did not accept that she had been provided with the information she had requested. She highlighted the following:

- That the organogram was not complete or "coherent", for example, there was no explanation of what certain areas designated or who was responsible for them e.g. 'Policy and Partnerships'.
- That there was no mention of the Chief Information Officer.
- That it should have been possible to link the organogram to the information on responsibilities, job descriptions, salaries, budgets etc.
- The complainant also directed the council's attention to a 'Code of recommended practice for local authorities on data transparency' which was published in September 2011. She stressed that salaries for senior posts should be provided for all employees (seconded included), even if names were not provided.

7. The council provided an internal review on 13 March 2012 in which it said that the response provided to her had addressed the information she had requested at points 1–3 of her request, however it had not taken into account her request for the information to be provided in datasets similar to those provided by Central Government.

The review added:

"I have considered your comments and would advise that under FOIA the Council needs to consider the request for information and where it is reasonable to do so provide the information in a format as suggested by the requester. From the comments in your email of 6 February 2012 the Council did not comply with this element of your request."

8. The council explained that further information had by then become available as the pay policy had now been *"produced in a format that is in accordance with Sections 38 to 43 of the Localism Act 2011"*. The council added that regard had been had to advice from the Department of Communities and Local Government in 2011 and 2012. The council cited section 21 (information accessible by other means) for part of the requested information, it provided links to that information, in accordance with its duties under section 16 of the FOIA. It also attached an organogram in response to point one of the complainant's request. However, the council maintained that the information it provided in response to the request was all that it held at the time of the request and that any dataset advice was for guidance only. Although the council did have statutory requirements (under the Localism Act 2011), they were not required to have them in place until 31 March 2012.
9. On 13 March 2012, the complainant said that the review response did not comply with the guidance she had provided to the council. She pointed out that the council had provided her with a link to 'Pay Policy' which had not been part of her request. She requested further detail to that which had been provided because she was unclear about the reporting relationships and she asked for some indication of budgets, responsibilities etc.
10. In a later review, after the Commissioner had begun his investigation, the council applied section 12(1) to part of the remaining requested information.

Scope of the case

11. The complainant contacted the Commissioner on 14 March 2012 to complain about the way her request for information had been handled.
12. The Commissioner considers the scope of this case to be whether the council has appropriately applied section 12(1) of the FOIA to part of the

requested information and whether it holds any remaining information relating to the remainder of the request that has not been provided to the complainant.

Reasons for decision

Section 12

13. Section 12 of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate cost limit, which in this case is £450.
14. The Commissioner has published guidance on the subject of applying the fees regulations. The regulations are clear that a public authority can only take into account the costs it reasonably expects to incur in determining whether it holds the information, locating, retrieving and extracting that information. The four activities are sequential and any estimate must be a reasonable one. The calculation is £25 per person per hour.
15. However, when applying the fees regulations under section 12 the Information Commissioner also expects that a public authority should have regard to its duties under section 16 of the FOIA to provide advice and assistance to the requestor as already discussed above.
16. The Information Commissioner is clear that where an authority refuses a request because the appropriate limit has been exceeded, it should, bearing in mind the duty under section 16 of FOIA to advise and assist an applicant, provide information on how the estimate has been arrived at and provide advice to the applicant as to how the request could be refined or limited in order to come within the cost limit.
17. Where the estimate exceeds the limit there is no obligation for the authority to communicate the information; however, there is still an obligation to confirm or deny whether the information is held unless to do this would in itself exceed the appropriate limit.
18. A public authority does not have to estimate costs in advance and can search up to the cost limit and then refuse to conduct future searches. However, the Information Commissioner must be satisfied that the public authority's decision that the cost estimate is reasonable must be presented with sensible, realistic and cogent evidence.
19. The council wrote to the Commissioner and the complainant on 8 November 2012. In this further review it explained that there were two areas it had considered. It cited section 12(1) of the FOIA as the

reason why it could not supply the underpinning information the complainant had requested. A link was provided to its final account information that the council published regarding staff earning over £58,200 which should have been provided previously and a link to its publication scheme. Finally, the complainant was invited to refine her request.

20. The council provided a breakdown pertaining to payscales and staff numbers it held within its human resources and payroll system (ORACLE). The council clearly stated that providing the requested information would exceed 18 hours and would therefore be considered exempt under Section 12(1). The council had already extracted staff numbers which it said were reconciled against the organisational chart provided to the complainant in its response of 13 March 2012. The council said that extracting this information had taken it in the region of 10 hours. The staff breakdown for LDL had already been provided to the complainant in its response of 6 February 2012. It estimated that providing the level of detail outlined in the request would require an individual interrogation against the Human Resources and Payroll modules. This was estimated to take approximately two minutes per record. The council then stated that, as there were currently 5697 staff records, it would equate to approximately 190 hours to provide the requested information regarding the council. Providing the same information for LDL would equate to 38 hours as there were 1133 staff records. It concluded that providing the requested information would exceed the appropriate limit.
21. The complainant refined her request on 22 November 2012 to the 22 employees seconded to LDL earning over 50k (2011/12 financial year). She contested the application of section 12(1) on the following grounds:
 - That the council had already identified those LDL secondees earning over £50,000 so it would not be necessary to interrogate all 1133 records, but 22 only which, by the council's own figures, would take 44 minutes.
 - That the LDL secondees were not included in the annual accounts and that this information was not available to her.
22. On 23 November 2012, the Commissioner asked the council if it wanted to supply further argument to the two bullet points set out in paragraph 20 above.

23. On 27 November 2012, the complainant wrote to the Commissioner stating that she had ascertained that LDL did, in fact, have an organisation plan.
24. On 7 December 2012, the council wrote to the complainant, acknowledging that the complainant had refined her request as follows:

"The job titles of the following groups of staff who fall within the following pay bands from LDL:
 1. £50,000 to £69,999 per annum
 2. £70,000 to £89,999 per annum
 3. £90,000 to £109,999 per annum
 4. £110,000 and above"
25. The council confirmed that it held this information but applied section 40(2) to the release of the job titles and concluded that it would be unfair to release the job titles of the groups of staff falling within the requested pay bands. The council explained that it followed rules that applied to final accounts when considering the release of information: job titles were released with regard to an officer who receives in excess of £100k; if the officer is on £150k plus they would be named. In order to dispel some confusion that had arisen in the council's responses, the council explained that its final accounts included all council staff that were seconded to LDL.
26. On 7 January 2013, the Commissioner asked for further information about the refined request made by the complainant as the council appeared to have confined it to the job titles of individuals that fell within certain pay bands.
27. On 8 January 2013, the Commissioner wrote again to the council explaining that the complainant believed that the request had been narrowed further than she believed the scope to be. The council stated that the request was confined to the job titles of the staff within certain pay bands. However, the complainant did not accept that her 22 November 2012 email had confined itself purely to that information and she explained that:
 - She was specifically asking for the formats to be similar to the datasets used by Central Government on its data.gov.uk website. This is because she wanted the salary information to be broken down into Post ID, grade, salary, combined salary of reporting posts, working time, role, notes, profession and contact details (email, phone unit).

- The complainant said that there was a discrepancy between the latest council response and a previous response relating to individuals earning over £50k.
28. The Commissioner also wrote to the council to state that he was likely to find that the disclosure of the job titles of most/all of the individuals earning the quoted pay band figures, would not be incompatible with fairness or outside their reasonable expectations and that individuals being paid within those pay bands were likely to be fairly senior figures. Therefore, the council needed to look again at this matter.
29. On 1 February 2013, the council responded again to the Commissioner:
- Having reconsidered, the council decided to disclose the job titles of those employees earning over the requested figure and included those council employees seconded to LDL.
 - The council maintained that it would take it beyond the appropriate limit to provide the dataset information that had been requested.
 - Any further requests for datasets would be considered vexatious under section 14(1) of the FOIA.
 - For the avoidance of doubt and because of earlier confusing responses, it was confirmed that secondees to LDL were reported in the council's Final Accounts.
30. The Commissioner considers that the council did not provide an explanation to him as to why the requested information it had refused under section 12(1) could not be provided once the complainant had refined her request. By the council's own figures, interrogating its ORACLE system should only have added another 44 minutes to the ten hours it had taken to provide a response up to that point. Therefore the Commissioner has concluded that the council's estimate was not reasonable and therefore has concluded that the exemption at section 12(1) of FOIA is not engaged.

Section 1

31. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request, and if that is the case, to have that information communicated to him.

32. The Commissioner wrote to the council on 13 August 2012 to ask for its arguments relating to what was held under section 1 of the FOIA in relation to salary information about the Chief Executive of LDL.
33. On 1 February 2013, the council took issue with the comments and opinions stated by the complainant in her response of 24 December 2012. It refuted assumptions she had made about the Chief Executive of Liverpool Direct Ltd and said that the complainant had specifically asked for information pertaining to secondees from the council to LDL which had been provided to her. It clearly stated that the Chief Executive of LDL did not fall within this category. The Chief Executive of LDL is a council employee but is seconded to BT and the council does not hold his salary information which is held by BT and therefore not subject to the FOIA. The council stated that in future it would:
- "...consider any requests regarding the Chief Executive of LDL's pay as vexatious under Section 14 (1) of FOIA on the grounds that your request would be considered to cause harassment to the council and distress to that staff member".*
34. On 18 February 2013, the council clarified the position of the Chief Executive of LDL. He was seconded to LDL in 2001. In 2006 he seconded from LDL to BT. The council confirmed again on 27 February 2013 (during a phone call) that it did not hold his salary information and that this had been checked again directly with the Chief Executive of LDL himself. The council stressed that any future requests from the complainant concerning his pay and conditions would be considered vexatious under section 14(1).
35. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. He will also consider the actions taken by the authority to check that the information was not held and he will consider if the authority is able to explain why the information was not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held. He is only required to make a judgement on whether the information was held *"on the balance of probabilities"*¹.

¹ This approach is supported by the Information Tribunal's findings in Linda Bromley and Others / Environment Agency (31 August 2007) EA/2006/0072

36. In deciding where the balance lies, the Commissioner considers the scope, quality and thoroughness of searches conducted by the public authority together with any reasons offered by the public authority or the complainant as to why the information is not held or should be held, where appropriate.
37. The Commissioner's approach was supported by the Information Tribunal in the hearing of Thompson and Dyke v Information Commissioner EA/2011/0164 and 0165. The Tribunal stated that the Commissioner is:

"...entitled to accept the public authority's word and not to investigate further in circumstances where there is no evidence as to an inadequate search, any reluctance to carry out a proper search and any grounds for believing there is a motive to withhold information actually in its possession."
38. The Tribunal referred to the Commissioner's national remit and limited resources and that to act otherwise might require a full scale investigation to be carried out in every case where a public authority is *"...simply not believed."*
39. The complainant does not accept that the council does not hold this particular information. The complainant contends that this information should be held for public accountability, that the council is contractually obliged to hold this information, and she has provided argument to that effect. However, the council has categorically denied holding this information and, as there is no evidence to support the view that any further information is held in relation to this request, the Commissioner has concluded in this case that, on the balance of probabilities, the requested information relating to the salary of the Chief Executive of LDL is not held.
40. The Commissioner is sympathetic to the argument that it might be reasonable to assume that the personnel details of an individual that is technically an employee, although on secondment for twelve years, might be held by the employer. In this instance, though, it is clear that the council strongly hold the view that they have neither the obligation nor desire to keep the details of such senior secondees on file. The Commissioner offers no view on this particular matter as he is only concerned with what is held in relation to a request, rather than what a third party thinks ought to be held.
41. The Commissioner would also wish to remind the council of its obligation to consider each request on its own merits. If the council should wish to rely on section 14 with regard to subsequent requests for information then the arguments that are relevant to that

particular set of circumstances should be considered and the full rationale provided to the applicant concerned.

Section 10

42. Section 1(1) of FOIA requires a public authority in receipt of a request for information to confirm whether it holds the requested information and, if so, disclose it to the applicant.
43. Section 10(1) of FOIA provides that this must be done within 20 working days of receiving a request. In this instance the council failed to respond within the statutory timeframe.

Right of appeal

44. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

45. 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.
46. 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

Andrew White
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