

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 August 2017

**Public Authority:** Sevenoaks District Council  
**Address:** Argyle Road  
Sevenoaks  
Kent  
TN13 1HG

#### Decision (including any steps ordered)

---

1. The complainant has requested information about specific expenditure at Sevenoaks District Council (SDC). Some of the requested information has been disclosed, it is SDC's position that some of the information is not held and the remainder of the request has been refused by SDC relying on sections 12 and 21.
2. The Commissioner's decision is that SDC is entitled to rely on section 21 to refuse parts of the request and that on the balance of probabilities some of the information is not held. However, she has also concluded that SDC has not satisfactorily established that the cost of compliance exceeds the appropriate limit and is not therefore entitled to rely on section 12 to refuse to comply with the request. Furthermore, SDC has failed to provide any advice or assistance to the complainant and accordingly has breached section 16 FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Provide a fresh response under FOIA in relation to the information previously withheld on the basis of section 12, ie the travel expense information sought by requests 1 and 2. That is to say, either provide the complainant with the travel expense information or issue a refusal notice citing an exemption to withhold this information.<sup>1</sup>

---

<sup>1</sup> For the avoidance of any doubt, should the Council decide to issue a further refusal notice, such a notice cannot of course cite section 12 as a basis to withhold this information.

4. 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

---

5. On 26 October 2016, the complainant wrote to SDC and requested information in the following terms:

*"Under the Freedom of Information Act, I would be grateful if you could please provide the following information.*

*1. The net spend by Sevenoaks District Council (SDC) on Management Away Days for the following years 2012/13, 2013/14, 2014/15, 2015/16 and the spend to date for 2016/17. Please break out costs to show an estimated total cost for staff time, venue hire, travel expenses and any additional miscellaneous expenditure.*

*2. How much has SDC spent on staff and councillor attendance at the Local Government Association Annual Conference for the following years: 2012, 2013, 2014, 2015, 2016? Please breakdown the cost of the conference, travel expenses, accommodation costs and subsistence costs.*

*3. As a percentage what is the average (mean) salary increase for the past 4 years for the following management tiers: Service Manager, Head of Service, Chief Officer?*

*4. How much did the Council spend on the original planning process for the proposed "Buckhurst 2" long stay multi storey car park up to the point that it withdrew the first planning application in October 2014? How many spaces were proposed in this car park? What was the anticipated total cost for this car park?*

*5. What is the anticipated total cost for the proposed new long stay car park (including all the costs involved in the planning/designing process)? How many spaces are proposed for this new car park?"*

6. SDC responded on 23 November 2016. It disclosed some of the requested information within questions 1 and 2, the information requested at point 4 and relied on section 21 in respect of points 3 and

5. SDC said that some of the information within the request was not held and relied on sections 12 to refuse parts of the request.
7. The complainant requested an internal review on 5 December 2016 and received a response on 9 December 2016. SDC maintained its original position.

## Scope of the case

---

8. The complainant contacted the Commissioner on 24 January 2017 to complain about the way the request for information had been handled. Specifically the complainant set out concerns about SDC's reliance on section 12, concerns about the fact that in relying on section 21, SDC failed to signpost the relevant information and the fact that SDC decided which information to disclose rather than asking the complainant to narrow his request. The complainant also asserted that SDC did not provide any advice or assistance in relation to the request
9. The Commissioner considers the scope of her investigation is primarily to determine whether SDC was entitled to rely on section 12 to refuse part of the request and whether it complied with section 16 – advice and assistance. She notes, in relation to section 21, that the complainant does not dispute that some of the requested information is publicly available rather that it failed to direct the complainant to the relevant information. The Commissioner will also consider SDC's position in respect of the information it states is not held.

## Reasons for decision

---

### Section 1 – information held/not held

10. Section 1 of FOIA sets out that a public authority, upon receipt of request for information, must inform the requester in writing whether the information described in the request is held and if that is the case, to communicate it to the requester. This is more commonly known as the 'duty to confirm or deny'.
11. In its initial response to the complainant, SDC set out that the request as it relates to the "*estimated cost of staff time*" does not fall within the FOIA as it does not possess the information described.
12. The Commissioner considers that SDC has not provided a particularly clear explanation as to why it considers that this element of the request

does not fall within the FOIA but accepts that in relation to the request for an estimate of the travel expenses, SDC has stated that a request for an estimate does not fall within the FOIA.

13. In considering the wording of the request at question 1, the Commissioner considers that the complainant has asked for *"an estimated total cost for staff time, venue hire, travel expenses and any additional miscellaneous expenditure"*.
14. It is clear from the initial response to the complainant and the initial submission to the Commissioner that SDC has considered this part of the request, ie the estimated cost of staff, in isolation. However, it is unclear from the response, the internal review and the two submissions to the Commissioner whether SDC considers that the information (about staff time) is not held because it relates to a request for an estimate or is not held because it relates to staff time. In responding to the Commissioner, SDC has stated *"it is simply the case that the Council does not hold such information."* In response to the Commissioner's questions about specific searches in relation to the information 'not held', SDC set out that *"no searches were carried out as there was no expected information to retrieve."*
15. The Commissioner notes that SDC has set out that a request for an estimate does not fall within the FOIA; it is her position that a request for an estimate does not fall outside of the FOIA as certain estimates may be held by a public authority.
16. However, she considers that on the balance of probabilities, SDC does not hold the information related to an estimate of the total spend for staff time. The total spend would of course have included attendance, organisation, administrative matters and any follow up activities relating to the away day such as completing feedback forms or feeding back details of the away day to other managers and staff. She accepts that the information disclosed by SDC is held because receipts and invoices are commonly generated by the particular activities but that this would not be the case in the estimate of staff time and accordingly this part of the request is not necessarily 'held' simply because other conference related activity is held and has been disclosed. The Commissioner considers that the request is for an estimate and is quite wide ranging and accordingly, she considers that on the balance of probabilities, SDC was correct to assert that the requested information was not held.

## **Section 12 – cost of compliance exceeds the appropriate limit**

17. Section 12 (1) of 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. In other words, section 12 FOIA provides an exemption from a public authority's obligation to comply with a request for information where the cost of compliance is estimated to exceed the appropriate limit.
19. This limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 at £600 for central government departments and £450 for all other public authorities. The fees regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours in this case
20. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in:
  - determining whether it holds the information;
  - locating the information, or a document containing it;
  - retrieving the information, or a document containing it; and
  - extracting the information from a document containing it.
21. The four activities are sequential, covering the retrieval process of the information from the public authority's information store.
22. Section 12 explicitly states that public authorities are only required to estimate the cost of compliance with a request, not give a precise calculation. In the Commissioner's view, an estimate for the purposes of section 12 has to be 'reasonable': she expects it to be sensible, realistic and supported by cogent evidence.
23. With regard to the elements of the request where SDC asserts section 12 applies, the travel expenses as requested at point 1 and point 2, its initial response does not set out any rationale behind the application of section 12 and in respect of travel expenses at point 1 asserts that it is the cost of providing 'accurate' information which exceeds the costs limit. It is the Commissioner's position that a request under FOIA is a request for recorded information held at the time of the request, irrespective of accuracy.
24. The Commissioner notes that the internal review attempts to address the lack of rationale behind the application of section 12 but notes that the review does not provide the requester with any meaningful rationale; rather it sets out vague, hypothetical situations in relation to the request. The review response states that the information would need

to be located from "various" systems and individuals would need to "search a large amount of information for a small number of claims" which may not exist and would not be readily identifiable."

25. The Commissioner notes that in the internal review response it appears that SDC has also included the cost of extracting irrelevant data and transferring the information to a system to cross check between what was claimed and what was paid. The cost of transferring the information to another system and cross checking the information clearly does not fall within the permitted criteria set out in Regulation 4(3) of the fees regulations and is not therefore relevant to the application of section 12 FOIA.
26. The Commissioner asked SDC to provide a submission setting out its reliance on sections 21, section 12, section 16 and section 1 in respect of the information considered to be 'not held'.
27. In the request for a submission the Commissioner set out that she will give a public authority one opportunity to justify its position.
28. SDC set out in its initial submission that it had conducted a 'test' to find the travel costs for one away day. A list of potential claimants was produced using minutes from a meeting then the finance system was checked for a period of up to three months in accordance with the time limit for claiming mileage. From this information a list was prepared of potential claimants who had been reimbursed for mileage. Individual claims were then inspected to ascertain if the claim related to the particular 'away day'. Two staff were identified as claiming for that date and SDC asserted that the cost was calculated using the travel rates for those staff.
29. SDC set out that this exercise took one and a half hours.
30. SDC has asserted that conducting the same exercise for earlier years 'may' take longer as those records are archived. It has also asserted that it would take longer to obtain information for the most recent year as claims stored electronically by individuals would take longer than if paper records need to be examined as all travel claims for a period are stored together.
31. SDC has not stated whether earlier records are held in paper format, electronic format or both.
32. SDC also asserted that previous work on this request had already taken nine hours but provided no evidence to support this assessment.

33. With regard to expenses relating to the Local Government Association Annual conference, SDC set out that this would be laborious to extract "for similar reasons". SDC set out that it therefore believed it was correct to rely on section 12.
34. The Commissioner did not consider that SDC had satisfactorily established that it could rely on section 12 as it had not provided an estimate which was sensible, realistic and supported by cogent evidence. She wrote again to the public authority setting out further specific questions and explaining that she was not persuaded that the section 12 arguments stood up to scrutiny.
35. The Commissioner notes that SDC asserted that all of its searches started using the expression 'away day' and she is concerned by the broad nature of such a starting point given that the request is specifically about costs related to 'away days'. It is important that public authorities do not create an environment whereby searches are overly complicated and subsequently lead to reliance on section 12. She recognises that such a search term may possibly have produced a wealth of information or no information at all. The search is specifically about expenses but searching the term 'away days' would not, in the Commissioner's view, be the most obvious starting point.
36. Furthermore, the Commissioner notes that in its initial submission to her office the starting point for the search is identified as drawing up a list of potential claimants. This is in contrast to its position in its subsequent response that all searches started with the term 'away day'. However, she considers that the starting point of creating a list of individuals who attended the 'away days' would constitute a more reasonable starting point for any search.
37. With regard to away days, SDC confirmed, in its second submission, that in 2012/13 it held one away day, four in 2013/14, five in 2015/16 and two in 2016/17. No figures have been provided for attendees to the away days other than for 22 July 2015 when the number was two. SDC did not include, in either submission, the number of 'potential' claimants who were identified from the meeting minutes. This would have been entirely relevant in terms of the four activities set out at paragraph 16. In these circumstances, the Commissioner was unable to agree that SDC's estimate was reasonable and was supported by realistic and cogent evidence.
38. In respect of the Local Government Association annual conference, the Commissioner asked SDC to set out, in its second submission, its rationale behind the application of section 12 given that there were only 11 people who attended over the period specified in the request.

39. SDC set out that this 'would' involve one officer trawling electronic and manual records in more than one physical location, including long term storage. SDC does not set out how many locations would need to be 'trawled' nor why it is not possible to pin point documents in an electronic search by using appropriate search terms. It is a vague reference to a process that is meaningless in the absence of supporting evidence.
40. The Commissioner notes that SDC has stated that the investigation "would have" required interrogation of three or four sources; although SDC has set these sources out, it remains unclear from the response why the search did not start and end with a search relating to the attendees expense claims for the relevant period; the position that the Commissioner had asked SDC to address. The Commissioner would be surprised if there were no audit requirement to retain such information.
41. The search as set out by SDC is estimated to take two hours for years up to 2016/17 and 1 hour for 2016/17. There is no evidence to support those figures. It is noteworthy that in addressing the issue of section 12 in its first submission SDC has set out that it would take longer to obtain the more recent information given how the records were held. It appears that the same does not apply in terms of the Local Government Association annual conference but SDC has offered no explanation regarding this difference in accessing records.
42. It is clear that there was no sampling exercise conducted in respect of the Local Government association annual conference and that the figures set out are subjective and cannot be considered realistic insofar as there is no supporting evidence let alone cogent supporting evidence. Whilst the Commissioner accepts that a public authority's awareness of its own practices and systems will influence its approach in relying on section 12, it is important to be able to set out why section 12 is appropriate in any particular case. No public authority can reasonably expect to rely on section 12 without the provision of evidence to support that position.
43. In its initial submission to the Commissioner, SDC set out that previous work on the request had taken nine hours but provided no further detail. In her follow up letter, the Commissioner requested detail as to how the figure of nine hours had been reached. In its second submission SDC set out that the "*officer was alive to the need to consider the time taken to comply with the request and noted the start and finish times of her work.*"
44. The Commissioner is most concerned by this response which either demonstrates a lack of understanding of the application of section 12 or is an attempt to trivialise the investigation by not providing the detail



requested by the Commissioner but expecting her to accept that its position is correct because SDC says it is.

45. Furthermore, the Commissioner concurs with the complainant's position that the public authority effectively decided what information falling within the scope of the request that the complainant could have and then relied on section 12 for the remainder of the information. The Commissioner's guidance on section 12 clearly sets out that such a situation should not prevail in a case where section 12 is being considered.
46. It is the Commissioner's position that at the point of an investigation, any public authority will already have had two opportunities to set out its position in respect of a request; the first via the response and the second via an internal review. In the event that a complaint is received and an investigation undertaken, the Commissioner would expect that a public authority can set out its position clearly and provide the necessary evidence to support that position. She does not consider that SDC has been able to do this despite a response, an internal review and two submissions to her office.

## **Section 16 – Advice and assistance**

47. Section 16 sets out that a public authority has a duty to provide advice and assistance, so far as it is reasonable to do so, to persons who propose to make, or have made requests for information.
48. The Commissioner notes that in its initial response to her office, SDC has commented that it is *"pleased to clarify that no advice or assistance was given to the applicant in this case because the requests for information were clear. The parts of the request which were refused could not have been refined without being omitted altogether."*
49. Again, this is a stance which the Commissioner finds concerning. She notes that in requesting an internal review, the complainant addresses the issue of advice and assistance in relation to his request as it relates to questions one, two and five.
50. In response, SDC provided the relevant links to publicly available information and reiterated its position regarding the application of section 12. Furthermore, SDC set out its position that it considered that it had not breached any legal duty. No specific reference was made to section 16 of FOIA despite the complainant having raised it.
51. In this case, the Commissioner considers that SDC should have sought to engage with the complainant in the event that section 12 applied and should have assisted the complainant in refining the request. The

complainant could have then considered whether he wanted certain elements of the request to be considered and omitted others or he could have reduced the time frame of his requests. What is clear is that there is undoubtedly potential for the request to be refined yet SDC did not consider this nor did it engage with the complainant.

52. It is therefore the Commissioner's position that there has been a clear breach of section 16 FOIA.

### **Other matters**

---

53. The Commissioner considers that this case has not been handled appropriately by SDC.
54. The request is set out in five numbered questions and SDC has elected to handle certain aspects of each of those five questions without engaging with the requester at any stage.
55. Section 21 of FOIA states that information which is reasonably accessible to the applicant by other means is exempt information.
56. In its response to the complainant, SDC set out that in respect of the request at points 3 and 5, the information is exempt as it is in the public domain. It did not direct the complainant to that publicly available information. The complainant subsequently requested copies of links to the publicly available information and these were provided in the internal review response.
57. The Commissioner considers that SDC, in accordance with her guidance, should have ensured in its original response that the complainant was provided with precise directions to the publicly available information.
58. The Commissioner notes that SDC has stated that it had considered it helpful to address certain aspects of the request but the Commissioner considers that it is either unfamiliar with her guidance which is readily available on the ICO website or SDC has deliberately attempted to obfuscate matters by taking the approach it did.
59. In handling the request as it has, SDC has created confusion around the request and has prompted a complaint to the Commissioner's office which could have been avoided by engaging with the complainant at an early stage in order to understand the request from the requester's perspective and to potentially resolve the case via a refined request.
60. The Commissioner considers that there is certainly scope for SDC to use this case in order to address any shortcomings and knowledge gaps and

Reference: FS50664496



to learn lessons. She would actively encourage SDC to use this case to ensure that future cases are handled in accordance with the FOIA.

## Right of appeal

---

61. 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 7395836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

62. 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.
63. 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** .....

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**