

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 December 2019

Public Authority: London Borough of Enfield

Address: Thomas Hardy House
39 London Road
Enfield
Middlesex
EN2 6DS

Decision (including any steps ordered)

1. The applicant has requested information relating to a major programme of works on a block of flats.
2. The Commissioner's decision is that London Borough of Enfield (the Council) was entitled to aggregate all six requests in accordance with section 12(4) of FOIA. However, it has failed to provide sufficient evidence to support the application of section 12(1).
3. The Commissioner also finds that the Council incorrectly cited section 14(1) of the FOIA in response to the request.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response without relying on either of the previously cited exemptions.
5. 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

6. The applicant submitted seven requests prior to the request under consideration here. The wording of those requests is reproduced in the annex attached to this notice.

7. On 18 October 2018, the applicant wrote to the public authority and requested information in the following terms:

"Please provide the Clerks of Works weekly reports for week commencing October 2 2017 to week ending October 19 2018 inclusive for the major works programme which is currently underway at the Council block of flats (1a - 11c) [Redacted]. Please also provide the documents which were used to record and track items/defects requiring remediation by Keepmoat/Engie as part of the major works programme at [Redacted]".

8. The Council responded on 5 December 2018 and refused to provide the requested information. It cited section 12 (costs) and section 14 (vexatious) of the FOIA as its basis for doing so.

9. Following an internal review the public authority wrote to the applicant on 11 February 2019 and maintained its position.

Scope of the case

10. The applicant initially contacted the Commissioner on 12 March 2019 to complain about the way his request for information had been handled.

11. In correspondence to the Commissioner the applicant stated:

"Enfield Council have refused my FOI request citing Section 12 of the Freedom of Information Act and I believe that it was not correct or justifiable for the Council to refuse the request under Section 12 of the FOI Act. The Council has stated that it has taken over 2.5 days to provide the requested information for my previous FOI requests submitted on July 26 and July 27 2018 and I do not believe that it is credible that the Council has spent 2.5 days dealing with my previous requests for the following reasons.."

12. He went on to explain that responses to the previous requests of 26 and 27 July 2018 contained 54 individual items and provided details of those items. The applicant also provided details of his own IT experience and stated:

"..and have significant experience in this area and can state with absolute certainty that the search and extraction of the email data which

was provided to me should not have taken any more than an hour to complete.

"..a large number of the email threads share the same 'email message subject' title and would likely therefore have all been discovered together using the same single search criteria."

"..it is reasonable to believe and expect that this information is stored electronically and in a central data repository like SharePoint, OneDrive or on a network share where each member of the major works project team would have access to this data to carry out their work and where the data would be easily searchable. It is therefore not credible that it would have taken any significant amount of time for this data to be located and extracted. Again, it is my opinion that the search and extraction of both the PDF and Word files provided to me should not have taken any more than an hour to complete."

13. The applicant provided similar arguments for the request for the Clerks of Works weekly reports for week commencing 2 October 2017 to week ending 19 October 2018 and the document(s) which were used to record and track items/defects requiring remediation. The applicant considered it reasonable to believe and expect that this information is also stored electronically and located in a central data repository where it is accessible and available to all members of the major works project team. Therefore it was not credible that it would take any significant amount of time for the Council to locate and extract this requested information.
14. It does not fall within the Commissioner's remit to specifically direct how an organisation should hold information or search for information within the scope of a request. However, she has issued guidance on the Section 46 Code of practice¹ - records management.
15. The aim of the code is to provide guidance to public authorities 'in connection with the keeping, management and destruction of their records' as well as the review and transfer of records to public archives.
16. The code sets out recommended, rather than mandatory, good practice. It is complemented by the code of practice issued under section 45 of FOIA.

¹ <https://ico.org.uk/media/for-organisations/documents/1624142/section-46-code-of-practice-records-management-foia-and-eir.pdf>

17. The Commissioner attempted to resolve the matter informally and engaged with both parties to provide her preliminary opinion that, at that time, she did not consider the Council had sufficiently demonstrated that the request was vexatious but that it may have been correct to cite section 12 of the FOIA.
18. She invited the Council to reconsider its position and take one of the following options:
 - explain in more detail why the Council considered the exemptions apply OR
 - provide a fresh response without relying on either of the previous exemptions OR
 - provide the information requested by the complainant.
19. The Council chose to maintain reliance on the exemptions it had cited. Therefore the Commissioner considers the scope of this case to be to determine if the public authority has correctly cited section 12(1) or 14(1) of the FOIA in response to the request.

Background

20. The applicant is a resident in the block of flats in question and also represents a number of other residents.

Reasons for decision

Section 12(4) - Aggregation of related requests

'Requests received within 60 consecutive working days'

21. The Fees Regulations state that requests received within 60 consecutive working days can be aggregated.
22. A public authority should consider whether it would exceed the appropriate limit to comply with the request based on the circumstances as they existed either on the day on which the request is deemed to be received, or on any day up to the time for statutory compliance.
23. Where a public authority wishes to aggregate the costs of dealing with more than one request, it is noted that the Fees Regulations do not cover how to reconcile the ability to aggregate requests received over 60 consecutive working days with the public authority's obligation to

respond to requests within 20 working days as required by section 10(1) of the Act.

24. The Commissioner's approach is to allow the aggregation period to only run up to 20 days 'forward' from the date of any single request under consideration to take into account the requirements of section 10(1).
25. The aggregation period will however be able to run up to 60 days 'backwards' from the date of any single request under consideration.
26. The total aggregation period, (running either forwards or backwards or a combination of both) from the date of any single request must not exceed 60 working days.
27. The Commissioner's guidance can be found here:
https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf
28. A total of eight requests were made in the period 26 July 2018 to 18 October 2018, the last of which fell on the 60th day.
29. When a public authority is estimating whether the appropriate limit is likely to be exceeded, it can include the costs of complying with two or more requests if the conditions laid out in regulation 5 of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations") can be satisfied.
30. Section 12(4) of FOIA states:
"The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –
(a) by one person, or
(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign, the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them."
31. The Commissioner has reviewed the applicant's six requests aggregated by the Council (set out in the Annex of this notice). These requests were submitted on 26 and 27 July 2018, with the current request being made on 18 October 2018. She is satisfied that all the requests were made by the same applicant and within 60 working days of each other, fulfilling the criteria at regulations 5(1)(a) and 5(2)(b).

32. The Commissioner must now consider whether these requests relate, to any extent, to the same or similar information. The Commissioner's view on aggregating requests can be found in her guidance on requests where the cost of compliance exceeds the appropriate limit².

33. Paragraphs 44 and 45 state:

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

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

34. The Fees Regulations' wording of *"relate, to any extent, to the same or similar information"* makes clear that the requested information does not need to be closely linked to be aggregated, only that the requests can be linked.

35. Public authorities can aggregate two or more separate requests and it should also be noted that multiple requests within a single item of correspondence are separate requests for the purpose of section 12.

36. This was confirmed by the Information Tribunal in the case of Ian Fitzsimmons v ICO & Department for Culture, Media and Sport (EA/2007/0124, 17 June 2008).

37. Having reviewed the wording of the applicant's requests, the Commissioner is satisfied that there is clearly a link in that they all relate to the works being carried out at a particular block of flats. Therefore the Commissioner considers the Council was entitled to aggregate the requests. She has next gone on to consider if complying with the requests would exceed the appropriate limit.

² https://ico.org.uk/media/fororganisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

Section 12 – cost of compliance

38. Section 1(1) of FOIA states that:

"(1) Any person making a request for information to a public authority is entitled –

(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."

39. 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."

40. The Fees Regulations set the appropriate limit at £450 for the Council; they also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that the appropriate limit for local government organisations equates to 18 hours.

41. 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:

- a. determining whether it holds the information;
- b. locating the information, or a document containing it;
- c. retrieving the information, or a document containing it; and
- d. extracting the information from a document containing it.

42. In determining whether the Council has correctly applied section 12 of FOIA in this case, the Commissioner has considered the Council's rationale provided to her during the investigation.

43. From point c. above it can be seen that the Fees Regulations do permit a public authority to take account of the cost of extracting information from a document containing it. However this relates to the work involved in extracting the entire body of information captured by a request from a larger document. It does not relate to the time it would take to separate information which a public authority wished to withhold under an exemption from that which it was prepared to release. Furthermore, a public authority cannot include the time it estimates would be taken to consider the application of any exemptions or identifying all the information captured by that exemption.

44. In its submission to the Commissioner the Council stated it has aggregated all requests and in determining costs has taken into account that it first needed to determine whether information is held by contacting individual officers.
45. It advised that it considered that there are many officers involved to contact. The volume of number of requests taking approximately 3/4 days of officer time, obtaining the information, collating it and extracting the relevant information. Details being collated by its project manager for the project, based on their daily rate and officer time already spent exceeded the limit of £450 for public authorities.
46. The Commissioner sought further clarification asking the Council to confirm the project manager's daily rate. However a number of officers have been involved in bringing the information together with day rates ranging from £150 - £352 per day.
47. The Council further explained that requests involved a number of different officers and all information is not centrally stored so required to ask individual officers to search their locally stored records to identify whether or not they hold any information. It would take these officers more than 1 hour each just to identify information held but even for the purposes of this calculation, that has used the 18 hour exemption period and then also to factor in time needed for collating all the information, printing off all the records, scanning the documents and then reading through them all to prepare for disclosure.
48. The Commissioner does not consider that the Council has provided an adequately detailed estimate of the costs involved despite having specifically stated *"When providing these calculations please include a description of the nature the type of work that would need to be undertaken (e.g. searching X number of files - 1 hour)."*
49. The Council does not specify the number of officers involved nor does it provide a calculation based on the allowable rate for the activities concerned, that is, £25 per hour. It refers to different rates of pay ranging from £150 - £352 per day and 'a number of different officers.
50. The Commissioner's guidance states:

"A public authority should note that even if it uses contract or external staff to carry out some or all of the permitted activities, it can only include their time at the rate of £25 per hour irrespective of the actual cost charged or incurred."
51. Given the lack of detail provided by the Council it is not possible for the Commissioner to determine if the estimate of costs is reasonable, and therefore she finds section 12 is not engaged.

52. The Council also cited section 14(1) of the FOIA in its response to the applicant and the Commissioner has next considered the application of this exemption.

Section 14(1) – vexatious requests

53. 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.
54. The term vexatious is not defined in the FOIA. The Upper Tribunal considered the issue of vexatious requests in the case of the Information Commissioner v Devon CC & Dransfield³. The Tribunal commented that vexatious could be defined as the "*manifestly unjustified, inappropriate or improper use of a formal procedure.*" The Tribunal's definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
55. In the Dransfield case, the Upper Tribunal also found it instructive to assess the question of whether a request is vexatious by considering four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff.
56. The Upper Tribunal did, however, also caution that these considerations were not meant to be exhaustive. Rather it stressed the "importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests."
57. In the Commissioner's view, the key question for public authorities to consider when determining if a request is vexatious is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.

³ <https://www.judiciary.uk/judgments/info-commissioner-devon-county-council-tribunaldecision-07022013/>

58. The Commissioner has identified a number of indicators which may be useful in identifying vexatious requests, these are set out in her published guidance⁴. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of the case will need to be considered in reaching a judgement as to whether a request is vexatious.
59. In order to determine whether a public authority has correctly refused a request on the basis that it is vexatious, the ICO will look at the context and history of the request. In particular the Commissioner will consider the following five criteria:
- whether compliance with the request would create a significant burden in terms of expense and distraction;
 - whether the request is designed to cause disruption or annoyance;
 - whether the request has the effect of harassing the public authority or its staff;
 - whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable; and
 - whether the request has any serious purpose or value.

The Council's position

60. The Council considered that complying with the request would create a burden in terms of expense and distraction. It explained that the project was still live, handover had not been taken from the contractor and therefore snagging and defects would have been dealt with at the end of the project. The requests for information were therefore unnecessary and officer's time was used responding to requests rather than focused on the works.
61. It also considered that the number and frequency of requests during a live project was unreasonable given the contract position and that these requests were overlapping.
62. It was the Council's view that the applicant could have far more reasonably engaged with the project team fully, but did not appear to like the answers he was given by the team so took the approach of making requests for information.

⁴ <https://ico.org.uk/media/1198/dealing-with-vexatious-requests.pdf>

63. The Council considered that where the applicant has any reasonable issues over the quality of works these issues have been rectified by directly speaking with the project team. The approach of sending multiple FOIs had no impact on the team ensuring that works were completed to a reasonable standard, as the freeholder of the block with a number of its tenants in the block there was no reason for the Council to accept poor quality workmanship.

The Applicant's position

64. The applicant considered that the Council cited section 12 and 14 in an attempt to close down any further scrutiny of the management and delivery of the major works programme. He further stated that the quality of the works was extremely poor, as was the management of the major works programme thus far and many defects are still outstanding.

65. He maintained that the residents cannot be prevented from asking further questions of the Council regarding the major works programme and that the Council are fully aware of the many issues and defects that are still outstanding.

66. The applicant advised that he had attended a meeting with the director of housing from the Council, and provided the Commissioner with the email chain following this meeting as he believed that it provided a useful context as to scale of the issues.

67. The applicant also stated that in a response to his FOI appeal attempts were made to portray a different context and then without any justification concluded that the requests were vexatious.

68. The applicant acknowledged that the director of housing did make a commitment at the meeting that the Council would ensure that the remaining issues were remediated. However, similar promises from the Council have been received in the past and, given that the works programme has now been ongoing since October 2017, it is therefore imperative that the residents retain the ability to further scrutinise the major works programme in the event that the Council fails to remediate the outstanding defects.

Conclusion

69. In terms of the purpose and value of the request, the Commissioner notes that the complainant does not appear to have a solely 'personal' interest in the subject matter. Rather, the complainant appears to have genuine concerns about the quality of the works carried out. He has also highlighted that due to the amount of public money and leaseholder charges being spent, the works programme should be open to full scrutiny to ensure value for money.

70. The Commissioner does not consider that there is any deliberate intention to cause annoyance to the Council; rather, she considers that the complainant is frustrated with what he considers an important issue and is seeking information.
71. The Commissioner notes the Council's contention that requests are frequent and overlapping. However, from the information available to her it appears that the complainant's previous requests were contained in just two emails on consecutive days. Each point in those emails was treated as a separate request which entitled the Council to aggregate them along with the current request. However, it is difficult to see how this could be described as 'frequent and overlapping', particularly as the final request was not made until 18 October 2018.
72. Although the Council has met with the applicant to discuss his concerns this does not mean the applicant is unable to make requests for information. In fact, it is likely that this information would be required for the applicant to make full and meaningful contributions to any meetings that may take place, as well as provide a record of what had been discussed and addressed by the Council and its contractors.
73. The Commissioner is therefore not satisfied that the complainant's request is a manifestly unjustified, inappropriate, or an improper use of the provisions of the FOIA.
74. The applicant raised further concerns about the amount of information that had been provided to him in response to his previous requests. For example, he stated the structural engineer and quantity surveyor attended site on many occasions during the works programme but the only structural report provided is a report written on August 2, 2016 prior to the works commencing.
75. The applicant acknowledged that it was impossible for him to know if he had received all the information held in response to his previous requests. He considered that in particular given the many issues with the concrete and brickwork repairs, "it is extraordinary that only two email threads and four word documents have been provided" by the Council.
76. However, given that the Council subsequently sought to rely on sections 12 and 14 of the FOIA this matter has not been included in this decision notice. When considering its fresh response the Council should also ensure it has located all the relevant information within the scope of this request.

Right of appeal

77. 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

78. 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.
79. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

Aggregated requests made 26 and 27 July 2018

80. Please provide all the communal lighting designs and the communal lighting level surveys produced to date as part of the Major Works Programme currently underway at the Council block of flats [redacted]
81. Please provide all communications (to include all emails, meeting notes and any other written material to date) between Enfield Council and its agents and between Enfield Council and or its agents and Engie (formerly Keepmoat) regarding the poor quality of the concrete and brickwork repairs which are being carried out as part of the Major Works Programme currently underway at the Council block of flats ([redacted]).
82. Please provide all communications (to include all emails, meeting notes and any other written material) between Enfield Council and its agents and between Enfield Council and or its agents and Engie (formerly Keepmoat) regarding the light nuisance issue caused by the newly installed balcony communal lights for the Major Works Programme which is currently underway at the Council block of flats [redacted].
83. Please provide all the 'Specification of Works' which have been provided by the Council and or its agents to Engie (formerly Keepmoat) for the Major Works Programme which is currently underway at the Council block of flats [redacted].
84. Please provide the initial 'Programme Schedule' and all subsequent revisions of the 'Programme Schedule' to date for the Major Works Programme which is currently underway at the Council block of flats [redacted].
85. Please provide all communication (to include all emails, meeting notes and any other written material) between Enfield Council and its agents and between Enfield Council and or its agents and Engie (formerly Keepmoat) regarding the change of roofing system manufacturer from Redland to Sandtoft for the Major Works Programme which is currently underway at the Council block of flats [redacted].
86. Please provide all the structural engineering report(s) produced to date for the Major Works Programme which is currently underway at the Council block of flats [redacted].