

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 September 2020

Public Authority: North East Lincolnshire Council

Address: Municipal Offices
Town Hall Square
Grimsby
North East Lincolnshire
DN31 1HU

Decision (including any steps ordered)

1. The complainant requested from North East Lincolnshire Council ("the Council") information in three parts relating to written food warnings. The Council initially refused this request under section 14(1) of the FOIA (vexatious requests). The Council later withdrew its citing of section 14(1) and cited section 30(1)(a) of the FOIA (investigations and proceedings). It then disclosed to the complainant information at part three of the request and maintained its citing of section 30(1)(a) for parts one and two. The Council then revised its position again and refused this request under section 12(1) of the FOIA (costs limit).
2. The Commissioner's decision is that the Council was not entitled to rely upon section 12(1) of the FOIA. The Commissioner's view is that the Council has also not complied with its duty to provide advice and assistance under section 16.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to this request which does not rely upon section 12.
4. The Council 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 24 October 2019, the complainant wrote to the Council and requested information in the following terms:

"I would like to make a request under the Freedom of Information Act:

1. According to LAEMS data in the public domain for 2018/19, there were 80 written warnings sent to food establishments by North East Lincolnshire Council. Could you please provide copies of the 80 written warnings sent.

2. Could you please provide a list of the establishments that received written warnings in 2018/19 from North East Lincolnshire Council?

3. According to LAEMS data in the public domain, there were 2 prosecutions recorded by North East Lincolnshire Council in 2018/19 could you provide disclosure on the parties that were prosecuted and what was the ruling made by the judge?"

6. The Council responded on 5 November 2019. It refused this request under section 14(1) of the FOIA (vexatious requests). It advised the complainant to contact the Information Commissioner's Office if he was dissatisfied with the response. As such, this complaint was accepted for investigation without an internal review.
7. During the Commissioner's investigation, on 9 March 2020, the Council wrote to the complainant and withdrew its citing of section 14(1). It cited section 30(1)(a) of the FOIA (investigations and proceedings) as its basis to withhold the requested information.
8. On 10 March 2020, the complainant requested an internal review. The Council contacted the Commissioner to ask if it should conduct an internal review at this stage and the Commissioner confirmed that an internal review was not necessary as the complaint was currently under investigation. As such, on 13 March 2020 the Council informed the complainant that it would not be conducting an internal review.
9. On 27 March 2020, the Council wrote to the complainant and stated that it had withdrawn its citing of section 30(1)(a) in respect of the third part of his request and it disclosed the information at part 3. On 27 March

2020, the complainant expressed dissatisfaction with the Council's latest response.

10. As part of her investigation into the Council's application of section 30(1)(a), the Commissioner asked for a copy of the withheld information in order to determine if the exemption had been accurately applied. When asked for this information, the Council stated that it could only provide a sample of the withheld information due to Covid19 service pressures. The Commissioner explained that she required sight of all of the withheld information. The Council then revised its position again and issued a fresh response to the complainant within which it refused this request under section 12(1) of the FOIA (cost limit). This refusal notice was dated 26 June 2020.

Scope of the case

11. The complainant contacted the Commissioner on 5 November 2019 to complain about the way his request for information had been handled.
12. Following the Council's refusal notice dated 26 June 2020, the complainant informed the Commissioner that he, *"would like to see the breakdown of how they have calculated or anticipated the costs that they 'may' incur in responding to my FOI request. Notwithstanding the above, should it be necessary I am willing to cover their costs of providing the answers to my questions which they are so eager to avoid answering"*.
13. As at paragraph 10 above, the Council revised its position during the course of this investigation. Therefore, the scope of this case is to determine if the Council was entitled to rely on section 12(1) to refuse to comply with the request (parts 1 and 2).
14. The Commissioner will also consider whether the Council has fulfilled its obligations under section 16 of the FOIA (advice and assistance).

Reasons for decision

Section 12(1) – cost of compliance exceeds the appropriate limit

15. Section 1(1) of the 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."*

16. Section 12(1) of the FOIA 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."

17. The appropriate limit in this case is £450, as laid out in section 3(2) of The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations"). This must be calculated at the rate of £25 per hour, providing an effective time limit of 18 hours' work.

18. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) of the Fees Regulations 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.

19. A public authority does not have to make a precise calculation of the costs of complying with a request; instead, only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal decision in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/20017/0004*¹, the Commissioner considers that any estimate must be "*sensible, realistic and supported by cogent evidence*".

20. In the Council's response to the complainant it stated that to comply with this request would take a minimum of 20 hours, or a cost of £500 based on an hourly rate of £25 per hour, to retrieve and extract the requested 80 written warnings. It explained that this estimate is, "*based on the need to manually review each individual case where a written*

¹ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf>

warning has been issued, which would take at least 15 minutes per case or written warning”.

21. In its response to the Commissioner, the Council stated that no time was required to determine whether the information was held, and minimum time would be required to locate the information as, *“a list of the premises written warnings were issued to can be produced from our system”.*
22. It explained that from the list of premises that were issued a written warning:

“an officer with knowledge of the case and / or expertise in this area would need to review each premises case files to identify and retrieve the required information. For each premises there will be multiple documents that will need to be reviewed and examined to determine which are relevant to this request. We estimate that the activities to examine and retrieve the relevant documents would take at least fifteen minutes per case, a total of 20 hours.”
23. The Council added that some time would also be required for extracting the information as it would either need to print whole documents or parts of documents.
24. A sampling exercise was undertaken within which the Council reviewed one premises case file *“which was representative of the case files that will be held for premises where a written warning has been issued”.* It determined that a minimum of 15 minutes would be required to undertake a comprehensive search of the case file in order to ensure that all relevant information was identified and extracted. It argued that these premises case files may include multiple documents related to a written warning, adding that each of these would need to be identified for the purpose this request. The Council stated that it has not been able to conduct a larger sampling exercise due to additional service pressures caused by Covid19.
25. The Council confirmed that its estimate has been based upon the quickest method of gathering the requested information. It explained that the written warnings are held as part of the overall premises case files, not separately. Therefore the Council reiterated that in order to retrieve the requested information, each case file would need to be reviewed by an officer.
26. It also stated that, *“automated searches for or reporting of the information are not available to retrieve / extract the required information”.*

27. As part of her section 12 investigation, the Commissioner asked the Council to provide a sample of the withheld information. The Council provided six examples of the withheld written warnings.

The Commissioner's conclusion

28. The Commissioner does not accept that the Council's cost estimate was reasonable. In order to locate and retrieve the requested information, the Commissioner does not accept that it would take the Council 15 minutes to examine each case file in order to extract the written warnings. The Council's estimate of 20 hours is only marginally higher than the cost limit of 18 hours. Therefore, the Commissioner requested that the Council provided a sample of the written warnings for further consideration. From the sample provided, it is clear which part of the premises case file would fall within the scope of the request. As such, these warnings should be fairly straightforward for the Council to locate within each case file.
29. The Commissioner's view is that it would likely take considerably less than 15 minutes to extract the written warnings from each case file. Even if the estimate of 15 minutes was even slightly less, for example, if the Council had estimated that it would take 13 minutes per each of the 80 case files, this would fall just under the cost limit. However, the Commissioner considers that it would take significantly less than 15 minutes per case file, rather than slightly less, which would mean that the Council could comply with the request comfortably within the cost limit.
30. The Commissioner also notes that the statement from the Council quoted above at paragraph 21 indicates that the Council could comply with part 2 of the request without this taking significant time. The citing of section 12(1) therefore hinges on whether the estimate of 15 minutes per file to extract the written warnings was reasonable.
31. As the Commissioner does not accept that the estimate of 15 minutes per file was reasonable, she finds that the Council has not estimated reasonably that the time required to comply with this request would exceed the 18 hours set out by the Fees Regulations. Therefore, it is the Commissioner's view that the Council was not entitled to rely on section 12(1) of the FOIA to refuse to comply with the complainant's request. The Commissioner requires the Council to take the step as outlined at paragraph three above.

Section 16 – advice and assistance

32. Section 16 of the FOIA states:

“(1) It shall be the duty of a public authority to provide advice and assistance, so far as would be reasonable to expect the authority to do so, to persons to propose to make, or have made, requests for information to it.

“(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.”

33. The Commissioner's view is that, where a public authority refuses a request under section 12(1) of the FOIA, complying with the section 45 Code of Practice will fulfil its duty under section 16(1).

34. Paragraph 2.10 of the section 45 Code of Practice states:

“Where it is estimated the cost of answering a request would exceed the ‘cost limit’ beyond which the public authority is not required to answer a request (and the authority is not prepared to answer it), public authorities should provide applicants with advice and assistance to help them reframe or refocus their request with a view to bringing it within the costs limit”.

35. In addition, paragraph 6.9 states that *“public authorities should consider what advice and assistance can be provided to help the applicant reframe or refocus their request with a view to bringing it within the cost limit”.*

36. In its refusal notice to the complainant, the Council stated that it would ordinarily offer advice and assistance under section 16. The Council explained that it could have provided advice to the complainant about refining the scope of the requested information to cover a shorter timeframe or specific business or business sector. However, it stated that even if the complainant refined his request in one of these ways, the Council would still refuse this request under section 30(1)(a) of the FOIA (investigations and proceedings).

37. In response to the Commissioner's investigation letter, the Council referred to this response to the complainant. The Council also stated that it was, *“unaware of the purpose for which the applicant requires the information, it may be possible that the information required by the applicant could be provided to them without the need to provide copies of the 80 written warnings. As a Council we are happy to explore this with the applicant”.*

38. The Commissioner considers that the Council has not taken steps to offer advice and assistance in an attempt to bring the request within the

appropriate limit. She therefore considers that the Council did not offer advice and assistance that was sufficient to meet the requirements of section 16 of the FOIA.

39. The Commissioner is not satisfied that the Council complied with its statutory obligation under section 16 to provide advice and assistance. Although this finding has been superseded by the finding in this notice on section 12(1), the Council should ensure that it provides appropriate advice and assistance in any future case in which it refuses a request under section 12.

Right of appeal

40. 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

41. 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.
42. 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

Ben Tomes
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF