

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 April 2024

Public Authority: Sheffield City Council

Address: PO Box 1283

Town Hall

Sheffield

S1 1UJ

Decision (including any steps ordered)

1. The complainant requested a copy of advice provided to Sheffield City Council ('The Council'), regarding a Public Inquiry held in 2007. The Council refused to confirm or deny whether it held information within the scope of the request, citing section 12(2) (cost of compliance exceeds appropriate limit) of FOIA.
2. The Commissioner's decision is that the Council was entitled to rely on section 12(2) of FOIA. However, he finds that the Council failed to provide reasonable advice and assistance and therefore did not meet its obligations under section 16(1) of FOIA.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 14 July 2023 the complainant requested the following information:

" I am a Director of [name redacted]. Thank you for your e mail of [date redacted] containing the two Agreements requested. SCC has confirmed that those two Agreements were not placed before the September 2007 NRQ CPO Public inquiry.

I request pursuant to the Freedom of Information act 2000 a copy of the advice given to the Council that lead to those Agreements being withheld from that Inquiry."

5. On 10 August 2023 the Council replied, stating it was unable to confirm or deny whether it held the information requested and applied section 12(2) of FOIA to the request. The Council explained that records from the time of the public inquiry were held by a legal firm. These records had not been examined and the Council was not certain whether they contained the requested information or not. The Council asserted that searching the records to establish this would exceed the cost limit of 18 hours or £450.
6. On 11 August 2023 the complainant requested an internal review on the grounds that searches could be narrowed down to a specific window of time. The complainant stated that the information "must be in the Councils [sic] possession. It will also be in your [place name redacted] lawyers office."
7. The Council had failed to provide an internal review at the point the complaint was accepted.

Scope of the case

8. The complainant contacted the Commissioner on 10 October 2023 to complain about the way their request for information had been handled in terms of the time taken for the Council to respond. The complainant also contends that the legal firm which advised the Council at the time of the Public Inquiry, and which still holds records from that time, holds the requested information.
9. The Commissioner considers the scope of this case is to determine if the public authority has correctly applied section 12(2) of FOIA in response to this request. The Commissioner will also consider whether the public authority met its obligation to offer advice and assistance, under section 16 of FOIA.

Reasons for decision

Section 12(2) - costs

10. Section 12(2) provides that a public authority is not obliged to confirm or deny whether requested information is held if it estimates that to do so would incur costs in excess of the "appropriate limit" as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations").
11. In other words, if the cost of establishing whether information of the description specified in the request is held would be excessive, the public authority is not required to do so.
12. The "appropriate limit" is set in the Fees Regulations at £600 for central government, legislative bodies, and the armed forces and at £450 for all other public authorities. Therefore, the "appropriate limit" for the Council is £450.
13. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, effectively imposing a time limit of 18 hours for the Council to deal with this request.
14. Section 12(2) requires a public authority to estimate the cost of establishing whether the information is held rather than to formulate an exact calculation. However, the Commissioner considers that any estimate must be sensible, realistic and supported by cogent evidence.
15. Where a public authority claims that section 12 of FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of the FOIA.

Would confirmation or denial exceed the appropriate limit?

16. As is the practice in a case in which the public authority has cited the cost limit under section 12(2) of FOIA, the Commissioner asked the Council to explain what searches, if any, had been carried out to establish where or how the requested information might be held. The Council was also required to provide a more detailed estimate of the time and cost which would be involved in establishing whether the requested information was held.

17. The Council states that it has:

"no records that go back to when such advice would be given. We are unsure if it ever was. Any Sheffield City Council (SCC) records that were contemporaneous with the public inquiry in 2007 have long since been destroyed or lost."

18. The Commissioner notes that employees involved with a specific event such as the public inquiry may have knowledge of what information the public authority holds and could locate it. In this case the Council has ascertained that:

"There is only one of the Council officers who remained from the 2007 CPO [Compulsory Purchase Order] team. The others are no longer with the Council. The senior lawyer has spoken to this officer on a few occasions, and [the officer] does not know where any documents relating to this request would be located."

19. The Council considered that the requested information could (if it had ever existed), only have been held by one or both of the legal practices acting on its behalf at the time of the public inquiry. These were DLA LLP, (now DLA Piper UK LLP) and Herbert Smith, now Herbert Smith Freehills LLP ("HSF").

20. The records held by DLA Piper had already been searched for a previous request. The Council was therefore confident that if the requested information was held, it could only be among those records located in HSF's London Office.

21. In order to work out the cost involved in searching HSF's records, in its response the Council explained:

"The documents are held in London we would need to dispatch officers to look at the records and their travel and subsistence expenses and time would significantly add to the cost of determining whether we have the records, locating and extracting them"

22. In its submission to the ICO the Council further stated:

"HSF's documents are held in London which would require a trip there but that would be five hours return travel time before a document had been looked at. A proper sift would take two officers a full day or two. There may need to be overnight accommodation."

23. The Council noted that there were 28 boxes of material held by HSF that would need to be searched. Moving these from London to Sheffield and back would be impractical and costly: as well as the transportation costs of the records themselves (which it did not quantify), the Council would

also have to have a representative of HSF accompany those records, as required by the HSFs corporate insurance, to ensure their integrity – the costs of that representative would have to be borne by the Council.

24. The Council does not know what information the 28 boxes contain:

“HSF state that they still have records from the time of the public enquiry. However, these records have not been examined even on a superficial level and so it is not certain what they contain.”

The Commissioner's view

25. The Commissioner accepts that the most reasonable, secure and practical solution would be to send a Council employee to London to carry out searches.

26. The Council is entitled to assume that it will need to search all 28 boxes to establish whether the information is or is not held. Even if each box can be searched within half an hour, searching all 28 boxes will require 14 hours of searching. Add in five hours of travel to and from London and the amount of time exceeds two eight-hour working days – necessitating two overnight stays.

27. The Commissioner considers an employee required to travel to London to carry out searches would incur the following reasonable expenses:

- Return off-peak train from Sheffield to London Liverpool Street (closest station to destination), estimated at £82.
- Two nights bed and breakfast in a budget hotel in walking distance to destination, estimated at £283.¹
- Subsistence costs (two evening meals plus two lunches): £70.²
- Staff time spent travelling from Sheffield to HSF's offices and back: approximately five and a half hours or a notional cost of £137

¹ Train and hotel cost estimates based on quotes from price comparison websites on the assumption the trip would be planned with less than 2 weeks notice.

² Based on the Council's published allowances (see para 9.2):
<https://democracy.sheffield.gov.uk/documents/s67526/Part%206A%20-%20Members%20Allowances%20Scheme%20April%202024.pdf>

28. Based on these figures, the Commissioner accepts that the Council would have incurred £500 of costs (thereby easily exceeding the cost limit) before the staff member had been able to carry out any searches whatsoever.
29. Alternatively, if the Council were to transport the boxes to Sheffield, even if all the boxes could be searched within 14 hours, that would only leave the Council £100 with which to procure a courier service to and from its offices. The Commissioner therefore considers this option unrealistic.
30. The Council would also have to pay the costs of having an HSF employee accompany the files. Given that the cost limit would already have been exceeded, the Commissioner has not found it necessary to determine the extent to which any of those associated costs could be included in the estimate.
31. The Commissioner's conclusion is therefore that the Council has estimated reasonably that to confirm or deny whether it holds any information within the scope of the complainant's request would exceed the appropriate cost limit.
32. Consequently, the Commissioner finds that the Council was correct to apply section 12(2) of FOIA to the complainant's request.

Procedural matters

Section 16(1) – duty to provide advice and assistance

33. Section 16(1) of FOIA provides that a public authority should give reasonable advice and assistance to any person making an information request.

Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice³ in providing advice and assistance, it will have complied with section 16(1). The FOIA code of practice states that, where public authorities have relied on section 12 to refuse a request, they should:

³ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

"provide applicants with advice and assistance to help them reframe or refocus their request with a view to bringing it within the cost limit".

34. In its response of 10 August 2023, the Council acknowledged its duty under Section 16 of FOIA to provide advice and assistance in the following terms:

"If you would like to narrow down the focus of your request, we would be happy to process your revised request as a new request for information under the Freedom of Information Act 2000."

35. What is "reasonable advice and assistance" will depend on the circumstances and the type of request that has been submitted. However, simply stating that the requester should "narrow" their request, without providing any indication of how the request should be narrowed or by how much, is very unlikely to be sufficient – especially when the request is already specific in what it is seeking.

36. In its submissions to the Commissioner, the Council changed its position, saying:

"We do not think that the request can be meaningfully refined to allow it to be complied with, within the appropriate limit."

37. Based on the information the Council has now provided to him about the way the relevant records are held and the specific nature of the request, the Commissioner accepts that the request could not be meaningfully refined. The complainant wants a specific piece of information. It is not certain whether that information still exists, or has in fact ever existed. If it does exist it must be within one of the 28 boxes held by HSF. There is simply no other way of establishing whether the information is held without searching each of the 28 boxes which, as has been set out above, would exceed the cost limit.

38. As the Council failed to explain that to the complainant when responding to the request, the Commissioner finds that the Council breached its obligations under section 16 of FOIA. However, in the circumstances, it would serve no useful purpose to order a remedial step.

Right of appeal

39. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

40. 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.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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