

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 05 October 2009

Public Authority: City of York Council
Address: The Guildhall
York
YO1 9NQ

Summary

The complainant asked City of York Council for various pieces of information regarding absenteeism due to stress, anxiety, depression, and bullying between two dates. City of York Council provided some of the information requested. However, it applied section 12 to the outstanding elements of the request on the basis that they would have to manually check thousands of records. The Commissioner found that City of York Council acted correctly in refusing the request under section 12 of the Act as the appropriate limit would have been exceeded.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 4 December 2008 the complainant made the following request:
 1. *I would like to know how many employees of the city council have been absent from work due to either stress, anxiety, depression or any combination of those ailments between 1st August 2004 and 31st October 2008.*
 2. *Please also confirm how many complaints of bullying have been made by employees of the council against managers or colleagues during the same period.*

3. Please confirm how many employees have claimed constructive dismissal within the same period for bullying/harassment.

4. Please confirm how many claims have been filed against the city council at the Employment Tribunal within the same period for bullying/harassment.

3. On 6 December 2008, the complainant contacted the public authority again stating:

"I would also clarify when I mentioned constructive dismissal, I was referring to the employee directly, similar point about bullying and harassment complaints, there is no Employment Tribunal claim called "bullying and harassment". This will usually form part of a claim for unfair dismissal or one (or more) of the various discrimination claim and/or under the Protection from Harassment Act. Could you provide the information on the aforementioned.

Could you provide the information in electronic format"

4. City of York Council responded to the complainant on 7 January 2009, within 20 working days, the Council provided details of staff sickness in relation to stress, anxiety and depression in response to part 1 of the complainant's request. They stated that they did not hold records centrally with regards to bullying or harassment complaints being taken to the employment tribunal in response to parts 2, 3 and 4 of the request. The information was held by Directorates in different locations.

5. On 9 January 2009 the complainant requested an internal review of the Council's decision stating the following:

"York City Council has not answered my question of how many complaints of bullying have been made by employees of the council against managers or colleagues during the period of 1st August 2004 and 31st October 2008.

I pointed out to the council there is no constructive dismissal, I was referring to the employee directly, similar point about bullying and harassment complaints, there is no Employment Tribunal claim called "bullying and harassment". This will usually form part of a claim for unfair dismissal or one (or more) of the various discrimination claim and/or under the Protection from Harassment Act. The council answered this question referring to bullying which would not provide the correct information."

6. On 9 January 2009 the Council provided the complainant with the outcome of its internal review. City of York Council stated:

"We have looked at your request again and the amount of work involved is prohibitive. Therefore it is exempt under section 12 of the Act.

The reason that the work involved is so extensive is that we do not keep the

figures in the format you have asked for; and we would have to deploy staff to look through several hundred individual files.”

7. On 10 January 2009 the complainant made further contact with the Council via email, requesting a further review of the application of section 12.
8. The Council responded on 6 February 2009 upholding their application of section 12, stating that to provide the information requested in parts 2, 3 and 4 of the request would involve manually checking in excess of 9000 staff files, estimating that this exercise would take in excess of 150 hours to complete. The Council offered to provide the complainant with copies of their policies and procedures for bullying and harassment. In the text of their response, the Council stated that it may be possible for them to be able to check 1000 or fewer files within the fees limit, however they stated that this information would not be a statistically valid sample and therefore could potentially be inaccurate information and subsequently of no use to the complainant.
9. On 12 February 2009, the complainant contacted the Council asking them to examine 1000 files, starting at A and stopping once they reached the 1000th employee.
10. The Council responded on 16 February 2009 stating that they would treat the request of 12 February 2009 as a new Freedom of Information Request and asked the complainant for clarification of the request.
11. The complainant contacted the Council on 17 February 2009 stating that she did not agree that her request of 12 February 2009 was a new request. She stated that the Council had failed to honour their obligations to provide advice and assistance as required by section 16 of FOIA and therefore she felt that the offer of checking 1000 files should be treated as a refined request.
12. On 6 March 2009 the Council responded stating that they could not identify a statistically valid sample and were therefore not prepared to carry out the task set as the result would not be a meaningful item of information, it would be a number rather than a statistic and would be likely to be misleading to anyone that read it. They referred the complainant to their original refusal under section 12.

The Investigation

Scope of the case

13. On 10 March 2009 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider City of York Council's application of section 12 to parts 2, 3 and 4 of her request and their failure to provide appropriate advice and assistance.

Chronology

14. On 3 July 2009 the Commissioner contacted City of York Council and asked it to provide further clarification of the costs involved in locating, retrieving and extracting the information requested by the complainant. The Council were also asked to make contact with the complainant in an attempt to informally resolve the complaint by offering further advice and assistance in order to provide information relevant to the request
15. The Council contacted the complainant on 9 July 2009 in which it provided an extract of a recently completed staff survey, they stated: *"The survey was carried out in February 2009 but the results were not available until our correspondence had closed. May I remind you that the survey was not compulsory, so the respondents are a self-selected group and not necessarily representative of the whole workforce. This information is not what you asked for, which was the actual number of complaints made about bullying and harassment - but it does give a subjective view from those who completed the survey. I am sure this is a better substitute for what you wanted than the "word search" would have been."* The information provided to the complainant showed that there were 1847 responses to the staff survey and provided the statistics in relation to the number of people who were being bullied or harassed as well as information about who was doing the bullying or harassing.
16. On 24 July 2009 the Complainant contacted the Commissioner stating that she was still unhappy with the level of advice and assistance that had been provided by the Council, and that she felt the Council were still incorrect in their application of section 12.
17. On the 4 August 2009 the Commissioner wrote to the Council asking them to provide further information about their application of section 12 in refusing part of this request.
18. The Council replied to the Commissioner on 11 August 2009 providing their arguments for applying section 12 and stating that they felt they had fulfilled their obligations under section 16.

Analysis

Exemption - section 12

19. Section 12(1) of the Act states:
 - i. *'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.'*
20. Accordingly, section 12 provides that a public authority is not obliged to comply with a request for information if it estimates that meeting the request would

exceed the appropriate cost limit. The appropriate limit is currently set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations'), the wording of which is provided in the legal annex to this Notice. A public authority may only take into account the cost of determining whether it holds the information requested, locating, retrieving and extracting the requested information in performing its calculation. The cost limit is currently set at £450 for all public authorities (other than central government) and equates to 2½ days' work (18 hours) at a rate of £25 per hour.

21. Technically, multiple requests within a single item of correspondence are separate requests for the purpose of section 12. If a public authority has applied the exclusion under section 12 to multiple requests within a single item of correspondence, the Commissioner needs to be satisfied that each request can be aggregated in accordance with the Fees Regulations. If it is found that one of the multiple requests is not similar to the others, the public authority will not be entitled to refuse that particular request under section 12 unless complying with the request by itself would exceed the cost limit.
22. In this case City of York Council informed the Commissioner in its letter of 11 August 2009 that, in order to collate the information requested in parts 2, 3 and 4 of the request, it would have to manually check in excess of 9000 files. It estimated that such work would take in excess of 150 hours stating:

".....each employee's HR file would have to be reviewed individually as there is no central record and each individual complaint is recorded in the complainer's file. Some files are structured by reference to matters such as complaints and grievances but many are not, and each document in the section (or entire file) would have to be reviewed to see if it identifies such a complaint. These are still paper files and no electronic search could be made"

"Time is required to prepare a space at which to work. A set of files must be brought from the cabinet. Each must have the relevant section located if there is one; then scrutiny can start. The set of files must be identified and recorded (to ensure completeness with no double-counting) and a counting mark made if the search words are found and a second check confirms it is a "qualifying" complaint. Then the documents can be put back, and eventually that set replaced. Cabinets are located in each directorate; more than one working space would be needed."

"One minute is a very rough average estimate but, for the sake of establishing reasonableness, a total of 9,200 HR files at one minute each would be 153 hours, well in excess of the cost limit."

23. In the present case the Commissioner considers that the process of manually checking in excess of 9000 files represents time spent on locating and retrieving the requested information, and so can be considered when estimating the total time that would be spent for the purposes of the section 12 cost ceiling. However, it is worth noting that for the purposes of section 12 the preparing of workspace and putting files back are not eligible for inclusion in the costs estimate.

24. The Commissioner notes the Regulations in that the cost limit equates to 2½ days work for a public authority at £25 per hour. On the basis of this information the Commissioner accepts that it was reasonable for City of York Council to reach its conclusion that retrieving and locating the information would take over 2½ days (18 hours) of staff time. In order to check in excess of 9000 files, within 18 hours, the public authority would have had to check in excess of 8.3 files per minute.
25. In the Information Tribunal case of *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency (EA/2007/0004)* the public authority had stated that it could not comply with one element of the complainant's request as it claimed that to do so would exceed the appropriate limit. The Information Tribunal decided that where a public authority cannot confirm whether it holds the requested information and estimates that to do so would exceed the appropriate limit, it will not be obliged to carry out any searches for the information and stated, at paragraph 13, that "the effect of section 12 is not to impose a limit, leaving the authority obliged to carry out work up to that limit; it is to remove the information from the scope of the section 1 duty to disclose altogether". Having considered the above information, the Commissioner is satisfied that the cost of locating, retrieving and extracting the requested information would exceed the appropriate limit, and that section 12(1) is engaged.

Section 16 'Duty to provide advice and assistance'

26. Section 16(1) provides that:

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

27. Section 16(2) provides that:

"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".

28. Where a public authority refuses a request because the appropriate limit has been exceeded, paragraph 14 of the section 45 Code of Practice on the discharge of public authorities' functions under Part I of the Freedom of Information Act 2000" recommends that the public authority should consider providing an indication of what, if any, information could be provided within the appropriate limit, and also consider advising the applicant that a narrowed or refocused version of the request could be handled within the limit.
29. With reference to paragraphs 8 to 12 above, where a public authority refuses a request under s12, and the applicant forms a refined request (potentially following advice and assistance under s16), the refined request should be treated as a new request, and the statutory time period for compliance commences on the date of receipt of that new request. Therefore the public authority was correct in advising

the complainant that they would treat the request (in paragraph 9 above) for the first 1000 file searches as a new request.

30. In the case of *Roberts v the Information Commissioner (EA/20080050)* the Information Tribunal agreed with the Commissioner's view that whilst the public authority did not deal with its obligation under s16 to provide advice and assistance that might have enabled the applicant to refine his request, this did not invalidate the s12 refusal. They acknowledged the importance of public authorities discussing the scope of a request with the applicant so that complying with it would not exceed the costs limit (paragraph 20), but nevertheless made the following findings at paragraph 20:

- *There is nothing in the language of s12 itself to suggest that the estimate may be challenged for any reason other than that it fails to comply with the Regulations.*
- *Nor does section 16 specify that failure to comply with its requirement should invalidate an estimate. In fact no sanction is mentioned in that section and it is to be inferred that the only available sanctions are those set out in Part IV of the FOIA, which make no reference to any consequential impact of breach on the applicability of other provisions.*
- *The relevant part of the Code of Practice ... indicates that the requirement to give advice only arises once the public authority has reached the stage where section 12 applies ("Where an authority is not obliged to comply with a request for information..."). Neither the statute nor the Code of Practice contain any suggestion that avoiding the obligation to comply is conditional on first complying with the Code of Practice or that a public authority must consult with the person seeking information as part of the process by which it reaches an estimated costs figure. This is entirely consistent with the purpose of the Code of Practice, (which is to provide guidance only), and with the language of section 16 itself, (which makes it clear in subsection (2) that the only impact of the Code of Practice is that a public authority which complies with it will be found to have provided the advice and assistance necessary to avoid a breach of subsection (1)).*

31. In his letter of 3 July 2009 the Commissioner asked the public authority to provide further advice and assistance to the complainant with a view to informal resolution. The public authority responded as per paragraph 15 above. In their letter to the Commissioner dated 11 August 2009 the Council also stated the following:

"Since the correspondence with [...name redacted...] in February, a staff survey has been completed. Relevant pages of a PowerPoint summary of the results were provided to her, dealing with two of the survey questions:

Are you being bullied or harassed in your work at present? (Yes/No)

Who is the bully or harasser? (various categories)

The results were expressed as percentages, and the overall survey response rate was 37% of staff excluding teachers. The total value can be extrapolated from

other data in the presentation slides. Teachers are a significant group of employees, and also positive respondents may feel bullied or harassed but not enough to complain, so the actual incidence that [...name redacted...] wants cannot be deduced reliably. Nevertheless this should give a reader a reasonable view of this problem within the council, especially as it is given a historic context. It is the mechanism the council uses for assessing the problem.”

“...the survey results are (the council believes) a real and meaningful alternative giving a valid view of the problem, which the other suggestion (as per paragraphs 8-12 above) would not be. Therefore the council believes it has fulfilled its duty of advice and assistance.”

32. In light of the above actions taken by the Council, the Commissioner considers that the Council have fulfilled the requirements of section 16(1), in that they have offered appropriate advice and assistance to the complainant.

The Decision

33. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act, and that it was justified in withholding the information by reference to section 12 (1) of the Act.

Steps Required

34. The Commissioner requires no steps to be taken.

Right of Appeal

35. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 5th day of October 2009

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal annex

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) 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.”

The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (No. 3244)

The appropriate limit

Regulation 3 provides that –

“(1) This regulation has effect to prescribe the appropriate limit referred to in ... section 12(1) and (2) of the 2000 Act.

(2) In the case of a public authority which is listed in Part I of Schedule 1 to the 2000 Act, the appropriate limit is £600.”

Estimating the cost of complying with a request – general

Regulation 4 provides that –

“(1) This regulation has effect in any case in which a public authority proposes to estimate whether the cost of complying with a relevant request would exceed the appropriate limit.

(2) A relevant request is any request to the extent that it is a request–

(a) for unstructured personal data within the meaning of section 9A(1) of the 1998 Act^[3], and to which section 7(1) of that Act would, apart from the appropriate limit, to any extent apply, or...

(b) information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply.

(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in–

(a) determining whether it holds the information,

(b) locating the information, or a document which may contain the information,

(c) retrieving the information, or a document which may contain the information, and

(d) extracting the information from a document containing it.

- (4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.”

Estimating the cost of complying with a request - aggregation of related requests

Regulation 5 provides that -

“(1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply, 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 total costs which may be taken into account by the authority, under regulation 4, of complying with all of them.

(2) This regulation applies in circumstances in which-

- (a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and
- (b) those requests are received by the public authority within any period of sixty consecutive working days.

(3) In this regulation, "working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971^[4] in any part of the United Kingdom.”

Section 16 - Duty to provide advice and assistance

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who 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.

Section 45 Code of Practice - Duty to provide advice and assistance

13. Where the applicant indicates that he or she is not prepared to pay the fee notified in any fees notice given to the applicant, the authority should consider

whether there is any information that may be of interest to the applicant that is available free of charge.

14. Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the "appropriate limit" (i.e. cost threshold) the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee.