

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 June 2017

Public Authority: North Yorkshire County Council
Address: County Hall
Racecourse Lane
Northallerton
DL7 8AL

Decision (including any steps ordered)

1. The complainant has requested statistics from the council relating to incidents of harassment and bullying within the council. The council provided some information but refused to provide more specific numbers for parts 3, 4 and 9 of the request on the grounds that section 40(2) applied (personal data). When the complainant asked for a review the council applied section 14(1) to the complainant's insistence that specific numbers are disclosed (vexatious). During the course of the Commissioner's investigation the council also argued that section 12 was applicable to part 9 of the complainant's request (cost exceeds appropriate limit).
2. The Commissioner's decision is that council was not correct to apply section 14 to the request. She has also decided that it was not correct to apply section 40(2) to withhold the information. She has however decided that it was able to apply section 12 to refuse part 9 of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information falling within parts 3 and 4 of the request to the complainant.
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

5. 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. On 12 November 2015 the complainant wrote to the council and requested information in the following terms:

"This request is being made to make the public at large and people in each authority aware of which councils are the worst offenders or the better examples when it comes to bullying in the workplace. All councils have very similar anti-bullying / dignity at work policies, but there seems to be a difference in the level of bullying. This is intended to statistically show those differences.

- 1) *How many employees of your authority have made an official complaint of harassment and bullying at work since the 1st April 2009?*
- 2) *How many of these complaints were upheld in favour of the complainant?*
- 3) *How many of those which were not upheld in favour of the complainant went on to Appeal?*
- 4) *How many of those that went to Appeal were found to favour the complainant?*
- 5) *How many complaints went on to an Employment Tribunal?*
- 6) *How many of these were found to uphold the complaint?*
- 7) *Out of how many of those allegations (the number given to question 1) did the complainant of bullying claim that the bullies were telling lies?*
- 8) *How many staff does your authority have and what is the current population within your authority's area?*

7. The council responded on 8 December 2015. It provided the complainant with a copy of its policy "Resolving issues at work". It clarified that it only holds data dating back to January 2012, and answered the above questions from that date as follows:

- 1) *There were 35 cases*
- 2) *6*
- 3) *Fewer than 5*
- 4) *Fewer than 5*
- 5) *0*
- 6) *0*
- 7) *0*

8) *Current Headcount is 20,522 (inc Schools) Current population is 601,500 (ONS mid 2014 population estimate)*

Where the numbers are so low that it may identify individuals or make it possible that those who already know, or can deduce, the identities of those concerned would learn facts about them that it would be unfair for the council to disclose, we have stated that there are fewer than 5. We are withholding this information under section 40 (2) of the Freedom of Information Act 2000 which exempts personal information from disclosure if disclosure would breach one or more principles of the Data Protection Act 1998..."

8. On 9 February 2016 the complainant then made an additional request for:

"I would like to add the following question to my request.

Q9) Out of the number in the response to question 1, how many of the complainants said that they had been called "a loner"?"

9. The council responded on 7 March 2016 and stated that it holds the relevant information but that it could not provide this to him as the number would be less than 5. It said that section 40(2) therefore applied to the information for the same reasons it had provided previously.
10. On 6 September 2016 the complainant wrote to the council and asked it to carry out a review of its response to the whole request following a decision of the Commissioner which had found that similar information should be disclosed.
11. Following an internal review the council wrote to the complainant on 4 October 2016. It said that it had reviewed the ICO decision but decided that the circumstances were different in the case raised by the complainant. It therefore upheld its previous response.
12. It also applied section 14(1) to the request for more specific numbers to be provided for parts 3, 4 and 9 of the request (vexatious request).

Scope of the case

13. The complainant contacted the Commissioner on 6 October 2016 to complain about the way his request for information had been handled.
14. He considers that the council was wrong to apply section 40(2) to withhold specific figures. He also argues that the council was wrong to apply section 14 as the request has a value and purpose.

Reasons for decision

Section 14(1)

15. Section 14(1) of the FOIA provides that a public authority is not obliged to comply with a request that is vexatious.
16. The term 'vexatious' is not defined in the FOIA. The Upper Tribunal (Information Rights) considered in some detail the issue of vexatious requests in the case of the *Information Commissioner v Devon CC & Dransfield* [2015] EWCA Civ 454 (14 May 2015)). The Tribunal commented that vexatious could be defined as the "*manifestly unjustified, inappropriate or improper use of a formal procedure*". The Tribunal's definition clearly establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
17. The Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues:
 - the burden imposed by the request (on the public and its staff);
 - the motive of the requester;
 - the value or serious purpose of the request; and
 - any harassment or distress of and to staff.
18. Consistent with that Upper Tribunal decision, which established the concepts of 'proportionality' and 'justification' as central to any consideration of whether a request is vexatious, the Commissioner's guidance on section 14(1) states:

"Section 14(1) is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress".

19. The Commissioner's guidance recognises that sometimes a request may be so patently unreasonable or objectionable that it will obviously be vexatious, but that in cases where the issue is not clear-cut the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
20. This will usually mean weighing the evidence about the impact on the authority and balancing this against the purpose and value of the request.
21. The council did not apply section 14 to its initial response to the request. It applied it when the complainant made his request for review. The Commissioner therefore notes that much of the work required to respond to the request had already been carried out before the council considered it appropriate to apply section 14.
22. The council argues that the request is primarily vexatious as providing specific figures to the complainant in response to his request would serve no value of purpose. It argues that it has already provided the information which the complainant needs in order to meet his stated intentions. It said that the complainant's request for review of this point demonstrates (at that point) that the request is vexatious.
23. It highlighted a quote from the Tribunal in the *Dransfield case* in which the tribunal found that:

"the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester or to the public or any section of the public". (para 68)
24. It argued that whilst workplace bullying is a matter of public interest, and the incidence of this is of public importance, its initial disclosure of 'less than 5' meets the need for transparency on the issue. It pointed out that the complainant's initial request had stated that his purpose in making the request was to inform the public who were the worst offenders or the better examples when it comes to bullying in the workplace. The council argue that there is however no value whatsoever in providing more specific numbers in response to the request because a disclosure of 'less than 5' from an authority with 20 000 employees clearly demonstrates that it must be amongst the better authorities in this regard. There is no value or purpose in the complainant requiring more specific figures from the council, and the request therefore lacks purpose or value.

25. In short therefore its argument is that there is no legitimate public interest in trying to achieve a level of accuracy which would not further the public's understanding of the issue and the complainant's insistence over the point therefore makes the request vexatious.
26. It did not specifically tie in its argument to its response to part 9 of the request, but the Commissioner notes that its response to this was to apply section 12 as a disclosure of specific information in respect of this would exceed the appropriate limit under section 12 of the Act.

The Commissioner analysis

27. The Commissioner has considered the above arguments. As stated, she considers that, broadly speaking, the key question a public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
28. The Commissioner notes that the council has already disclosed the details for questions 1-8 and so this would create no additional burden on the council to respond and provide the specific numbers concerned at the point that it determined that the request should be considered vexatious. Responding to parts 1 – 8 would not cause a disproportionate or unjustified level of disruption. Having said this, the Commissioner has explained in the paragraphs below why she has accepted the council's argument that section 12 is applicable to this part of the request.
29. Even with accepting this point the Commissioner does not consider that, overall, the request can be considered to be vexatious. The complainant requested specific information which the council agreed the public has a legitimate interest in knowing – the levels of bullying and/or harassment complaints made within the authority. The council has sought to apply an exemption to that information to a degree and provided a band of information to parts of the request where it considered that the exemption in section 40(2) applied. The complainant asked the council to review that decision at which point the council sought to rely on section 14 for the reasons provided above. The council's argument is therefore that the complainant's persistence on obtaining the specific information he requested is vexatious, rather than an argument that the request itself is vexatious.
30. The Commissioner considers that the complainant has a right to request that an internal review is carried out. The council offers this process following the guidance in the section 45 Code of Practice. This provides guidance to authorities that reviews should be part of the procedures set in place to deal with FOI requests, (although this is not a statutory requirement set in to the Act itself). Essentially the council's reaction to

the request for review in this case was to consider the request vexatious because the complainant has not accepted its initial, partial response.

31. As regards question 9, the fact that a person has requested information which takes the amount of work required by the authority over the appropriate limit is not of itself a reason for that request to be considered vexatious— other factors need to be present, such as an intention to create work disproportionate to the value of the information requested or to create disruption or to harass individuals at the council or a general lack of purpose to the request. In this case the overall request was reasonable and the council agreed that a disclosure of the information was in the public interest. It simply disputes that the exact figures need to be disclosed in order for the complainant to understand the number of complaints it has had compared to other authorities.
32. The Commissioner's decision is therefore that the council was not correct to apply section 14(1) to the request. The complainant is entitled to ask the council to review its initial decision and would be informed by the Commissioner to do so before his complaint would be accepted for investigation by her.

Section 40(2)

33. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').
34. The council relied on section 40(2) to provide the bands of 'less than 5' to part 3, 4 and 9 of the request. It said that if it provided more specific figures then employees may be able to be identified by colleagues who would then learn that a complaint about harassment or bullying had been made.
35. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

“Personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or*
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and*

any indication of the intentions of the data controller or any other person in respect of the individual."

36. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the data protection principles under the DPA. The Commissioner notes in this case that the council said that disclosure would breach the first data protection principle.

Is the withheld information personal data?

37. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
38. From the definition above, it follows that information or a combination of information, that does not relate to and identify an individual, is not personal data.

The Public authority's arguments

39. The disputed information in this case is the further breakdown of the overall number of complaints which the Council confirmed were in the scope of the request (less than five), which the council applied to questions 3, 4 and 9. The primary consideration in the circumstances of this case is whether any employees are identifiable from the anonymised data, in conjunction with information already known or available to the public, including work colleagues of the individuals concerned.
40. The information relates to complaints made by employees relating to bullying and/or harassment at the council. The council argues that answering the relevant questions to a more specific number than 'less than 5' would allow some individuals to be identified by other members of staff who work with the individuals. They may be aware that the individual was involved in some issue with the council but have no further details of what this was about. If they recognised that the figures related to the individual they would realise that a complaint about harassment/bullying had been made by, or about them.

41. It argues that disclosing specific numbers of less than 5 heightens the potential for colleagues to pinpoint who had made such claims, and therefore gain information about their colleague which they would not otherwise have known. For example it argued that:

"...a certain person has been to an appeals tribunal, and that there has only been one appeal in the last year. If he learns that only one appeal case concerned bullying, then he can deduce that the person he knows had alleged bullying. By this process the information would indirectly disclose a fact which he had not previously known."

42. The Commissioner notes however that the complainant has not asked for the specific years in which the numbers of complaints were made to be specified. He has merely asked for the information to be disclosed from 2009. The council has however highlighted it only holds information from 2012.

The 'motivated intruder' test

43. A test used by both the Commissioner and the First-tier tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of re-identification of an individual from information which, on the face of it, appears truly anonymised.

44. The ICO's 'Code of Practice on Anonymisation' notes that:

"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".

45. In summary, the motivated intruder test is that if the risk of identification is "reasonably likely", the information should be regarded as personal data.

The Commissioner assessment

46. Even where the numbers of individuals involved may be low, the Commissioner does not consider that this in itself means that the information is personal data.

47. The Commissioner is mindful of the timeframe of the request, i.e. the information requested covers a period of just over of 5 years. The council pointed out however that this is a band of time, and that cases may involve a timeline of less than 5 years. Nevertheless in the Commissioner's view the time period involved would lessen the likelihood of some individuals being identified. This is because an individual would need to have a detailed knowledge of all the employees working at the Council over the relevant period of time, together with details of the specific outcome of the complaints in order to be able to potentially identify specific individuals. Additionally, there will have been a turnover of staff during that period and those who made complaints may therefore no longer be employees.

48. The Commissioner code of practice on anonymisation states at page 25:

"The risk of re-identification posed by making anonymised data available to those with particular personal knowledge cannot be ruled out, particularly where someone might learn something 'sensitive' about another individual – if only by having an existing suspicion confirmed. However, the privacy risk posed could, in reality, be low where one individual would already require access to so much information about the other individual for re-identification to take place. Therefore a relevant factor is whether the other individual will learn anything new.

49. On page 26 it goes on to state:

"Data protection law is concerned with information that identifies an individual. This implies a degree of certainty that information is about one person and not another. Identification involves more than making an educated guess that information is about someone; the guess could be wrong. The possibility of making an educated guess about an individual's identity may present a privacy risk but not a data protection one because no personal data has been disclosed to the guesser. Even where a guess based on anonymised data turns out to be correct, this does not mean that a disclosure of personal data has taken place. However, the consequences of releasing the anonymised data may be such that a cautious approach should be adopted, even where the disclosure would not amount to a disclosure of personal data. Therefore it may be necessary to consider whether the data should be withheld for some other reason, as discussed later in this code."

50. The council has reduced the specific numbers involved down to the band of 'less than 5' in order to reduce the possibility than individuals might be recognised from the disclosure of the data. It argues that the main risk is that colleagues might be able to recognise individuals if more specific numbers are disclosed. Correctly, it has excluded colleagues

from the Human Resources department of the council from this consideration as they would be already be likely to be aware of the issue.

51. The Commissioner notes that the council has over 20 000 employees. This is relevant to whether an individual could be identified from such a large number. Larger numbers of employees affect the surety which any colleague might have. He or she could not be sure that any numbers disclosed refer to that individual to the same degree as if employee numbers were less than a few hundred or less. They would be unsure of how many other incidents might have occurred which they were not aware of.
52. Additionally, knowledge of the fact that a colleague has appealed a council decision does not mean that their case related to bullying and harassment. Appeals can be made on a number of different issues (such as a pay dispute, a dispute over leave or an equality issue). Disclosing that there had been, for instance, a single or several appeals relating to bullying and harassment would not put employees in a better position to relate this to a specific individual unless they also know, or could distinguish, that no other appeals had been made on other issues. It appears to the Commissioner that it would be highly unlikely that no other appeals on any other issues had occurred over the space of 5 years in a council of 20 000 employees.
53. Effectively therefore even if employees considered that the disclosure of the figures might relate to colleagues, without the full facts they would not be able to establish that that was the case. As noted above, the Commissioner considers that a disclosure which allows for no more than an educated guess is not a disclosure of personal data for the purposes of the Act.
54. The Commissioner is therefore satisfied that a disclosure of the figures withheld in response to questions 3 and 4 would not be a disclosure of personal data. The council was not therefore correct to apply Section 40(2) to this information.

Section 12

55. During the course of the Commissioner investigation the council sought to apply an argument that disclosing a more detailed response to question 9 would be likely to exceed the appropriate limit under section 12 of the Act. It said that although it had provided a figure of less than 5 to the complainant in actuality this was based on an estimate given by a member of the responsible team, rather than any specific searches for information being carried out. The estimate was based upon the individual's knowledge, and the officer had said that she could not

remember any particular cases have the word 'loner' as part of the complaint. Effectively therefore the council believed it was correct to say 'less than 5' was an appropriate response to this part of the request as the numbers would be below this, and may even be zero.

56. The Commissioner asked the council to provide an estimate of the time it would take to search the relevant files to locate any relevant information bearing in mind that a total of 35 files would appear on the face of it to be a manageable amount to consider within the appropriate time limit.
57. The council argues that it considers that the nine questions are a single set, and nothing in the enquirer's words indicates that he sees them differently. It therefore argues the appropriate limit of 18 hours applies to all nine questions.
58. To answer the first eight questions of the request, the council said that it conducted a survey of all its available 'Resolving Issues at Work' cases which generated a list of 315 cases. It said that each had to be checked individually to see if they related to bullying and harassment, as cases are only loosely classified. Many took around 3 minutes per case, but a number of cases had to be read thoroughly because it wasn't clear from the electronic information whether they were bullying and harassment cases. These cases could have taken up to 15 minutes each as the HR advisor involved in each case had to be consulted. But even at only 3 minutes each for all of them, at least 15.75 hours had been spent before question 9 was reached.
59. The council argues that the word 'loner' is not one of its descriptors under which cases are filed, and therefore the only way to determine the actual figures it holds would be to read through each of the 35 files it has identified as being relevant to question 1 with a view to identifying whether this formed part of the complaint or the response. It argues that the cases are, on average 65 pages long and each one would take, on average, 45 minutes to read fully in order to determine whether the word 'loner' was included. The Commissioner notes that this is longer than the original 15 minutes it suggested it took to go through files when considering its response to parts 1- 8 of the request. The council argued however that no more than 2.25 hours was available to answer Q9. It suggested that implies an average of 4 minutes per file, or less than 4 seconds per page in order to read through the files within the remaining time. The council argues that this is not feasible if the search is to be even minimally reliable.

60. It argues that 35 times an average of 45 minutes each provides an estimated figure of 26.25 hours to complete. When added to the time taken to initially identify and respond to parts 1 – 8 of the request this provides an overall estimate of 42 hours. It said that it does not see how this figures could be reduced in any way below the appropriate limit and said that it sought to reply to the complainant in the only way it could to reduce the request whilst still providing a response to the requestor as required under section 16 of the Act. As stated above, it also believes that from its discussions with the relevant individual, it is correct in any event to state that if any information is held, the figure is likely to be less than 5.
61. The Commissioner has considered the council's response. She notes that there is a discrepancy in the council's response in that it has provided two different estimations of time to read through the relevant files (15 minutes in response to parts 1-8, and 45 to read the same files provided in response to part 9). However even with this point, if the council could read through each file within 15 minutes (the estimate for reading through the files it originally considered), this would still add over 8 hours to the work carried out on parts 1 – 8 of the request. This would also exceed the appropriate limit. For this reason she has accepted the council's application of section 12 to this part of the request.
62. The Commissioner therefore considers that the council was correct to apply section 12 to the response to question 9.

Right of appeal

63. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

64. 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.

65. 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

Andrew White
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