



Case Reference: EA/2023/0117
Neutral Citation Number: [2024] UKFTT 00583 (GRC)

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

**Heard by: Cloud Video Platform
Heard on: 26 June 2024
Decision given on: 05 July 2024**

Before

**JUDGE HAZEL OLIVER
MEMBER PIETER De WAAL
MEMBER SUZANNE COSGRAVE**

Between

JULIAN SAUNDERS

Appellant

and

**(1) INFORMATION COMMISSIONER
(2) SANDWELL METROPOLITAN BOROUGH COUNCIL**

Respondents

Representation:

For the Appellant: In person

For the Respondent: Did not attend

For the Second Respondent: Mr Robin Hopkins, counsel

Decision: The appeal is Dismissed

REASONS

Mode of hearing

1. The proceedings were held by video (CVP). All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

Background to Appeal

2. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 3 February 2023 (IC-177327-Z9G1, the “Decision Notice”). The appeal relates to the application of the Freedom of Information Act 2000 (“FOIA”). It concerns information about Code of Conduct breaches requested from Sandwell Metropolitan Borough Council (the “Council”).

3. On 19 December 2021, the Appellant wrote to the Council and requested the following information (the “Request”):

“Sandwell MBC has unlawfully sought to keep secret details of alleged breaches of the Code of Conduct for Councillors since [NAME REDACTED] was employed by the Council. This is not only unlawful but directly contrary to the approach of other local authorities such as Waltham Forest BC.

In the circumstances, please state which Councillors have been investigated for alleged breaches of the Code of Conduct since the date [NAME REDACTED] [POTENTIALLY IDENTIFIABLE INFORMATION REDACTED].

The response should include - in each and every case - the name of the Councillor, the date of the complaint, a brief description of the nature of the complaint, the date of the decision, who made the decision and a brief description of the outcome. Where the independent person has allegedly been consulted please name the relevant one.

By way of a template here is an example from a recent Waltham Forest response:

Cllr [named]

Date of complaint - May 2021

Allegation - Failed to declare interests

Outcome - Not upheld

Investigator - xxxxxxxxxxxxxxxxxxxxxxx in consultation with the statutory independent person.”

4. The Council responded on 20 December 2021 and said that the information was held, but exempt from disclosure under section 21 FOIA (information accessible by other means). On internal review the Council changed its response and provided some information from 2021-2022, taken from published updates to the Ethical Standards and Member Development Committee. The Council stated that information from 2017 to 2020 was exempt under section 12 FOIA (cost of compliance).

5. The Appellant complained to the Commissioner on 4 July 2022. During the Commissioner’s investigation, the Council took the position that all of the information from 2017 to 2022 was exempt under section 12 FOIA. The Council provided information about its record keeping and attempts to collate the information.

6. The Commissioner decided that the Council was entitled to refuse to comply with the Request in accordance with section 12(1) FOIA, and that the Council had complied with its obligations under section 16 FOIA to offer advice and assistance. The Commissioner accepted the

Council's position that they had identified 74 cases and it would take in excess of 26 hours to collate and extract the information requested – the process had already taken in excess of 18 hours and was incomplete.

The Appeal and Responses

7. The Appellant appealed on 3 February 2023. His overall ground of appeal is that the Council's time limits are not accurate and section 12 FOIA is not applicable. He makes the following points:

- a. The disclosure that has been provided is incomplete.
- b. The Council's records are mostly electronic rather than paper, and all complaints are dealt with via email.
- c. Reports of ongoing cases are made for each meeting of the Ethical Standards Committee.
- d. He has created his own table within one hour, and at five minutes per case the Council could create a table for all 74 cases within six and a half hours.
- e. The Council's Monitoring Officer must be able to remember most of the names from memory.
- f. Waltham Forest Council did not apply section 12 to a similar request.

8. The Commissioner's response maintains that the Decision Notice was correct. The Commissioner makes the following points in response to the appeal:

- a. He believes the Council has provided honest and accurate estimates of the hours required by specific members of staff to complete the necessary work required to answer the Request.
- b. The Council has stated that reports of cases to the Ethical Standards Committee have only been implemented from 2021 onwards, so would not assist with collating information from 2017 to 2020.
- c. The 26 hours was time spent on the overall Request, the Council would have to undertake a variety of work on each of the 74 cases, and the Appellant will not know the amount of information that needs to be checked.
- d. The comments about the Monitoring Officer are speculation.
- e. The table of information provided by the Council to assist the Appellant was partial and should not have been provided.
- f. Waltham Forest is a different public authority and is likely to have different recording procedures, it only had records for two years, and only identified 24 cases.

9. The Council was joined as a party to the proceedings. The Council's response maintains that their unfinished attempts to collate the requested information have already taken in excess of 18 hours, and they maintain their reliance on the section 12 exemption. The response provides further details about their records and the work involved in responding to the Request, as discussed below.

Applicable law

10. The relevant provisions of FOIA are as follows.

1 General right of access to information held by public authorities.

- (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.

.....

12 Exemption where cost of compliance exceeds appropriate limit.

- (1) 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.

.....

58 Determination of appeals

- (1) If on an appeal under section 57 the Tribunal considers—
- (a) that the notice against which the appeal is brought is not in accordance with the law, or
 - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
- the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
- (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

11. The “appropriate limit” under section 12(1) is £600 for central government and £450 for any other public authority (regulations 3(2) and 3(3) of the Freedom of Information and Data Protection (Appropriate Limits and Fees) Regulations 2004).

12. Costs are estimated at a rate of £25 per person per hour (Regulation 4(4)). This means that the limit for a public authority (which is not central government) is exceeded after 18 hours of work. The costs which a public authority can take into account are set out in Regulation 4(3) as follows: (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.

13. A public authority does not have to provide a precise calculation of the cost of complying with a request, only an estimate is required. However, it must be a reasonable estimate. ***Mclnerney v Information Commissioner and the Department for Education*** [2015] UKUT 0047 (AAC) paragraph 40 states, “[s12(1)]...depends on an estimate and...the issue for the Commissioner is whether the estimate is reasonable. If the public authority relies on the section before the Tribunal it will take the same approach as the Commissioner would.” As stated by the Upper Tribunal in ***Kirkham v Information Commissioner*** [2018] UKUT 126 (AAC), paragraph 24, “An estimate involves the application of a method to give an indication of a result. In the case of FOIA, the result is whether the cost of compliance would exceed the appropriate limit (regulation 4(1)). It follows that the method employed must be capable of producing a result with the precision required by the legislation in the circumstances of the case. The issue is whether or not the appropriate limit would be reached. The estimate need only be made with that level of precision. If it appears from a quick calculation that the result will be clearly above or below the limit, the public authority need not go further to show exactly how far above or below the threshold the case falls.”

14. The appropriate limit is assessed on the basis of the information storage and retrieval systems that a public authority actually has - not the ideal systems, or the systems that an

appellant thinks a public authority ought to have (*Commissioner of Police for the Metropolis v Information Commissioner and Mackenzie* [2014] UKUT 0479 (AAC)).

Issues and evidence

15. The issue is whether the Council was entitled to rely on section 12 FOIA (cost of compliance) to withhold the requested information. Has the Council provided a reasonable estimate that the cost of complying with the Request would exceed £450, representing 18 hours of work?

16. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents, which includes the appeal, responses, and the Appellant's detailed response to the Commissioner's application to strike out the appeal.
- b. One additional document from the Appellant (a newspaper report about another council).
- c. Oral submissions from the Appellant and the Council at the hearing.

17. The Council did not provide a witness statement or call a witness at the hearing. There was no requirement for them to provide witness evidence. The Council did suggest during the hearing that their in-house solicitor could answer factual questions from the Tribunal, but the Appellant objected to this suggestion and the panel decided that this was not necessary in order to reach a fair decision.

Discussion and Conclusions

14. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision.

15. The Council has provided information in its response to the appeal about its records of complaints against Councillors:

- a. Complaints are dealt with by the Council's Monitoring Officer, or a Deputy Monitoring Officer. For the period 2017 – 2022 the Council has had one Monitoring Officer and two Deputy Monitoring Officers, and both Deputy Monitoring Officers have since left the Council. We understand that the Monitoring Officer has now left the Council as well.
- b. The Council holds the records of each complaint, but does not maintain a full log. The logs held and prepared for the Ethical Standards and Member Development Committee relate to the matters that are open at that particular time, and they are removed from that log as they are dealt with and closed. There is not one document available that lists all of the complaints.
- c. The information is stored in hard copy files, electronic folders of each officer, and email accounts of each officer.
- d. Since 2021 some of the information is provided in a schedule to its Ethical Standards and Member Development Committee as a summary of allegations. This was provided

to the Appellant, but is not in the format required and does not contain all of the requested information.

- e. After receiving the complaint to the Commissioner, the Council continued to try to collate the information through electronic searches of emails, review of electronic information, physical file searches and other direct enquiries with officers. This took in excess of 18 hours and remains incomplete.
- f. The work done so far is:
 - PA to the Director of Law and Governance & Monitoring Officer – 6 hours reviewing the electronic records of the Monitoring Officer and one of the former Deputy Monitoring Officers and extracting the information for the request.
 - Senior Information and Investigations Officer – 12 hours locating and reviewing paper files, cross referencing with electronic records and extracting relevant information.
 - Legal Assistant – 7 hours locating and extracting information.
- g. Estimated further work is:
 - Review of emails of the 2 former Deputy Monitoring Officers – minimum of 6 hours.
 - Review of electronic records of the other former Deputy Monitoring Officer - minimum 4 hours.
 - Cross checking to ensure accuracy – 4 hours.

16. ***Has the Council provided a reasonable estimate that the cost of complying with the Request would exceed £450, representing 18 hours of work?*** The Appellant made various points at the hearing about why he does not accept the Council's estimate. His overall position is that he believes the Council is not telling the truth in order to cover up what has happened and could, in fact, easily provide the requested information within less than 18 hours. The Council's position is that it has explained clearly in its responses to the Commissioner and in these proceedings why compliance would exceed the costs limit, and the Appellant has not provided any evidence that the Council is not telling the truth.

17. The Appellant says that the Council's records are electronic, and records would be held in the Monitoring Officer's and Deputy Monitoring Officers' emails. He questions why it would be necessary to search paper records at all. He is familiar with the form used for making a complaint, and explained that this would give details of the Councillor, date and content of the complaint. These have been submitted electronically since before 2017. He also explained that each complaint is given a reference number which is used when they are reported to the standards committee (so that the complaints are anonymous to the public). He also says that the information should be in the records of Council meetings.

18. The Appellant confirmed that he did not know whether all of the information would be contained in a single document. He said he thought there would be an electronic file that would be prepared to submit to the standards committee. The Appellant says in his appeal that he prepared his own table of cases from information provided to the standards committee, and this took him under one hour. However, this only provides the month, a complaint reference number, and in some cases the name of the Councillor. It does not contain all of the information that he requested, and it does not show that all of this information would be contained in one document or file.

19. We accept that some of the information requested by the Appellant would be contained in a single electronic document, such as the complaints form or a report to the standards committee. However, it does not appear that a single document would contain all of the information he had requested, such as the outcome or the details of the independent person. The Appellant now says that he does not require the name of the independent person, but he only said this for the first time in his response to the strike-out application. The request also asks for a “brief description” of both the nature of the complaint and the outcome, which would require someone to extract and summarise this information and to identify ongoing complaints where no outcome has yet been reached.

20. The Appellant refers to the fact that Waltham Forest Council did not apply section 12 to a similar request. However, we agree with the Commissioner that this is different because it only covered two years and involved 24 cases. This is a different public authority which is likely to keep records in a different way. The Appellant also said during the hearing that they told him they had lost a number of their records, which may explain how they were able to respond within the costs limit.

21. The Appellant suggests that the Council's then Monitoring Officer would have been able to remember cases off the top of his head. It seems unlikely that this would be true for as many as 74 cases. The Monitoring Officer has since left the Council. In any event, FOIA requires the Council to provide the information which it actually holds, not information which its officers may be able to remember. The Appellant also highlighted a reference in a letter from the Council to the Commissioner that the Monitoring Officer “holds this information”, but in context this refers to information that had been collated by the Council rather than all of the information requested by the Appellant.

22. We have considered the information provided by the Council in its response to the Commissioner and the response to the appeal (as set out above). The Council has provided an explanation of why it believes the costs limit would be exceeded, due to the amount of work involved. This estimate is based on a partial attempt to collate this information. The Appellant says that this account is untrue. He criticised the Council for not providing a witness for cross-examination. This does mean that we have a limited amount of evidence from the Council. However, we do have their detailed explanation to the Commissioner during his investigation, and their response to the appeal is based on the same explanation.

23. We note the following point from the Council's response to the appeal – *“It is not appropriate to provide the information collated as it is not complete and its disclosure is likely to result in criticism of the Council and likely accusations that the Council has deliberately withheld information or tried to mislead the requester”*. We agree that this would not be appropriate. A public authority is not required to provide a partial response to a FOIA request if that can be done within the costs limit. The test is whether the request can be responded to fully within the costs limit.

24. We also agree that it would be important for the Council to provide complete and accurate information in response to the Request. This is always important, but it is particularly important in this case because the requested information would be personal data about the named Councillors. The Council would need to ensure that the information was definitely accurate before it is released to the world at large under FOIA. As submitted by the Council at the hearing, they would need to check fragmentary information to ensure it is accurate, as they would not want to publish

misleading personal information. This explains why the Council needed to cross-check electronic information and physical files, and make enquiries with officers.

25. The Council's response to the Commissioner explained that the information is held in hard copy files, electronic folders of each officer, and electronic email accounts of each officer. The Council says that all of the requested information is not in one place, and the Appellant has not provided any evidence that contradicts this position. He has suggested that it should all be in one electronic file under a file number, but the Council's position is that this is not correct. In these circumstances, we accept that the Council would need to gather the information from various sources before checking that it is complete and accurate. Their obligation is to provide all of the information that they hold which is within the scope of the Request. This includes providing an accurate description of the nature of the complaint and the outcome (if there had been a decision). The process of checking the information for accuracy is particularly important because it is personal data of the Councillors about the sensitive matter of complaints. This process would take more than 18 hours even if it only took 15 minutes per record. We accept that it is likely to take longer than this for at least some of the records. It would take 24 hours even if the average was only 20 minutes per record.

26. Taking all of the above matters into account, we find that the Council has provided a reasonable estimate that the costs of compliance would exceed 18 hours of work.

27. The Appellant made various points during the hearing about concerns regarding the Council's handling of complaints about breach of the Code of Conduct, and why he is attempting to obtain further information in the public interest. However, the public interest in the information does not need to be considered where section 12 applies.

28. We find that the Council was entitled to rely on section 12 FOIA to withhold the requested information. We dismiss the appeal.

Signed Judge Hazel Oliver

Date: 4 July 2024

Promulgated

Date: 5 July 2024