

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 August 2019

Public Authority: London Borough of Hillingdon
Address: Civic Centre
Uxbridge
Middlesex
UB8 1UW

Decision (including any steps ordered)

1. The complainant has requested information about costs associated with the London Borough of Hillingdon's ("the London Borough's") in-house legal services department. Some information was provided but the remainder of the request was refused because responding to it would have exceeded the cost limit.
2. The Commissioner's decision is that the London Borough was entitled to rely on section 12 of the FOIA to refuse the request. However, she also finds that the London Borough failed to discharge its section 16 duty to provide adequate advice and assistance.
3. The Commissioner requires the London Borough to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with advice and assistance to help him refine his request such that it falls within the cost limit.
4. The London Borough 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 8 November 2018 the complainant contacted the London Borough via the whatdotheyknow.com website and requested information of the following description:

"Please supply the following information covering the past 3 years on a year by year basis from 1st November to 31st October 2016/2017/2018

- [1] The number of tribunal/court/appealed cases brought by LBH (including pending) Please make clear the area of concern (housing, social care, child care, racial discrimination, employment, etc) and the costs incurred in each case.*
- [2] The number of tribunal/court/appealed cases defended by LBH (including pending) Please make clear the area of concern (housing, social care, child care, racial discrimination, employment, etc) and the costs incurred in each case.*
- [3] The number of tribunal/court/appealed cases dealt with solely by the legal department's internal regulated solicitors (including pending) Please make clear the area of concern (housing, social care, child care, racial discrimination, employment, etc) and the costs incurred in each case.*
- [4] The number of internal regulated solicitors that have dealt with court cases without the use of external counsel*
- [5] The number of tribunal/court/appealed cases dealt with in part on entirety by appointed outside legal representation/counsel (including pending) Please make clear the area of concern (housing, social care, child care, racial discrimination, employment, etc) and the costs incurred in each case.*

"No other details of the cases are required that would identify the specific case or other party or parties. In the event that this normally essential analysis information is not to hand, please start at the 31st October 2018 and work backwards until cost constraints are met. If you require any further clarification, please do not hesitate to contact me."

- 6. On 30 November 2018, the London Borough responded. It provided the total number of cases it had dealt with in the relevant years, broken down by type and advised that all but two cases had been dealt with by in-house services. However it refused to provide the information in more granular form. The London Borough relied on section 12 of the FOIA (cost of compliance exceeds appropriate limit) as its basis for refusing to provide further information.
- 7. The complainant requested an internal review on 1 December 2018. The London Borough states that it supplied the outcome of its internal

review on 20 December 2018, however the outcome did not appear on the relevant whatdotheyknow.com thread until 6 March 2019.¹

8. The London Borough upheld its original position at internal review.

Scope of the case

9. The complainant contacted the Commissioner on 7 March 2019 to complain about the way his request for information had been handled.
10. The complainant provided a number of comments about the way in which the London Borough had dealt with previous requests which he had made which, he argued, provided "context" to the London Borough's refusal of this request. The Commissioner does not consider those comments relevant to the matter at hand – not least because many of these issues have formed the basis of other complaints which the complainant has submitted to her and which would be considered on their own merits. The Commissioner considers each complaint on an individual basis.
11. The scope of this complaint has been to determine whether the London Borough estimated reasonably that responding to the request would have breached the cost limit and, if it did, whether the London Borough discharged its duty to provide adequate advice and assistance.

Reasons for decision

Section 12 - cost of compliance

12. Section 1(1) of the FOIA states that:

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.

¹ See "Other Matters"

13. Section 12 of the FOIA states that:

- (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.*
- (2) *Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.*

14. The "Appropriate Limit" is defined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") and is set at £450 for a public authority such as the London Borough. The Regulations also state that staff time should be notionally charged at a flat rate of £25 per hour, giving an effective time limit of 18 hours.

15. When estimating the cost of complying with a request, a public authority is entitled to take account of time or cost spent 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.

16. 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 in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be "sensible, realistic and supported by cogent evidence".² The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.

The complainant's position

² <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf>

17. The complainant believes that the London Borough must hold the information (and, presumably, must hold it in easily retrievable form) because it would be necessary for making budget forecasts.

18. The complainant commented:

"Given the criteria along with an understanding standard accountancy across the local authority sector, including internal legal practices, there is a requirement to present legal costs for each department which funds are extracted from the departmental budget in relation to legal costs on a case by case basis...any legal practice with a diverse remit, would be acutely aware of what legal expertise would be required in both short and long term in order to plan for recruitment and ad hoc 3rd party services such as outside solicitors and barristers. The monitoring allows the practice to determine the nature of current and future skill set requirement.

"Any medium to large solicitors practice, including local authority, would need to constantly track case load (live data) and which internal or external legal representation is being used and current financial and future financial liabilities...there would be an electronic database in which summary reports can be generated ranging from expenditure and cost allocation for accountancy purposes to analysis of case types and individual costing of each case. This type of standardised electronic database reporting has been in use for more than 30 years. It is doubtful if any official body is using the Bob Cratchit method of record keeping where individual file review is required to obtain the information requested unless those files are archived. However, basic accountancy and case notes would be kept electronically for 6 years and there is evidence of electronically kept records going back 22 years accessible through the council's website."

19. In addition the complainant also noted that the London Borough would need to keep records of costs for internal re-charging and for supplying information on costs to the courts, where these were being sought from the opposing side.

20. Finally, the complainant drew the Commissioner's attention to spreadsheets published by the London Borough which collated information on business rates He also outlined a process by which he had collated information on legal costs published in the London Gazette. He argued that these examples demonstrated that the request could have been responded to within the cost limit. These representations did not, however, appear relevant to the cost of responding to the specific request that the complainant had made.

The London Borough's position

21. The London Borough explained that it did not hold the information which the complainant had requested in a format that would allow it to be extracted easily. It therefore argued that the request, as drafted, could only be answered by conducting a manual trawl of each individual case file.
22. In response to the complainant's points about internal budgeting, the London Borough noted:

"It is important to appreciate the nature of our practice. The ICO will be aware of the Council's duties in safeguarding vulnerable children and adults, public safety and public protection, property management and debt recovery to name a few. The instructions we receive are therefore normally in response to the actions of individuals.

"For example, no one would ever wish to try and predict how many children will be abused by their parents over a given period of time or how many people will choose to commit criminal offences which will then lead to a prosecution. Similarly, the Council cannot predict how tenants may fail to pay their rent or breach their conditions of tenancy or how many tenants may choose to exercise their statutory right to buy and plan its Legal Services in this manner. [The complainant] is therefore wrong to state that the Council 'would be acutely aware of what legal expertise would be required in both short and long term.'"

23. The London Borough noted that producing the figures provided to the complainant in its initial response had taken around 5 hours.
24. Whilst the London Borough has not made an estimate of the total cost of complying with the request, or carried out a sampling exercise to determine how long extracting the required information would take, it has already identified the amount of files that would need to be considered to extract that information. The London Borough noted that reviewing the 4,390 files within scope would require 244 files to be reviewed each hour for the cost limit not to be breached. It considered that this was unrealistic.

The Commissioner's view

25. The Commissioner's view is that the request could not be answered within the cost limit.
26. Whilst the Commissioner accepts that the London Borough may well need to plan its legal budget, she does not accept that it could not do so

without information of the granularity which the complainant is seeking and she has seen no evidence which contradicts the London Borough's submission.

27. As part of a previous investigation, the London Borough informed the Commissioner that it did not operate an "internal recharge" system in relation to legal services and the Commissioner accepted this as being the case³. She does not therefore intend to revisit this point.
28. Having accepted that a manual trawl of files would be necessary to identify and extract the requested information, the Commissioner has gone on to consider whether that could be achieved within the cost limit.
29. The Commissioner notes that a large number of files would need to be reviewed to determine which party had commenced the action, whether external counsel had been sought and what the associated costs had been. Whilst the London Borough has not provided a robust estimate of how long it would take to review each file for this information, the Commissioner notes that, in order to answer the request within 18 hours, each individual file would have to be reviewed (and the relevant information extracted and collated) within just 15 seconds – which she considers would not be possible.
30. The Commissioner thus concludes that the London Borough estimated reasonably that responding to the request could not be achieved within the cost limit and thus the London Borough was entitled to rely on section 12 to refuse the request.

Section 16 – advice and assistance

31. Section 16 of the FOIA requires a public authority to provide "reasonable advice and assistance" to those making or wishing to make a request.
32. In cases where a public authority considers that a request could not be answered within the cost limit, the Commissioner would normally expect advice and assistance to be provided to help the requestor bring their request within the cost limit.
33. At the outset of her investigation, the Commissioner noted to the London Borough that no advice and assistance appeared to have been

³ See: <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614801/fs50770146.pdf> (paras 26-33)

provided with either its original response or as part of the internal review. She asked the London Borough to identify any advice and assistance it had provided or, if it had not provided any, explain why.

34. The London Borough responded to say that it:

"did not offer any to [the complainant]. The reason for this is that the duty under section 16 is to offer advice and assistance as is reasonable. The ICO will be aware that [the complainant] is well-versed in the Freedom of Information Act making many requests to the Council. [The complainant] is always precise in specifying the information that he wants...it is [the London Borough's] view that the Council's residents would consider it wholly unreasonable for me to use scarce resources to offer advice and assistance when none is required."

35. The Commissioner considers such a response to be inadequate. Even the most "well-versed" requestor may be ignorant of the way that a public authority structures the information which it holds – as is the case here. That is why the FOIA places a duty upon public authorities to explain the information which they do hold – in order that a requestor may access it.
36. It is not for a public authority to second guess what information a requestor may or may not want. If a request is unclear, the public authority must clarify that request. If the request is too broad, the public authority should explain how it might be narrowed down. The requestor may or may not choose to refine their request – but that is a decision for them to make.
37. Whilst the Commissioner is aware that the London Borough has a difficult relationship with this particular complainant, that does not release it from its obligations under the FOIA.
38. In his original request, the complainant suggested that the London Borough could satisfy the request by working up to the cost limit. The Commissioner does not consider such requests to be valid.⁴
39. Nevertheless, based on the submissions provided to her, the Commissioner *does* consider that the request could be refined to reduce its scope – for example by reducing the time parameters or by

⁴ <https://ico.org.uk/media/for-organisations/documents/1164/recognising-a-request-made-under-the-foia.pdf>

restricting the information to a particular type of legal work, family law or debt recovery for example.

40. The Commissioner therefore cannot consider the London Borough to have discharged its duty to provide advice and assistance and she thus finds that it breached section 16 of the FOIA.

Other matters

41. The outcome of the internal review appeared on a different whatdotheyknow.com thread⁵ – involving the same complainant, but a different public authority – on 20 December 2018. The review was received on the correct thread on 6 March 2019.
42. The Commissioner has not sought submissions on this matter as no breach of the FOIA could have occurred – therefore she makes no determination as to where the error occurred. However, she notes it is open to the complainant to make his requests directly to the London Borough, rather than via a third party website, if he has concerns about responses going astray.
43. Finally, whilst the Commissioner cannot say for certain that better advice and assistance would have prevented a complaint being made, given that she is ordering a remedial step anyway, the London Borough may wish to reflect upon how it complies with its section 16 duties in future – given its obvious concern to protect resources.

⁵ Whatdotheyknow.com generates a separate thread for every request and a unique email address for each request thread. Replies to the automatically-generated address are uploaded directly onto the relevant request thread.

Right of appeal

44. 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

45. 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.
46. 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
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