

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 April 2021

Public Authority: London Borough of Sutton
Address: Civic Offices
St. Nicholas Way
Sutton
SM1 1EA

Decision (including any steps ordered)

1. The complainant requested from the London Borough of Sutton (“the Council”) information regarding payments to service providers during the pandemic. The Council refused the request as it considered that compliance with it would exceed the cost limit under section 12 of the FOIA.
2. The Commissioner’s decision is that the Council was entitled to rely on section 12(1) of the FOIA to refuse to comply with this request. However the Commissioner also finds that the Council did not comply with its duty to provide advice and assistance under section 16 (advice and assistance) of the FOIA.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Provide advice and assistance to the complainant on refining his request.
4. The Council 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 16 August 2020, the complainant wrote to the Council and requested information in the following terms:

"Over the past few months councils in England have continued to make payments to providers of services even though those services were not provided in full or in part. This was with the aim of ensuring those providers were able to continue with the provision of services when the situation returned to normal. However, some services such as school transport did not continue to pay their self-employed staff, not least because they could avail themselves of assistance from the government scheme. As a result, many service providers could profit from the situation to the extent of tens or even in some cases hundreds of thousands of pounds of taxpayers' money. If repeated across the country then many millions of pounds may have found their way into the pockets of individuals running these services.

I should like to know what providers were paid during the pandemic even though they were not providing a full service and how much each was paid.

I should also like to know what the council is doing to follow up those payments and audit each provider who received funds to establish where the money was spent, including what steps were or are going to be taken to ensure that any claims that individuals such as drivers and others were paid are properly verified."

6. The Council responded on 5 October 2020. It stated: *"the National Government has published guidance to public bodies on payment of suppliers to ensure service continuity during and after COVID-19."* It provided two links to this guidance. It stated, *"in line with the above guidance, the Council reviewed the contracts and suppliers on a case by case basis to identify the payment approach. For example, this approach included consideration of the national support schemes available and also local needs, such as where contractual action could not be undertaken but could be used to support the local response elsewhere."*
7. In its response the Council also stated, *"if you are interested in the data that the council holds, we recommend that you take a look at Sutton Council's Open data initiative. We now have a wide range of data about the borough available for public use all available in one place"* and provided a link.

8. On 7 October 2020 the complainant wrote to the Council and requested an internal review. He stated that the Council's response did not answer the points he had raised and that he did not consider the response to be related to his request. He also stated that the link to the Council's open data initiative did not work. He said, *"have you made a mistake here as I find it difficult to believe that anyone could miss the question so comprehensively, particularly when you have gone considerably beyond the time allowed for FOI responses."*
9. On 4 November 2020 the Council provided its internal review decision. It apologised and stated that its initial response was incomplete and contained a typing error. It also provided a new link to the Council's open data initiative. The Council stated that its initial response omitted to include confirmation that the extraction of individual payment amounts for every supplier/provider would exceed the time limit for complying with a request, therefore appearing to cite section 12 of the FOIA (cost limit). The Council further explained its position as follows:

"The Council continues to work closely with suppliers and providers to both respond to the pandemic and to support providers to cope with the impacts of the virus and the new lockdown. The approach taken remains in line with the national guidance and each supplier's circumstances are considered on a case by case, taking into account both local and market conditions as well as service demand. The Council works in partnership with key providers to ensure any payments made are used as per national guidance."

Scope of the case

10. The complainant contacted the Commissioner on 24 November 2020 to complain about the way his request for information had been handled. He raised the following concerns:

"I asked London Borough of Sutton for details of payments made to contractors for which they received no service (I have asked the same question of a number of councils). Their initial response did not answer a single point of my request. On review, their response said it would take more than 18 hours of time to provide the information. This is clearly incorrect as they must know who they have contracts with and how much they have been paid. I should be grateful if the Commissioner would consider whether their response is adequate."

11. The scope of this notice is to determine if the Council was entitled to rely upon section 12(1) of the FOIA (cost limit) in order to refuse to comply with this request.
12. The Commissioner will also consider whether the Council fulfilled its obligations under section 16 of the FOIA (advice and assistance).

Reasons for decision

Section 12(1) – cost of compliance exceeds the appropriate limit

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

"(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."

14. Section 12(1) of the FOIA 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."

15. The appropriate limit in this case is £450, as laid out in section 3(2) of The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations"). This must be calculated at the rate of £25 per hour, providing an effective time limit of 18 hours' work.
16. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) of the Fees Regulations states that an authority can only take into account the costs it reasonably expects to incur in:
 - determining whether it holds the information;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.

17. 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 decision in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/20017/0004*, the Commissioner considers that any estimate must be "*sensible, realistic and supported by cogent evidence*".
18. In the Council's internal review response to the complainant it stated that, "*to extract individual payment amounts for every supplier/provider would exceed the time limitation for producing a response*" also stating, "*to provide individual provider payment details would have taken longer than is permitted under the FOI time limitation.*" The Council did not provide a specific cost/time estimate to the complainant.

Determining whether the information is held

19. In its response to the Commissioner, the Council stated that it would take approximately **2 hours** to determine what relevant information was held. It stated that this time would be required for: "*identifying sources of information available to the Council including spend over £500, financial reporting, supplier relief requests/ authorisation/ programme records, contract management information/ performance scorecards to help map out the requirement.*"

Locating the information, or a document which may contain the information

20. The Council provided an estimate for the time taken to locate the information, or a document which may contain the information. It stated that to locate the information it would need to undertake a financial reporting exercise. The Council split its estimate for this into three parts as follows.
21. Firstly, it stated that the payment information for all of its contractors during this period is held on its financial system, Agresso. It explained that its Commissioning and Finance team have worked together to build up a report from data extracted from Agresso, detailing spend by supplier. It stated that the extraction of the financial data from the Agresso system delivered, "*a large volume of information consisting of 36,816 rows of data.*" It estimated that this would take approximately **5 hours**.
22. Secondly, the Council argued that it would take approximately **15 hours** to, "*digest the data and summarize it in a way that is acceptable to be accessed by officers*". The Council did not give any further explanation

about why this was a necessary step in order to comply with the request or any greater detail about what these 15 hours would involve.

23. Thirdly, the Council explained that its analysis has provided a list of 2443 suppliers that received payment during the pandemic's first wave. It provided the following explanation about the steps this information would necessitate:
- Approximately **5 hours**: Corporate commissioning to identify contracts that have been in receipt of the supplier relief programme, approximately 300 suppliers and map against the master sheet.
 - Approximately 1-5mins per supplier, approximate total of 1,500 - 3,000 mins = **50 hours**: commissioners/contract managers to go through the remaining 2,000 suppliers and identify those suppliers where no adjustments have been made.

Retrieving the information, or a document which may contain the information

24. In relation to retrieving the information, the Council stated that for approximately 300 to 400 suppliers, information needs to be obtained for each contract including evidence of decisions, supplier agreement/contract variations during the pandemic, and contract management records including auditing and payment reconciliation.
25. The Council explained that there is no central contract management system for storing specific contract management information and that function is devolved across the Council. It therefore explained that it would take approximately up to 30 minutes for each service/contract manager to collate this information for individual contracts. It therefore argued that it would take approximately **200 hours** to retrieve the information.

Extracting the information from a document containing it

29. The Council estimated that it would take approximately **28 hours** to extract the information from a document containing it. It explained that it would assign corporate resources to collate, review and validate this information against records provided by the contract managers.

Sampling exercise

26. The Council confirmed that a sampling exercise had been undertaken and partial actions taken for the first and second actions listed above under "locating the information, or a document which may contain the

information". It estimated that this led to Council officers spending approximately 22 hours on this task.

27. It confirmed that its estimate has been based upon the quickest method of gathering the requested information, which was using the Council's payment system and records of relevant decisions. However, it explained that ultimately, in the absence of a centralised contract management records, the Council would need to liaise directly with contract managers in obtaining and analysing information from approximately 300 to 400 contracts, which it estimated would take approximately **300 hours**.

The Commissioner's conclusion

28. A summary of the Council's cost estimate is as follows:

- Determining whether the information is held: **2 hours**
- Locating the information, or a document which may contain the information: **75 hours** (5 hours + 15 hours + 5 hours + 50 hours)
- Retrieving the information, or a document which may contain the information: **200 hours**
- Extracting the information from a document containing it: **28 hours**

29. The Commissioner understands the Council's cost estimate of 300 hours to be the estimated sum of the above figures, which is 305 hours more precisely.

30. The Commissioner considers the Council's reasoning to be persuasive. The Commissioner notes that the Council do not have a centralised contract management record and would therefore need to need to liaise with contract managers in order to obtain and analyse the information of approximately 300 to 400 contracts. The Commissioner considers that even if it took 5 minutes per contract, and the lower end of 300 contracts, this would take 25 hours only to locate the information which would in itself exceed the cost limit.

31. Therefore, the Council has estimated reasonably that the time required to do so would exceed the 18 hours set out by the Fees Regulations. Therefore, it is the Commissioner's view that the Council was entitled to rely on section 12(1) of the FOIA to refuse to comply with the complainant's request.

Section 16 – advice and assistance

32. Section 16 of the FOIA states:

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

33. The Commissioner's view is that, where a public authority refuses a request under section 12(1) of the FOIA, complying with the section 45 Code of Practice will fulfil its duty under section 16(1).

34. Paragraph 2.10 of the section 45 Code of Practice states:

"Where it is estimated the cost of answering a request would exceed the 'cost limit' beyond which the public authority is not required to answer a request (and the authority is not prepared to answer it), public authorities should provide applicants with advice and assistance to help them reframe or refocus their request with a view to bringing it within the costs limit".

35. In addition, paragraph 6.9 states that *"public authorities should consider what advice and assistance can be provided to help the applicant reframe or refocus their request with a view to bringing it within the cost limit"*.

36. In its response to the complainant, the Council provided links to government guidance and to the Council's open data and transparency page.

37. In response to the Commissioner's investigation, the Council stated that it had considered its duty to provide advice and assistance however it is unable to offer advice to the complainant on this occasion or to suggest how the request could be narrowed to bring it within the appropriate limit.

38. The Commissioner considers that the Council has not taken steps to offer advice and assistance in an attempt to bring the request within the appropriate limit. She therefore considers that the Council has not complied with its obligations under section 16 of the FOIA.

39. The Commissioner is not satisfied that the Council complied with its statutory obligation under section 16 to provide advice and assistance. The Council is therefore required to take the step outlined at paragraph three above.

Right of appeal

40. 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

41. 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.
42. 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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