

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 April 2022

Public Authority: Merton Council

Address: Merton Civic Centre
London Road
Merton
SM4 5DX

Decision (including any steps ordered)

1. The complainant has requested information relating to performance reviews of employees of Merton Council ("the Council"). The Council applied section 12(1) of FOIA to the complainant's request, stating that providing the information would exceed the cost limit as set out in that section of FOIA.
2. The Commissioner's decision is that the Council has correctly applied section 12(1) of FOIA to the complainant's request
3. The Commissioner requires no steps to be taken.

Request and response

4. On 23 November 2020 the complainant wrote to the Council and requested information in the following terms:
 - Please can you detail all reasons why staff members at Merton Council were placed on informal and formal performance reviews in the last two years?

- Please can you confirm the ethnic breakdown of all staff members who were placed on informal and formal performance reviews in the last two years?
 - Please can you confirm what processes are in place to ensure ethnic background is not a factor in disciplinarys and or formal performance reviews?
5. The Council responded on 16 December 2020, providing the complainant with some information in response to the request and stating that it did not hold the remaining information sought, ie it did not hold data on informal capability reviews.
 6. The complainant sought an internal review of the Council's handling of his request on 17 February 2021.
 7. The result of that internal review was provided to the complainant on 17 March 2021. It detailed further concerns which the complainant had raised with the Council via e-mails on 17 December 2020 and 9 and 26 January 2021, which were, in summary, that the complainant did not accept that the Council did not hold data regarding informal capability reviews as he felt these would be monitored and some sort of record kept.
 8. The reviewer stated that the Council had been incorrect to state that it did not hold that information on the basis that HR did not hold formal records of it. The reviewer acknowledged that FOIA covered all relevant records held Council-wide, not just formal ones retained by HR.
 9. The reviewer further stated that, due to the time it would take to examine all employee files for the information, the Council was applying section 12 of FOIA to the complainant's request as compliance would exceed the cost limit for local government, i.e. £450.00. The Council also stated that there was no reasonable advice or assistance it could offer to the complainant regarding narrowing or refining his request, as per the provisions of section 16 of FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 6 September 2021 to complain about the way his request for information had been handled.
11. The Commissioner has considered the Council's handling of the complainant's request, in particular its application of section 12(1) of FOIA.

Reasons for decision

Section 12 – cost of compliance

12. Section 12(1) of the FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate cost limit.
13. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') at £450 for local government public authorities such as the Council.
14. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours for the Council.
15. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - 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.
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 decision in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency*¹, the Commissioner considers that any estimate must be "sensible, realistic and supported by cogent evidence". 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.

¹ EA/20017/00041

17. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under the FOIA to consider whether there is a public interest in the disclosure of the information.
18. Where a public authority claims that section 12 of FOIA is engaged it should, where reasonable, provide advice and assistance to help the complainant.

The Council's position

19. As is the practice in a case in which the public authority has cited the cost limit under section 12 of the FOIA, the Commissioner asked the Council to provide a detailed explanation of its estimate of the time and cost of responding to the request.
20. In its submissions to the Commissioner, the Council maintained its reliance on section 12(1) of the FOIA and offered an explanation for how it had calculated that the request exceeded the appropriate limit.
21. The Council explained that it has looked at this matter afresh and conducted a sampling exercise in response to the Commissioner's correspondence.
22. The Council provided the Commissioner with an estimate with reference to the four activities as follows:-

- **determining whether the information is held;**

The information relates to informal capability reviews for which there is no central database. Notes on informal capability reviews are held electronically by each manager as part of the information in an employee file. It would not take any time to determine whether such information is held by managers.

- **locating the information, or a document which may contain the information;**

The above activity would consist of opening each electronic file kept by line managers on each of their staff members and skim reading the notes on file to locate any information relating to an informal capability review. The Council estimates that this would take on average 3 minutes per Council employee. There are 1,700 Council employees therefore this would take 5,100 minutes or 85 hours.

- **retrieving the information, or a document which may contain the information;**

The complainant's request for information asks for the reasons for an informal capability review. The Council states that generally the reasons for such reviews would be to address signs of an employee requiring support to ensure they continue performing their role to the required standard. The employee's manager would be required to note the date of the informal capability review (to ensure it is within the period relevant to the information request i.e. between 1 November 2018 and 1 November 2020). This could be done within the 3 minutes allocated to locating the information.

- **extracting the information from a document containing it.**

The manager would be required to note the ethnic background of the employee who was subject to an informal capability review. This could be done within the 3 minutes allocated to locating the information.

23. When calculating at a rate of £25 per hour, the Council calculated that it would cost approximately £2125 to locate the requested information.

Sampling exercise

24. The Council can confirm that it conducted a sample of skim reading HR notes on employees to locate information relating to informal capability reviews. All the notes were held electronically, in one place and in chronological order. The Council confirmed to the Commissioner that this was the quickest method of gathering the information. This took 4 minutes. No information relating to an informal capability review was found. Where there is information relating to an informal capability review the Council stated that the time may be shorter depending on where in the file the information relating to the review appears. Taking this into account the Council has reduced the time estimate to skim read HR notes by 1 minute to 3 minutes.

The Commissioner's position

25. The Commissioner accepts that it would take 85 hours to locate, retrieve and extract the requested information due to the time it would take to read the HR notes and the number of employees in the Council.
26. The Commissioner considers the Council's estimate of 85 hours to locate, retrieve and extract the requested information to be reasonable. He agrees that the Council's estimate of 3 minutes to search each mailbox for information within the scope of the request is conservative.

27. Even if the Council was to take 1 minute to search each mailbox and extract the requested information, the cost of complying with the request would still be in excess of the cost limit under FOIA.
28. The Commissioner's decision is that the Council estimated reasonably that the cost of complying with the request would exceed the appropriate limit. Therefore, the Council was correct to apply section 12(1) of the FOIA to the request.

Section 16(1) – the duty to provide advice and assistance

29. Section 16(1) of the FOIA provides that a public authority should give advice and assistance to any person making an information request. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice¹ in providing advice and assistance, it will have complied with section 16(1).
30. The Council advised the complainant that there was no reasonable advice or assistance it could offer to him regarding narrowing or refining his request, as per the provisions of section 16 of FOIA.
31. The Council informed the Commissioner that reducing the period of time applicable to the information request from 2 years to 1 year would reduce the time to fulfil the request by half. It took 2 minutes to look at one year of employee notes for the sample conducted (half of 4 minutes). The Council calculates it would take 1.5 minutes on average (half of the 3 minutes average estimate for each file). This reduction in time period would result in fulfilment of the information request taking 42.5 hours, still exceeding the appropriate limit.
32. The Council also considered advising the requestor to reduce the time period further to less than 1 year. This would not reflect the annual cycle of employee appraisals carried out by managers. The Council also considered advising the requestor that the scope of the request be narrowed to apply to only 360 employees over the 2 year period or 720 employees over a 1 year period to remain within the appropriate time limit. These refinements would not reflect the interest expressed by the requestor, or the public interest, in transparency and understanding whether there is any racial bias in HR matters across the Council therefore this advice and assistance would not be reasonable.
33. The Council has provided comprehensive information in relation to the complainant's information request relating to formal capability reviews. The nature of informal capability reviews means that the Council is unable to provide the information requested without exceeding the appropriate limit.

34. The Commissioner considers that this was an appropriate response in the circumstances given the Council-wide nature of the information required to provide a full response to the request. He is therefore satisfied that the Council has met its obligations under section 16(1) of FOIA.

Right of appeal

35. 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

36. 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.
37. 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

Deirdre Collins
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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