

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 December 2010

Public Authority: Magherafelt District Council
Address: Council Offices
50 Ballyronan Road
Magherafelt
BT45 6EN

Summary

The complainant requested information in relation to correspondence between the Foods Standards Agency (FSA) and Magherafelt District Council (the Council) during 2009. The Council refused this request on the basis that the estimated cost of compliance would exceed the appropriate limit as set out at section 12(1) of the Act.

The Commissioner's decision in this case is that the Council acted correctly in refusing the request under section 12(1). However the Commissioner also finds that the Council failed to provide adequate advice and assistance, and therefore breached section 16(1).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the Act). This Notice sets out his decision.

The Request

2. On 21 January 2010 the complainant made the following information request to Magherafelt District Council (the Council):

"...Can you provide a copy of all correspondence between Magherafelt District Council and the Food Standards Agency during 2009?"

3. On 3 February 2010 the Council responded to the complainant refusing the request under section 12(1). The Council explained that the estimated cost of complying with the request would exceed the appropriate limit of £450 as specified in Regulation 3(3) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations). The Council suggested to the complainant that the request be defined to a more manageable level which may bring it below the appropriate limit.
4. On 5 February 2010 the complainant requested the Council conduct an internal review of its decision not to comply with his request on the grounds of cost. The Council responded with the outcome of its internal review on 4 March 2010 and upheld its original decision not to comply with the request.

The Investigation

Scope of the case

5. On 13 April 2010, the complainant contacted the Commissioner complaining about the Council's decision not to comply with his request.

Chronology

6. On 6 August 2010, the Commissioner wrote to the Council to request a detailed breakdown of how it determined the cost of complying with this request would exceed the appropriate limit of £450.
7. The Council provided its response by letter dated 2 September 2010 and at the request of the Commissioner provided further information on 11 November 2010 regarding its application of section 12(1) of the Act.

Analysis

Substantive Procedural Issues

Section 12 – cost limit

8. Section 12(1) of the Act states:

"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".

9. The appropriate limit (the cost limit) is set out in the Fees Regulations, the wording of which is set out in the Legal Annex to this Notice. Regulation 4(3) provides that a public authority, when calculating the cost of providing any requested information, may only take into account the cost of determining whether it holds the requested information, locating, retrieving and extracting that information. The cost limit is currently set at £450 for all public authorities (other than central government) and equates to 2.5 days' (18 hours') work at a rate of £25 per hour.

10. The issue of what constitutes a reasonable estimate in relation to the cost limit was considered by the Information Tribunal in the case of *Roberts v the Information Commissioner*¹. The Commissioner is assisted by the Tribunal's approach as set out in paragraphs 9 -13 of the decision:

- *"Only an estimate is required"* (i.e. not a precise calculation)
- The costs estimate must be reasonable and only based on those activities described in regulation 4(3)
- Time spent considering exemptions or redactions cannot be taken into account
- Estimates cannot take into account the costs relating to data validation or communication
- The determination of a reasonable estimate can only be considered on a case-by-case basis and
- Any estimate should be *"sensible, realistic and supported by cogent evidence"*.

¹EA/2008/0050

11. The Tribunal went on to suggest that producing an estimate requires a process of both investigation and assessment/calculation. At paragraph 12, the Tribunal said:

"...The investigation will need to cover matters such as the amount of information covered by the request, its location, and the hourly rate of those who have the task of extracting it. The second stage will involve making an informed and intelligent assessment of how many hours the relevant staff members are likely to take to extract the information..."

12. The Council pointed out that the complainant had requested "all correspondence" between the Council and the FSA, and the Council advised that this was likely to be held in the following locations:

- 400 premises files
- 26 complaints files
- Emails held by eight members of staff

13. The Council explained that each premises file relates to a particular food premises which is subject to registration under food safety legislation. The files vary in content from 25 pages to three lever arch type files of material for a single premises file, dependent on interactions between the Council and the food business.

14. A separate complaint file is maintained for each food complaint received, and details the nature of the complaint, the investigation undertaken and conclusions. Each file would be a minimum of 10 pages but would usually be considerably longer, dependent on the complexity of the investigation.

15. Finally, the Council explained that it had identified eight staff who might hold emails containing relevant information, and that each of these individuals would need to check their files.

16. In estimating the time required to check each premises and complaints file, the Council had been guided by a similar scoping exercise it had undertaken in conjunction with the FSA. This exercise involved estimating the time required to check each premises file for a particular piece of information, and the time for each file was estimated at 4.8 minutes. Given that a similar exercise would be required to ascertain whether each file held correspondence with the FSA, the Council considered the estimate of 4.8 minutes per file to be reasonable. Therefore, the estimated time taken to check 400 premises files and 26 complaints files at 4.8 minutes per file, would be 32 hours.

17. The Council also advised that it would also have to search the email accounts for eight staff over a one year period, which it estimated would take four hours, or half an hour per person. In total, then, the Council estimated that the steps of determining whether it held the requested information, locating, retrieving and extracting that information, would take approximately 38 hours.
18. The Commissioner notes that the Council's estimate included the cost of communicating the information to the complainant, which it estimated would cost £525. However, as communication costs are not a relevant activity for the purposes of estimating whether the appropriate limit has been reached, the Commissioner disregarded this element of the estimate.
19. Having disregarded the communication costs, the Commissioner is nevertheless satisfied that the Council's estimate of 38 hours in relation to the relevant steps is reasonable. The Commissioner accepts that the Council would need to check each premises and complaints file for relevant information, and that files will vary considerably in the volume of information contained. Therefore the Commissioner considers that 4.8 minutes per file is a reasonable estimate. In addition, the Commissioner considers that half an hour is a reasonable estimate of the time it would take a member of staff to trawl through a year's record of emails. As the appropriate limit equates to 18 hours, an estimate of 38 hours would clearly exceed this limit.
20. For the reasons set out above, the Commissioner is satisfied that section 12(1) is engaged in relation to the request of 21 January 2010. As compliance with the request would exceed the appropriate limit, the Council was not obliged to comply.

Procedural Requirements

21. Section 16(1) provides that:

'It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.'

22. The Code of Practice issued under section 45 of the Act (the Code) provides guidance on good practice to public authorities in carrying out their duties in relation to the Act. The Code includes suggestions in relation to the nature of the advice and assistance that public

authorities should provide in relation to section 16 of the Act. Paragraph 14 of the Code recommends that:

"14. Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the "appropriate limit" (i.e. cost threshold) the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee."

23. The Commissioner notes that, in its refusal letter of 3 February 2010, the Council made the complainant aware of its obligation under the Act to provide advice and assistance and suggested the request be defined to a more manageable level to *"which may bring it below the appropriate limit"*. The Council advised the Commissioner of its view it was *"obvious that the requester could have redefined his request in order to reduce costs"*.
24. The Commissioner notes that the complainant did not engage with the Council in relation to its suggestion that he redefine his request. The Commissioner believes that, if a request is refused on the grounds of cost, it may be helpful for applicants to consider whether there is any scope for refining their request, for example concentrating on specific information which is of interest.
25. However, the Commissioner is of the view that the Council did not attempt to identify how much, if any, of the information requested it could provide within the appropriate cost limit. Nor did the Council provide any kind of practical assistance or guidance to the complainant as to how he might redefine his request. Whilst some weight is given to the fact that the council did alert the complainant to the possibility of refinement, in the circumstances of this case the Commissioner did not find this sufficient on its own to fulfil the requirements of section 16. On that basis the Commissioner finds that the Council breached its duty under section 16 of the Act to provide the complainant with advice and assistance in relation to this part of his request.

The Decision

26. The Commissioner's decision is that the Council correctly refused the request under section 12(1) of the Act. However the Council failed to comply with section 16 of the Act in that it did not provide adequate advice and assistance to the complainant.

Steps Required

27. The Commissioner requires the Council to contact the complainant and discuss whether it can provide any information within the costs limit, or whether it can provide guidance on how the complainant could refine his request, in order for the Council to comply with its obligations under section 16(1) of the Act.

Failure to comply

28. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

29. The public authority did not provide the complainant with any breakdown of the estimated costs of complying with the request in the refusal notice. Although the Act does not require a public authority to provide a costs breakdown when refusing a request under section 12, the Commissioner considers that it is good practice to do so. He would advise the public authority that including a costs breakdown in a section 12 refusal notice is likely to make it easier to comply with the section 16 duty to advise and assist an applicant on what could be provided within the cost limit.

Right of Appeal

30. 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
Arnhem House
31, Waterloo Way
LEICESTER
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 21 day of December 2010

Signed

Andrew White

Group Manager

Information Commissioner's Office

Wycliffe House

Water Lane

Wilmslow

Cheshire

SK9 5AF

Legal Annex

The Freedom of Information Act 2000

Section 9 – Fees

(1) A public authority to whom a request for information is made may, within the period for complying with section 1(1), give the applicant a notice in writing (in this Act referred to as a “fees notice”) stating that a fee of an amount specified in the notice is to be charged by the authority for complying with section 1(1).

(2) Where a fees notice has been given to the applicant, the public authority is not obliged to comply with section 1(1) unless the fee is paid within the period of three months beginning with the day on which the fees notice is given to the applicant.

(3) Subject to subsection (5), any fee under this section must be determined by the public authority in accordance with regulations made by the Secretary of State.

(4) Regulations under subsection (3) may, in particular, provide—

- (a) that no fee is to be payable in prescribed cases,
- (b) that any fee is not to exceed such maximum as may be specified in, or determined in accordance with, the regulations, and
- (c) that any fee is to be calculated in such manner as may be prescribed by the regulations.

(5) Subsection (3) does not apply where provision is made by or under any enactment as to the fee that may be charged by the public authority for the disclosure of the information.

Section 16 - Duty to provide advice and assistance.

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

The Freedom of Information and Data Protection (Appropriate Fees and Limits) Regulations 2004

Regulation 4 - Estimating the cost of complying with a request

4 (1) This regulation has effect in any case in which a public authority proposes to estimate whether the cost of complying with a relevant request would exceed the appropriate limit.

- (2) A relevant request is any request to the extent that it is a request—
- (a) for unstructured personal data within the meaning of section 9A(1) of the 1998 Act(1), and to which section 7(1) of that Act would, apart from the appropriate limit, to any extent apply, or
 - (b) information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply.
- (3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request 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.
- (4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.