

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 February 2020

Public Authority: London Borough of Southwark
Address: PO Box 64529
London
SE1P 5LX

Decision (including any steps ordered)

1. The complainant requested information relating to the London Borough of Southwark Council's ("the Council") investigations, warnings and penalties regarding Council property tenants involved in unauthorised short-term lets. The Council refused the request, relying on section 12(1) of the FOIA, because it estimated that the cost of compliance would exceed the appropriate limit.
2. The Commissioner's decision is that the Council was entitled to rely on section 12(1) of the FOIA to refuse the request, and complied with its duty to provide advice and assistance under section 16.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 30 July 2019, the complainant wrote to the Council and requested information in the following terms:

"Dear Sir or Madam

Under the Freedom of Information Act, please provide:

- *the number of council property tenants who have been investigated for unauthorised short-term/holiday lets (e.g. Airbnb)*
- *the number of council property tenants that have received warnings about unauthorised short-term/holiday lets (e.g. Airbnb)*
- *the number of council property tenants that have received any other penalty for unauthorised short-term/holiday lets (e.g. Airbnb) (please provide information about any such penalties)*

Please provide this information broken down by financial year for the past three years (i.e. 2016/17, 2017/18, and 2018/19).

Please could you provide this information as a spreadsheet or CSV file."

5. The Council acknowledged this request on 30 July 2019.
6. On 12 August 2019 the Council responded and refused to provide the requested information citing section 12(1) of the FOIA. It claimed that responding to this request would exceed the appropriate cost limit.
7. The Council advised the complainant that although they were unable to advise her on how to narrow the scope of the request, the complainant may wish to reword her request and this would then be considered as a fresh request.
8. The complainant did not narrow the scope of her request, but did request an internal review on 12 August 2019. The Council provided an internal review response on 21 August 2019 in which it maintained its original position that section 12(1) applied.

Scope of the case

9. The complainant contacted the Commissioner on 23 August 2019 to complain about the way her request for information had been handled.
10. The scope of this investigation and notice is whether the Council was entitled to rely on section 12(1) to refuse to comply with the request.
11. The Commissioner will also consider whether the Council has fulfilled its obligations under section 16 of the FOIA.

Reasons for decision

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

12. 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."*

13. 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."

14. 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.

15. 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.

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 EA/20017/0004*¹, the

¹ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf>

Commissioner considers that any estimate must be "*sensible, realistic and supported by cogent evidence*".

17. In the Council's responses to the Commissioner and the complainant, it explained that the requested information was held by two separate service areas: the "resident services team" and the "special investigations team". The Council explained that when a property is sublet, the resident services team deal with any unauthorised occupation as part of their normal housing management duties. Should a case become complex, this property is then referred to the special investigations team so that it can be formally investigated for illegal occupancy/subletting. The resident services team holds documents, records and case notes relating to a tenancy. The special investigations team holds information and notes regarding investigations: records of visits, interviews, relevant case decisions, decision making processes and management decisions. These case files will also include other relevant documents such as emails, referrals, tenancy documents, housing application documents and so on.
18. The Council explained that the resident services team employs an electronic data management system which holds a file for each tenancy. It stated that there are over 37,000 tenancies and each file would need to be manually reviewed as it is not possible to search this database. It explained the documents may include emails, photographs, reports and letters but as there is no agreed naming convention, the contents of each document are difficult to determine from title alone.
19. A sampling exercise was undertaken of five files and the Council estimated that it would take five minutes to review each of these files. It stated that the total time required to review the information on these 37,000 files would exceed 3,000 hours. At £25 per hour, the Council calculated that the complainant's request would cost in excess of £75,000.
20. Turning to the information held by the special investigations team, the Council explained that the service area uses a case management system which contains the case details, fraud type, status and notes. For the requested period, 870 cases were opened and notes added.
21. The Council went on to explain that this database cannot be searched for specific terms. This is because the records do not distinguish between the type of subletting, such as the short term/holiday lets sought in this request. The Council also stated that although the cases are initially assigned with the most appropriate case/fraud type classification as the main reason for referral, subletting may have later been identified but would not appear as the case classification. It also noted that where allegations of subletting are raised, these are always

recorded, even when disproved. As such, the Council explained that it would be necessary to review all of the notes for each of the 870 cases.

22. A sampling exercise was undertaken within which the Council sampled ten cases with different fraud types and outcomes. The Council stated that the review of these took 261 minutes. It previously advised the complainant that this would take on average 20 minutes per case. The Council confirmed that, since there are 870 cases: *"on this basis, the total time needed would be more than 375 hours, at a cost of £9,375"*.
23. In the Council's response it explains it has considered ways in which to reduce the time required to comply with this request. One method would be to review only the case notes in each of the 870 cases rather than all documents. It stated that this would take an average of 11 minutes per case, which would still result in a total time in excess of the cost limit.
24. However, the Council stated that, *"limiting a review to case notes only means that relevant information may be missed"*. This indicates that the alternative method would also not have enabled the Council to comply with the request fully as some of the information within the scope of the request may have been missed.
25. In the complainant's internal review request, she argued that there must be a record of the warning letters or action taken within investigations that is separate to the record of the file. However, the Council stated that no separate record of warning letters is held outside of the tenancy files.
26. The Council has stated that in light of the time that it would take to locate and retrieve the information, it has not also considered the time needed to extract the information.
27. The Commissioner asked the Council to confirm whether it would be possible to review only those files captured within the timeframe of the request i.e. 2016-19. The Council clarified that each of the 37,000 files, *"represents a single property and covers all tenancies relating to that property to date"*. The Council state that *"once a property file has been opened, the search can be narrowed by date and older documents and records outside the relevant period can be discounted. However, the calculation of five minutes per file takes this into consideration"*.

The Commissioner's conclusion

28. The Commissioner considers the Council's position to be fair and persuasive. In order to locate and retrieve the requested information, the Commissioner accepts that the Council would need to individually examine a large number of cases in two separate service areas. It estimated reasonably that the time required to do so would exceed the

18 hours set out by the Fees Regulations. Even if the Council were to search only the special investigations team's 870 cases, this would still exceed the cost limit.

29. 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

30. 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."

31. 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).

32. 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".

33. 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"*.

34. In this case, the Council suggested to the complainant in its response that, although it could not see a way to advise them on how to narrow the scope of their request, it suggested they reword the request.

35. The Commissioner asked the Council if it had considered its responsibilities under section 16(1) of the FOIA. In response to the Commissioner's investigation letter, the Council wrote to the complainant and suggested that it would be able to provide, for the

relevant time period, the total numbers of potential cases of illegal occupancy that were referred to the Council and/or the total number of properties recovered by the Council from illegal occupancy.

36. The Council also advised the complainant that there had been a change to procedure from July 2019 which has enabled short term/holiday lets to be recorded as a separate case type. The Council explained that it is therefore now able to provide this information from July 2019 onwards.
37. The Commissioner considers that the Council has taken steps to offer advice and assistance in an attempt to bring the request within the appropriate limit. She therefore considers that the Council offered advice and assistance that was sufficient to meet the requirements of section 16 of the FOIA.
38. The Commissioner is satisfied that the Council complied with its statutory obligation under section 16 to provide advice and assistance.

Other matters

39. As noted above at paragraph 23, the Council identified that reviewing only the case notes would have provided an alternative method of providing some of the information requested. It appears that it would have been possible for the Council to provide meaningful advice and assistance to the complainant by advising her to limit her request to information contained within case notes and with a revised, shorter time frame. Doing so would have aided the Council to fulfil its duty to provide advice and assistance under section 16 as promptly as possible.

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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