

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 July 2024

Public Authority: **Caerphilly County Borough Council**

Address: **Penallta House
Tredomen House
Ystrad Mynach
Hengoed
CF83 7PG**

Decision (including any steps ordered)

1. The complainant requested information about the grassed areas in the Penmaen Ward. Caerphilly County Borough Council (the Council) initially applied section 12 (appropriate limit) of the FOIA to the requests as it considered compliance would exceed the appropriate limit. In its internal review the Council stated that it did not hold the information requested. During the course of the Commissioner's investigation the Council revised its position again and maintained that section 12 of the FOIA applied to the requests.
2. The Commissioner's decision is that the Council is entitled to consider the combined cost of responding to both requests and that it has reasonably estimated the combined cost as exceeding the appropriate limit. Consequently, the Council was entitled to refuse to comply with the requests in accordance with section 12(1). However, the Commissioner finds that the Council breached section 16(1) of the FOIA as it failed to provide sufficient advice and assistance to the complainant. The Commissioner also finds that the Council breached section 10(1) as it failed to respond to one request within the statutory time limit.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.

- Provide the complainant with relevant advice and assistance to enable them to submit a refined request within the cost limit.
4. The public authority must take these steps within 30 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 13 July 2023 the complainant wrote to the Council and requested information in the following terms:

"List the grassed areas maintained by the council's Highways Department in the Penmaen Ward".
6. On 14 July 2023 the complainant submitted a second request for information for the following:

"List the location of all grassed areas, and the actual ground area of each, maintained by the council's Parks Department in the Penmaen Ward".
7. The Council responded to the first request on 30 August 2023 and stated it was refusing the request under section 12 as compliance with it would exceed the appropriate limit.
8. The Council responded to the second request on 10 August 2023 and stated it was refusing the request under section 12 as compliance with it would exceed the appropriate limit.
9. On 29 August 2023 the complainant asked for an internal review in respect of the handling of their second request.
10. On 7 September 2023 the complainant asked for an internal review in respect of the handling of their first request.
11. The Council provided the outcome of its internal review on 24 November 2023 in respect of both requests. It stated that as part of the review, it had endeavoured to undertake a sampling exercise to determine whether its estimate for compliance was accurate. In doing so, the Council discovered that the information was held in an old system that is no longer used and the software subscription had been cancelled. As such the Council stated that it did not hold the information requested.

Scope of the case

12. The complainant contacted the Commissioner on 14 December 2023 to complain about the way their requests for information had been handled.
13. As stated earlier in this notice, during the course of the Commissioner's investigation the Council confirmed that it was seeking to rely on section 12 of the FOIA to refuse the requests.
14. In light of the above, the scope of the Commissioner's investigation is to determine whether the Council correctly applied section 12 to the requests.

Reasons for decision

Section 12 – cost of compliance

15. Section 12(1) of 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 limit" as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations").
16. The appropriate limit is set in the Fees Regulations at £600 for central government, legislative bodies and the armed forces and at £450 for all other public authorities. The appropriate limit for the Council is £450.
17. 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.
18. Regulation 5 of the Fees Regulations states that:
 - (1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit to any extent apply, be made to a public authority—
 - (a) by one person, or
 - (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,the estimated cost of complying with any of the requests is to be taken to be the total costs which may be taken into account

by the authority, under regulation 4, of complying with all of them.

- (2) This regulation applies in circumstances in which—
 - (a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and
 - (b) those requests are received by the public authority within any period of 60 consecutive working days.
19. The three criteria in Regulation 5 must be met in order for requests to be aggregated. Firstly, the requests must be made by either the same person or a group of people acting together. Secondly, the most recent request must have been submitted within 60 working days of the oldest request. Finally, the requests must all relate to the same or similar information “to any extent.”
20. It is beyond doubt that both requests were made by the complainant and that fewer than 60 working days separates the dates of the first and the second requests, as the requests were made on consecutive days.
21. The Commissioner’s guidance interprets the phrase “to any extent” to be a fairly wide test. However, he goes on to note that:

“requests are likely to relate to the same or similar information where, for example, the requestor has expressly linked the requests, or where there is an overarching theme or common thread running between the requests in terms of the nature of the information that has been requested.”¹
22. The Commissioner notes that the first request asks for the location of grassed areas in the Penmaen Ward. The second request essentially encompasses the first request but also asks for the actual ground area of each grassed area. In light of this the Commissioner accepts that both requests relate, to some extent, to similar information and thus the Council is entitled to aggregate the two requests.
23. Where requests can be aggregated, the public authority is entitled to consider the total combined cost of complying with all the aggregated requests when deciding whether it can comply with them.

¹ https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

24. 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.
25. 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.
26. However, it must be a reasonable estimate. In accordance with the First-tier Tribunal in the case of *Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, 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.
27. 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 FOIA to consider whether there is a public interest in the disclosure of the information.
28. Where a public authority claims that section 12 of FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of FOIA.

Would the cost of compliance exceed the appropriate limit?

29. The Council confirmed that the information requested is not currently recorded in one collated list or document. During the course of the Commissioner’s investigation, the Council acknowledged that it does hold the building blocks which would allow it to provide the information requested. However, the Council maintains that provision of the information would exceed the appropriate limit.
30. The Council advised that it previously held information which was potentially relevant to the request within a digital software system known as Confirm. However, this system is no longer paid for by the Council as it cancelled its subscription and the Council is therefore no longer able to access the software in question.

31. The Council explained that, in order to comply with the request it would need to:
- a. "review, locate, and extract information contained within the 1997 map books held (A1 size). We've determined that the information is contained within 1 of these map books, and officers would need to review 4 areas to cover the Penmaen Ward area stated in the original request. These areas include Oakdale, Pen Y Fan, Crospenmaen, and Woodfieldside", and then
 - b. "review, locate, and extract information from the digital mapping system (QGIS) for the areas identified above to update the information held within the 1997 map book to include new developments and new adoptions or land sold/changed ownership".
32. The Council advised that it would be necessary to complete three steps in order to compile the information requested. These are:

Step one – this would need to be repeated for each of the four areas which make up the Penmaen Ward

- "OPEN MAP BOOK to find the relevant map (e.g. Oakdale area).
- OPEN DIGITAL MAPPING SYSTEM (QGIS) and select the correct, corresponding area from the drop down. A one-off action is to change settings to support square metre calculations".

Step two – this would need to be carried out for all plots in each of the four areas to note any changes (such as new buildings or sports track) and deduct any grassed area plots no longer maintained.

- "Search the digital mapping system (QGIS) for the corresponding area displayed on the map book page (see Example 2). Please note the view on QGIS is larger than the map books and can be hard to find without knowledge of Parks officers.
- Identify which areas of land are owned by CCBC using QGIS to support. The yellow highlighted areas owned by CCBC include buildings and grassed areas.
- Locate the grassed areas maintained by CCBC using Parks officer knowledge".

Step three

- "Add the maintained grassed area identified to a newly created list.

- Calculate the square metre of the plot by drawing around the area on QGIS. The software then calculates the area. However, a CCBC officer would also need to calculate the area of any obstacles (e.g. electric power stations) and remove these from the overall plot area. Add this to the newly created list”.
33. The Council advised the Commissioner that, using the steps listed above, it had undertaken a sampling exercise and it took 5 minutes to locate and match a corresponding area in its QGIS system and 8 minutes to then compare the area with the hard copy map book and locate and extract the information for each plot of land. As such, the Council’s position is that it would take 13 minutes to obtain the information requested for each plot of land.
 34. Whilst it doesn’t have the exact number of plots that would need to be reviewed in order to provide the information, the Council stated that officers manually counted plots within the largest area, Oakdale, using the QGIS system to identified grassed areas it maintains. This process identified an estimated 108 plots for the Oakdale area. The Council’s estimates for the other three areas falling within the Penmaen ward to be 54 plots for Woodfieldside, and 35 for each of the Pen y Fan and Crosphenmaen areas.
 35. Based on the sampling exercise undertaken the Council’s total estimate for compliance with the request is 3016 minutes or 50.3 hours (232 plots X 13 minutes).
 36. In their complaint to the Commissioner the complainant asserted that the Council held the information requested. They referred to an earlier request for information they submitted to the Council on 12 July 2023 for a copy of the Council’s terrier showing its ownership of land in the Penmaen Ward. In response to this request the Council disclosed a copy of an A2 size map showing the information requested with Highways’ and other departments’ (including Parks) land separately shown colour coded.
 37. In addition, the complainant considers that the information must be held in a more accessible format, to notify either Council staff or contractors which areas of grass they need to cut. They referred to a report on grass cutting regimes which was considered by the Council’s Housing and Environment Scrutiny Committee at a meeting on 12 December 2023². The complainant asserts that this

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<https://democracy.caerphilly.gov.uk/documents/g13810/Public%20reports%20pack%2012th-Dec->

report suggests that the Council has a schedule of grass cutting and therefore information about the location and size of the grassed areas.

38. The Commissioner asked the Council about the points raised by the complainant. The Council advised that the A2 terrier map it had previously provided to the complainant outlines all land it owns. This includes buildings and grassed areas, and is similar to the information contained within its QGIS system. As such, the Council stated that it would need to match information from its Property team to that held within the 1997 map books held and its QGIS digital mapping system, then remove any Council owned buildings to obtain a list of grassed areas it maintains.
39. In relation to the report on grass cutting regimes the Council stated that this schedule specifically identifies areas that will be left uncut to encourage wildflower growth and biodiversity. The schedule only outlines the frequency by which land it owns will be maintained as opposed to the location of all grassed areas maintained. The Council advised that its map books, QGIS system and local knowledge of Parks and Countryside officers informs the service area which areas to visit each week to undertake grass cutting.

The Commissioner's decision

40. The Commissioner is satisfied that the information held by the Council is not held in a readily retrievable form. He considers that the Council's explanations regarding the activities and processes necessary in order to comply with the request appear reasonable. Based on the Council's representations, the number of plots of land involved and because of the way that the information is recorded, the Commissioner accepts that the work involved in complying with the request would significantly exceed the appropriate limit of 18 hours. The Commissioner also notes that even if the estimate was halved it would still exceed the appropriate limit of 18 hours work.
41. Having considered the detailed estimate provided by the Council, the Commissioner finds that it is realistic and reasonable. He therefore accepts that the Council estimated reasonably that to provide the remaining information requested would exceed the appropriate limit and that section 12(1) has been correctly applied in this case.

Section 16 – Advice and Assistance

42. Section 16(1) of the FOIA provides that a public authority is required to provide advice and assistance to any individual making an information request, so far as it would be reasonable to expect it to do so.

43. In general, where section 12(1) is cited, in order to comply with this duty a public authority should advise the requester as to how their request could be refined to bring it within the cost limit, albeit that the Commissioner does recognise that where a request is far in excess of the limit, it may not be practical to provide any useful advice.

44. In its initial responses to the requests the Council, when it initially applied section 12, in respect of its obligations to provide advice and assistance the Council stated that:

“as the information is not separately held and would require the examination and extraction from individual hard copy documents, maps and folders and cross-referencing with electronic records we are unable to provide the detail requested without exceeding the appropriate fees limit”.

45. However, the Commissioner notes that the first request simply asked for a list of the grassed areas whereas the second request asked for a list of the grassed areas as well as the and the ground area of each plot. Given that some of the activities involved in complying with the requests in this case relate to calculating the size of each plot, it is unclear to the Commissioner, whether the Council would be able to provide just a list of the grassed areas without the size of each plot for the whole Penmaen area. In addition, the Commissioner also notes that based on the estimate of 13 minutes per plot, it would appear that the Council *may* be able to provide information for one or more of the 4 wards within the Penmaen area, with the exception of Oakdale, which has 108 plots.

46. In light of the above, the Commissioner’s decision is that the Council has not complied with its duty under section 16. He therefore requires the Council to provide advice and assistance to enable the complainant to submit a refined request within the cost limit.

Section 10 – time for compliance

47. Under section 10(1) a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of a request.

48. In this case the first request was submitted on 13 July 2023 and the Council did not respond until 30 August 2023. The Commissioner

therefore finds that the Council breached section 10(1) of the FOIA in failing to respond to this request within the statutory timescale.

Other matters

49. The Commissioner also finds it necessary to record within this decision notice the time taken by the Council to provide its internal review response. There is no obligation under FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where an authority chooses to offer one, the code of practice³ established under section 45 of FOIA sets out, in general terms, the procedure that should be followed.
50. The code states that reviews should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances. In no case should the internal review exceed 40 working days.
51. In this case, the complainant requested internal reviews on 29 August and 7 September 2023 and the Council did not provide its internal review response until 24 November 2023.
52. It is clear that in this case, the Council failed to complete its internal review within the Commissioner's guidance. The Commissioner expects the Council to ensure that reviews it handles in the future adhere to the timescales he has set out in his guidance.
53. The Commissioner uses intelligence gathered from individual cases to inform his insight and compliance function. This aligns with the goal in his draft "Openness by design"⁴ strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting systemic non-compliance, consistent with the approaches set out in his "Regulatory Action Policy"⁵.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

⁴ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁵ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

54. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

55. 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.
56. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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