

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 February 2015

Public Authority: Cornwall Council

Address: County Hall
Treyew Road
Truro
Cornwall
TR1 3AY

Decision (including any steps ordered)

1. The complainant requested information relating to land which he bought from the council. He asked for details it holds relating to work carried out on the land by a third party and any enforcement taken against it. The council refused the request on the grounds that Regulation 12(4)(b) applies (manifestly unreasonable). It said that any information it might hold would have been transferred to it by Kerrier Council as part of a merger in 2009 but a lot of information would also have been destroyed or deleted. It therefore does not know whether relevant information is held and it cannot determine this without carrying out significant searches of its archives which would place a disproportionate burden on it.
2. The Commissioner asked the council to provide further information on the application of the exception, however the council failed to provide any information supporting its decision other than to repeat that it would need to search the entire archive to determine whether any information was held. The council failed to provide details of the size of the archive or whether it was indexed when asked to do so however.
3. In the absence of such information the Commissioner's decision is that the council was not correct to apply Regulation 12(4)(b).
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- To issue a fresh response without relying upon Regulation 12(4)(b)
5. The public authority 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

6. On 9 April 2014 the complainant wrote to the council and requested information in the following terms:

"With regard to the land at Tolksithy Lane, originally known as land adjacent to Tolskithy Lane and now known by land registry as Tree Huggers Wood the Council must provide detail as part of my Freedom Of Information request of the enforcement action against Ashton & Hattam when they operated the site (any actions during the period from being engaged or assigned with regard to the site, up to the point of their cessation of involvement with the site and resolution of the action).

This will include a breakdown which is expected to provide a level of detail which shows:

- *The contractual agreement between Cornwall Council and Ashton & Hattam. (this will include the formal site name and waste permit number, along with the waste authorised for disposal)*
- *The case (action) and reasons for the action against Ashton & Hattam*
- *A list of the decisions and outcomes of any legal, council or regulatory judgement concerning the case (action).*
- *A list of the prescribed AND actually undertaken actions / works as a result of the case (action) or with regard to the enforcement against Ashton & Hattam.*
- *The response must include a list / breakdown of the relevant and associate confirmations or notifications of each action having been advised, undertaken and signed off as completed.*
- *The detail must provide the evidence to demonstrate that the Council checked and signed off successful resolution / mitigation or conclusion of all works as a result of the actions / decision / judgement with regard to the enforcement against Ashton & Hattam.*

- *Notification or indication that the council have met their legal and regulatory requirements with regard to the works*
- *Copies of analysis and test results where they were undertaken with regard to identifying the concern / issue / problem*
- *Copies of analysis and test results that were undertaken to clarify the result of actions taken to resolve the concern / issue / problem*

I require this level of indication as the Council must provide proof of what problems and issues were identified, how they were communicated and enforced and that they ensured that the problems dictated by the action were resolved and signed off by the council as correct / complete: Therefore, if fully compliant, the council by its actions were signing off and ensuring it met the environmental, legal and regulatory elements and ensured the safety of the environment, local residents and wider community.

17b. FOI 2 regarding the Derelict Land Grant Program at the land now known as Tree Huggers Wood

With regard to the land at Tolksithy Lane, originally known as land adjacent to Tolskithy Lane and now known by land registry as Tree Huggers Wood the Council must provide detail, as part of my Freedom Of Information request, a fully broken down set of details that show the prescribed and actual actions and activities undertaken under the Derelict Land Grant Program, which will be expected to show:

- *The description of the works to be undertaken as identified by the council and agreed under the grant*
- *A list / details of the plan of works / activities / actions identified to be undertaken by the Council or their contracted third parties under the grant or where associated to the grant with regard to the site.*
- *Costs assigned and apportioned against each action undertaken.*
- *The response must include a list / breakdown of the relevant and associate confirmations or notifications of each action having been advised, undertaken and signed off as complete.*
- *It must provide the evidence to demonstrate the Council having checked and signed off successful resolution / mitigation or conclusion of all works as a result of the Land Grant Program.*
- *Notification or indication that the Council have met their legal and regulatory requirements with regard to the works*

- *Copies of analysis and test results where they have been undertaken with regard to identifying any issue / concern / problem*
 - *Copies of analysis and test results that were undertaken to clarify the result of actions undertaken to resolve any identified issue / concern / problem.*
7. The council responded on 22 May 2014. It refused to confirm or deny whether it held any relevant information falling within the scope of the request. It said that *"We have been unable to find any record of the information within Cornwall Council's filing systems. It may be contained within the Kerrier District Council archived filing system however we do not have a reference as to where this may be found."*
8. Following an internal review the council wrote to the complainant on 14 July 2014. It said that the request had been refused on the grounds that Regulation 12(4)(b) applied. It said that this was on the basis that searching for the information would create a significant burden upon the council.

Scope of the case

9. The complainant initially contacted the Commissioner on 22 May 2014 to complain about the way his request for information had been handled. The council had not at that point issued its review decision. After receiving the internal review response he confirmed his wish for the Commissioner to consider the application of Regulation 12(4)(b) by the council.
10. The Commissioner considers that the complaint is that the council has wrongly applied Regulation 12(4)(b) to the request.

Reasons for decision

Regulation 12(4)(b)

11. Regulation 12(4)(b) provides that a public authority may refuse to disclose information to the extent that the request is manifestly unreasonable.
12. Where the exception is engaged it is subject to a public interest test under Regulation 12(1)(b) to determine whether the information should be disclosed in spite of the exception applying.

13. A request can be manifestly unreasonable for two reasons: firstly, if it is vexatious and secondly where it would incur unreasonable costs for a public authority or an unreasonable diversion of resources to provide the information. This is not a charge to the requestor, but a consideration of the cost to the authority in searching for and providing the information.
14. In this case the council said that searching for the relevant information would be a disproportionate diversion of its resources to the extent that responding to the request would be manifestly unreasonable.
15. The EIR do not provide a definition of what constitutes an unreasonable cost. This is in contrast to section 12 of the FOI Act under which a public authority can refuse to comply with a request if it estimates that the cost of compliance would exceed the 'appropriate limit'. This appropriate limit is defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations) as £600 for central government departments is £600 and £450 for all other public authorities.
16. The Act allows a public authority to consider the above amount by charging the following activities at a flat rate of £25 per hour of staff time:
 - Determining whether the information is held;
 - Locating the information, or a document which may contain the information;
 - Retrieving the information, or a document which may contain the information; and
 - Extracting the information from a document containing it.
17. Although the Regulations are not directly applicable to the EIR, in the ICO's view they can provide a useful point of reference when public authorities argue that complying with a request would incur an unreasonable cost and therefore could be refused on the basis of regulation 12(4)(b).
18. A request may therefore exceed the above limit and yet still require a response from the authority. Under the Regulations the circumstances of each individual case will determine whether the request is manifestly unreasonable or not.
19. The council explained that it considered the request to be manifestly unreasonable because the information which has been requested was initially held by a different council which merged with the county council in 2009. It said that in April 2009 Cornwall County Council and 7 former District Councils merged to become Cornwall Council. The information that is requested is information that would have been held by the former

Kerrier District Council. It said that the old Kerrier District Council offices have, in the last 5½ years, being completely rebuilt and all files that were at this location have been destroyed or moved.

20. It is said that as part of the merger, officers were made redundant, left the authority or were transferred into different roles or locations. As a result of this it has not been possible to find an officer who has knowledge of the information requested who could direct the council where to begin searching for relevant information.
21. It is said that officers that are now responsible for the service which would normally hold this information have confirmed that they do not know where the information might be held or archived. As a result the council cannot establish whether relevant information is held by it or not.
22. The council's response is therefore that it does not know whether information is held or not, and that if it is held it does not know where within its archives the information might be held. Its argument is therefore that in order to be able to respond to the request it would need to search the archives to establish if it holds relevant information. It argues therefore that this would cause it a significant burden to the extent that the request should be deemed to be manifestly unreasonable.
23. The Commissioner notes that the archive referred to in the original response is the archive relating to the former Kerrier Council. The Commissioner accepts the premise that where a search of the entire archive would be needed in order to establish whether information is held or not then this may cause an authority a significant burden. This is particularly the case where, as in this case, the information would have been provided to it by another authority, or may have been destroyed at the time of the merger with no record of that being retained. A search could then effectively find no information and the time and resources spent would have been wasted.
24. The Commissioner asked the council to provide further information about the archive. He sent messages to the council on 18 November 2014 asking further questions about the size of the archive and whether it was indexed in any way that might allow searches to be narrowed. The Commissioner also wrote to the council on 18 November 2014, 9 December 2014 and left a message on the relevant officer's voicemail on 18 December 2014 asking the council to respond to his questions. Again he asked questions aimed to establish whether searches might in some way be narrowed down to only part of the archive (i.e. for instance, 'legal' or 'enforcement' files) or whether the whole of the

archive would need to be searched, and if so, how large a task that would be.

25. In a discussion with the relevant officer of the council on 9 January 2015 it was stressed to the council that its arguments needed to be supported by further evidence if it wished to continue to rely upon Regulation 12(4)(b) as a means of refusing the request. This was further confirmed with the council in an email of 13 January 2015. The council failed to respond to all of the above.
26. The Commissioner's decision is therefore that the council has failed to provide evidence to demonstrate that section 12(4)(b) has been correctly applied. His decision is therefore that the council was not correct to apply Regulation 12(4)(b) to the information.

Other Matters

27. The Commissioner has found that the council's application of Regulation 12(4)(b) in this case was not correct. He considers that the council's responses to his initial questions have raised concerns about the maintenance of its information and records and whether the council is able to meet its legal obligations as regards information access requests and overall records management from information contained within its archives on an ongoing basis.
28. The council says that its current records management procedures would prevent cases such as this occurring again. However the Commissioner has concerns that the council has said that it does not know what records or information it received from Kerrier council during the merger. Potentially this may also be the case with information it holds from other councils which merged with it at that time.
29. Where information was received from another council as part of a merger the council then holds this information in its own right. It has legal responsibility to maintain the information, and to answer information access requests for information from it. In order to do this it must have knowledge of the information it holds within the archives.
30. The Commissioner is concerned that if the council does not know what information it holds within its archives from other authorities it would be in a position where it could avoid its legal obligations as regards any requests for information possibly held within this body of information on an ongoing basis.

31. The Commissioner therefore has concerns that the council is failing to meet its responsibilities under the Act, and that its practices may not meet with the code of practice issued under Section 46 of the FOI Act.
32. Whilst not legally binding on an authority, the Section 46 Code of Practice provides guidance to authorities on their records management duties and how to go about managing them in a way which will better enable an authority to meet its obligations as regards information access requests. Paragraph Viii of the forward to the code also states:

"Authorities should note that if they fail to comply with the Code, they may also fail to comply with legislation relating to the creation, management, disposal, use and re-use of records and information, for example the Public Records Act 1958, the Data Protection Act 1998, and the Re-use of Public Sector Information Regulations 2005, and they may consequently be in breach of their statutory obligations."

33. The Commissioner will therefore contact the council outside of the actions he has taken directly relating to this complaint. He will consider further whether action should be taken by the council to ensure that it can meet its obligations as regards information requests on all information it holds in the future.

The council's engagement with the Commissioner

34. The Commissioner also has concerns that the council has failed to engage fully with his investigation in this case.
35. The Commissioner asked the council to answer questions relating to the archive in order to fully understand and demonstrate its reliance upon Regulation 12(4)(b). The council did not however respond to these questions in spite of numerous contacts from the Commissioner by email or telephone.
36. The Commissioner has therefore noted a lack of engagement with his inquiries and may decide to pursue this with the council separately.

Right of appeal

37. 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@hmcts.gsi.gov.uk

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

38. 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.
39. 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

Andrew White
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