

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 November 2022

Public Authority: Castle Point Borough Council
Address: Kiln Road
Thundersley
Benfleet
Essex
SS7 1TF

Decision (including any steps ordered)

1. The complainant has requested information from the Castle Point Borough Council ("the Council") relating to a list of financial contributions for affordable housing made in the last 10 years.
2. The Council refused to comply with the request citing section 12 (cost limit) of FOIA.
3. The Commissioner's decision is that:
 - The Council was entitled to refuse to comply with the request under section 12(1) of the FOIA.
 - The Council breached section 10(1) of FOIA in that it failed to provide a valid response to the request within the statutory time frame of 20 working days.
 - The Commissioner also finds that the Council did not comply with its obligation under section 16 to offer advice and assistance.
4. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation:
 - Provide the complainant with reasonable assistance on how to limit the scope of their request so that it can be complied with within the appropriate limit.

Request and response

5. On 23 August 2021, the complainant wrote to the Council and requested information in the following terms:

“Please can you send me a list of the financial contributions within section 106 agreements that are for ‘affordable housing to be built elsewhere in the Borough’ made over the past ten years.”

6. The Council responded on 23 September 2021 advising that it considered the matter dealt with already due to a similar request previously made by the complainant and a decision made by the Information Commissioner.¹
7. Following an internal review, the Council wrote to the complainant on 17 November 2021. It stated that it had previously sent the complainant a spreadsheet of financial contributions and that it was going to maintain its position that Section 12 would still be engaged for this request.

Scope of the case

8. The complainant contacted the Commissioner on 16 October 2021 to complain about the way his request for information had been handled. The complainant disagrees with the Council’s application of Section 12(1) of FOIA.
10. The Commissioner considers the scope of this case to be to determine if the Council has correctly cited Section 12(1) of FOIA in response to the request.
11. The Commissioner has also considered whether the Council met its obligation to offer advice and assistance, under section 16 of FOIA.

Reasons for decision

Section 12 – cost of compliance

¹ [ic-46978-l2r8.pdf \(ico.org.uk\)](#)

12. Section 12 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" cost limit.
13. Section 12(2) of the FOIA states that subsection (1) does not exempt the public authority from the obligation to comply with paragraph (a) of section 1(1) (the duty to inform an applicant whether it holds information of the description specified in the request) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit. The Council relied on section 12(1) in this case.
14. 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 public authorities such as the Council.
15. 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.
16. 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.
17. 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 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.
18. 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.

19. 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?

20. The Commissioner has considered whether the estimated cost of complying with the request would exceed the appropriate limit of 18 hours.

The Complainant's Position

21. The complainant advises that it is impossible to find all the information required on the Council's website, which is why they submitted this request.
22. The complainant provided an Authority Monitoring Report² for 1 April 2018 – 31 March 2020 ("the Report"), which is available on the Council's website. The complainant advised that part of this report held information within the scope of the request.
23. The Report also included carry over figures from previous years and surplus figures for following years. The complainant advised that the Report held all the information the complainant required for this period of their requested.
24. The complainant believed that as the Report had information within the scope of the request, the Council must hold more information electronically and should be easily accessible.
25. The complainant suggested that this demonstrated that information is held electronically and could easily be provided to them rather than manually having to look through each Section 106 agreements³.

² The Authority Monitoring Report monitors the Council's plan-making and development progress. [download.cfm \(castlepoint.gov.uk\)](https://www.castlepoint.gov.uk/download.cfm)

³ A Section 106 Agreement is a legal contract between property developers and local planning authorities that outlines obligations that the developer must undertake to reduce impacts on nearby communities. Under the terms of a Section 106 Agreement, developers are obliged to make certain commitments in return for planning permission.

The Council's Position

26. As is the practice in a case in which the public authority has informed the complainant that it holds the information, the Commissioner asked the Council to provide a detailed estimate of the time/cost taken to provide the information falling within the scope of this request.
27. The Council reiterated that although it had sent the complainant a spreadsheet of financial contributions, it would be unable to ascertain where the affordable housing was [to be] built from the accounting records.
28. The Council went on to advise that Section 106 agreements do not stipulate where the monies are to be spent. The Council stated that in November 2011 the Localism Act introduced a 'self-financing' system for local authority social housing and the Council were required to maintain a Housing Revenue Account. The Council expressed that the account would show monies available in the fund and monies spent, but would not have the level of detail requested.
29. In the Council's internal review, it advised the complainant that Section 106 agreements may be entered into for development but the development may never commence, therefore the monies would never be due. Without a central record of all affordable housing contributions, it would not be able to answer the request.
30. The Council advised that the source of funding used for developments whether it is 'to be built or built' within the location of the 106 development or elsewhere in the borough would be impossible to identify.
31. In its submission to the Commissioner, the Council stated that each Section 106 agreement are stored in individual packets whereas the remainder of the archive is split between two rooms. Deeds and agreements date back more than 100 years and therefore the volume of paper is significant.
32. The Council confirmed that it does not have a central or specific location for all section 106 agreements and therefore it would have to manually locate all the relevant information within the scope of the request. This alone would take a great deal of time, without the Council even reading and extracting relevant information.
33. The Council used a recent Section 106 agreement to calculate the amount of time it would reasonably take to extract information relevant to the scope of the request. The council advised that it would take no less than 2 minutes per page for reading, and the most recent 106 agreement was 44 pages long.

34. The Council estimated that it would take 2 minutes to read each page which would equate to 88 minutes/1.466 hours for each section 106 agreement.
35. The Council advised that it creates between 2-4 agreements per year and therefore gathering information for a 10 year period would require reading between 20-40 agreements at 1.5 hours which would equate to around 30-60 hours for all information within the scope of the request.
36. When queried by the Commissioner regarding extracting the information from the Annual Monitoring Reports as suggested by the complainant, the Council suggested that although part of the information was held in this document, the other Annual Monitoring Reports did not contain this same level of detail. This meant the Council would still be required to manually search records and would still engage section 12(1).
37. The Commissioner does note that although part of the requested information is held within the Annual Monitoring Report provided by the complainant, the Council engaged Section 12(1) correctly (which looks at the wider cost of complying with the full request not part of the request) it was under no obligation to provide this part of the information.

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

38. Section 16(1) of 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 practice⁴ in providing advice and assistance, it will have complied with section 16(1).
39. The Commissioner would like to take this opportunity to remind the Council that the if the request is able to be refined in a way that would not exceed the cost limit, the Council is bound under Section 16(1) to provide advice and assistance where appropriate.
40. The Commissioner notes that no advice or assistance was given when dealing with the matter. The Commissioner is therefore satisfied that the Council did not meet its obligations under section 16 of FOIA.

4 <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

Section 10 – timeliness of response

41. Section 10(1) of FOIA states that a public authority must respond to a request promptly and “not later than the twentieth working day following the date of receipt”. 50. From the evidence provided to the Commissioner in this case, EWR did not deal with the request for information in accordance with FOIA. The Commissioner finds that EWR has breached section 10(1) by failing to respond to the request within 20 working days.

Other matters

42. The Commissioner would like to raise attention to the fact the Council tried to rely on previous searches (for a larger request by the same complainant) as evidence for this case. If a complainant makes a conscious effort to support the Council by refining their request, the Council are expected to do new appropriate searches to see if the cost limit still applies.

Right of appeal

43. 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

44. 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.
45. 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

Catherine Fletcher
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