

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 June 2014

Public Authority: Caerwent Community Council
Address: clerk@caerwentcc.com

Decision (including any steps ordered)

1. The complainant submitted various requests about the disposal of a particular piece of land in 1973. Caerwent Community Council ('the Council') stated that it did not hold the information requested. The Commissioner's decision is that the Council did not deal with the request in compliance with section 1(1) of the FOIA.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response under the FOIA.
3. The public authority must take this step 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

4. On 12 September 2013 the complainant wrote to the Council, referring to its response to a previous information request where it stated that:

"This is stated in Historic Minutes of Caerwent Community Council. The disposal of the land by the parish was covered by the Local Government Act 1972 section 127(1) which states 'Subject to the following provisions of this section, a parish or community council, or the parish trustees of a

parish acting with the consent of the parish meeting, may dispose of land held by them in any manner the wish”.

5. He requested information in the following terms:

“based on your reply

Please could i have a copy of the Historic Minutes you refer to in your reply

Please could i have copies of the notices posted in the press, relating to disposal of land

please could i have copies of response’s to the notice

please could you say if the council achieved best consideration for the land as stated in Local Government Act

Did the Council have the land valued

if the land was valued what was the valuation

did the community council consult with other resident of THE CROSS AREA

What provision was made for other residents underground apparatus that ran through the land the council disposed of”.

6. The Council responded on 25 September 2013 and stated that it did not hold the information requested and suggested it may be obtained from the archives at Ebbw Vale.
7. On 4 November 2013 Mr Harris requested an internal review of the Council’s handling of his request.
8. The Council provided the outcome of its internal review on 12 November 2013 and upheld its position that the requested information was not held and again suggested that the information may be available from the archives at Ebbw Vale.

Scope of the case

9. The complainant contacted the Commissioner on 27 November 2013 to complain about the way his request for information had been handled.
10. In his complaint the complainant raised a number of issues which fell outside the Commissioner’s remit, including the Council’s policy on retention of documents. The complainant also provided further detail about the piece of land which was the subject of his request, which was disposed of in 1974.
11. Following correspondence with the complainant it was agreed that the scope of the Commissioner’s investigation into this complaint would be

to establish whether the Council held the information he had requested on 12 September 2013.

Reasons for decision

Section 1 –General right of access

12. Section 1 of the FOIA provides that 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. Alternatively, a public authority can issue a refusal notice compliant with section 17 of the FOIA. Where the public authority is refusing to provide information under any exemption in Part II of the FOIA, the public authority should cite the specific exemption(s) that it is relying on to refuse the request and explain why any exemption(s) apply.

The Council's position

13. In its initial response and its internal review response, the Council simply stated that it did not hold the information requested but went on to suggest that the information "may be available" at the archives at Ebbw Vale ('Gwent Archives').
14. In order to establish whether the Council held any relevant information, the Commissioner asked the Council to respond to a number of points such as explaining any searches it had conducted in order to identify any relevant information. The Commissioner also asked the Council to confirm whether any information which may be held at Gwent Archives was held on behalf of the Council, in accordance with section 3(2)(b) of the FOIA. That section clarifies that for the purposes of the Act, information is held by a public authority if it is held by another person on behalf of the authority.
15. In terms of searches it conducted to identify relevant information the Council stated that "As the request referred to historical information we knew we did not hold there was no need to carry out any searches". The Council also confirmed that minutes of Council meetings held prior to 1991 were held at Gwent Archives. The Council advised that it "believed" that a record of verbal discussions relating to the disposal of land was held at Gwent Archives. The Council confirmed that all Council information held at Gwent Archives was held on behalf of the Council It also stated that it considered section 21 of the FOIA to apply to any relevant information held at Gwent Archives.

16. The Commissioner wrote to the Council again and confirmed that, as the information held at Gwent Archives was held on the Council's behalf it would need to consider its obligations under the FOIA accordingly. He pointed out that the Council would need therefore to confirm or deny whether any relevant information was held, and either disclose it or fully explain the basis on which any information was considered. The Commissioner also explained how the section 21 exemption could apply.
17. The Council responded to the Commissioner's further enquiries, however, its response in terms of information held relevant to the request was somewhat contradictory. The Council confirmed that "information relating to these historical events occurred in records that have now been deposited within the public archives". However, the Council later stated in the same response that it "does not believe there is any information held relevant to the request", and then went on to say that although the Council itself was not in possession of any relevant information, "the information 'may' be held in a public archive". The Council stated that it considered section 21 to apply to any information that "may" be held in Gwent Archives as the archive is considered to be reasonably accessible to the applicant.
18. The Commissioner also pointed out to the Council that only part one of the request related to Council minutes. He asked the Council to provide further representations to support its position that it knew no relevant information was held and, as a consequence, that no searches were undertaken. In response to this question, the Council confirmed that records held at Gwent Archives were indexed and consisted of minutes of meetings for the period from 1894 to 1991. The Council stated that there is no specific reference within the indexes relating to the specific request in this case. The Council also advised that:

"specific minutes relating to the request were discussed in 1972. This information was passed to [name of complainant] under a previous FOI request so the council believes this information is not subject to this enquiry. As the council is unaware of any other reference to the request we have indicated that we do not hold that information".

The Council stated that it did not consider it " 'reasonable' to spend public money" on searching all the publicly available records within Gwent Archives to establish whether any relevant information is held.

The Commissioner's position

19. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to

ascertain information falling within the scope of the request and he will consider if the authority is able to explain why further information is not held. For clarity, the Commissioner is not expected to prove categorically whether additional information is held. He is only required to make a judgement on whether the information is held "on the balance of probabilities"¹. In reaching a decision on such cases, the Commissioner generally considers both:

- the scope, quality, thoroughness and results of the searches and
 - other explanations offered as to why further information is not held.
20. Based on the representations provided by the Council, the Commissioner has been unable to draw a conclusion as to whether the Council holds any information relevant to the request in this case. This is because the Council has not adequately explained why it does not hold any information itself, particularly as no searches have been conducted. It is also unclear whether or not any information relevant to the request is actually held on the Council's behalf at Gwent Archives.
21. When a public authority receives a request for information it has to first establish whether it holds that specific information. Under section 1(1)(a) of the FOIA a requestor is entitled to be told whether the public authority holds the information, unless there is an exception from the duty to confirm or deny. This means that a public authority cannot proceed on the basis that it probably holds the information or holds information of the same type; it has to know whether it holds the specific information requested.
22. The Council considers that any relevant information which may be held at Gwent Archives would be exempt under section 21. However, in order to rely on this exemption, the Council would first need to establish whether any information relevant to the request **is** held.
23. In addition, in this case, whilst the Council has confirmed that records held at Gwent Archives on its behalf are indexed, it has not provided the complainant with any precise directions on how he could access any information relevant to his request which may be held at the Archives. In accordance with his guidance on section 21², the Commissioner

¹ This approach is supported by the Information Tribunal's findings in *Linda Bromley and Others / Environment Agency* (31 August 2007) EA/2006/0072

²

http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of

generally accepts that information is reasonably accessible if a public authority:

- knows that the applicant has already found the information; or
- is able to precisely direct the applicant to the information. In this case the public authority has to be reasonably specific to ensure it is found without difficulty and not hidden within a mass of other information.

24. In this case, based on the representations provided by the Council and, in particular, the fact that it has not yet confirmed whether any relevant information is held at Gwent Archives, the Commissioner has been unable to make any decision as to whether section 21 of the FOIA applies to the request or any parts of the request.

25. Turning to the Council's concerns that it is not "reasonable" to spend public money on undertaking a search of all publicly available records to establish whether there is any information relevant to the request. The Commissioner's view is that if it would take over 18 hours to identify whether relevant information is held then the request should have been refused under section 12(2) of the FOIA, as this is in excess of the appropriate limit (cost ceiling), rather than stating the information is not held when this had not been verified by appropriate searches. Whilst the Council seems certain that no relevant information is held within the Council itself the Commissioner does not consider it reasonable to be so certain when it has conducted no searches to verify its position, and it has provided no reason other than that the request relates to "historical information" to explain why no information is held. In addition, the Council is also unsure whether any relevant information is held on its behalf at Gwent Archives. Under section 12(2) a public authority may refuse a request if undertaking checks and searches to establish whether it holds requested information would itself exceed the 'appropriate limit' of 18 hours of work.

The Commissioner's conclusion

26. Based on the information available to him, the Commissioner has been unable to draw any conclusion in relation to the Council's handling of the request in this case. As such, he requires the Council to revisit the request from scratch in relation to any information held (either within its own offices or held on its behalf in Gwent Archives). While the

Commissioner acknowledges that it is feasible the Council may be entitled to refuse to comply with the request for any information it does hold (by way of other provisions under the FOIA) – and indeed information may not be held in relation to all parts of the request – it should issue a fresh response to the complainant which complies with the provisions of the FOIA.

Right of appeal

27. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

28. 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.
29. 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

Anne Jones
Assistant Commissioner
Information Commissioner's Office
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