

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice**

Date: 21 February 2023

Public Authority: Royal Borough of Kingston upon Thames
Address: Guildhall
Kingston upon Thames
Surrey
KT1 1EU

Decision (including any steps ordered)

1. The complainant requested from Royal Borough of Kingston upon Thames (the Council) information regarding the number of times the Council used a specific response "the Public Interest Test" (PIT) to a FOIA request. The Council refused to comply with the request and cited section 12(1) (cost of compliance) of FOIA.
2. The Commissioner's decision is the Council was entitled to refuse to comply with the request in accordance with section 12(1) of FOIA. However, the Council failed to provide adequate advice and assistance in accordance with section 16(1) of FOIA.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Provide advice and assistance to the complainant to assist in submitting a request falling within the appropriate limit.
4. 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 FOIA and may be dealt with as a contempt of court.

Background, request and response

5. On 24 October 2021 the complainant requested information from the Council regarding "foundation depths" which is relating to building control records. The Council recorded this request under its reference FOIK-961 and on 11 November 2021 it provided its response to the request.
6. The Council said "EIR requires us to consider the public interest in the information being requested. This is known as the Public Interest Test. In this case there is no wider public interest in disclosure and the information is withheld".
7. The complainant was dissatisfied with the Council's response (FOIK-961) which related to the application of Principle 2 – the Public Interest Test (PIT) and the fact that the Council had not provided him with a full explanation. The complainant argued that a request had been made, therefore he believed that "there was public interest". He said the response provided in relation to Principle 2 indicates this PIT was incorrectly applied. The complainant acknowledged that the Council's subsequent response provided a more detailed explanation. However, as a result of this, on 31 March 2022 the complainant submitted a new information request to the Council in the following terms:
 - "...since the FOIA was introduced in 2000;
 - a) How many times have the FOIA office used the exemption of "there is no wider public interest in disclosure and the information is withheld" in a response to a FOIA request
 - i) with providing an explanation & ii) without providing one.
 - b) How many times have the IGT office used the exemption of "there is no wider public interest in disclosure and the information is withheld" in a response to a FOIA request
 - i) with providing an explanation & ii) without providing one.
 - c) How many times have the IGT validated/verified/confirmed the FOIA office's use of "there is no wider public interest in disclosure and the information is withheld" in a response to a FOIA request
 - i) with providing an explanation & ii) without providing one.

d) How many times have the FOIA office or the IGT used "there is no wider public interest in disclosure and the information is withheld" in responding to FOIA requests specifically in relation to Kingston Building Control matters in a response to a FOIA request

i) with providing an explanation & ii) without providing one.

Again, I appreciate the size of the potential task that would need to be undertaken, so would accept data for the last 3 years broken down to individual years as a starting point."

8. On 3 May 2022 the Council responded (ref: FOIK1545: Application of Principle 2 – The Public Interest Test) and stated it does not hold the information requested. It explained that it does not hold this information as the Council does not record the data requested. The Council also provided the complainant with the following:

"The public interest test is used to balance the public interest in favour of disclosure against the public interest in favour of withholding the information. The 'public interest' is not the same as what interests the public. In carrying out a public interest test we consider the greater good or benefit to the community as a whole if the information is released or not."

9. On 1 June 2022 the complainant asked the Council for an internal review as he considered its response "we don't record the data requested" to be incorrect. The complainant stated "the minimum retention period set out for Kingston FOI/IGT are as follows: FOI requests and responses: Year records created +2 years..." and he said "since FOIA requests and responses are retained for a minimum period of two years, therefore indicating you do hold requests dating back to 2020." The complainant asked the Council if his questions A to D could be resubmitted and checked against FOIA responses for this period. He argued that the Council does "record the data requested".
10. On 24 June 2022 the Council provided its internal review response. It agreed that the information is not recorded in a specific report, and explained to the complainant the reasons it is unable to provide the information requested. The Council also cited section 12 (cost of compliance) of FOIA to this request.

Reasons for decision

11. The following analysis focuses on whether the Council was entitled to respond to the request in accordance with section 12(1) of FOIA. It will also consider whether the Council met its obligation to offer advice and assistance under section 16(1) of FOIA.

Section 12 – cost of compliance

12. 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”).
13. The Regulations state the appropriate cost limit is £600 for central government, legislative bodies and the armed forces, and £450 for all other public authorities. The appropriate limit for the Council in this case is £450.
14. The Fees Regulations also specify the cost of complying with a request must be calculated at the rate of £25 per hour, meaning section 12(1) effectively imposes a time limit of 18 hours for the Council.
15. 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.

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.

16. In accordance with the First-tier Tribunal in the case of *Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*¹, the Commissioner considers any estimate must be "sensible, realistic and supported by cogent evidence". The task for the Commissioner in a section 12(1) matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.

The Council's position

17. The Council stated to the complainant that it receives over 1100 FOI and EIR requests a year. It explained to review all responses in order to comply with this request, would exceed the appropriate limit set out in section 12 of FOIA.
18. The Council quoted the paragraph of our section 12 guidance within its response, and said "this represents the estimated cost of one person spending 18 hours at £25 per hour locating all responses sent out by all services, reviewing each response and recording any reference to the phrase you have requested." The Council also informed the complainant that with regard to an explanation which he had asked for, "providing an explanation does not fall under the scope of FOIA." The Council added that "if an explanation was provided in the response, this would also need to be recorded." The Council concluded its internal review by offering an apology to the complainant that a fuller response was not provided to him.

The complainant's position

19. The complainant is dissatisfied with the Council's response to this request which was "we do not hold this information as we don't record the data requested." He considers this response to be incorrect, and said that all FOIA requests and responses are retained for at least two years. The complainant is concerned with the Council's apologies for originally stating "we don't record the data requested" and subsequently it applied section 12 of FOIA to the request. Therefore, the complainant has lost trust in the responses provided by the Council, and simply requires the Council to provide him with the information requested.

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

The Commissioner's view

20. The Commissioner considers the Council estimated reasonably the cost of complying with the request which would exceed the appropriate limit. He accepts the Council's reasonable explanation on reviewing each response and recording any reference to the phrase in question. However, the Commissioner is of the view that the response from the Council was poor, and he expected to see a more detailed estimate rather than an assertion.
21. The Commissioner notes that this complaint has arisen due to an unsatisfactory response from the Council to the complainant's previous request for information. The Commissioner is aware of the complainant's other cases which are being dealt with separately, and they will be handled on a case by case basis.
22. In conclusion of this exemption being applied, the Commissioner is satisfied that compliance with this request would exceed 18 hours/£450. The Council was therefore entitled to rely on section 12(1) of FOIA to refuse the complainant's request.

Section 16 – advice and assistance

23. Section 16(1) of FOIA provides that a public authority is required to provide advice and assistance to any individual making an information request. 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.
24. The Council said it recognises its duty to provide advice and assistance to a requester under section 16 of FOIA. However, the Council said it was unable to offer further advice and assistance on this matter and stated "as I believe the matter has been 'reasonably' addressed and clarified in previous responses and again in this response."
25. The Commissioner is of the view that the Council could have provided the complainant with advice and assistance as to how his request could be refined to bring it within the cost limit. For example, reducing the timeframe/number of years. If no meaningful advice and assistance can be offered, the Council must explain this to the complainant.
26. In conclusion, the Commissioner requires the Council to contact the complainant and provide adequate advice and assistance.

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@justice.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

Joanna Marshall
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF