

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 March 2021

Public Authority: Swansea Council

Address: Data.protection@swansea.gov.uk

Decision (including any steps ordered)

1. The complainant has requested information in respect of care plans from Swansea Council's Social Services department. Swansea Council refused the request on the basis of section 12 of the FOIA and during the Commissioner's investigation, questioned the validity of the request as defined by section 8 of the FOIA and also cited section 14(1).
2. The Commissioner's decision is that the request fulfils the requirements of section 8 of the FOIA, and that Swansea Council was not entitled to rely on either section 12 or section 14(1) of the FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - issue a fresh response which does not rely on either sections 8, 12 or section 14(1) of the FOIA.
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 the Act and may be dealt with as a contempt of court.

Request and response

5. On 19 August 2019, the complainant wrote to Swansea Council and requested the following information in respect of care plans:

- *"Clarification of the number of people in the authority area who have had a care assessment under the Act [Social Services and Wellbeing (Wales) Act 2014] but have not had a care plan.*
 - *Details of the number of people who have had a care assessment under the Act but no care plan that have been charged for social services.*
 - *The total amount of money charged to people who have had a care assessment under the Act who do not have a care plan."*
6. The Council responded on 16 September 2019. It refused the request on the basis of section 12 of the FOIA adding that it had looked to see if the request could be narrowed in any way to bring it within the cost limit, but had been unable to identify how it could achieve this.
7. The complainant did not challenge the Council's reliance on section 12 in respect of his original request, but submitted a refined request on 17 September 2019 which stated:
- "Based on the cost and time limit of 18 hours at £25 per hour and an average time to conduct a review per file of 5 minutes it would seem that it would be possible to conduct a review of 216 files (12 per hour x 18 hours).*
- ...I would therefore suggest that a random sample of 200 files in the period from 1 October to date...In order that we can agree the random sample please let me have a list of care assessments by anonymised case reference number and I shall let you know the 200 to be sampled."*
8. The Council refused the request referring to its understanding of the Commissioner's guidance in respect of section 12 and stated that there is no obligation to search up to the appropriate limit via the random sampling exercise he described and in this case, the decision is not to do so.
9. Following an internal review the Council wrote to the complainant on 28 October 2019 upholding its original response.

Scope of the case

10. The complainant contacted the Commissioner on 30 October 2019 to complain about the way his request for information had been handled. The complainant has not challenged the Council's reliance on section 12 in respect of his original request, but is not satisfied with the Council's reliance on section 12 in respect of his refined request. He expressed

concern that the information officer at the Council had misdirected himself in relation to the Commissioner's guidance regarding section 12.

11. In its most recent correspondence with the Commissioner, the Council has questioned whether the refined request describes the data the complainant is seeking, and is questioning the validity of the request. The Commissioner will firstly therefore, need to consider whether the request is valid as defined by section 8 of the FOIA.
12. Having assessed the validity of the request, the Commissioner considers that the scope of her investigation is to determine whether the Council was entitled to rely on section 12 of the FOIA to refuse to comply with the refined request for information. Additionally, since the Council is now also relying on section 14(1) as a basis to refuse the request, she will need to consider whether section 14(1) of the FOIA is engaged.

Reasons for decision

Section 8 – valid request for information

13. Section 8 of the FOIA deals with the validity of requests for information and states:

"...any reference to "a request for information" is a reference to such a request which-

(a) is in writing,

(b) states the name of the applicant and an address for correspondence, and

(c) describes the information requested."

14. Parts (a) and (b) are not in dispute, however as stated earlier in this notice, in its most recent correspondence with the Commissioner, the Council has questioned whether the request describes the information. It does not dispute that the original request was capable of being described, however the council states that the:

"...refined request is for some unknown form of sampling to take place."

15. The Commissioner notes that the refined request asks for a random sample of 200 cases from 1 October 2018 to the date of the request, from the thousands of cases in his original request. The complainant also requested a list of care assessments by anonymised case reference number so that he could select the sample.

16. The Commissioner considers that it should be clear to the Council that the complainant wants a random sample of 200 cases from the thousands which fall within the scope of the original request. However, the issue appears to be that the complainant wants to choose the sample himself from an anonymised list of all cases. The Commissioner does not expect the Council to provide a list of cases to the complainant, but regardless of this, she considers that the request does describe the information.
17. She has therefore concluded that the request is a valid request for information under the requirements of section 8 of the FOIA.

Section 12 – cost of compliance exceeds the appropriate limit

18. Section 12 of the FOIA states that:

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."

19. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the 'Regulations') sets the appropriate limit at £450 for the public authority in question. Under these Regulations, a public authority can charge a maximum of £25 per hour for work undertaken to comply with a request. This equates to 18 hours work in accordance with the appropriate limit set out above.
20. A public authority is only required to provide a reasonable estimate or breakdown of costs and in putting together its estimate it can take the following processes into consideration:
 - (a) determining whether it holds the information,
 - (b) locating the information, or a document which may contain the information,
 - (c) retrieving the information, or a document which may contain the information, and
 - (d) extracting the information from a document containing it.

21. In its response to the original request the Council informed the complainant that:

"Unfortunately, the information which you have asked for is not regularly reported upon so in order to provide a definitive response to your request, a manual audit exercise would be required on thousands of cases to extract the information with each case taking on average 5 minutes to view."

22. Based on the Council's own estimate of an average of 5 minutes per case, the complainant submitted a refined request for a sample of 200 cases in the period from 1 October to date.
23. As stated previously, the Council also refused this request on the basis of section 12, referring to the Commissioner's guidance which states:

"A public authority may search up to or even beyond the appropriate limit of its own volition. Also, if a requester asks the public authority to search up to or beyond the appropriate limit and the public authority is willing, then it can do so."
24. In correspondence with the Council, the Commissioner pointed out that whilst this is indeed correct in respect of the original request, her guidance in respect of refined requests confirms that they should be treated as new requests, and if it can provide the information within the cost limit, it is required to do so, unless a valid exemption applies.
25. The Commissioner would also point out that her guidance further confirms that original and refined/new requests should not be aggregated for the purpose of calculating the costs of dealing with the new request as to do so would frustrate the purposes behind sections 12 and 16 of the FOIA.
26. In response the Council repeated its previous position adding that it considers the Commissioner's guidance to be in place:

"...to prevent public authorities wasting resources on an eighteen hour search which does not in the end yield a valid statistical result. If the authority knows the purpose of the request will not be served by starting the search, there is no need to start the search."
27. It further argued that it considers the refined request to be a means to circumvent the 18 hour search limit, and in its opinion, is not within the spirit of the legislation and the purpose of section 12 in that it would result in statistically unreliable data being provided, adding that the result would be different whichever means of sampling was chosen and cannot be said to be recorded information, merely an exercise.
28. Whilst the Commissioner acknowledges that different samples may yield different results, it is not a basis for the Council to refuse to comply with the request.
29. The Commissioner again therefore wrote to the Council repeating her previous confirmation that a refined request should be treated as a new request, pointing out that the complainant would be fully aware that the figures related solely to the refined sample, and is disappointed that the

Council continues to maintain its position that section 12 applies to the refined request.

30. Not only is the Council refusing to accept long standing guidance that the refined request is a new request, it has further argued that the Commissioner has used "*flawed logic that sampling is a 'refinement'*" arguing that it is the opposite of giving greater clarity to the information sought as a request for a random sample or other statistical sample is less defined than the original request. It considers it is a request to search in a particular way rather than define the data sought and that the request should fail on section 1 and section 12.
31. The Council also considers that the Commissioner has erred in her decision making in failing to consider the FOIA regime generally, and the misuse of information rights, and in not considering the purpose and legal obligations of FOIA and how they relate to obtaining specified information, it is creating a burden the legislation does not account for.
32. It has further argued that the purposive approach to considering the FOIA should result in a conclusion that the provision of sampling or other statistical exercises with an 18 hour officer time expenditure was not what was envisioned when the Act was introduced to increase transparency. In extending the FOI to include random or other statistical sampling, it creates further difficulties, as in its view, the Council considers it is adopting an approach that reverses and circumvents the principle that in section 12 cases an authority is not required to search up to the appropriate limit.
33. The Council has referred to the Tribunal decision in the case of Mr P Quinn and the Information Commissioner where the Commissioner had concluded that section 12 could not be relied on once a public authority (the Home Officer) had tried to comply with the request and already embarked on a search. As a result, the Commissioner's investigation did not address section 12, but following a number of searches, accepted that neither the report nor evidence of its destruction could be found by the Home Office, concluding that section 1(1) of the FOIA had been complied with.
34. However, the Tribunal over-turned this decision as the central question for its investigation was whether the Home Office held the information at the time of the request. Its investigation confirmed that at least six copies of the report existed in 1989 but that the Home Office was unable to provide evidence of what had happened to them in the intervening years. It also found that the Home Office was unable to provide evidence of the destruction of any of the six copies, concluding that the most probable cause of events was that the information still existed on Home Office premises but could not be located.

35. The Tribunal determined that the Commissioner had erred in concluding that section 1 had been complied with and in her understanding that once a public authority had started a search that it could no longer rely on section 12.

<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i49/MrPQuinnvInfoCommissioner15Nov06v7307.pdf>

36. The Commissioner confirms that it has always been her position that a public authority is not required to search up to the 18 (or 24 hour) limit where it estimates that the cost of compliance with the request would exceed the appropriate limit and considerable case law has been generated which supports this position. She would also point out that the above Tribunal decision dates back to 2006 when the FOIA was in its very early stages and acknowledges that a public authority is entitled to rely on section 12 even in circumstances where it has embarked on a search. The Commissioner therefore considers that the Council has drawn parallels between the Quinn decision and this request which do not exist.
37. Additionally, the Quinn case was concerned with one request as opposed to a refined request, yet the Council has failed to acknowledge or accept that the refined request is a new request for information despite the Commissioner's repeated and explicit guidance on this matter. By the Council's own estimate, this new/refined request can be complied with within the cost limit, therefore she can reach only one decision; namely that section 12 does not apply to this request.
38. As the Commissioner has concluded that section 12 does not apply to the refined request, she has now gone on to consider the Council's late reliance on section 14(1).

Section 14(1) - Vexatious requests

39. Section 14(1) of the FOIA states that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious. There is no public interest test.
40. The term 'vexatious' is not defined in the FOIA, however, the Upper Tribunal in the Information Commissioner vs Devon CC and Dransfield [2012] UKUT 440(AAC), (28 January 2013) took the view that the ordinary dictionary definition of the word 'vexatious' is only of limited use, because the question of whether a request is vexatious ultimately depends on the circumstances surrounding that request.
41. In further exploring the role played by circumstances and whether the request has adequate and proper justification, the Tribunal concluded

that 'vexatious' could be defined as the "...*manifestly unjustified, inappropriate or improper use of a formal procedure.*" (paragraph 27)

42. Consistent with the Upper Tribunal's decision which established the concepts of 'proportionality' and 'justification' as central to any consideration of whether a request is vexatious, the Commissioner's guidance for section 14 confirms that the key question to ask when weighing up whether a request is vexatious is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
43. Where this not clear, the public authority should weigh the impact on the authority of complying with the request and balance this against the purpose and value of the request. In doing this, public authorities will inevitably need to take into account the wider factors such the background and history of the request.
44. As previously stated, during the course of the Commissioner's investigation of this complaint the Council now considers that there is a case to apply section 14 to the request based on the context of the request and the Council's long history of correspondence with the complainant. It has referenced the Dransfield case, referred to above, and considers that the emphasis on protecting public authorities resources from unreasonable requests applies to this request.
45. The Council has argued that complying with this request would cause a disproportionate or unjustified level of disruption on the basis that:

"Sampling the files would have to be done by a social services member of staff at a time of a pandemic and stretched resources."
46. It has added that any time spent sampling would be disproportionate as the quality of information obtained would be poor, and is likely to result in an inaccurate representation of the whole.
47. The Council further argued that the complainant has been given the opportunity for an independent investigation into his particular circumstances but has chosen not to do so, and believes that the FOI regime is being used to further an individual grievance against the authority despite there being mechanisms (including independent mechanisms) for investigating his issues.
48. The Commissioner informed the Council that any consideration of exemptions or provisions within the FOIA must be based on the situation at the time of the request, up to the internal review. As the request and responses pre-date the pandemic, the Council cannot therefore use this as justification for relying on section 14(1) after the event. She also pointed out that there is a very high bar for public authorities relying on

section 14(1) on the basis of a disproportionate burden to meet, which has not been demonstrated by the information provided to date.

49. In response to the Commissioner's comments regarding the current pandemic, the Council confirmed that it considers the request would also be unduly burdensome during normal times as it does not consider it a proportionate use of officer time. However, as it has already been established in the discussion of section 12 that the request can be complied with within the appropriate limit, this leaves the Commissioner with no other option but to disagree with this argument.
50. The Commissioner also queried when the offer of an independent investigation was made as it could only be taken into consideration if it pre-dated the request/response, pointing out that even if this was the case, it was insufficient by itself to engage section 14(1), adding that much stronger arguments supported by evidence would be necessary for section 14(1) to be engaged and provided the link to the relevant guidance to assist the Council if it still intended to rely on section 14(1).
51. The Council however, repeated its previous point that the complainant has been offered an independent investigation into his specific circumstances adding that a random sample neither assists nor detracts from his ability to challenge the Council in regard to his grievance. It did not however confirm the date the complainant was offered the investigation or any evidence in support of this.
52. The Commissioner does not consider that even if this pre-dates the request, that this is sufficient to engage section 14(1) of the FOIA and has concluded that the Council was not entitled to rely on this provision within the legislation.

Right of appeal

53. 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@justice.gov.uk

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

54. 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.
55. 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 Dickenson
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF