

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 24 July 2023

**Public Authority:** Plymouth City Council  
**Address:** Plymouth  
PL1 3BJ

#### **Decision (including any steps ordered)**

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1. The complainant requested information from Plymouth City Council (the Council) relating to Mount Edgcombe Garden Battery and Plymouth Sound National Marine Park. The Council refused to comply with part of the request citing section 12 (cost limit) of FOIA.
2. The Commissioner's decision is that the Council was entitled to refuse to comply with the request in accordance with section 12(1) of FOIA.
3. However, the Commissioner finds that the Council did not comply with its obligations under section 16 of FOIA (duty to offer advice and assistance). In addition, the Commissioner finds that the Council did not comply with section 17 of FOIA as it failed to issue a valid refusal notice.
4. The Commissioner requires the Council to take the following steps:
  - Provide advice and assistance to the complainant to assist in submitting a request falling within the appropriate limit.
5. The Council 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.

## Request and response

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6. On 14 November 2022, the complainant made the following request for information from the Council:

“Under the Freedom of Information Act 2000, can you disclose the following: ALL information that you hold including - but not limited to -email, notes, etc. in relation to The Garden Battery at Mount Edgumbe being proposed / becoming part of the Plymouth Sound National Marine Park.”

7. The Council responded on 9 December 2022, stating that:

“The Garden Battery at Mount Edgumbe has not become part of the Plymouth Sound National Marine Park. For that to happen (a change in the ownership of the asset) there would have to be an LG asset transfer procedure with the associated consultations. That process would be complicated as the asset is in Cornwall – jointly owned by Plymouth City Council and Cornwall Council and also protected as an integral part of the Grade 1 listed landscape. We can confirm that this has not occurred - therefore there is no information available as this was never proposed and has not happened.”

8. The complainant responded to the Council on 9 December 2022, stating:

“It looks like my request has been interpreted too literal [sic]. With ‘being proposed / becoming part of’ I did not mean as in ‘change of ownership of the asset’, but as part of ‘the project’.

The Garden Battery will clearly be part of the project, as advertised on their website, in presentations and as confirmed by Park Manager [name redacted] - see some scans attached. Also, For instance, I understand about £1 million of a total of £10 million Lottery Grant Money will become available to Mt Edgumbe?

I have tried to communicate with PCC/ Plymouth Sound National Marine Park (via [name redacted]) to understand the decision making but after some initial non-replies I simply have not heard back anymore, despite a last email now months ago in which [name redacted] stated she would get back to me.

Hence my FOI request, as it seems to be the only option left open to get the information I’m after.

So, can you relook at my request in this light? – and ideally not as a 40 day 'review', but a normal 20 day FOI."

9. Following an internal review the Council wrote to the complainant on 26 January 2023, stating:

"As previously stated, the Garden Battery remains part of the Mount Edgcumbe estate which is overseen by the Joint Committee comprising membership from Cornwall Council and Plymouth City Council. Day to day management is delegated to [name redacted], Estate Manager. The development of the Garden Battery was deemed an opportunity by the Joint Committee to secure the Battery's long term future. No formal decision on whether the architectural plans will be signed has been made by the Joint Committee given that there is considerable process to get through before any formal decision can be taken. However, to be clear the National Marine Park is not an entity that will have any governance responsibilities for Mount Edgcumbe and no assets will be transferred to it.

Colleagues from Mount Edgcumbe are working with a design team on the concept for the Garden Battery but it will be in keeping with the developing strategic plans for the Estate.

These are shared with the Joint Committee on a regular basis. There will be an opportunity for discussion of the plans at a future Joint Committee meeting and if the idea is pursued, there will, of course be consultation during the planning process."

## Scope of the case

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10. The complainant contacted the Commissioner on 26 January 2023 to complain about the way their request for information had been handled. In particular, the complainant was concerned that the Council had not provided any of the information requested, only a summary of the requested information.
11. During the Commissioner's investigation, the Council reconsidered the complainant's request and decided it could provide all documentation relating to:
- a) the proposal for Mount Batten to become a hub partner of the National Marine Park, and

- b) the discussion leading to the proposal for the redevelopment of the Garden Battery being included in the bid for Lottery funding, made under the auspices of the National Marine Park.
12. The Commissioner understands this information was provided to the complainant on 4 April 2023, and therefore wrote to the complainant on 5 April 2023 to ask whether they were content with the steps the Council had taken.
  13. The complainant responded to the Commissioner on 6 April 2023, raising a query about whether they had been provided with all the information the Council held.
  14. In particular, the complainant was concerned that the date of the first email communication<sup>1</sup> included in the bundle provided to them by the Council was 5 January 2021. This was the same date as a slide presentation given at a workshop on that day, which was also included in the bundle. The complainant stated that the slide presentation clearly had the Garden Battery already earmarked for the project and was therefore of the view that more communication or documentation must exist prior to 5 January 2021.
  15. In view of this, the Commissioner wrote to the Council on 13 April 2023, asking it to revisit the request and provide him with further clarification as to why it had not provided any information dated prior to 5 January 2021.
  16. The Council responded to the Commissioner on the 27 April 2023 and explained that it had provided the complainant with all relevant information from the official files relating to the National Marine Project, as well as an extensive narrative to aid with the understanding of the information.
  17. The Council confirmed that it had again consulted with its Economic Development Department, which held responsibility for the project. It confirmed that individual officers held no further information that fell within the scope of the request.
  18. The Council went on to state that to identify any additional information not held within the formal records for project, it had conducted a search of its email archive using the term "Garden Battery" as a key search term. The Council stated that this search returned more than 16,000

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<sup>1</sup> An email between an employee of the Council and the Park Manager about a meeting with a Plymouth City Councillor

items, which it stated it would need to review in their entirety to identify any further information relevant to the complainant's request. The Council explained that to be certain that it had captured, as far as possible, all information that may be relevant, it would also need to separately search using the terms "National Marine Park" and "Mount Edgecumbe".

19. The Council stated that a sift of just the original search results of 16,000 items would take a member of staff approximately 21 working days to complete, which would result in the cost of complying with the request exceeding the appropriate limit set out in section 12 of FOIA.
20. The Commissioner wrote to the complainant on 19 May 2023, explaining the Council's position and asking whether they were prepared to accept the Council's explanation and reliance on section 12 of FOIA.
21. The complainant responded to the Commissioner on 22 May 2023 disagreeing with the Council's reliance on section 12 of FOIA. The complainant was of the view that the Council could combine multiple search terms to bring the number of results down and therefore bring the request within the cost limit.
22. The Commissioner therefore considers that the scope of this case is to determine whether the Council has correctly relied on section 12(1) of FOIA to refuse to provide any emails it holds within the scope of the request, dated prior to 5 January 2021. The Commissioner has also considered whether the Council met its obligation to offer advice and assistance under section 16 of FOIA.

## **Reasons for decision**

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### **Section 12 – cost of compliance**

23. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if it 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"). Section 12(2) of FOIA states that this does not exempt the public authority from the obligation to comply with the duty to inform an applicant whether it holds information of the description specified in the request<sup>2</sup> unless the

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<sup>2</sup> As required by section 1(1)(a) of FOIA

estimated cost of complying with that duty alone would exceed the appropriate limit (for example, if conducting searches for the information would exceed the limit).

24. In this case, the Council considers that determining whether it holds further information (in particular, email communications dated prior to 5 January 2021) would itself exceed the appropriate limit and has therefore relied on section 12(1) to refuse to establish whether any such further information is held.
25. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 set the appropriate limit at £600 for central government, legislative bodies, and the armed forces and at £450 for all other public authorities. The appropriate limit for the Council is therefore £450.
26. 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. A request can therefore be considered to exceed the cost limit if it would take more than 18 hours of staff time to comply with.
27. 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.
28. 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 therefore to determine whether the public authority made a reasonable estimate of the cost of complying with the request.
29. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit, there is no requirement under FOIA

to consider whether there is a public interest in the disclosure of the information.

30. 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?**

31. 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.
32. The Commissioner understands that the Council had not initially combined the search terms "National Marine Park" and "Mount Edgumbe" with the search term "Garden Battery" (i.e., performed a single search for emails containing all three terms, or a combination). The Commissioner therefore asked the Council to perform such a combined search. The Council responded, stating that a combined search of the mailboxes of all nine individual who were placed on the project from 5 January 2019 for the period from 13 September 2019 to the 6 January 2021 returned a total of 30,711 items.
33. The Commissioner asked the Council for some further details on how it had carried out its searches to understand why refining the search terms appeared to result in more emails being identified than in previous searches (30,711 as opposed to the circa 16,000 originally stated).
34. The Council clarified that when it carried out the search, quotation marks were placed around the key terms so that the entire phrase would be searched for rather than the individual words (i.e., "Garden Battery", "National Marine Park", "NMP", Mount Edgumbe"). The search terms were combined as requested and the mailboxes of all staff involved on the project at that time, were included.
35. The Council confirmed that the previous search which returned approximately 16,000 items used only the key term "Garden Battery" as this is the main focus of the complainant's request. No other parameters were applied.
36. The Council advised that it had not searched on the individual search terms but upon doing so, it returned a total of 22,549 items, broken down as follows:
- Garden Battery: 115
  - Mount Edgumbe: 11,475

- National Marine Park: 7,106
- NMP: 14,853

The Commissioner notes that this breakdown actually totals 33,549.

37. As the Council appeared to have carried out separate searches on the above terms and then combined the number of results, the Commissioner again asked the Council to clarify whether, after carrying out a search for the phrase "Garden Battery" (which returned a result of 115 items), it had then combined the search terms "Garden Battery" and "National Marine Park" to further refine this result (i.e. of the 115 items that contain the term "Garden Battery", how many also contain the term "National Marine Park"?). The Commissioner also asked whether the Council had done the same with the other search terms listed above.
38. The Council stated that it was unable to perform the searches as described above and it therefore carried out a manual review of each of the 115 emails containing the term Garden Battery to establish whether they contained information falling within the scope of the complainant's request.
39. The Council located the 5 January 2021 email that was provided to the complainant on 4 April 2023. It located a second email which showed that the Garden Battery was being considered as part of the project but stated that this email did not indicate from whom the proposal originated. Having viewed this email, the Commissioner agrees with the Council that it does not indicate from whom the proposal originated and therefore does not fall within the scope of the complainant's request.
40. The Council has confirmed that the search of the 115 emails of the project staff in place on 5 January 2021, covering the period 13 September to 6 January 2021 and using the key term "Garden Battery" did not exceed the cost limit. However, as explained above it did not satisfy the complainant's request.
41. The Council clarified that in its response to the complainant following the complaint to the Commissioner, it stated that it answered the request from the project's formal records, which contained all of the information that the Council considered to be pertinent to the project and its progress.
42. The Council stated that following the complainant's subsequent concerns, it was clear that to identify additional information outside of these files, a search of emails, using the key term "Garden Battery", would be required which, as stated above at paragraph 18 of this decision notice, returned in excess of 16,000 items.



43. The Council explained that when estimating the time it would take to sift the results of an email search to isolate items of relevance, the Council based its estimates on the average number of emails that can be reviewed in a 7.4 hour day by an experienced Information Governance Officer. The Council explained that in its experience, on average, approximately 750 emails per day can be skim-read to identify items of relevance. Based on this figure, it would take the Council an estimated 21 days to review the emails located.
44. The Council, therefore, maintains that complying with this request, as it stands, would exceed the cost limit.
45. The Commissioner considers that the Council estimated reasonably that it would take more than the 18 hours / £450 limit to respond to the request. The Council was therefore entitled to rely on section 12(1) of FOIA to refuse to provide further email correspondence in response to the complainant's request.

### **Section 16(1) – The duty to provide advice and assistance**

46. Section 16(1) of FOIA requires public authorities to 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 practice<sup>3</sup> in providing advice and assistance, it will have complied with section 16(1).
47. The Commissioner notes that the Council has not provided the complainant with any advice and assistance in this case. In particular, when relying on section 12 of FOIA, it did not provide any advice to the complainant on how they might narrow their request so that it would fall within the cost limit. The Commissioner is therefore satisfied that the Council did not meet its obligations under section 16 of FOIA.

### **Section 17 – refusal of request**

48. Section 17(1) of the FOIA requires that where a public authority is relying on an exemption to withhold information, it must inform the requester of that fact, specify the exemption relied on and explain why it applies (if not apparent), no later than 20 working days after the date on which the request was received.

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<sup>3</sup> <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

49. In the circumstances of this case, the Council failed to comply with the requirements of section 17, in that in its responses to the complainant, it failed to explain that it was refusing to comply with the request with regards to the further possible email correspondence, the provisions within FOIA it was relying upon to do so, and why.

## Right of appeal

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50. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

51. 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.
52. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**