

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 14 August 2013

Public Authority: Ilminster Town Council
Address: North Street
Ilminster
Somerset
TA19 0DG

Decision (including any steps ordered)

1. The complainants have requested various information in relation to a cemetery wall that borders their property. The request was refused by Ilminster Town Council (council) under section 12 of the Freedom of Information Act 2000 (FOIA). However the Commissioner considered the requested information to be environmental information and should have been refused under regulation 12(4)(b) of the EIR.
2. The Commissioner's decision is that regulation 12(4)(b) is engaged to the request and therefore the council were correct to refuse to supply the information. The Commissioner has also found that the council has breached regulation 5(2) of the EIR by not providing its response to the complainants within 20 working days and has breached regulation 9(1) by not providing appropriate advice and assistance.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainants with appropriate advice and assistance with regard to the requested information that can be provided within the appropriate limit, to enable them to make appropriate refined requests if necessary.
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 5 October 2012, the complainant wrote to the council and requested information in the following terms:

"1) Copies of all independent surveys regarding the stone wall which runs alongside the grass lane boundary with our property, together with copies of all independent surveys regarding the stone foundations and the unclimbable metal fence which runs along the length of the boundary with the end of the cemetery and our small wood area (both boundaries referred to in the conveyance dated 15 November 1913, the relevant extract registered on the cemetery by HM Land Registry, under title number WS50497).

2) Copies of the minutes of all meetings (full Council and Committee) in which reference is made to the above mentioned stone wall and/or the stone foundations and the unclimbable metal fence.

3) Copies of all records relating to the maintenance and maintenance schedule of the above mentioned stone wall and/or the stone foundations and the unclimbable metal fence.

4) Copies of all records relating to the repair and repair schedule of the above mentioned stone wall and/or the stone foundations and the unclimbable metal fence.

5) Copies of all written independent surveys regarding any tree root ingress for the above mentioned stone wall and/or the stone foundations and the unclimbable metal fence.

6) Copies of all written independent surveys regarding the Town Council owned trees in the cemetery which are either still living or have been removed in the last 10 years, within a 20 metre distance of either the above mentioned stone wall and/or the stone foundations and the unclimbable metal fence.

7) Copies of records, including minutes of meetings regarding any trees owned by the Town Council which are either still living or have been removed in the last 10 years, within a 20 metre distance of the above mentioned stone wall and/or the stone foundations and the unclimbable metal fence.

8) Copies of any asset management plans in which reference is made of the above mentioned stone wall and/or the stone foundations and the unclimbable metal fence.

9) Copies of evidence of budget planning and forecasting documents ascertaining to the payment or proposed payment of repairs and maintenance of works to either the above mentioned stone wall and/or the stone foundations and the unclimbable metal fence.

10) Any other document not specifically mentioned above, which relates or refers to the above mentioned stone wall and/or the stone foundations and the unclimbable metal fence.

Please note that our legal advice indicates that the Town Council will need to include documents such as tender documents in your response, although sensitive contractor information regarding price (but not time estimated to complete the works) can be removed."

6. The council acknowledged the request on the 9 October 2012 but a response was not provided.
7. The complainant contacted the Commissioner on the 5 November 2013 as it had not received a response from the council.
8. The Commissioner contacted the council on 9 January 2013 requesting a response to the request.
9. The council responded to the Commissioner on the 9 January 2013 to advise it had responded to the complainant on both the 7 January 2013, to advise it was preparing the information to be sent out, and then on the 8 January 2013, advising the complainant that it did not hold any information relating to questions 1, 3, 5, 6, 8 and 9 and refusing to provide the requested information for questions 2, 4, 7, and 10. It cited section 12 of FOIA as its basis for doing so. The council advised that it would be possible to provide council and committee meetings since 2008 and financial records from 2002 as they are kept electronically.
10. No internal review was carried out in this case. The Commissioner considered that because of the time scale of the case already and as the council did not have any one else other than the original responder at the council to carry out a review, this avenue would only serve to delay a conclusion to the case.

Scope of the case

11. During the course of the Commissioner's investigation in this case the complainants advised that they would be satisfied if the council provided the information that had already been printed off by the council plus the

electronically recorded minutes of council and committee meetings since 2008 and the financial records from 2002. The Commissioner anticipated that this may have allowed the case to be resolved informally without the need for a decision notice.

12. This information was provided to the complainant by the council on the 14 June 2013 in hard copy.
13. On receipt of the information, the complainants were not satisfied with the information provided. After reviewing the information they received, they informed the Commissioner that they still required the electronically recorded minutes of council and committee meetings since 2008, the financial records since 2002 and the correspondence regarding the legal advice from South Somerset District Council to Ilminster Town Council dated August 2012 and between July 2009 and December 2009.
14. The council advised the Commissioner that it would not supply the legal advice as it would be refused under section 42 of the FOIA. It also stated that the electronic information had been provided in hard copy not electronically. It acknowledged that information may be missing in what was supplied because it found that to provide the electronic information it had to search for it using the key word "cemetery wall". It also explained that reviewing all the information that the search had returned, to ensure all the requested information was there, would again exceed the costs under section 12 of the FOIA. So with regards to the electronically recorded council and committee meetings since 2008 and the financial records from 2002, the council had provided the complainants with what had been located from the computer search.
15. It was clear to the Commissioner that the anticipated informal resolution had been unsuccessful as the complainants were not satisfied with the information provided and the council still relied on section 12 of the FOIA with regard to ensuring the completeness of the information that had been provided. Whilst the council had also sought to rely on section 42 of the FOIA, the Commissioner considers there is no need to consider this exemption in the event that section 12 applies, as the legal advice information falls under question 10 "*any other document..*", and the council had relied on section 12 of the FOIA with regards to the request as a whole.
16. The Commissioner considers that the requested information all falls within the definition of environmental information and therefore should be considered under the EIR. Therefore this request should have been refused under regulation 12(4)(b) of the EIR, manifestly unreasonable. The Commissioner asked the council to explain its reasons for not providing the information under regulation 12(4)(b) of the EIR.

Reasons for decision

Is the information environmental information?

17. The Commissioner has first considered whether the requested information would constitute environmental information as defined by regulation 2(1) of the EIR. Regulation 2(1)(c) with (b) is relevant in this case. The information requested is measures affecting, or likely to effect the elements of the environment, namely the landscape. The wall is part of the land and landscape and much of the information such as minutes etc are measures which are likely to affect the state of the landscape by changing the wall, e.g. rebuilding it.

Regulation 12(4)(b) – Manifestly unreasonable

18. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose environmental information to the extent that the request for information is manifestly unreasonable. There is no definition of 'manifestly unreasonable' under the EIR, but the Commissioner's opinion is that 'manifestly' implies that a request should be obviously or clearly unreasonable.
19. In this case, the council considers the request is 'manifestly unreasonable' due to the time and cost necessary to comply with the request. It has argued that complying with the request would place an unreasonable burden on its resources in terms of expense.
20. Unlike the FOIA however, the EIR do not have a provision where a request can be refused if the estimated cost of compliance would exceed a particular cost limit. However, the Commissioner considers that if a public authority is able to demonstrate that the time and cost of complying with the request is obviously unreasonable, regulation 12(4)(b) will be engaged. The Commissioner considers the section 12 costs provision in the FOIA is a useful benchmark, acting in this case as a starting point for the Commissioner's investigation.
21. Section 12 of the FOIA states that a public authority is not obliged to comply with a request for information if it estimates that the cost of complying would exceed the appropriate cost limit. In this case, the cost limit is £450 as set out in section 3(2) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations'). This must be calculated at the rate of £25 per hour, effectively giving a time limit of 18 hours.
22. A public authority is only required to provide a reasonable estimate or breakdown of costs. Regulation 4(3) of the Fees Regulations states that an authority, when estimating whether complying with a request would

exceed the appropriate limit, can only take into account the costs it reasonably expects to incur in:

- determining whether it holds the information;
 - locating the information, or documents containing it;
 - retrieving the information, or documents containing it; and
 - extracting the information from any documents containing it.
23. The Commissioner therefore asked the council to provide a reasonable estimate or breakdown of costs to assist with his investigation of this complaint.
24. The council used the example of question 2, which requested copies of minutes for all meetings "*...in which reference is made to the above mentioned stone wall/ or the stone foundations and the unclimbable metal fence*" to demonstrate the difficulty of extracting the information relevant to the request.
25. The council advised the Commissioner that the minutes and any committee meetings that are held between 1973 and 2008 are stored in hard copy only. They are stored in ring binders and organised in date order only, there is no index. As the wall was erected in approximately 1913, to find and extract any information relating to the complainants' request to question 2, would require reading each set of minutes between 1974 and 2008.
26. The council advised that for the municipal year 1974-75 there were 16 council and committee meetings. For the current year, the council has explained that there are 45 scheduled meetings.
27. The council state it takes approximately 5 hours to read a years' worth of minutes, and has based this on practical experience where the council attempted to create a subject index of the 1974-75 minutes in December 2012.
28. The council then calculated from this sample that to read each set of minutes of the meetings held since May 1974 would take 190 hours of work. As shown in the councils below calculation:
- Number of years = 38 (1974-2012) x 5 Hours = 190 hours.
29. It calculated that 190 hours of work at the rate of £25 per hour = £4,750
30. The council advised that due to the age of the wall, erected in 1913, it is possible that it will have been discussed on many occasions, and so would be necessary to go through all the council's minutes to establish this.

31. The Commissioner considers that as the council's minutes of meetings from 1974 to 2008 are held manually and only organised by date, it is reasonable to assume that, given the age of the wall, all the minutes held from 1974 would need to be read in order to provide the information requested to the complainants question 2. The Commissioner notes that the minutes from 2008 to 2012 would not need to be read through by the council as they are held electronically and can therefore be searched electronically. This reduces the council's estimate to 165 hours at £4125. However the Commissioner recognises that this does not alter the council's estimate substantially.
32. The Commissioner therefore accepts that as the council estimates it takes approximately five hours to read one year's worth of minutes, it is reasonable to assume that for the council to answer question 2 alone would take over 165 hours of work.
33. As stated previously, under EIR, unlike under FOIA, there is no appropriate costs limit above which public authorities are not required to deal with requests for information. However, the exception at regulation 12(4)(b) of the EIR can apply if the cost or burden of dealing with a request is too great.
34. As stated in the Upper Tribunal case of *Craven v The Information Commissioner and the Department of Energy and Climate Change* [2012] UKUT442 (AAC)¹,

"Taking the position under the EIR first, it must be right that a public authority is entitled to refuse a single extremely burdensome request under regulation 12(4)(b) as "manifestly unreasonable", purely on the basis that the cost of compliance would be too great (assuming, of course, it is also satisfied that the public interest test favours maintaining the exception). The absence of any provision in the EIR equivalent to section 12 of FOIA makes such a conclusion inescapable."
(paragraph 25)

35. With this in mind, the Commissioner considers that for the council to answer just the second question from the complainant would be

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<http://www.osspsc.gov.uk/judgmentfiles/j3682/GIA%200786%202012-00.doc>

extremely burdensome in the cost to the council and therefore is satisfied that the entire request would be manifestly unreasonable and that regulation 12(4)(b) is engaged.

Public interest test

36. Regulation 12(4)(b) is a qualified exemption and is therefore subject to the public interest test at regulation 12(1)(b) which states that information can only be withheld if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the information

37. The Commissioner accepts that there is a strong interest in disclosure of environmental information in general as it promotes transparency and accountability for the decisions taken by public authorities and public expenditure.
38. The complainants reasons for obtaining the information requested is due to the fact that the council are repairing the wall and want the complainants to pay towards the repair. The council consider that the complainants' trees roots caused the damage, whereas the complainants believe that the council have not maintained the wall, and that is the reason for it needing repairs.

Public interest arguments in favour of maintaining the exemption

39. The council employs four part time members of staff, and state that compliance with the request would place an unreasonable burden on its resources in time and costs, and this would in turn divert the council from carrying out its other responsibilities. Therefore compliance could be achieved, but at the expense of work which is also of significant importance to the delivery of other services to the public.

Balance of the public interest

40. The Commissioner is mindful of the presumption in favour of disclosure in regulation 12(2) and the concurrent duty to interpret the exceptions restrictively. Nevertheless, having regard to paragraphs 28 and 29 above, the time which it would take the council to respond to the requests is far in excess of what would be permitted if the information were not environmental and the requests were being processed under the FOIA.
41. The Commissioner considers that there is a strong public interest in the council being able to carry out its core functions without the disruption that would be caused by complying with requests that would impose a

significant burden in terms of both time and resources. The Commissioner is of the view that there is very strong public interest in public authorities being able to carry out their wider obligations fully and effectively, so that the service they have responsibilities for providing are delivered. The Commissioner is also mindful of the fact that the public authority's ability to comply with requests submitted by other requesters would be undermined if it had to routinely deal with requests demanding significant resources. This is particularly the case given the small size of the council and the limited resources at its disposal.

42. There are important reasons why the exception at regulation 12(4)(b) exists. Both the FOIA and the EIR give the public unprecedented rights to access recorded information held by public authorities. However, it was not the intent of the legislation that compliance with requests would impede disproportionately and unfairly on the many other important duties that the public authorities have to carry out, often with limited resources in place.
43. Having regard to the extent of time which processing the requests would take, along with the likely resulting effect on the council's other functions, the Commissioner is of the view that, on balance, the public interest lies in favour of maintaining the exemption.
44. Therefore the Commissioner considers that the council has correctly applied regulation 12(4)(b) in this case.

Regulation 9(1) – advice and assistance

45. Regulation 9(1) of the EIR states:

"A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants."

46. The Commissioner in this case has reviewed the advice and assistance given by the council and has found the following to be relevant.
47. In the refusal letter to the complainants the council did advise the complainants that they could make an appointment to come in and inspect the signed hard copies of the council and committee minutes. This never occurred.
48. With regards the electronic minutes that the council advised they could supply to the complainants, from reviewing the council's correspondence with the Commissioner, it seems that confusion has been caused by what the council said it could supply and what it did supply. The council did not advise the complainants that in order to supply this information it would need to run a "key word" search using the Windows search

facility on the council's computer and would only use the key word "cemetery wall". This may be the reason why, to the complainants, there seems to be an incomplete or missing amount of meeting minutes and information. The Commissioner considers the council, in regards to the electronically held information, could have better advised the complainants how it would go about collating the information to enable the complainants to make an appropriate refined request.

49. The Commissioner is mindful of the fact that the council's obligation under regulation 9(1) only extends to what is reasonable. His view is that it would have been reasonable for the council to have offered more insight to the complainants on how it would collate the electronically held information as this would have allowed the complainants to have provided input to assist with a refined search. The Commissioner also notes that the council have stated that more clarity and assistance could be provided to the requesters. The Commissioner therefore finds the council has failed to comply with regulation 9(1) of the EIR.

Regulation 5(2) – Duty to make environmental information available on request

50. Regulation 5(2) of the EIR states:

"Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of request."

51. The complainants submitted their request on 5 October 2012. The council did not provide its response to the complainants until 8 January 2013. Therefore the Commissioner finds that the council breached regulation 5(2) of the EIR, in that a response was not provided to the complainant within 20 working days.

Right of appeal

52. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

53. 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.
54. 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

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