

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 17 October 2013

Public Authority: London Borough of Hackney

Address: Town Hall
Mare Street
London
E8 1EA

Decision (including any steps ordered)

1. The complainant requested information relating to the planned building of an academy school in Hackney. London Borough of Hackney (the Council) refused to disclose this information on the basis that the complainant's requests were manifestly unreasonable and so the exception provided by regulation 12(4)(b) applied.
2. The Commissioner's decision is that the requests were not manifestly unreasonable and so the exception provided by regulation 12(4)(b) was not engaged.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the complainant's requests that does not rely on regulation 12(4)(b).
4. 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 the Act and may be dealt with as a contempt of court.

Request and response

5. On 12 February 2013, the complainant wrote to LBH and requested information in the following terms:

"Can I make a request to cover [in relation to the planned building of an academy school in Hackney]

- All submitted plans/outline plans and proposals relating to the above development and replies from LBH*
- All recorded notes of meetings between the key stakeholders*
- All correspondence between the Council and other key stakeholders."*

6. The Council responded on 19 February 2013. It stated that some information was already available and cited the exemptions provided by sections 22 (information intended for future publication) and 43 (commercial interests) of the Freedom of Information Act (FOIA).

7. The complainant requested further information on 20 February 2013:

"...the full details of all the feasibility studies commissioned"

"[in relation to] the decision making process: which committees were set up to deal with this, who sat on the committees, when they met and what was discussed."

8. The Council responded to this on 1 March 2013 and stated that *"the response provided to you on 19 February 2013 remains valid"*.
9. The complainant responded on 4 March 2013 and raised issues about the responses he had received to his information requests. The Council interpreted this as a request for internal review and responded with the outcome of the review on 9 April 2013. The Council provided the complainant with a breakdown of the information held but upheld the refusal to disclose this information under section 43(2) of the FOIA. No mention of section 22 was made at this stage.

Scope of the case

10. The complainant contacted the Commissioner initially on 22 February 2013 to complain about the refusal of his 12 February 2013 requests. On 3 June 2013, following the completion of the internal review, the complainant contacted the ICO again and confirmed that he wished the scope of this case to cover all his requests of 12 and 20 February 2013.

11. The Commissioner contacted the Council initially on 5 June 2013 and advised it that it appeared very likely that the information requested would be, for the reasons given in the analysis below, environmental according to the definition given in regulation 2 of the EIR and so the request should have been handled under the EIR rather than the FOIA. Given this the Council was recommended to issue a fresh response to the complainant under the EIR. Alternatively, if the Council did not agree that this was necessary, it was asked to respond explaining why it did not agree that the information in question was environmental.
12. The Council provided a fresh response to the complainant on 25 June 2013. This stated that the request had been reconsidered under the EIR, but that the information requested would not be disclosed as the exception provided by regulation 12(5)(e) (adverse effect to the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest) was believed to apply.
13. Following this, the complainant confirmed that he wished the Commissioner to investigate whether regulation 12(5)(e) had been cited correctly. As part of this investigation, the Commissioner contacted the Council and asked it to supply his office with a copy of the withheld information.
14. At this stage the Council raised the issue of the volume of information that fell within the scope of the requests and indicated that it believed that the exception provided by regulation 12(4)(b) (manifestly unreasonable request) may apply due to the time that it would be necessary to spend on dealing with the requests. Following the mention of regulation 12(4)(b), the Commissioner contacted the Council again and stated that, if its position had now changed again to being that regulation 12(4)(b) applied, it would be necessary for it to write to the complainant advising him of this and to respond to the ICO with a detailed explanation of its reasoning for the citing of this exception. In view of the time that it had taken to get to this point, the Council was asked to respond within a short deadline.
15. The Council failed to respond within this deadline and so the Commissioner issued an information notice under section 51 of the FOIA. This obliged the Council to write to the complainant specifying that, if this was now its position, regulation 12(4)(b) was believed to apply, and to write to the ICO with a full explanation of its reasoning for the citing of that exception.
16. In line with the information notice the Council wrote to the complainant on 16 August 2013 and advised him that the Council now relied on regulation 12(4)(b) on account of the time and cost of complying with

these requests, and withdrawing reliance on regulation 12(5)(e). The complainant was also advised at that stage of where some information falling within the scope of his requests was now available to him. Regrettably, it required further chasing of the Council by the Commissioner before a response was provided to his office giving an explanation for the citing of regulation 12(4)(b).

17. The analysis below covers the citing of regulation 12(4)(b). The Commissioner comments further on the poor handling of these requests by the Council and its lack of engagement with his office in the "Other matters" section below.

Reasons for decision

Regulation 2

18. The first question for the Commissioner to address here is whether the information is environmental in accordance with the definition given in regulation 2(1) of the EIR, which defines environmental information as follows:

"any information in written, visual, aural, electronic or any other material form on –

(a) the state of the environment, such as air and atmosphere, water, soil, land and landscape and natural sites including wetlands...

(b) factors, such as substances, energy, noise, radiation or waste, emissions...affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...".

19. The view of the Commissioner is that this information is 'on' a plan that falls within the scope of regulation 2(1)(c). As the wording of the request suggests, the information requested by the complainant concerns planning and construction. Information relating to the planning process will generally be considered environmental due to the impact that this process will inevitably have on several of the elements and factors referred to in regulations 2(1)(a) and (b). The information in

question is, therefore, environmental under regulation 2(1)(c) and it is correct to consider this request under the EIR.

Regulation 12(4)(b)

20. This regulation provides that a public authority is not obliged to comply with a request that is manifestly unreasonable. The Council cited this exception on the basis of the time and cost that it would be necessary to spend on this request. Its representations to the ICO were based around the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the fees regulations). These regulations apply in relation to section 12 of the FOIA and are not directly relevant to the EIR - the cost limit and hourly rate set by the fees regulations do not apply in relation to environmental information. It is also the case that time and cost are not the only means by which a request may be manifestly unreasonable. However, the Commissioner accepts that the fees regulations provide a useful starting point where the reason for citing regulation 12(4)(b) is the time and cost of a request.
21. The Commissioner will also take the following factors into account when considering this exception:
 - Proportionality of the burden on the public authority's workload, taking into consideration the size of the public authority;
 - The individual circumstances of the case;
 - Presumption in favour of disclosure under regulation 12(2);
 - The requirement to interpret the exceptions restrictively.
22. If the conclusion is that regulation 12(4)(b) is engaged, it is also necessary to go on to consider the balance of the public interest in accordance with regulation 12(1)(b). This means that if the public interest in the maintenance of the exception does not outweigh the public interest in disclosure, the information must be disclosed.
23. The Council set out to the Commissioner what information it held falling within the scope of the request and the tasks that it would be necessary to undertake in order to supply this to the complainant. Its overall estimate of the time it would take to comply with the request was 27 hours. Using the £25 per hour rate set in the fees regulations, this would give a total cost of £675, with the limit prescribed by the fees regulations for non-central government public authorities set at £450.
24. The Commissioner has considered the breakdown given by the Council in its cost estimate. Having done so, his view is that the Council has over-estimated the time that it would be necessary to spend on these

requests. First, he has noted that the Council has mentioned on several occasions in its estimate the time that would be spent on providing a hard copy of the information to the complainant by post. Secondly, it has included as part of its estimate the time that would be spent on reviewing the information with a view to it possibly being subject to other exceptions.

25. On the issue of supplying the information to the complainant in hard copy by post, the Commissioner notes that the request was made by email. He also notes that the Council has confirmed that the majority of the information in question is held electronically and it refers to the scanning of information that is held in hard copy.
26. Had it been the case that the complainant expressed a preference when making his requests for the information to be supplied in hard copy, the Commissioner would agree that it would be reasonable for the Council to take the costs of doing so into account. In this case, however, in the absence of the complainant having expressed any preference as to format, there was no reason for the Council to assume that it was necessary to provide the information in hard copy.
27. The Council did state during its correspondence with the ICO that it would be difficult to send the information by email due to its size. The Commissioner recognises this, but is of the view that sending the information by post was not the only alternative. Instead, the information could have been sent as attachments to a number of emails, or could have been uploaded to a secure website for the complainant to access. In any event, it would not be fair to the complainant to characterise his requests as manifestly unreasonable as a result of limitations to the Council's IT infrastructure.
28. The Council also included actual costs of printing and posting information in its estimate. These would not be relevant factors under the fees regulations – under the FOIA a public authority can require a requester to cover the costs of processes such as copying and postage, but cannot refuse a request due to these costs – and, as covered above, it was not necessary for the Council to supply the information by post in any event.
29. Overall, the view of the Commissioner is that any problems that did exist with the practicalities of the provision of the information to the complainant could have been resolved by dialogue between the Council and complainant. For these reasons, the Commissioner does not accept that issues relating to the provision of the information in hard copy through the post are valid grounds for finding the complainant's requests to be manifestly unreasonable.

30. Moving to the second point referred to in paragraph 24, the Council has taken into account time spent on redacting exempt content prior to disclosing the information. This is not a factor that the fees regulations allow to be taken into account; section 12 of the FOIA cannot be cited on the basis of time that would be spent redacting exempt information.
31. For the purposes of regulation 12(4)(b) of the EIR, there are limited circumstances in which it may be reasonable to argue that a request is manifestly unreasonable due to time that would be spent on redaction. This could be where, for example, information has been requested that has already been clearly established as exempt, the requester is aware of that and there is no realistic possibility of a different outcome from any further request for the same information. In general, however, the Commissioner's view is that it is not fair to characterise a request as manifestly unreasonable partly due to some of the information falling within its scope possibly being covered by another exception.
32. This is not a case where the complainant has unreasonably requested information in relation to which it has been clearly established another exception applies. It would not be reasonable to expect the complainant to take into account that some of the information may be exempt and the Commissioner does not accept that time spent on redaction is a valid factor in favour of the complainant's requests being manifestly unreasonable.
33. For the reasons above, the Commissioner has subtracted from the Council's estimate the time sent on supplying the information by post and on identifying and redacting exempt information. Having done so, his view is that 27 hours is a significant over-estimate.
34. The position of the Commissioner is not that the request would only take up minimal staff time. He accepts that the request covers a significant volume of information and that some of the tasks specified by the Council in its estimate are reasonable to take into account. Taking those tasks into account, the supply of this information would require staff to give over some time to the request. His view is, however, that it would not take the 27 hours estimated by the Council; instead his view is that it would be unlikely to exceed the 18 hour limit set in the fees regulations.
35. The next step is to take into account the factors mentioned at paragraph 21 above. On the issue of the burden on the public authority's workload, the Commissioner has already covered that he does not believe that the request would require time in excess of the limit set in the fees regulations. Using the limit set in the fees regulations as the marker for what would be considered a disproportionate burden, the view of the Commissioner is that the complainant's requests would not be

manifestly unreasonable on the basis of the work they would require by the Council.

36. As to the individual circumstances of this case, the key point here is what benefit may result through compliance with the request. That a new school is to be constructed within the area covered by the Council is matter of legitimate public concern and the disclosure of the information requested would contribute to public knowledge and understanding about this project. This weighs against the requests being characterised as manifestly unreasonable.
37. The presumption in favour of disclosure and the requirement to interpret the exceptions restrictively are self-explanatory. Any time that an exception from the EIR is cited, the arguments in favour of the citing of that exception must be sufficiently compelling to outweigh these factors. For the reasons stated, the Commissioner finds the case advanced by the Council here less than compelling.
38. The Commissioner has found that the time and cost of dealing with the request would be likely to be significantly less than the Council estimated and that, particularly given that there would be a clear value to disclosure of the requested information, it would not impose a disproportionate burden upon the Council. When adding the presumption in favour of disclosure and the requirement to interpret the exceptions restrictively, the conclusion of the Commissioner is that the complainant's requests were not manifestly unreasonable and so the exception provided by regulation 12(4)(b) is not engaged. As this conclusion has been reached, it has not been necessary to go on to consider the balance of the public interest.

Other matters

39. As covered under the "Scope of the case" heading above, it was only after the intervention of the Commissioner that the Council reached a settled position on the legislation under which this request should have been handled and under which exception it was being refused. The Council should ensure that it is aware of the requirements of the EIR and of the necessity for a request for environmental information to be handled under the EIR. In particular, where a request is made that relates to planning and construction, the Council should bear in mind that such information will very often be environmental.
40. It should also not be necessary for the Council to go through a process of citing several exemptions and exceptions before it alights on its preferred one. In this case it became apparent at the point of the Commissioner asking to be supplied with a copy of the withheld

information that the Council had not done a thorough job of identifying what relevant information was held prior to citing regulation 12(5)(e). The Council should ensure in future that its first step upon receiving an information request is to identify all relevant information it holds. Only then should it consider to what extent this information may be covered by exemptions or exceptions.

41. The problems with the Council's handling of the complainant's requests were compounded by its poor engagement with the ICO. Deadlines for responding to written correspondence were missed, necessitating the issuing of an information notice. The Council also proved near impossible to reach by telephone, with a consistent failure to respond to voicemails. These issues made this case difficult to progress.
42. The issues with engagement experienced in this case are not isolated. Instead, they are an extension of a pattern set in previous cases involving the Council. The ICO will be contacting the Council separately to raise these engagement issues in order to ensure that they are resolved.
43. At paragraph 3 above the Council is required to issue a fresh response to the complainant's requests. In view of the manner in which the complainant has been disadvantaged so far by the indecision of the Council on which legislation the request should have been considered under and on which exception it was relying, the Commissioner would urge the Council to now disclose to the complainant the information requested to the maximum possible extent.

Right of appeal

44. 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

45. 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.
46. 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

Jon Manners
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