

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 28 April 2014

Public Authority: Hampshire County Council
Address: The Castle
Winchester
Hampshire
SO23 8UJ

Decision (including any steps ordered)

1. The complainant has made two information requests to Hampshire County Council ("the Council"). He seeks information relating to the development of a Sainsbury's supermarket in Bishop's Waltham, Hampshire. The Council refused the complainant's request in reliance of regulation 12(4)(b) of the EIR on the grounds that the request is manifestly unreasonable.
2. The Commissioner's decision is that the Council has failed to demonstrate that the request is manifestly unreasonable and therefore the Council has contravened regulation 12(4)(b). He has also decided that the Council has contravened regulation 9(1) for failing to provide the complainant with appropriate advice and assistance.
3. The Commissioner requires the Council to revisit the complainant's request and to offer him appropriate advice and assistance in accordance with regulation 9. Having done this the Council should the issue a new response which does not rely on regulation 12(4)(b).
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. The complainant made two requests for information:

Request 1: On 19 December 2012 the complainant made the following request for information:

"Please email me a copy of all emails, letters, notes of telephone calls, dates of meetings held and their records to and from HCC Highways and Rights of Way depts. To and from Sainsbury's and their agents relating to Sainsbury's Supermarket, Station Road, Bishops Waltham planning application from the decision 7.4.2011 to the present time.

This includes the text of the S278 Agreement for which the only master layout drawing need be supplied with no detailed drawings or bills of materials, at least at this stage."

6. The Council responded to the complainant's request on 30 January 2013 under its reference E5647. It refused to supply the information he seeks in reliance of regulation 12(4)(b) of the EIR on the grounds that the request was manifestly unreasonable. Notwithstanding its application of regulation 12(5)(b), the Council supplied the complainant with a copy of the Section 278 Deed of Agreement for the proposed development of a new supermarket.

7. **Request 2:** On 15 April 2013 the complainant made his second request for information:

"Please email me a copy of all emails, drawings, letters notes of telephone calls, dates of meetings held and their records to and from HCC Highways and Rights of Way depts. To and from Sainsbury's and their agents relating to the Sainsbury's Supermarket, Station Road, Bishops Waltham planning decision from 24.11.11 date of the S106 agreement to the present time.

For "drawings" only a master layout drawing need be supplied with no detailed drawings or bills of materials, at least at this stage"

8. The Council responded to the second request on 10 June 2013 by issuing a refusal notice. The Council refused to supply the information in reliance of the exception provided by regulation 12(4)(b) of the EIR.
9. On 10 June the complainant sent the Council an email in which he complained about its maladministration in respect of the rejection of his information request. The complainant's email laid out his reasons for not accepting the Council's estimate, which was given to illustrate the time it envisaged would be needed to locate, retrieve and extract information relevant to the complainant's request.
10. The Council treated the complainant's email of 10 June as a request for an internal review of its handling of his request.

11. On 10 July the Council sent the complainant the results of its internal review. The Council confirmed its reliance on regulation 12(4)(b) but acknowledged that it had exceeded the twenty working days allowed by the EIR for complying with requests for environmental information.
12. The Council pointed out that it had refused the complainant's requests in reliance of regulation 12(4)(b) only. It advised the complainant that, on further consideration of this matter, it believed regulations 13 and 12(5)(b) would also be relevant to the request, should regulation 12(4)(b) not be applicable. The Council issued a new Notice of Determination to reflect its position after its internal review.

Scope of the case

13. The complainant contacted the Commissioner on 22 September 2013 to complain about the way his requests for information had been handled. The complainant provided several reasons why he considered that the Council was wrong to determine his requests were manifestly unreasonable and to apply the exception provided by regulation 12(4)(b) of the EIR.
14. The Commissioner's investigation of this case was focussed on whether the Council was correct to apply regulation 12(4)(b) of the EIR to the requests.

Reasons for decision

Is the requested information 'environmental information'?

15. Regulation 2(1) of the EIR defines what constitutes 'environmental information'. Subsections (a) to (c) state –

'(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges, and other releases into the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred

to in (a) and (b) as well as measures or activities designed to protect those elements.'

16. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
17. In the Commissioner's opinion the information sought by the complainant is likely to constitute environmental information: the information relates to the landscape – the development of a supermarket, and administrative measures – including policies, legislation plans and programmes concerning the development of the supermarket. The Commissioner therefore finds that the information sought by the complainant falls to be considered under the EIR.

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.
19. There is no definition of 'manifestly unreasonable' under the EIR. The Commissioner considers that 'manifestly' implies that the request should be 'obviously' or 'clearly' unreasonable.
20. The Council has explained a little of the background to the complainant's requests: The Council's Environment Department and Legal Services Departments have been involved in making arrangements for the developer of the supermarket to carry out works on the highway. This work involved a stopping up order for part of the highway, requiring input from the Council's Countryside Service. The Council received objections to the stopping up order and this resulted in a Secretary of State public enquiry. The Council advised the Commissioner that the matter was not straightforward and the volume and complexity of the information it holds reflects this.
21. The Council has explained to the Commissioner that it is likely to hold information across various departments which were involved in the supermarket development. The departments it identified are: Strategic Transport (part of Economy, Transport and Environment), Legal Services and Rights of Way (part of Culture, Communities and Business Services).
22. The Council has confirmed to the Commissioner that it has not carried out a process whereby the information sought by the complainant has been located, retrieved and extracted.

23. The Council's position in respect of its application of regulation 12(4)(b) to the requests is based on its estimate that it holds recorded information consisting of 1000 records: These records are likely to include emails and electronic and paper files held across the identified departments.
24. Based on the estimates extent and location of the recorded information, the Council has provided the Commissioner with the following estimates of the time needed to undertake various activities for it to comply with the requests:
 - (1) The Council considers that there are approximately 900 emails which may be relevant to the requests. It estimates it would need to spend an average of one minute per email to consider each email. This equates to 15 hours of work.
 - (2) The Council states it holds electronic records containing 120 items. To extract that data would require 2 hours of work.
 - (3) The paper-based files held by the Council would require 2 hours to review.
 - (4) It would take 2 hours to retrieve relevant information from the various departments within the Council.
25. The number of hours of work the Council estimates it needs to comply with the requests is therefore 21 hours.
26. Unlike the FOIA, the EIR do not have a provision where a request can be refused if the estimated costs of compliance would exceed a particular cost limit.
27. However, the Commissioner considers that the cost provisions of section 12 of the FOIA offer a good benchmark against which to measure whether complying with a request for information would be unreasonable.
28. 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. The cost limit is set out in section 3(2) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations") and is currently set at £450.
29. The £450 limit must be calculated at the rate of £25 per hour. This effectively provides a time limit of 18 work hours. Additionally regulation 4(3) the Fees Regulations only allow for four activities which can be

considered in relation to complying with the requests. These activities are:

- Determining whether the public authority holds the information requested;
 - Locating the information or documents containing the information;
 - Retrieving such information or documents; and
 - Extracting the information from a document or other information source.
30. The cost of redacting relevant but exempt information may not be taken into consideration for the purpose of calculating the appropriate limit.
31. The Commissioner accepts that the Council is likely to hold relevant information across several departments and he has no reason to doubt its estimate that the Council holds 900 emails and electronic and paper-based files.
32. However the Commissioner considers that the Council has failed to properly explain how it arrived at its estimate of the number of emails and electronic and paper-based files.
33. Further, the Council has failed to explain to the Commissioner why it needs to 'consider' the contents of the estimated 900 emails or 'review' the contents of the paper-based files in line with the four activities allowed by the Fees Regulations.
34. Consequently, based on the evidence available at this time, the Commissioner has decided that the Council has failed to demonstrate that complying with the complainant's requests would exceed the appropriate limit and that it would be manifestly unreasonable to comply with the complainant's requests. Therefore, the Commissioner has determined that the Council has not engaged regulation 12(4)(b).
35. In addition to considering whether complying with a request would be manifestly unreasonable, the application of regulation 12(4)(b) also requires the public authority to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
36. The Commissioner notes that the Council has considered the public interest in respect of the information sought by the complainant. However, due to the Council's failure to demonstrate that complying with the complainant's requests would be manifestly unreasonable, the Commissioner has not gone on to consider the public interest further.

Regulation 9 – Advice and assistance

37. Regulation 9 of the EIR states –

“(1) 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.

(2) Where a public authority decides that an applicant has formulated a request in too general a manner, it shall—

(a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and

(b) assist the applicant in providing those particulars.

38. The Council advised the Commissioner of its belief that the complainant's requests were clear and required no further clarification. Taking into account of what the Council believes are the complainant's concerns, the Council determined that it is difficult to see how his requests could easily be refined in such a way to have a lesser impact on it department.

39. The Council understands that the root concern of the complainant is the length of time taken to put in place the agreement made between the developer and the Council under section 278 of the Highways Act for works to take place on the highway.

40. The Council also noted that the complainant has offered to attend its offices to view the files in person. The Council felt that this would not remove the need to locate, retrieve and print out the relevant details from the files before he could view them.

41. The Commissioner has considered the Council's position in respect of the advice and assistance it may or may not be able to give the complainant. He considers that the Council has taken a limited view of the requirements of regulation 9 and has solely focussed on regulation 9(2) in terms of whether the Council believed the complainant could refine his requests.

42. The Commissioner would draw the Council's attention to the requirements of regulation 9(1) – above. He considers that this provision is not merely restricted to assisting a person to refine a request: It also suggests that, where the circumstances are appropriate, the door should be open to allow a dialogue between the parties. Such a dialogue could offer the opportunity to identify specific pieces of

information which could be disclosed in order to meet the requestor's information needs/purpose.

43. The Council may be entirely correct in identifying why the complainant seeks the information outlined in his requests. However, it cannot be sure of its assumptions without there being any attempt to offer the advice and assistance required by regulation 9 of the EIR.
44. In the absence of any evidence suggesting that the Council provided appropriate advice and assistance to the complainant, the Commissioner has determined that the Council has contravened regulation 9 of the EIR.

Regulations 12(5)(b), 12(5)(e) and 13

45. The Commission notes that the Council has solely relied on regulation 12(4)(b) in respect of the complainant's requests and has not applied these exceptions other than on a hypothetical basis.
46. The Commissioner makes no comment on whether the use of these exceptions would be appropriate. He would, however, advise the Council that it would not be able to properly rely on the exceptions without first examining the requested information. To do this, the Council would need to undertake the activities listed at paragraph 29 above.

Right of appeal

16. 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@hmcts.gsi.gov.uk

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

17. 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.
18. 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

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