

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 13 September 2016

Public Authority: Sheffield City Council

Address: Town Hall
Sheffield
South Yorkshire
S1 2HH

Decision (including any steps ordered)

1. The complainant requested information relating to Sheffield City Council's (the council) interactions with a named developer, and a quote for works, regarding an ongoing issue with a narrowed road.
2. The council refused this request on the grounds it was manifestly unreasonable under regulation 12(4)(b) of the EIR. However, the Commissioner is not persuaded that the exception is engaged by the request.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation:
 - Issue a fresh response 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 7 June 2015, the complainant wrote to the council's Chief Executive and requested information in the following terms:

"...we are writing to make a formal request under the Freedom of Information Act for the following documents in relation to the above subject matter [the narrowing of a road]:

1 A copy of all correspondence between any member of Council staff (including yourself) and either [named individuals] or their company, [named business]. This should include but not be limited to the exchange of correspondence that you referred to at our last meeting on 29th September 2014.

2 A copy of the quote from Amey or other contractor confirming the likely cost of the works to widen the lane.

3 A copy of any minutes of any meeting that any member of the Council staff (including yourself) has had with [named individual]. If no minutes have been taken please provide documents evidencing that meetings have taken place e.g. diary records/extracts; and

4 A copy of all internal emails and other documents held by any member of Council staff."

6. The council responded on 24 June 2015 and requested clarification of the request. It requested a timescale for the information requested and details of the specific departments or council staff the complainant believed held information falling within the scope of the request.

7. The complainant responded on 26 June 2015 and confirmed the timescale was 1 June 2014 to the present date. He also confirmed the following departments should be included in the request:

- "1. Planning*
- 2. Legal*
- 3. Highways*
- 4. Amey (the council's contractor)*
- 5. Mr Mothersole"*

8. The council wrote to the complainant on 27 July 2015 to issue its refusal notice. It refused to comply with the clarified request on the basis of section 14 of the Freedom of Information Act 2000 (FOIA).

9. On 17 August 2015, the complainant requested an internal review setting out their arguments against the decision.

10. The council provided the outcome of its internal review in a letter dated 8 September 2015. Email correspondence between the council and complainant after this date, however, shows that the internal review was not issued until after 5 October 2016. The council considered whether the request should have been handled under the Freedom of Information Act 2000 (FOIA) or EIR. The council stated that as the information requested related to planning issues, some of the requested

information may fall to be considered under the EIR. The council confirmed that should the EIR be the appropriate legislation, then regulation 12(4)(b) was engaged as the request was manifestly unreasonable on the basis of vexatiousness and cost burden. The council set out the public interest arguments in favour of disclosing the information and maintaining the exception and stated that it considered the balance of the public interest was against disclosure.

Scope of the case

11. The complainant contacted the Commissioner on 26 October 2015 to complain about the way his request for information had been handled.
12. During the course of the Commissioner's investigation, the council explained that it no longer wished to rely on the vexatious element of regulation 12(4)(b) and now wished to rely on regulation 12(4)(b) on the basis of the costs burden created by the requests.
13. The Commissioner considers the scope of the investigation to be whether the council was correct to refuse the complainant's request under regulation 12(4)(b) of the EIR.

Background of the case

14. The complainant and the council have been in correspondence regarding the narrowing of a lane following the erection of an extension by one of the lane's resident businesses.
15. The complainant (and other members of the public) had complained to the council as the narrowing of the lane has led to restricted access problems for emergency and refuse vehicles.

Appropriate legislation

16. Regulation 2 of the EIR provides the definition of environmental information for the purposes of the Regulations. It defines environmental information as:

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

- (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, 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, 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;*
 - (d) *reports on the implementation of environmental legislation;*
 - (e) *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
 - (f) *the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);"*
17. As the request is for recorded information relating to the proposed widening of the named street, as stated in the request ("we are writing to make a formal request under the Freedom of Information Act for the following documents in relation to the above subject matter"), the Commissioner considers that this request falls squarely within the EIR.

Reasons for decision

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. The EIR do not provide a definition of "manifestly unreasonable". The Commissioner considers that in order for a request to be considered "manifestly unreasonable" there must be a clear and obvious unreasonable element to the request.
20. A request can be manifestly unreasonable for two reasons: where the request is vexatious and where the public authority would incur unreasonable costs or an unreasonable diversion of resources. The

council has sought to rely on the exception on the grounds of the costs of compliance.

21. There is no appropriate cost limit under the EIR and the application of the exception should be based on a consideration of the proportionality of the cost with respect to the request and the wider value in the requested information being made available.
22. The Commissioner considers the appropriate limit set for requests falling under the Freedom of Information Act to be a useful starting point when determining whether a request is manifestly unreasonable under the EIR.
23. The appropriate limit is defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations) as £600 for Central Government and £450 for all other public authorities. In this case, therefore, the appropriate limit would be £450.
24. The Regulations allow a public authority to include the following activities at a flat rate of £25 per hour of staff time:
 - Determining whether information is held;
 - Locating the information, or a document which may contain the information;
 - Retrieving the information, or a document which may contain the information; and
 - Extracting the information from a document containing it.
25. However, while the Commissioner will take the appropriate limit into account, it is not determinative for the purposes of the exception. The Commissioner must make her decision based on whether the cost of complying with the request is 'clearly' or 'obviously' disproportionate to the public interest in disclosure.

The council's position

26. The council's initial submission to the Commissioner focussed on the issue of vexatiousness but did provide a brief overview of the cost element of the request.
27. The council explained that it considered providing a detailed estimate to be a difficult exercise. This is because it would require a full review of both electronic and hard copy records held throughout the council's Chief Executive office, legal, highways and planning departments. It also

initially explained that the number of staff involved would be in excess of 50 individuals, but later amended its position.

28. The council explained that a search and review of records would include email, personal drives, corporate systems, hardcopy files and diaries. It considered this search would likely take in excess of one hour per individual, on average, to provide a comprehensive response to the request. The council explained that not all of the information requested will be indexed or easily retrievable.
29. The council explained to the Commissioner that it considered the overarching element of the request meant that it would be difficult to provide a concrete estimate and the very action of producing such an estimate could lead to the collation of the information held, which would go against the application of the manifestly unreasonable exception.
30. The council also explained that prior to applying regulation 12(4)(b), the information held by three individuals in the Chief Executive's office was collated. The council set out that this exercise took one hour to collate all information held by the three individuals.
31. The council explained that the Chief Executive's office would have had relatively minimal contact with the named individuals and business and therefore it believed that the time taken by other departments would be higher.
32. As the council had confirmed it wished to rely on regulation 12(4)(b) solely on the basis of the costs burden, the Commissioner requested a more detailed breakdown of the estimated costs involved in complying with the request.
33. The council provided the Commissioner with a second submission. It set out the staff numbers of the council departments named in the requested clarification. The council confirmed within these departments, not including sub-contractors and the Chief Executive's office, the number of staff totalled 1053. The number of staff directly employed by the council in these departments was 312.
34. The council again explained that to provide a conclusive response to the request, a full review of both electronic and hard copy record held for each staff member would need to be undertaken.
35. The council referred again to the need to search and review any records held including emails, personal drives, corporate systems, hardcopy files and diaries. The council maintained its position that this would take an average of 1 hour per staff member as not all information held would be indexed or easily retrievable.

36. The council confirmed that it still considered the estimate of 1 hour per staff member to be reasonable for the collation of information including the identification of appropriate officers, communication, search of electronic and paper records and filtering of relevant information if held.
37. The council explained that searching for terms such as [named individuals' surname] or [first word of business name] would be likely to provide a wide list of irrelevant information.
38. The council then set out that using the directly employed staff member number and the estimate of 1 hour per staff member a simple calculation of $312 \times 1 \text{ hour} = 312 \text{ hours}$ demonstrates that the time taken to comply with the request would be excessive and disproportionate and therefore manifestly unreasonable.
39. The Commissioner wrote to the council again to request further details regarding the council's estimate. She provided the council with a link to her guidance on applying an exception on the basis of cost. She also pointed out that a public authority should be able to produce a "*reasonable estimate*" and that the Information Tribunal had defined this as "*sensible, realistic and supported by cogent evidence*".
40. The Commissioner brought the council's attention to her specific advice that a sensible and realistic estimate should be "*based on the specific circumstances of the case. In other words, it should not be based on general assumptions, for example, that all records would need to be searched in order to obtain the requested information when it is likely that staff in the relevant department would know where the requested information is stored*".
41. The Commissioner also drew the council's attention to the parts of the guidance which set out the level of detail she would expect a public authority to provide in a submission to her.
42. The Commissioner made it clear to the council that this was its final chance to provide its arguments before she proceeded to decision notice.
43. The Commissioner asked the council to confirm whether it was the council's position that all 312 employees included in the calculation provided in the council's second submission would hold information falling within the scope of the request.
44. The council explained that it was not in a position to state whether all 312 employees would hold information in relation to the specific terms of the request. The council considered that it would have to begin collating information to complete such an activity. The council explained that it believed the Commissioner would want completeness in terms of

the searches completed and the only way to provide this would be for "each and every" staff member to search for information held in systems and hard copy format.

45. The council again stated that the search terms required would be likely to bring forward a wide range of irrelevant information which would take staff time to filter.
46. The council also confirmed that the search would likely have to be wider than the 312 directly employed staff members quoted in its previous submission and the council would have to ask all 1053 staff across the requested departments whether information was held.
47. The Commissioner asked the council to confirm what steps had been taken to confirm whether employees will hold information and provided an example of how this may be achieved (an all staff email requesting a response if information may be held).
48. The council explained that it considered asking staff whether they held information would be disproportionate in terms of the number of staff members and the searches required. The council again explained that it believed all staff would need to complete a systems and hard copy search.
49. The Commissioner asked the council to confirm whether a sampling exercise further to the collation of information held by the Chief Executive's office had been performed and whether this sampling exercise had provided the council with the estimate of 1 hour per staff member.
50. The council confirmed that no sampling exercise had been performed outside of the previous attempt to collate information in the Chief Executive's office. The council maintained that the 1 hour estimate per staff member was reasonable as although the Chief Executive's office took 1 hour to search three people's records, the council was confident other departments would take longer as they were likely to be less organised and would require a more thorough search.
51. The Commissioner sought clarification of the council's statement that "corporate systems, hard copy files and diaries" would need to be searched. She asked the council to confirm whether the corporate systems were available to all staff members and, if so, how many staff members would need to search each system. The Commissioner also asked the council to confirm how many staff members would be required to search departmental hard copies and diaries.
52. The council explained to the Commissioner that it did not hold information to the level requested to answer the Commissioner's

questions. However, it did explain that the council provides some grace to staff regarding managing their work, including diaries, in order that the work systems in place are user friendly and suit the individual staff member. The council explained that staff may use electronic and paper diaries and therefore both would need to be searched.

53. The council also explained that shared corporate systems, where more than 1 staff member would access the system, had been taken into consideration, however, given the overarching nature of the request, the council considered that all information whether shared or local should be checked to provide a robust response to the request. The council maintained its 1 hour estimate per staff member and stated it considered this reasonable and "*more than realistic*" in the circumstances.
54. As outlined at paragraph 21, the Commissioner set out to the council that whilst there is no cost limit set for the EIR, the 'appropriate limit' set for the FOIA can provide a useful startingpoint when deciding if complying with a request would incur an unreasonable cost.
55. The Commissioner asked the council, with reference to the four activities listed at paragraph 24, to provide a detailed estimate of the time taken and costs incurred to comply with the request. She specified that any calculations provided should include a description of the work that would need to be undertaken.
56. The council explained to the Commissioner that it considered this question had already been answered in its previous submission. The council did, however, provide a further explanation of why it had not performed an exercise to ascertain how many staff members may hold information falling within the scope of the request.
57. Using the example provided by the Commissioner at paragraph 47 of an 'all staff' email asking staff whether they believe they may hold information, the council stated that completing this activity would require sending an email to all 1,053 members of staff working in departments falling within the clarified request and those who work for contractors . The council explained that if it were to solely require a nil return, where applicable, it considered this activity would require at least 1 minute to send, read and record all such nil returns. The council set out that it considered the administration of this activity would take in excess of 17 hours to collate the responses alone, not taking into consideration the search itself by the staff concerned or collation of any held information by individual members of staff.

58. The Commissioner asked the council to confirm that the estimate provided had been based on the quickest method of gathering the requested information.
59. The council explained that it believed that it had already detailed the likely split of records requiring review and it again maintained the 1 hour estimate per staff member was a reasonable estimate. The council acknowledged that the time taken to search records may be lower than 1 hour for some staff, however, it believed that this estimate would be significantly exceeded for other members of staff dependent on how the records requiring a search are managed.

The Commissioner's assessment

60. In considering whether the council was correct in its application of regulation 12(4)(b), the Commissioner has taken note of previous decision notices, Tribunal decisions and her own guidance.
61. The explanations provided to the Commissioner in the council's three submissions have not persuaded the Commissioner that responding to the request would incur a manifestly unreasonable cost to the council.
62. The Commissioner does not accept the council's argument that all staff would need to search all records held within the stated departments.
63. The EIR does not require public authorities to conclusively determine whether they hold information. It is the Commissioner's view that a public authority would only be required to undertake the extensive searches described if it had a reasonable belief that information falling within the scope of the request was held by the staff member and/or the department.
64. The First Tier Tribunal set out in *Police Service of Northern Ireland and Information Commissioner [EA/2015/0192]* that searches do not need to be conclusive and every document does not need to be searched. The search undertaken should be appropriate to the information requested.
65. As the Commissioner does not accept that all 1,053 staff members would be required to conduct a search and the council has not provided the Commissioner with any estimate of how many staff members may hold information, she cannot accept the argument that the cost would be unreasonable due to the number of staff involved.
66. The view of the Commissioner is that the council has not provided a thorough explanation or breakdown to sufficiently justify its estimate of 1 hour per staff member despite the Commissioner's request for further details.

67. The absence of a detailed explanation or evidence means that it is difficult for the Commissioner to accept 1 hour per staff member as a reasonable estimate.
68. She recognises that the time spent by each staff member searching for information could be significantly lower but still fall to be considered as manifestly unreasonable due to the number of staff members who would be required to search for this information. However, in the absence of an evidence based estimate of how many staff members would be required to search, even if the Commissioner were to accept the 1 hour estimate per staff member, she cannot accept that the overall estimate is reasonable without also being satisfied that the council has adopted a proportionate approach when identifying those staff who may hold information relevant to the request. The Commissioner considers a proportionate approach may be for the council to seek to identify groups of staff who are likely to have had involvement in the issue of the narrowing of the lane, and limit more detailed searches on this basis.
69. The Commissioner also considers that there is a shortcoming in the search methods the council has suggested it would need to use to locate and extract relevant information. The council states that to search electronic documents for [named individuals' surname] or [first word of named business] would be likely to retrieve large amounts of irrelevant data that would require filtering. However, a public authority should consider whether more targeted search terms can reasonably be used to identify relevant information. For example, the Commissioner considers that the search terms could be refined to the full name or title and surname of the business owners and the full name of the business without compromising the results. Similarly, electronic correspondence exchanged with particular parties identified in the request may be located by searching for emails sent to and from the email addresses of those parties.
70. The Commissioner is not satisfied that the council has provided a convincing or persuasive reasonable estimate of the time and costs which would be incurred by complying with the request.
71. Whilst the council may argue that this issue could have been resolved by the Commissioner reverting to it for further explanation, by the point of this notice, the council had had three opportunities to explain its position and had, in some instances, refused to provide further details as it believed the question had been answered. Furthermore, the council is advised in every investigation that it has a single opportunity to make its case to the ICO; that approach had already been departed from in this case by the Commissioner showing leniency and reverting to the council twice following its initial submission. In the interests of resolving

cases within a reasonable timeframe, the Commissioner will not enter into protracted correspondence with public authorities.

72. Taking all of the above factors into account, the council's submissions have not persuaded the Commissioner that the request is manifestly unreasonable, and therefore her decision is that the exception under regulation 12(4)(b) is not engaged. Therefore the Commissioner has not gone on to consider the public interest arguments presented by the council.
73. The Commissioner requires the council to issue a fresh response to the request that does not rely on regulation 12(4)(b).

Right of appeal

74. 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@hmcts.gsi.gov.uk

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

75. 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.
76. 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
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