

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 October 2017

Public Authority: Warwickshire County Council
Address: Shire Hall
Barrack Street
Warwick
CV34 4SX

Decision (including any steps ordered)

1. The complainant made a request to Warwickshire County Council (the Council) for information on a proposed new road. The Council refused to comply with the request and cited regulation 12(4)(b) as the basis for refusing to comply.
2. The Commissioner's decision is that the Council has not provided persuasive arguments to engage regulation 12(4)(b). The Commissioner considers that in the specific circumstances of this case, regulation 12(4)(b) is not engaged.
3. The Commissioner requires the public authority 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 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 1 April 2016, the complainant wrote to the Council and requested information in the following terms:

“Under the provisions of the Section 5 of the Environmental Information Regulations, please provide all information that held by Warwickshire County Council, particularly the Highways Department, relating to such a potential new road development. This would include any reports, plans, cost-benefit analysis and possible route option information. This will include the documentation within which the claimed merits of such a road have been “identified”, and any evidence claimed to substantiate such merits. The information may be held independently by the council or will be included in communications to or from other public agencies.”

6. The Council responded on 28 April 2016. It confirmed that it held information falling within the scope of the request and refused to provide the information citing regulation 12(4)(d)¹ of the EIR. The Council explained that it considered the balance of the public interest lay in maintaining the exception.
7. Following an internal review, the Council wrote to the complainant on 21 June 2016 and maintained its position.

Scope of the case

8. The complainant contacted the Commissioner on 10 July 2017 to complain about the way his request for information had been handled.
9. During the course of the investigation, it became apparent to the Commissioner that not all information held by the Council had been considered for disclosure. Following further questioning by the Commissioner, the Council confirmed that it also held a large amount of correspondence related to the proposed new road. It explained that in order to avoid applying regulation 12(4)(b)² on the basis of costs, the Council had restricted its searches to the documents named in the request (*“reports, plans, cost-benefit analysis and possible route option information”*).
10. The complainant confirmed to the Commissioner that he considered the Council's interpretation of his request was incorrect and that the Council's communications regarding the project should have been considered when responding to the request.

¹ Exception from disclosure on the basis that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.

² Exception from disclosure on the basis that the request is “manifestly unreasonable”

11. The Commissioner notes that the complainant specifically stated "*all information*" held by the Council in relation to the new road. She considers that the Council was incorrect to refine the request without informing the complainant or providing him with the opportunity to refine his request such that it is useful to him.
12. The Commissioner therefore considers the scope of the investigation to be whether the Council are entitled to rely on regulation 12(4)(b) to refuse to comply with the request.

Background

13. At the time of the request, the Council was considering a proposal for a new road linking the A46 with either the A452 or A45. The complainant set out the context of his request by providing the Council with an agenda for a Council meeting which stated that "*proposals should take account of the potential for a new road linking the A46 Stoneleigh Junction with Kirby Corner and subsequently to the A452 or A45*".

Applicable legislation

14. As the request is for information relating to a proposed new road, the Commissioner considers that the withheld information is caught by the definition of environmental information in regulation 2(1)(c)³. The Council was therefore correct to handle the request under the terms of the EIR.

Reasons for decision

15. 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.
16. 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.

³ <http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made>

17. 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.
18. Unlike the Freedom of Information Act 2000 (FOIA), 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.
19. The Commissioner considers the appropriate limit set for requests falling under the FOIA to be a useful starting point when determining whether a request is manifestly unreasonable under the EIR.
20. 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 departments and £450 for all other public authorities.
21. The Regulations state that where the cost of complying lies in the staff time required to comply with the request, public authorities should apply a flat rate of £25 per hour, equivalent to more than 24 hours work for Central Government departments and f 18 hours for other public authorities.
22. 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

23. The Council confirmed to the Commissioner that complying with the request would take an estimated 165 hours.
24. The Council explained that it had taken 15 hours to review the information found when undertaking the restricted searches in response to the request.
25. The Council originally estimated that a review of "*all information*" would take up to five working days for one officer.
26. The Council subsequently reviewed its estimate in more detail and confirmed that it now estimated that it would take one officer 125-150

hours to complete a review of the correspondence that had not originally been included in the Council's searches.

27. The Council explained that its estimate was based on the following information:

- A review of the email inbox of a named staff member (the primary contact at the Council)
- Using the search terms including 'A46 Link Road' and 'A46 Stoneleigh' to look for relevant emails.
- These search terms return between 500 and 600 emails.
- Each email would need to be reviewed and where necessary redacted.
- To undertake the above would take an average of approximately 15 minutes per email (based on some emails being longer and more detailed than others).

28. The Council explained that it considered this time estimate to be reasonable given the volume of emails to review and the work that will need to be undertaken per email to allow it to be released. The Council then confirmed that the information in the emails, or left in the redacted emails, would provide very little, if any, information to the public that is not already in the public domain.

29. The Council confirmed that its estimate had been based upon the quickest method of gathering the requested information. It explained that all information is held electronically and therefore the above search terms were used to locate relevant information.

30. The Council explained that a sampling exercise was undertaken to ascertain the above estimate. The Council confirmed that it had taken a sample of the emails that were located using the search terms named above and reviewed each of these emails. The Council explained that based on the time it took to review and redact each email, as necessary, the Council were able to establish that it would take an average of 15 minutes to review each email.

31. The Commissioner reminded the Council of regulation 7 which states:

"Where a request is made under regulation 5, the public authority may extend the period of 20 working days referred to in the provisions in paragraph (2) to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is

impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so."

32. The Council maintained its position that it would be manifestly unreasonable to provide the information within the extended 40 working days as it would require 22 working days to review all information falling within the scope of the request.
33. The Council set out that the officer that would have to undertake the job of reviewing the requested information is employed by the Council as a Transport Planning Manager. The Council confirmed that this is a full time role and the officer would be required to take 22 working days away from his normal duties in order to complete this task in the extended 40 working day timeframe.
34. The Council explained that it considered complying with the request would be disproportionate and manifestly unreasonable as a staff member would be required to abandon their day job for 22 working days. The Council also explained that the information that would be provided in this time would add little, or no, information to the complainant. The Council confirmed that the information contained in the emails had been used to produce the reports and other documents that have already been disclosed to the requester and are available on the Council's website. The Council therefore considers that the officer time is better spent providing crucial frontline services to the residents of Warwickshire.
35. The Council cited a recent decision notice, FER0659916⁴, in which the Commissioner found that 30 hours of work would constitute a disproportionate effort. The Council set out that its estimate of 150 hours far exceeds the time estimate in FER0659916.
36. The Council also cited the Tribunal decision *Craven v The Information Commissioner's Office and the Department of Energy and Climate Change [2012] UKUT 442 (AAC)* which stated:

"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

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014325/fer0659916.pdf>

course, it is also satisfied that the public interest test favours maintaining the exception)"

37. The Council confirmed that it considered the request to be extremely burdensome and provided public interest arguments regarding disclosure of the requested information and maintaining the exception.

The Commissioner's position

38. In considering whether the Council is entitled to rely on the exception at regulation 12(4)(b), the Commissioner has taken note of previous decision notices, Tribunal decisions and her own guidance.
39. The explanations provided to the Commissioner in the Council's submission have not persuaded the Commissioner that responding to the request would incur a manifestly unreasonable cost to the Council.
40. The Commissioner is not persuaded by the Council's estimate of 15 minutes per email to review the located information.
41. For the purposes of her decisions, the Commissioner does not require a public authority to provide a precise calculation of the costs of complying with a request, instead only an estimate is required. However, it must be a reasonable estimate.
42. What amounts to a reasonable estimate can only be considered on a case by case basis. However, the Information Tribunal in the case of *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency (EA/2006/0004, 30 October 2007)* said that a reasonable estimate is one that is *"...sensible, realistic and supported by cogent evidence"*.
43. Whilst regulation 12(4)(b) of the EIR differs from section 12 of the FOIA, the Commissioner considers that estimates provided regarding regulation 12(4)(b) should contain the same level of detail as those submitted regarding section 12 of the FOIA.
44. The Commissioner has not been provided with any evidence for why the average time required for each email is 15 minutes. When asserting such a high estimate per individual email, the Commissioner would expect a more detailed explanation than that provided. The Commissioner cannot accept simple assertions of time required.
45. The Commissioner acknowledges that the Council has explained that some emails would require longer to review as they may require redaction, however, no indication of the proportion of emails that require more thorough reviews has been provided.

46. The Commissioner notes that a sampling exercise was performed, however, no details of this exercise were provided (for example, the number of emails reviewed in a set amount of time, how many would require redaction) and the Commissioner would expect public authorities to provide this as evidence of how the estimate was arrived at.
47. The Commissioner also notes that the figure provided by the Council for the number of emails was not specific. Whilst the Commissioner only requires an estimate of the time required, she would expect details, such as the number of emails returned by a search, to be as specific as possible to allow for a reasonable estimate that is *"based on cogent evidence"*.
48. The Commissioner is not satisfied that the Council has provided convincing or persuasive arguments that the estimate of the time and costs which would be incurred by complying with the request is reasonable.
49. The Council may argue that this issue could have been resolved by the Commissioner reverting to it for further explanations, however, the Commissioner made clear in her letter dated 6 July 2017 that she intended to proceed directly to decision notice and would not return to the Council for further information. The Commissioner advised the Council to provide its full and final submission regarding the application of regulation 12(4)(b).
50. Furthermore, the Council is advised in every investigation that it has a single opportunity to make its case to the Commissioner. In the interests of resolving cases in a reasonable timeframe, the Commissioner will not enter into protracted correspondence with public authorities.
51. Taking all of the above factors into account, the Council's submission has 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. As the exception is not engaged, the Commissioner has not gone on to consider the public interest arguments presented by the Council.
52. The Commissioner requires the Council to issue a fresh response to the request that does not rely on regulation 12(4)(b).

Regulation 4: Dissemination of environmental information

53. Regulation 4 of the EIR states:

(1) *Subject to paragraph (3), a public authority shall in respect of environmental information that it holds-*

- (a) *progressively make the information available to the public by electronic means which are easily accessible; and*
 - (b) *take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information.*
 - (2) *For the purposes of paragraph (1) the use of electronic means to make information available or to organize information shall not be required in relation to information collected before 1st January 2005 in non-electronic form.*
 - (3) *Paragraph (1) shall not extend to making available or disseminating information which a public authority would be entitled to refuse to disclose under regulation 12.*
 - (4) *The information under paragraph (1) shall include at least-*
 - (a) *the information referred to in Article 7(2) of the Directive; and*
 - (b) *facts and analyses of facts which the public authority considers relevant and important in framing major environmental policy proposals. "*
54. The complainant set out that he considered that the Council had not fulfilled its obligation under regulation 4 to proactively public environmental information.
55. The Commissioner has considered whether she has the jurisdiction to issue a decision requiring a public authority to make available information otherwise than in a response to a request for information.
56. The First-Tier Tribunal considered the Commissioner's jurisdiction to determine this issue in case EA/2016/0310⁵, Dr Thornton v The Information Commissioner. Paragraph 43 states:
57. *"FOIA section 50 (as applied to EIR by regulation 18) provides that a complaint may be made to the Information Commissioner if an information request is thought to have been dealt with in a manner that is inconsistent with the requester's right to have information disclosed*
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on request. Clearly a complaint that voluntary publication has not been effected cannot, by definition, arise from an information request. It is of course open to the Information Commissioner to consider, under FOIA section 52, whether a public authority has complied with any of the requirements of Parts 2 and 3 of the EIR (which will include obligations to publish environmental information under regulation 4). And if that leads to the conclusion that the public authority is in default, an enforcement notice may be issued."

58. The Tribunal did not come to a conclusion regarding the Commissioner's jurisdiction, however, the above paragraph leads to the logical conclusion that a decision notice cannot be issued for a complaint which does not originate from a request for information.
59. The Commissioner has, however, considered whether it would be proportionate to open a separate investigation with a view to determining whether an enforcement notice is required.
60. The wording of regulation 4 and article 7(2)⁶ of the Directive appears to give discretion of when and, to a certain extent, what information should be published to the public authority that holds it.
61. The Commissioner notes that information has been made available by the relevant public authorities for the stages of the proposal that it has been decided will progress.
62. In the specific circumstances of this case, the Commissioner has no concerns regarding the Council's proactive publication and will not proceed any further with this complaint.

Other matters

63. The Commissioner would like to remind the Council that in circumstances where a request is likely to engage regulation 12(4)(b) or section 12 of the FOIA, in no circumstances should a public authority refine the request without first informing the applicant that the exception is engaged and providing them with the opportunity to refine the request in such a way that is useful and meaningful to them.
 64. Following submitting a complaint to the Commissioner, the complainant wrote to the Council to ask it to provide the Commissioner with the
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⁶ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003L0004>

withheld information and a submission regarding the Council's decision to withhold the requested information.

65. The Commissioner appreciates that the complainant's intention was to be helpful and assist in resolving the case in a timely manner, however, she asks that complainant to refrain from this in future cases. The Commissioner's officers review each case and request relevant information upon allocation and the Commissioner does not consider it necessary for a complainant to request submissions from a public authority on her behalf.

Right of appeal

66. 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

67. 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.
68. 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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