

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 21 June 2017

Public Authority: Beechen Cliff School
Address: Kipling Avenue
Bath
BA2 4RE

Decision (including any steps ordered)

1. The complainant has requested from Beechen Cliff School (the 'School') information relating to a planning application to extend the School's playing fields.
2. The Commissioner has determined that the School has correctly applied regulation 12(4)(b) of the EIR to the request. The School has also complied with regulation 9(1) in the handling of this request. Therefore, she does not require the School to take any steps.

Request and response

3. On 29 October 2016 the complainant wrote to the School and requested information in the following terms:

"1) When you first were aware of the intention (preliminary or otherwise) to a) extend the playing fields and b) to apply for planning permission to do so, in each case using the spoil to do so and 2) when you first instructed any consultant in relation to the above planning application (be such instructions preliminary or otherwise). For the avoidance of doubt this email constitutes a Freedom of Information request and due to its limited scope I do not believe it can be tenably refused on the grounds of cost."

4. On 18 November 2016 the complainant contacted the Information Commissioner's Office (the 'ICO') about the School's failure to respond to his information request.
5. On 29 November the ICO wrote to the School asking it to respond to the request.
6. On 2 December 2016 the School responded. It stated the following:

"Other than the first Masterplan created for consultation and published, the first record the school has available is an email of 7th July 2016 at 15:21 recording a conversation earlier that day. The email includes instructions agreed with our consultants and a copy is attached. Email addresses, telephone numbers, website details and commercially sensitive information have been redacted."

7. On 5 December 2016 the complainant contacted the School as he considered its response was limited and that more information should have been provided. The complainant asked the School to answer further questions. The questions are as follows:

"Question: 1) when you first were aware of the intention (preliminary or otherwise) to a) extend the playing fields and b) to apply for planning permission to do so, in each case using the spoil to do so

- please can you provide the correspondence with the builders/engineers who dug and compacted the spoil in relation to the positioning of the spoil, it's compacting and any aspect inconsistent with its temporary storage.

- please can you provide the correspondence for the period 1 May 2016 to 15 August 2016 with all parties that have corresponded with you about the spoil including those living near the school,

- Please can you provide all emails relating to the spoil sent to or from any of the parties listed as a recipient, sender or cc'd to the email disclosed of 7 July 2016, 15:21.

8. On 14 December 2016 the School provided its internal review response to the request of 29 October 2016. The School disclosed to the complainant further information (an email from April 2016). This information was in relation to the "spoil bank" and was in response to questions 1 and 2 of the complainant's information request.

9. In regards to the complainant's further questions contained within his letter of 5 December 2016, the School confirmed that the specific information requested "*exists (emails and correspondence)*" but that to release it, this would exceed the appropriate cost limits under section 12 of the FOIA.
10. On 17 December 2016 the complainant responded and expressed his disappointment with the information which the School provided. He considered that his questions to the School had remained unanswered and he therefore asked the School to answer them.
11. On 20 December 2016 the complainant wrote to the School to chase its response.
12. On the same day the School wrote to the complainant stating that it had responded to his FOIA requests. The School suggested to him a meeting with it to discuss the plans which relate to his information request.
13. On 21 December 2016 the complainant argued that the School had "*restricted the scope of the disclosure by way of the application of a defined terms search.*" The complainant asked the School to comply with his request without the key word restrictions and he disputed that this would exceed the appropriate cost limits.
14. On 4 January 2017 the complainant asked the School again to comply with his request and to provide him with "*all emails between the governors and the headmaster and governors and other staff from April 2016 to today's date.*"
15. On the same day the School responded. It considered that it had complied with the requirements of the FOIA regarding the original information requested and it said that it had exceeded the appropriate cost limit for the supplemental elements.
16. On 9 January 2017 the complainant disputed the School's statement that it had complied with his FOI request and he asked the School to comply with this request.
17. Further to subsequent correspondence between the School and the complainant regarding his concerns with the planning application, on 2 February 2017 the complainant conveyed his dissatisfaction of the information which the School had provided and he asked again for the School to comply with his information request.

18. The complainant said he was unhappy with what he considered had been restricted disclosure of information requested in October 2016 and the follow up queries.

Scope of the case

19. The complainant contacted the Commissioner on 2 February 2017 to complain about the way his request for information had been handled. In particular, the School's refusal to provide full disclosure of information ("*all the communications within the scope of the request that is in the school's inbox and outbox*") on the grounds of costs in obtaining information from its files. This is the request of 5 December 2016.
20. During the investigation the Commissioner considered the information requested would fall under EIR and not under FOIA. The School was informed of this and it was asked to review the request under EIR. The School subsequently conducted a review and it provided the Commissioner with its revised outcome to the request.
21. Therefore, the Commissioner considers the scope of this case is to determine whether the School correctly applied regulation 12(4)(b) of the EIR to the request.

Reasons for decision

Is the information environmental information?

22. Information is "environmental" if it meets the definition set out in regulation 2(1) of the EIR. Under regulation 2(1)(c) any information on activities affecting or likely to affect the elements of the environment listed in regulation 2(1)(a), which include land, will be environmental information.
23. The requested information relates to the proposed plans to extend the School's playing fields and for information relating to its construction works.
24. The Commissioner is satisfied that this information is environmental as it is a measure likely to affect the state of the elements of the environment, namely land and landscape and is also a measure designed to protect those elements. The Commissioner has therefore concluded that the requests should be dealt with under the EIR.

Regulation 12(4)(b) of the EIR – manifestly unreasonable

25. 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.
26. In this case, the School considers the request ("*all the communications within the scope of the request that is in the school's inbox and outbox*") to be 'manifestly unreasonable' due to the time and cost necessary to comply with the request. It has argued that to provide anything further than what it already had provided, would place an unreasonable burden on the School's resources in terms of time and expense.
27. 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.
28. The Commissioner considers that 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.
29. 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.
30. 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.

31. The Commissioner therefore asked the School to provide more detail of the work that would need to be undertaken in order to disclose the requested information. The School was also advised to submit a reasonable estimate or breakdown of costs to assist with the investigation of this complaint.

The School's position

32. The School considered this request and estimated that it would take well in excess of the time allowed by the FOIA to respond to. The School provided the Commissioner with its sampling exercise. Its calculations are as follows:

"Summary of ACTUAL Time Expended"

(a) "Determining whether we hold the information"

Meeting - 4.5 hours = £112.50

Head of IT Obtaining quotation for retrieving emails - 1 hour = £25

The School explained that the Head of IT had been instructed to determine the cost of retrieving the emails of the staff concerned older than two months and that approximately 1 hour was spent on this.

Chair of Governors obtaining information from Project Manager – 1 hour = £25

(b) "Locating a document containing the information"

Search and provision of copy emails by Head of IT – 3.5 hours = £75

Search and provision of Governors documents by Clerk – 2 hours = £50

Review of construction team emails by Project Manager – 1 hour = £25

Search and provision of Governors documents by Headmaster's Secretary – 1.5 hours = £37.5

(c) "Retrieving a document containing the information"

Quotation for retrieving school emails from archive = £891

Quotation for retrieving school emails from construction team and extracting information. Project Manager's estimate = In excess of £5,000

Retrieving emails included in 'b'.

(d) *"Extracting the information from the documents"*

Reviewing the documents – Chair of Governors = 1.5 hours + Head Master's Secretary 2.5 hours = £100

"Detailed Estimate of Cost Required to obtain the Information"

(a) *"Determining whether we hold the information"*

"Done"

(b) *"Locating a document containing the information"*

Retrieving school emails greater than two months old = £891

Searching relevant email documents $(3.5/2) \times 12 = 21$ hours (based on a key word search of limited accounts)

Search of Governors documents = already undertaken

(c) *"Retrieving a document containing the information"*

As above

Search of Headmaster's documents going back a further 10 months = 1.5 hours

(d) *"Extracting the information from the documents"*

Reviewing the documents retrieved $(4/2) \times 12 = 24$ hours

Locating, retrieving and extracting information from the builders/engineer = £5,000

33. The School explained the basis of its estimates. It said that its time estimates are based on pro rata calculation from the actual work undertaken. The School considered this an under-estimate as, until it has retrieved the documents, the School is unable to state how many documents are held and the work required in extracting the required information from the documents.

34. The School reported that in searching the emails the three key words were used; *soil, spoil and embankment*. It said that many of the documents are electronic and location had been undertaken by means of key word searches. The School added that document review was manual to ensure commercial and personal information had been removed.
35. The School considered regulation 12(4)(b) to be applicable to the requests. By conducting a sampling exercise the School maintained that the cost of compliance with the requests is too great.
36. The School stated that it refused the requests for information as it considered these to be manifestly unreasonable and that they would place a disproportionate burden on the School.
37. The School was asked to provide the details of its storage policy and to answer the question – how long do users retain their emails for before they are archived? In its response, the School explained that all its emails are retained for future reference by a third party on the School's behalf. In regards to the length of time they are retained in a particular addressee's inbox or local storage before deletion, the School stated that this is left to the discretion of the individual and how they manage their inbox. It added that it is generally driven by the volume of emails the individual receives.
38. The School stated that it had attempted to answer the complainant's initial requests on two occasions – 2 December 2016 and 16 December 2016. The School argued that the complainant's requests for information had been similar in subject to his previous requests and that he had asked for related information. It said that the complainant appeared to be asking for non-recorded information concerning its "*intent*" and believed that he had not been satisfied with the School's responses.
39. The School said that both its responses to the complainant had resulted in further requests or other matters being raised. The School reported that between 17 December 2016 and 7 March 2017, the complainant had sent the School 18 emails and that these had only ceased during the ICO's involvement.
40. The School considers the frequency, nature and variety of the complainant's requests fall clearly under the exception.

The complainant's view

41. The complainant considered the School's partial disclosure of information did not cover the scope of his request. He said that this request of 5 December 16 was a composite part of his previous request of 29 October 2016. The complainant considered this matter to be outstanding for seven weeks throughout the process of a planning application to which this relates to. He had asked the School to defer the planning decision until full disclosure of the requested information had been made.
42. The complainant clarified that he is simply asking for compliance with the FOIA and he said that his request included all the emails in scope within the Governors' and Headmaster's inboxes and outboxes without the key word restrictions. The complainant stated that he would have been prepared to meet with the School to discuss his concerns regarding the planning application, if the information were to be disclosed to him.
43. The complainant argued that the School had restricted the scope of the disclosure by way of the application of a defined word search. He disputed that costs would be high and he argued that this is not a reason for refusal from the School to comply with his request. The complainant is of the view that each Governor and the Headmaster would be able to carry out date range searches quickly.
44. He said that they could readily type the date range and the recipients into the School's inboxes/outboxes and to then re-send the same information to him. He added that he had previously raised this point and that it had not been addressed.
45. The complainant expressed his dissatisfaction to the Commissioner and disputed the School's response saying that he considered the School's estimation as inaccurate. The complainant reiterated that he is seeking the "*emails*" containing the minutes of meetings between the Governors between the years 2014 and 2016. However, the Commissioner notes that although the complainant had defined to her that his request is for information for the last two years, his actual request suggest differently and states this information is for April 2016 up until the current date.
46. The complainant said that he is not making allegations against the School but that he questions its estimated calculation of the cost to comply with his request. He stated that he does not require information relating to the advisors as he is aware that this information is confidential.

The Commissioner's position

47. The Commissioner has considered the School's estimation for complying with the request. She notes that this would most likely exceed 18 hours of work to search for all information which included emails, correspondence, site minutes and site instructions. However, the Commissioner does not agree that all of the activities are relevant to the engagement of the exception but she accepts that it is engaged.
48. The Commissioner has also taken into account the complainant's request was for *all* emails. On the grounds of the request of 4 January 2017, the Commissioner is sympathetic with the School's assessment which had evolved at each stage of the communications. However, as described in paragraph 34, it is not clear why the School refined the search to the key word searches.
49. The Commissioner acknowledges that the removal of the search parameters (key word searches) would be likely to increase the costs involved in the School's compliance with the request. She accepts that the search estimates are relevant to the complainant's request and she also accepts the School's estimated costs of dealing with this.
50. As stated previously, under EIR, unlike under FOIA, there is no appropriate cost 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. Unlike FOIA, regulation 12(4)(b) can cover review times.
51. In the Upper Tribunal case of *Craven v The Information Commissioner and the Department of Energy and Climate Change* [2012] UKUT442 (AAC)¹, the Tribunal 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 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)

¹<http://www.osscc.gov.uk/judgmentfiles/j3682/GIA%200786%202012-00.doc>

52. The Commissioner understands that for the School to comply with the request, when coupled with previous dealings on the same subject, would be burdensome. She considers the burden imposed on the School would be significant.
53. Therefore on consideration of the above the Commissioner finds that the School is able to rely on regulation 12(4)(b) in relation to this request. The Commissioner will go on to consider the public interest test.

Public interest test

54. 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.

Factors in favour of disclosing the requested information

55. The Commissioner accepts that there is a strong public interest in disclosure of environmental information in general, as this promotes transparency and accountability for the decisions taken by public authorities and public expenditure.
56. The Commissioner has taken into account the presumption of disclosure under regulation 12(2) of the EIR. She has also given weight to the principle that compliance with the complainant's request and the disclosure of the information sought would potentially increase the public's understanding of the actions taken by the School and of the processes by which it makes its decisions.
57. In relation to the School's decision to apply for planning permission to extend the School's playing fields, the Commissioner accepts that compliance with the complainant's requests and disclosure of the information sought may increase transparency in the School's decision making procedures. Therefore, serving to promote greater accountability.
58. The complainant said he had concerns that the School had intended to build three pitches. He affirmed his disappointment with what he thought was the School's application for the spoil to be permanent and that he and other residents had been told in writing that it was to be temporary. The complainant is of the view that the residents should have been informed of plans at an early stage. He added that there had been inconsistencies over the planning application and that his questions relating to this had been unanswered.

Factors in favour of maintaining the exception

59. The estimated time required to provide the requested information would almost certainly have an impact on the School's ability to perform its other functions. The School considers that this would place a significant and unreasonable amount of burden and expense on its resources in order to achieve compliance with this request.
60. The School explained that much of the information related to the construction works is held by its professional team. The School estimated the cost of the search would be in excess of the appropriate amount. It said that emails other than those that are held on the IT system are held by a third party contractor offsite.
61. The Commissioner has taken into account the fact that the complainant's requests for information have placed a significant burden on the School and as a result caused disruption and unwarranted use of its increasingly limited resources.

Balance of the public interest

62. The Commissioner is mindful that the time it would take the School to comply with the request is far in excess of what would be permitted if the information was not environmental and was being processed under the FOIA.
63. The Commissioner is of the view that there is a strong public interest in the School being able to carry out its core functions without the disruption that would be caused by complying with information requests. This would be burdensome in terms of both time and resources.
64. The Commissioner is aware of the fact that the School's ability to comply with requests submitted by other requesters would be undermined if it had to routinely deal with requests demanding significant resources.
65. The Commissioner has taken into account the wider public interest in protecting the integrity of the EIR and ensuring that they are used responsibly.
66. In this case, the Commissioner considers that the factors in favour of complying with the requests are outweighed by those in favour of maintaining the exception. Accordingly, the Commissioner finds that the School is entitled to rely on regulation 12(4)(b) of the EIR on the basis that the requests for information are manifestly unreasonable.

Regulation 9(1) – advice and assistance

67. When refusing a request for environmental information under regulation 12(4)(b) on the grounds of cost, public authorities should provide the requester with appropriate advice and assistance.

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."

68. In this case, the Commissioner notes that the School had provided information to the complainant in December 2016 which it considered complied with the request. However, this resulted in further requests for information from the complainant.
69. The School had also offered to meet with the complainant along with another Governor and with the School's Architect to discuss the then current construction. The Commissioner accepts that this was an offer of advice and assistance to the complainant in an attempt to provide him with information.
70. The Commissioner acknowledges that the School had tried to resolve the complainant's concerns about the planning application with a suggestion of a face to face meeting - in the hope to restore its position of trust with the School.
71. Taking this into consideration, the Commissioner has found that the School has met with its obligations to provide the complainant with advice and assistance relating to the request. Therefore, the Commissioner is satisfied with the School's compliance with regulation 9(1) of the EIR in this case.

Right of appeal

72. 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

73. 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.

74. 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

Alun Johnson
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF