

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice**

Date: 5 February 2018

Public Authority: London Borough of Hackney
Address: Maurice Bishop House
17 Reading Lane
London
E8 1HH

Decision (including any steps ordered)

1. The complainant has requested from the London Borough of Hackney (the Council) information concerning its considered usage of the site Audrey Street Depot E2 8QH for educational purposes.
2. The Commissioner's decision is that the Council has correctly applied Regulation 12(4)(b) of the EIR. Therefore, she does not require the Council to take any steps to ensure compliance with the legislation.

Request and response

3. On 26 April 2017, the complainant wrote to the Council and requested information in the following terms:

"Any two notes or pieces of correspondence between Jan 2012 and May 2015 showing that the head of Hackney Council Education Property Department was considering usage of the site known as Audrey St Depot for educational purposes."
4. The Council acknowledged receipt of the request on 25 May 2017 and it provided its response on 9 June 2017. It considered the request as manifestly unreasonable and applied regulation 12(4)(b) of the EIR and section 12 (costs) of the FOIA.
5. On the same day the complainant asked for an internal review and on 28 June 2017 he chased the response.

6. Following an internal review the Council wrote to the complainant on 4 July 2017 and it upheld its original response.

Scope of the case

7. The complainant contacted the Commissioner 26 July 2017 to complain about the way his request for information had been handled. Specifically, the complainant disputed the Council's application of the exception and he argued that the information requested is separate from his previous requests referred to – 120 days since the last request.
8. The Commissioner considers the scope of the case is to determine whether the Council is entitled to rely on regulation 12(4)(b) to refuse to comply with the request.

Background

9. In 2016 the Council submitted a planning application to use the Audrey Street Depot ^[1] plot for a temporary school while it built two brand new secondary schools to help meet the needs for more local school places.
11. The site, in Audrey Street, was historically used as a depot by the Council's parks team, and was used as temporary accommodation for Bridge Academy in 2007, while its permanent site was built. After that the land was returned to its original use in or about 2008.
12. The proposals are restricted to the hard-standing area within the existing fence line, which comprises 2.33% of the total park site. They do not include the nearby BMX track or the orchard area to the south of the depot site. Arrangements have been discussed with existing interim users of the depot site to relocate them elsewhere within the park.
13. The temporary site would initially provide accommodation for the school proposed for the Britannia Leisure site. It would open in 2017 and move into its permanent site in 2020, at which point pupils starting at the second secondary school would move in, until the proposed Benthall site opens in 2022.

^[1] <http://news.hackney.gov.uk/find-out-about-plans-to-create-more-secondary-school-places/>

14. The site sits in Hackney Road Conservation Area and is a designated site of importance for nature conservation. The Council recommended that planning permission be granted for this development at its Planning Sub-Committee meeting on 9 November 2016.

Reasons for decision

The Environmental Information Regulations 2004 – The relevant law

15. The Council has dealt with the complainant's request under the EIR on the basis that the information requested is environmental.

16. Under Regulation 2(1) of the EIR environmental information is defined as;

'any information in written, visual, aural, electronic or any other material form on: (a) the state of the elements of the environment such asland, landscape and natural sites including wetlands...biological diversity...(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'.

17. The requested information relates to the potential planning development on a piece of land known as Audrey Street Yard in Hackney, namely the erection of a building to accommodate a school for a temporary period.
18. The Commissioner is satisfied that all the 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 EIR is the relevant law in this case.

Regulation 12(4)(b)

19. Regulation 12(4)(b) of the EIR states that;

'a public authority may refuse to disclose information to the extent that-
(b) the request for information is manifestly unreasonable'

20. The Commissioner considers that the inclusion of 'manifestly' in regulation 12(4)(b) indicates Parliament's intention that, for information to be withheld under the exception, the information request must meet a more stringent test than simply being 'unreasonable'. 'Manifestly' means that there must be an obvious or tangible quality to the unreasonableness of complying with the request.
21. The exception will typically apply in one of two sets of circumstances; either where a request is vexatious or where a compliance with a request meant a public authority would incur an unreasonable level of costs, or an unreasonable diversion of resources.
22. Unlike the Freedom of Information Act 2000 (FOIA) and specifically section 12, the EIR does not contain a provision that exclusively covers the cost and time implications of compliance. The considerations associated with the application of regulation 12(4)(b) of the EIR are, instead, broader than with section 12 of FOIA. This means that there are other considerations that should be taken into account when deciding whether the exception applies to environmental information. These include the following:
 - Under the EIR there is no statutory equivalent to the "appropriate limit" – the cost limit beyond which a public authority is not obliged to comply with a request – described at section 12 of FOIA.
 - The proportionality of the burden that compliance would place on the public authority's workload, bearing in mind the size of the public authority and its ability to allocate resources to dealing with an information request.
 - The importance of the requested information, and the underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue.
23. The Commissioner considers that public authorities may be required to accept a greater burden in providing environmental information than other information. Unlike section 12 of FOIA, regulation 12(4)(b) of the EIR is also subject to the public interest test.
24. In this case, the Council has argued that disclosing the requested information would be manifestly unreasonable due to the cost, the time and the effort required to identify, locate, retrieve and extract it.
25. The Commissioner will now deal with each consideration of manifestly unreasonable in turn.

The complainant's position

26. The complainant disputes the Council's argument that the request is *manifestly unreasonable*. He reported that in 2012 and 2015 he had been informed by council officers that there were no plans to develop this part of the park. However, further to him being granted planning permission, the complainant said he later discovered that the Council had been planning the development for years. He also said that the Council had kept this site out of public use despite promises to return it to public use. The complainant considers that the Council was intending to use this parkland for development purposes and he believes that it will continue to do so in the future. He is of the view that this current request is a simple and easy way to obtain the information which he and others require in order to establish the facts of this issue.
27. The complainant has made it clear that he is dissatisfied with the Council, he believes that residents have been misled by the Council and stated that this is the reason why he urgently requires the information in order to show the residents that the Council, in his opinion, has not been transparent in its behaviour concerning the project.

The Council's position

28. The Council considered the request manifestly unreasonable because the cost of complying with it would be too great. It referred the complainant to its previous response of 8 June 2016, FOI reference: FOI116-0511-09473, where the complainant had requested similar information. In this case the Council had again considered regulation 12(4)(b) to be engaged. It also referred the complainant to the related ICO decision notice FS50625746 ^[2] for the above case and to the searches required to identify information within the scope of the request. The Council asserted that the activities involved in attempting to identify information in scope of the request would require a disproportionate part of an officer's time, taking them away from their core duties. The Council estimated 243 Hours and 35 minutes of staff time at a financial cost of £6088.75 based on the hourly rate of £25 to identify, locate, retrieve and extract the information requested.

^{2]} <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2013594/fs50625746.pdf>

29. In its internal review outcome, the Council considered the request as very broad and reiterated that it would require a disproportionate amount of Officer's time to identify the information and progress the request. The Council maintained its position that it would take more than the appropriate limit of 18 hours to process the request. It explained that the *same* searches would need to be conducted in order to identify the information requested.
30. The Council said that each email would have to be assessed to ascertain the content and that this is because the subject heading would not necessarily show whether the email contains the information which the complainant is seeking.
31. The Council stated that it does not have a data base for emails, therefore its option would be to access each officer's email account individually using the search function which has varying levels of accuracy. It reported that in attempting to identify two pieces of information relevant to the request, it would exceed the appropriate limit of 18 hours. Subsequently, the Council upheld its original response. It believes that the burden in terms of the cost and the significant disproportionate diversion of resources to comply with the request, would outweigh any benefit of disclosure to the public.

Manifestly unreasonable in terms of costs and diversion of resources

32. The Council has referred to the cost limit set out under the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 as a starting point to assess the reasonableness of this request. Whilst these Regulations do not apply under EIR, the Commissioner has recognised in her Guidance that "...we take these regulations to give a clear indication of what Parliament considered to be a reasonable charge for staff time."
33. The regulations stipulate that a cost estimate must be reasonable in the circumstances of the case. The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. Public authorities can charge a maximum of £25 per hour to undertake work to comply with a request - 24 hours work for central government departments; 18 hours work for all other public authorities.
34. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken to:
 - (a) Determine whether it holds the information;
 - (b) Locate the information, or a document which may contain the information;

(c) Retrieve the information, or a document which may contain the information, and

(d) Extract the information from a document containing it.

35. During the investigation the Council was asked whether a refined search would reduce the cost of complying with the request (i.e. selected keywords – Head of Department, Audrey Street, school?) and the Council responded. It said that it had accommodated the complainant's further searches as of the following description:

"Search term 'School'"

This search term produced an error message stating 'Full Text Search Limit Exceeded – Please refine your search and try again'. This error message occurs when there are too many folders to accommodate the search.

"Search term 'Audrey Street'"

In the Council's internal review response of 15th August 2016, FOI reference: FOI16-0622-09246, the Council provided a breakdown of the 'Audrey Street' terms to the complainant. As such, the Council believes that it has already accommodated the complainant's requests.

"Head of Department'"

Searching the Council's document management system for 'Head of Department' returned 184 files, and 1076 under the names of the Head of Department for that period."

36. The Council is of the view that it has endeavoured to accommodate the complainant's various requests and that it has narrowed down the searches. It believes that the requests have placed a significant burden on the Council and taken staff members away from their core duties. The Council referred the Commissioner to an appeal from the complainant, which at the time of this decision notice, is awaiting a decision from the Information Tribunal. It added that it had received another request from the complainant in which he asked the Council to conduct further searches for the same information as requested in his current complaint.
37. Therefore, the Council believes that it has gone beyond its duty in attempting to accommodate the complainant's requests via the FOIA and the EIR and through dialogue and correspondence outside of this process.

38. The Commissioner accepts that the request for information has placed a significant burden on the Council in terms of the cost and the disproportionate diversion of resources. She acknowledges the Council's endeavours to assist the complainant with his request. Specifically, in refining its searches for the information sought and its efforts outside the FOIA/EIR process.
39. The Commissioner considers that the Council's estimated time and cost are reasonable. Particularly as the request seeks information over a lengthy period of time (Jan 2012 – May 2015), the Commissioner accepts that the Council's search parameters are appropriate and adequate.
40. The Commissioner's conclusion is that the request is manifestly unreasonable under regulation 12(4)(b) of the EIR. Taking the submissions into account, the Commissioner is satisfied that the exception is engaged as to comply with the request, would result in the Council incurring an unreasonable level of costs and diversion of resources.

The public interest

41. The Commissioner will now go on to consider whether the public interest is best served by the Council complying with the complainant's request or whether the public interest lies in maintaining the application of the exception under regulation 12(4)(b) of the EIR.

Public interest in disclosure

42. The Council said that it recognises its obligation to promote transparency and accountability, also to promote greater public awareness and understanding.
43. The complainant has made it clear that he is dissatisfied with the Council and he has argued the value of the information. The complainant believes that residents have been misled by the Council and stated that this is the reason why he urgently requires the information in order to show the residents that the Council, in his opinion, has not been transparent in its behaviour concerning the project.

Public interest in maintaining the exception

44. The Council referred to its previous response where it said it had consulted with the public by holding an event on 14 June 2017 at a community hall near the depot site. The Council added that the public were given an opportunity to submit their views relating to the planning development by completing forms which were available at the advertised event.

45. The Council stated that it would not be in the public interest for an officer to be taken away from their core duties in order to process this request. Therefore, the Council considers the public interest in favour of maintaining the exception is in protecting the Council from processing requests which would place a disproportionate burden on its resources.
46. Having considered the public interest test, the Council's position is that the balance of favour lies in refusal of the request.

Balance of the public interest

47. The Commissioner has considered both the complainant's and the Council's position regarding this case. She understands the complainant's concern about the local residents being made aware of the Council's actions regarding the development project. However, the Commissioner has taken into account the fact that the complainant's current request would place a significant burden on the Council.
48. The Commissioner has given weight to the principle that compliance with the request and the disclosure of the information would potentially increase the public's understanding of the Council's actions and of the processes by which it makes its decisions. The Commissioner accepts that this might also increase transparency in the Council's decision making procedures which would serve to promote greater accountability.
49. The Commissioner recognises the importance of accountability and transparency in decision-making within public authorities, also, the necessity of a public authority bearing some costs when complying with a request for environmental information. In considering the public interest test for this matter, the Commissioner must assess whether the cost of compliance is disproportionate to the value of the request.
50. The Commissioner notes that the cost of complying with the request would be too great and that it would take the Council more than the appropriate limit of 18 hours to process the request. The Commissioner is satisfied with the Council's refined searches and that it had gone beyond its duty in its effort to accommodate the complainant's request through the EIR and outside of this process.
51. The Commissioner acknowledges that there has been an opportunity given through the planning process for public consultation and for chances for the public to submit their views and objections to the planning development.

52. The Commissioner has taken into account the fact that the complainant's current and previous requests have placed a significant burden on the Council and as a result caused disruption and unwarranted use of its increasingly limited resources.
53. Having considered the relevant factors in this matter, the Commissioner has concluded that maintaining the exception outweighs those in favour of complying with the request. In view of this, the Commissioner finds that the Council is entitled to rely on regulation 12(4)(b) on the basis that the request is manifestly unreasonable.

Right of appeal

54. 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

55. 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.
56. 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
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