

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 21 May 2019

Public Authority: Herefordshire Council
Address: Plough Lane
PO Box 4
Hereford
HR4 0XH

Decision (including any steps ordered)

1. The complainant requested information relating to planning enforcement on a particular piece of land.
2. The Commissioner's decision is that Herefordshire Council (the Council) has correctly applied regulation 12(4)(b) (manifestly unreasonable) to the complainant's request. She finds that the public interest lies in maintaining the Council's application of this exception.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. The complainant reported that she submitted her request via an online form on the Council's website on 14 May 2018. She requested information in the following terms:

"1. Please provide a breakdown of all costs incurred by enforcement action on the land to the rear of [address redacted] since the beginning of 2000. Information to include costs of planning / enforcement appeals, court action and other legal proceedings or agreements and the time of all staff involved in enforcement activity.

2. If costs of staff time are not available please provide records of all correspondence, meetings, site visits and any other activity relating to enforcement actions and work leading up to enforcement. This request should also be considered under the Environmental Information Regulations 2004 given that the site is a former water meadow, now deemed to be brownfield land."

(The Council numbered the request for the purposes of providing its response).

5. The Council responded on 12 June 2018. It stated that it did not hold information in relation to part 1 of the request. It also confirmed that it was refusing part 2 of the request under regulation 12(4)(b), on the grounds that the request was manifestly unreasonable.
6. Following an internal review the Council wrote to the complainant on 31 July 2018. At this stage it changed its position in relation to part 1 of the request and now refused both parts of the request under regulation 12(4)(b).

Scope of the case

7. The complainant contacted the Commissioner on 13 August 2018 to complain about the way her request for information had been handled.
8. The scope of the following analysis is to consider whether the Council was correct to rely on regulation 12(4)(b) as its grounds for refusing the complainant's request.

Reasons for decision

Regulation 2 – Is the requested information environmental?

9. The Council dealt with the complainant's request under the provisions of the EIR on the grounds that the requested information satisfies the definition of environmental information provided by regulation 2 of the EIR.
10. Regulation 2(1)(c) of the EIR defines environmental information as any information on "*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 [2(1)](a) and (b) as well as measures or activities designed to protect those elements.*"

11. The requested information is for correspondence, meetings, site visits, costs and any other activity relating to planning enforcement action. The Commissioner is satisfied that the planning enforcement process is a measure that may affect several of the environmental elements and factors listed in regulations 2(1)(a) and (b). The Commissioner therefore agrees with the Council that it is appropriate to consider the request under the terms of the EIR.

Regulation 12(4)(b) – Manifestly unreasonable

12. The Council's position is that the request is manifestly unreasonable on the grounds that to comply with it would impose a significant and detrimental burden on the Council's resources, in terms of officer time and cost.
13. Regulation 12(4)(b) provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. A request can be refused as manifestly unreasonable either as it is considered vexatious, or on the basis of the burden that it would cause to the public authority. In this case, the Council is citing regulation 12(4)(b) due to the burden of the request.
14. The EIR differ from the Freedom of Information Act 2000 (FOIA) in that there is no specific limit set for the amount of work required by an authority to respond to a request, unlike section 12 of the FOIA.
15. The Freedom of Information and Data Protection (Appropriate Limit Fees) Regulations 2004 (the fees regulations) which apply in relation to section 12 of the FOIA are not directly relevant to the EIR. However, the Commissioner accepts that the fees regulations provide a useful starting point where the reason for citing regulation 12(4)(b) is the time and cost of a request, but they are not a determining factor in assessing whether the exception applies.
16. The fees regulations provide that the costs associated with these activities should be worked out at a standard rate of £25 per hour per person. For non-central government public authorities the appropriate limit is £450, which is the equivalent of 18 hours work.
17. Regulation 12(4)(b) sets a robust test for an authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is 'manifestly' unreasonable, rather than simply being 'unreasonable'. The Commissioner considers that the term 'manifestly' means that there must be an obvious or clear quality to the identified unreasonableness.
18. It should also be noted that public authorities may be required to accept a greater burden in providing environmental information than other

information. This was confirmed by the Information Tribunal in the DBERR case¹ where the tribunal considered the relevance of regulation 7(1), which provides for a time extension in relation to complex or voluminous requests, and commented as follows (paragraph 39):

"We surmise from this that Parliament intended to treat environmental information differently and to require its disclosure in circumstances where information may not have to be disclosed under FOIA. This is evident also in the fact that the EIR contains an express presumption in favour of disclosure, which FOIA does not. It may be that the public policy imperative underpinning the EIR is regarded as justifying a greater deployment of resources. We note that recital 9 of the Directive calls for disclosure of environmental information to be 'to the widest extent possible'. Whatever the reasons may be, the effect is that public authorities may be required to accept a greater burden in providing environmental information than other information."

19. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will consider the following factors:
- Proportionality of the burden on the public authority's workload, taking into consideration the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services.
 - The nature of the request and any wider value in the requested information being made publicly available.
 - The importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue.
 - The context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester.
 - The presumption in favour of disclosure under regulation 12(2).

¹ Department for Business Enterprise and Regulatory reform v The Information Commissioner and Platform. Appeal no. EA/2008/0097

20. The Council has provided the Commissioner with its rationale for applying the exception to disclosure provided by regulation 12(4)(b). It acknowledged that the EIR contains an express presumption in favour of disclosure, justifies a greater deployment of resources and that it is therefore required to accept a greater burden in providing environmental information. However, it argues that responding to a request of this size and scope would place a disproportionate burden on the Council.
21. The Council initially established that enforcement activity had taken place at the site specified in the request. It identified that information was potentially held in 3 categories:
 - emails,
 - paper and electronic files held by Planning Enforcement, and
 - paper and electronic files held by Legal Services.
22. The Council estimated that it would take in excess of 124 hours to comply with the request. It provided a breakdown as follows:

"the total estimated time / cost to provide the information falling within the scope of the request is:

Emails = 60.95 hours (8 days)

Planning Enforcement = 32.2 hours (approx. 4 days)

Legal Services = 31 hours 42 minutes (approx. 4 days)

[Total] = 124.57 hours (16 days)

Total cost of officer time @ £25 per hour = £3,114.25".
23. In support of the above estimates, the Council provided the Commissioner with a detailed description of the work that would need to be undertaken. This includes the time it would take to determine whether information within the scope of the request was held and to consider whether any information would be exempt from disclosure.
24. The Council explained that while some emails would be held within the Planning Enforcement and Legal Services paper and electronic files, to ensure that all emails relevant to the request were located it would need to undertake a search of its Outlook email store.
25. A search was undertaken for all emails containing the address specified in the request in the subject heading or body of the email, including any attachments. The Council explained that, as the request was for "all

correspondence", no further search criteria was applied as it considered that this would restrict the retrieval of all relevant information. The search identified 3309 potentially relevant emails.

26. The Council explained that its officers would then have to manually read each of the 3309 emails to determine whether there was information relevant to the request and, if so, whether any exceptions applied. The Council stated that it would be extremely likely that exceptions would apply to some of the information within the emails, given the nature of the information requested. In particular, regulation 13 (personal data of a person other than the applicant), regulation 12(5)(b) (the course of justice, the ability of a person to receive a fair trial or the ability of the public authority to conduct an inquiry of a criminal or disciplinary nature) and regulation 12(5)(d) (confidentiality of proceedings where confidentiality is provided by law).
27. The Council told the Commissioner that it did not complete a sampling exercise to determine the time it would take to review the emails. Rather, it based its estimations on a sifting exercise which it had recently completed for a similar EIR request. It considered that this was appropriate as the request was of a substantially similar nature; it asked for copies of correspondence sent and received by particular officers and councillors relating to planning applications and enforcement action at a particular site. For that request, the average time taken for an officer to manually review each email and extract the relevant information was 1.078 minutes. Applying this average to the 3309 emails the Council therefore estimated that it would take 59.5 hours to review them. It combined this with the 45 minutes already taken to initially search for the emails and arrived at the total of 60.95 hours.
28. The Council told the Commissioner that its planning enforcement records are not destroyed and its Planning Enforcement team holds records dating back to 2000 for the location specified in the request. These are held in both paper and electronic format. Current paper records are held at their office. However, as some of the paper records are historic they are held in storage at the Council's archive centre.
29. The Council determined that the following potentially relevant information was held:
 - 5 paper files held in storage. These relate to planning enforcement and the public enquiry at the location. The joint enforcement and Certificate of Lawfulness (CLEUD) public enquiry files contain approximately 500 pages of text, most of which is double sided. These files were retrieved in order to complete a sampling exercise.

- 3 formal notice files held electronically. These records detail nearly 50 diary entries, which can consist of anything from notes of a telephone call to more lengthy documents.
 - 3 enforcement files held electronically. These files contain over 100 entries including details of a current enforcement case.
30. The Council explained that it tested a sample of one of the 11 files. It took 2.7 hours to read through the file to check for relevant information, determine what information would need to be extracted and consider whether any exceptions applied. It considered that while the files varied in size, with some being shorter or longer than the file selected for the sampling exercise, it was reasonable to apply this average time to the remaining files. It arrived at the following estimations:

"Retrieving files from storage – 1.5 hours

Review files and determine whether requested information held – 1 hour

Search 11 files (5 paper, 3 electronic notice files and 3 electronic enforcement files) to retrieve and extract relevant information including considering exceptions – 2.7 hours per file = 29.7 hours

Total number of hours = 32.2 hours".

31. The Council stated that 8 files were identified by Legal Services which could be relevant to the request. It completed a high level review (no more than a skim read) of each which found that 3 may not contain information within the scope of the request. However, it stated that a solicitor would need to review each file to confirm this.
32. To provide a reasonable estimate of the time it would take to review each file a sampling exercise was undertaken by a solicitor, using one of the 5 files considered relevant to the request. It took approximately 5 minutes to review each page. The files contained an average of 65 pages each, so the Council estimated it would take 27 hours and 5 minutes to review all 5 files (5 hours 25 minutes per file).
33. The Council applied a reduced average time of 2.5 minutes per page to the 3 files which it considered less likely to contain any relevant information. These files contained an average of 35 pages each so the Council estimated it would take a total of 4 hours 37 minutes to review all 3 files (1 hour 27 minutes per file). So, to review all 8 files the Council estimated it would take a total of 31 hours 42 minutes.

34. The Council confirmed to the Commissioner that all of the above estimates are based on the quickest method of gathering the requested information.
35. In reaching a decision the Commissioner has to consider how complying with the request would affect the Council and the proportionality of the burden on its workload.
36. The complainant asked for "*all costs incurred by enforcement action [...] since the beginning of 2000*" and "*all correspondence, meetings, site visits and any other activity relating to enforcement actions and work leading up to enforcement.*" Given the broad scope of the request and the 18 year time period it covers, the Commissioner accepts that it would take the Council a substantial amount of time to fulfil the request.
37. The Commissioner is satisfied that the Council's searches were appropriate and that it has presented adequate evidence for its calculations of cost estimates for complying with the request.
38. Having considered the Council's detailed representations, the Commissioner considers that compliance with the request would require significant public resources and place a substantial burden on the Council. The Commissioner is of the view that the request is manifestly unreasonable and is satisfied that regulation 12(4)(b) is engaged.

The public interest test

39. The Council's reliance on regulation 12(4)(b) is subject to consideration of the public interest test. The Commissioner must decide whether the balance of the public interest lies in favour of maintaining the exception or in disclosing the requested information.
40. The public interest test in this case concerns whether the public interest factors in favour of disclosure of the requested information outweighs the public interest in the Council not being obliged to use its resources to respond to a request that imposes a manifestly unreasonable burden.

The public interest in the information being disclosed

41. The EIR states that public authorities should apply a presumption in favour of disclosure when considering requests.
42. The Council recognises that the release of environmental information would promote transparency and accountability, and increase public awareness and understanding of environmental matters, which would in turn enable the general public to more effectively participate in decision making.

43. It has acknowledged the complainant's arguments that there have been "*gross failures by Herefordshire Council to manage unauthorised development*" at this site and her comments that the site referred to in the request has been degraded. In the complainant's request for an internal review, she states that the case has "*serious environmental implications. The land referred to [address redacted] was designated as a water meadow, an increasingly rare habitat. The land is so degraded following the failures of planning enforcement that the current owner asserts that it is brownfield land.*" The Council considers that the EIR could therefore be a useful vehicle to illuminate any issues at the site and provide the public with an insight into the actions and decisions the Council has made regarding enforcement.

The public interest in the exception being maintained

44. The Council explained that Herefordshire is a small rural county and the Council itself is comparatively small with a low number of staff. It argued that complying with the request would divert resources from core services including responding to other information requests, complaints handling and dealing with planning matters. This would directly affect other members of the public requiring services in these areas.

45. The Council believes that the wider public interest of this request is limited. It says:

"action taken on this site has not had wider or significant impact on the public – it is a single site consisting of land to the rear of a pub – it is not information, for example, like an environmental policy which has a wider impact. It does not have a particular size e.g. it does not affect large parts of the county nor does it have a wider environmental or public impact, such as the construction of a road."

46. It has also checked its complaints records, which are held from 2014, and has confirmed to the Commissioner that it has not received any formal complaints regarding planning or planning enforcement at this location. It considers that this suggests the handling of enforcement action at this site is not a matter of wider public concern.
47. In response to the complainant's allegations of "*gross failures*", the Council stated that she had not provided any evidence to support this. While release of information could illuminate matters at this site and confirm to the complainant whether officers have acted appropriately or effectively, it would in no way constitute an investigation by the Council into this case. It suggested that it may be more appropriate for the complainant to raise her concerns via another avenue such as raising a formal complaint.

Balance of the public interest arguments

48. The Commissioner recognises the inherent importance of accountability and transparency in decision-making within public authorities. However, there is a strong public interest in not placing a manifestly unreasonable burden on public authorities. 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.
49. The Commissioner considers that there is a public interest in transparency relating to information about planning enforcement as this may impact individuals in the locality. The Commissioner is aware that the Council has already put some information into the public domain which goes some way to meeting the public interest in disclosure.
50. The Commissioner's position is that the public interest in this case lies in ensuring that the Council's resources are used effectively and are not diverted from its other core business functions. The Commissioner therefore considers that dealing with the request does not best serve the public interest.
51. The Commissioner finds that the public interest lies in favour of maintaining the exception under regulation 12(4)(b).

Regulation 9 – Duty to advise and assist

52. Regulation 9(1) states that *"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."*
53. This regulation places a duty on a public authority to provide advice and assistance to someone making a request. The Commissioner considers that this includes assisting a requester to refine a request if it is deemed that answering it would incur an unreasonable cost.
54. The Council considers that it provided appropriate advice and assistance in its response to the complainant. It argues that it set out the costs involved, broken down by the type of material held. It also invited the complainant to contact it to discuss ways in which the scope of the request could be reduced, suggesting that the complainant would need to vastly reduce the timescale. It notes that the complainant did not take up any offer to discuss ways she could reduce the scope of the request.
55. It states that due to the volume of information being requested it was unable to offer more substantive advice without having received further guidance from the complainant about what particular information would be of most use to her.

56. The Commissioner is satisfied that the Council has complied with the requirements of regulation 9(1).

Right of appeal

57. 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@justice.gov.uk

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

58. 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.
59. 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

Ben Tomes
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