

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

Date: 14 October 2019

Public Authority: London Borough of Havering
Address: Town Hall
Main Road
Romford
RM1 3BB

Decision (including any steps ordered)

1. The complainant has requested information from the London Borough of Havering generated by a Village Green Application.
2. The London Borough of Havering relied on 12(4)(b) (Manifestly Unreasonable) to withhold the requested information.
3. The Commissioner's decision is that the London Borough of Havering has not persuaded her that 12(4)(b) is engaged.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with information he has requested; however it is not to provide "excepted" information as defined by regulation 13 (personal data).
5. 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

6. On 23 March 2018, the complainant wrote to the London Borough of Havering ("Havering") and requested information in the following terms:
 - "I am writing to you under the Freedom of Information Act 2000, requesting copies of all correspondence, electronic or otherwise, held by Havering Council regarding Village Green Application AOD-HAV008186, including, but not limited to, internal correspondence between any officers, employees, councillors, or other associated persons of Havering Council, and correspondence between any such persons and third parties, whether individual persons, companies, institutions, or organisations"
7. Havering responded on 5 June 2018. It stated that whilst it held the requested information it refused to provide it on the following grounds provided by the EIR;
 - 12(4)(b) – Manifestly Unreasonable
 - 12(4)(e) – Disclosure of Internal Communications
 - 12(5)(d) – Confidentiality of proceedings of a Public Authority where confidentiality is provided by law
8. Regarding its reliance on 12(4)(b), Havering said to the complainant (about the engaging of the exception);
 - The requested information is not held in an easily accessible format in order to be readily identified and extracted. Records are held by a number of sources and would need to be manipulated to a large degree to enable an officer to pull out the information. In order to do this would exceed 20 hours and is considered to be manifestly unreasonable.
9. Regarding its reliance on 12(4)(e), Havering said to the complainant (about the engaging of the exception);
 - The requested information forms part of internal communications and as such is exempt.
10. Regarding its reliance on 12(5)(d), Havering said to the complainant (about the engaging of the exception);
 - The information requested is considered to be confidential and as such exempt from disclosure.
11. Following an internal review, Havering wrote to the complainant on 21 August 2018 stating that it upheld its original position.

Scope of the case

12. The complainant contacted the Commissioner on 21 August 2018 to complain about the way his request for information had been handled.
13. On 16 September 2019, Havering informed the Commissioner that it now relied only on regulation 12(4)(b) not to meet the complainant's request for information.
14. The Commissioner considers that she has to determine whether Havering's reliance on regulation 12(4)(b) not to meet the complainant's request for information was correct.

Reasons for decision

15. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

16. The Commissioner has not seen the requested information but, as it is information relating to a Village Green Application, she believes that it is likely to be information on “measures” affecting the elements of the environment. The Commissioner therefore determines Havering to have correctly dealt with this matter under the EIR.
17. 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.
18. The Commissioner considers that the inclusion of ‘manifestly’ in regulation 12(4)(b) indicates 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.
19. The exception will typically apply in one of two sets of circumstances; either where a request is vexatious or where compliance with a request means a public authority would incur an unreasonable level of costs, or an unreasonable diversion of resources.
20. Havering asserts that complying with the request would place a disproportionate burden on its resources, hence its reliance on 12(4)(b) not to meet the complainant’s request for information
21. In order for the Commissioner to evaluate Havering’s reliance on regulation 12(4)(b) she asked¹ it a number of probative questions. The questions asked are detailed below in paragraphs 22 to 26.
22. “The EIR do not provide a definition of what constitutes an unreasonable cost. This is in contrast to section 12 of the FOI Act under which a public authority can refuse to comply with a request if it estimates that the cost of compliance would exceed the ‘appropriate limit’. This 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.
23. The Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time:
 - Determining whether the information is held;

¹ Letter dated 7 February 2019

- Locating the information, or a document which may contain the information;
 - Retrieving the information, or a document which may contain the information; and
 - Extracting the information from a document containing it.
24. Although the Regulations are not directly applicable to the EIR, in the Commissioner's view they can provide a useful point of reference when public authorities argue that complying with a request would incur an unreasonable cost and therefore could be refused on the basis of regulation 12(4)(b).
25. Therefore, with reference to the four activities set out above, please provide a detailed estimate of the time/cost that would be taken to provide the information falling within the scope of this request. In any calculations provided, please include a description of the work that would need to be undertaken (e.g. searching X number of files – 1 hour).
26. Please also confirm that the estimate has been based upon the quickest method of gathering the requested information, e.g. where possible databases would be used rather than searching manual files".
27. Havering's reply² to the Commissioner's above queries are given in paragraphs 28 to 33 below.
28. Detrimental impact of complying with the request
- The request relates to an application to register land at New Zealand Way, Rainham ("the site") as a town or village green pursuant to section 15(2) of the Commons Act 2006 ("the application"). The application was originally submitted to Havering on 4 July 2016 and was finally decided on 8 February 2018 following the close of a non-statutory public inquiry on 11 January 2018. Havering's files relating to the application remained live for approximately two years.
29. During the course of the application Havering had various (conflicting) interests in the site. Havering was both the registration authority for the purposes of the Commons Act 2006 and the owner of the site. To remove the potential for conflict and preserve a separation of its functions Havering put a "Chinese wall" in place which acted to separate interaction between departments with conflicting interests and provide

² Email dated 30 April 2019

separate professional advisers. There was separation between Havering as registration Authority; Havering as owner of the Site; and Havering as Planning Authority. Implementation and maintenance of the Chinese wall was resource intensive through the use of more officers and external advisers resulting in the production of considerably more correspondence / documentation than would otherwise have been required.

30. The request relates to the entire two year period of the application. The broad nature of the request covers all correspondence exchanged during that two year period, both internally and with external organisations. Fulfilment of the request would place an unreasonable burden on Havering's resources. Havering estimates that an integration of all electronic and hard copy correspondence by all parties involved in the application during its two year cycle would equate to a minimum of 35 hours of work. Havering does not consider this to be a justifiable use of its resources and disproportionate in all respects.
31. Havering also asserted that the complainant had also made five other request of it over a 21 month period of time.
32. The request now before Havering is too broad and would result in a disproportionate burden being placed upon it.
33. In applying the regulation 12(4)(b) exception Havering considered and balanced the degree of public interest in the release of information pursuant to the request against maintaining the exception. Havering considered that fulfilment of the request would place a disproportionate burden on it through diversion of officer time to the detriment of Havering's other functions and duties. Havering recognises that there would be a level of public interest in fulfilment of the request but considers this to be outweighed by the disadvantages as aforementioned. Havering also questions whether there remains a need for the release of information pursuant to the request as it is probable that the desired information has already been released to the complainant through the Havering's fulfilment of subsequent refined requests made pursuant to the legislation.
34. In a letter dated 29 May 2019 the Commissioner advised Havering that its then submissions (i.e. paragraphs 28 to 33 above), had not persuaded her that regulation 12(4)(b) was engaged. However the Commissioner was giving Havering a further and final opportunity to persuade her that regulation 12(4)(b) (or any other exception)³ was

³ Emphasis added

indeed engaged. The Commissioner therefore suggested that Havering fully answer her letter (and the questions therein) to it dated 7 February 2019.

35. On 14 June 2019 Havering advised the Commissioner that it had nothing further to add in terms of the application of exception 12(4)(b).
36. Havering asserted to the Commissioner that the complainant has previously made five requests of it but failed to expand why it considered this to be relevant in its reliance on 12(4)(b). The Commissioner does not consider that a complainant making five previous requests for information is automatically sufficient to engage the exception. In any event Havering failed to adequately explain why the complainant's five requests were of particular relevance to its decision that the exception afforded 12(4)(b) was engaged.
37. Havering had opined that it was probable that the requested information has already been released to the complainant through its fulfilment of subsequent refined requests made pursuant to the legislation. However this bare assertion was not substantiated or bolstered by supporting evidence. In addition, the Commissioner is also conscious that a public authority cannot take into account circumstances which post-date a request in order to add weight to the decision taken in respect of it.
38. Taking into account all Havering's submissions⁴ (given their paucity and/or supporting arguments) the Commissioner cannot find that its compliance with the information request would incur an unreasonable level of costs, or an unreasonable diversion of its resources. In particular, the assertion of Havering that it would take in excess of 35 hours is not supported by sufficient evidence or by cogent explanations as to why it would take such time to comply with the request. In this context the Commissioner notes that Havering initially said to the complainant that it would take in excess of 20 hours but offered no explanation as to its revised figure of 35 hours. In any event, as regards the "revised figure" Havering (despite the Commissioner's requests for the same) failed to explain how it had arrived at this estimate. Specifically, it failed to explain adequately (if at all) how much information it held or what tasks would be required for its collation.
39. Accordingly the Commissioner has not been persuaded that the 12(4)(b) is engaged. She therefore finds that it does not operate to allow Havering to withhold the requested information.

⁴ Both to the Commissioner and to the complainant.

Regulation 13(1)

40. The Commissioner's role and duty is to uphold information rights in the public interest. This, of course, includes the protection of people's personal data and she therefore also makes the following decision.
41. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied. Accordingly, Havering is not to release information that is excepted information as defined by this regulation.

Procedural matters

42. Regulation 5(2) of the EIR provides that on response to information requests under the EIR, information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
43. The complainant made his request for information on 23 March 2018. Havering responded on 5 June 2018, which is much later than the prescribed 20 working days after the date of receipt of the request.
44. The Commissioner has therefore found that Havering failed to comply with the requirements of Regulation 5(2) in its response to the complainant's request for information.
45. Regulation 11 of the EIR states that a public authority shall respond to a request for an internal review within a maximum of 40 working days.
46. The complainant made his request for the internal review on 7 June 2018 and he was informed of its outcome on 21 August 2018. This reply was therefore not within the 40 working days period and the Commissioner has therefore found a breach of regulation 11.

Other matters

47. The Commissioner reiterates that it is incumbent on a public authority to provide her with its comprehensive and detailed submissions to substantiate its reliance on exceptions not to meet its duty to provide a complainant with requested information it holds. In this particular matter Havering failed to provide such comprehensive and detailed submissions when asked to do so by the Commissioner. In the absence of such submissions the Commissioner cannot unfairly surmise for the benefit of a public authority to the detriment of the complainant.

Right of appeal

48. 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 123 4504

Fax: 0870 739 5836

Email: GRC@justice.gov.uk

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

49. 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.
50. 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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