

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 19 June 2019

Public Authority: Tamworth Borough Council
Address: Marmion House,
Tamworth
B79 7BZ

Decision (including any steps ordered)

1. The complainant has requested information about open space enhancement contributions. Tamworth Borough Council did not comply with the request citing regulation 12(4)(b) (manifestly unreasonable) of the EIR, because of the time and cost of compliance.
2. The Commissioner's decision is that Tamworth Borough Council has applied regulation 12(4)(b) of the EIR appropriately. However she considers that Tamworth Borough Council has breached regulation 11 (Representations and reconsideration) the EIR.
3. The Commissioner does not require Tamworth Borough Council to take any steps as a result of this decision.

Request and response

4. On 20 April 2018 the complainant wrote to Tamworth Borough Council (the council) and requested information in the following terms:

'I would like to know how much money TBC collects as "Open Space Contributions". Also, for this request, I'm not interested to know how much TBC has spent maintaining local Open Space, but I would like to know how much TBC has spent enhancing (or improving the quality of) local Open Space facilities.'

1. *Open Space Contributions*

i) Could you please state how much money as "Open Space Contributions" TBC has collected from Planning Applications each year from the year 2009 to the year 2018?

*ii) Could you please state how much money TBC has spent **enhancing** Open Space facilities each year from the year 2009 to the year 2018?*

2. Enhancement of Open Space facilities

*For each **enhancement** of Open Space facilities completed from the year 2009 to the year 2018, could you please provide details about the following:*

i) Location of the Open Space facilities enhancement

ii) Description of the work carried out

iii) Who carried out the work

iv) Date(s) when the work was carried out and completed

v) Actual cost of the work that was carried out.'

5. The council responded on 25 May 2018. In relation to question 1(i), it provided a table showing the years from 2009 to 2018 and the income for each year. In relation to 1(ii) it explained that the income received had been used to enhance open spaces within the borough; in some instances it will have been match funded against other monies to further enhance projects.
6. In relation to question 2(i) it explained that many of Tamworth open spaces will have benefitted from enhancement projects over the years, but the sites and works are not recorded. In relation to 2(ii) it explained that various works would include: landscaping, new trees and shrubs, new street furniture/ infrastructure, play equipment, fencing, tarmacking. In relation to 2(iii) it explained that a combination of in house works and various external contractors would have carried out the work.
7. The council also confirmed that it did not hold information in relation to question 2(iv)-(v).
8. The complainant requested an internal review on 25 May 2018. He also submitted three further questions.
9. Following an internal review the council wrote to the complainant on 15 August 2018. In relation to question 1(ii) it explained that the income shown in the table provided in relation to question 1(i), had been spent enhancing public open spaces throughout the borough for the years shown, in accordance with the terms of each individual section 106 agreement. In some cases but not all, the council has been able to match fund section 106 agreements, thus enabling more enhancements to be undertaken and therefore giving better value for money.

10. In relation to 2(i) the council explained that many of Tamworth's open spaces will have benefitted from enhancement projects over the years, although the sites and works were not recorded. It explained that all the ordering of goods and services was recorded in its financial system, which is a record of all its transactions, not just those used for section 106 enhancements. It confirmed that there was no way of determining which was which electronically. This meant that it would have to carry out a manual trawl which would involve looking through thousands of transactions. The council confirmed that all individual orders were made in accordance with its financial regulations and the recommended quotes/tenders etc were obtained and recorded. It also provided the complainant with a link to the council's spend, budget and account information.
11. In relation to 2(ii) the council explained that various works included: landscaping, new trees and shrubs, new street furniture/infrastructure, play equipment, fencing and tarmacking. It also explained that the orders mentioned in 2(i) related to this work. The council also explained that not all works undertaken used section 106 funding.
12. The council also explained that there would be an order on its financial system for every bin, bench and piece of play equipment etc ordered. It also confirmed that it was not possible to order anything without an official order.
13. In relation to 2(iii) the council explained that a combination of in house works and various external contractors carried out the work.
14. In relation to 2(iv-v), the council reiterated that it did not hold any information.

Scope of the case

15. The complainant initially contacted the Commissioner on 27 July 2018 to complain about the way his request for information had been handled. He explained that he may submit a planning application in the near future and was concerned that any open space contribution he would have to pay to the council would not be used for its intended purpose. He also referred to a planning application submitted by a different developer.
16. The complainant pointed out that when the council responded to him, it had made reference to section 106 enhancements, including open space contributions. He explained that his complaint was about open space contributions only; he confirmed that he did not want any response to deviate from this by mentioning section 106 enhancements in general or other types of section 106 enhancements.

17. The Commissioner noted that although the complainant had requested an internal review, it had not been carried out. She contacted the council about this and it carried out an internal review on 15 August 2018. The complainant contacted the Commissioner again on 17 August 2018 and explained that he was dissatisfied with the outcome of the internal review.
18. The complainant explained to the Commissioner that he accepted the responses from the council regarding questions 1(i) and 2(iv-v). He also explained that he wanted the council to answer the three questions he submitted as part of his request for an internal review. The Commissioner considers that when a requester submits further questions in a request for a review, they should be treated as a new request. However, in this case, she considers that the first question "*Why are you not telling me how much TBC have spent enhancing Open Space facilities each year from the year 2009 to the year 2018?*" is part of his dissatisfaction with the council's response to question 1(ii), rather than part of a new request.
19. During her investigation, the Commissioner explained to the council that she considered that the request should have been handled under the Environmental Information Regulations 2004 (EIR). The council carried out an internal review under the EIR on 26 November 2018. It explained that it considered that the request was manifestly unreasonable under regulation 12(4)(b) (Manifestly unreasonable request) of the EIR.
20. The complainant also complained that the same person who had responded to his request initially had also carried out the internal review.
21. Additionally, the complainant explained that as the council knew that there were no records kept for any enhancement of any open space, he believed that the collection of open space contributions amounted to fraud. The complainant explained that if the council or the Commissioner could explain to him how this did not amount to fraud, he would be happy to consider his "stance" on this.
22. The Commissioner does not have the legal remit to consider whether a public authority has committed fraud, therefore she will not be considering this as part of her investigation.
23. The Commissioner will consider whether the council is correct to state that the request is manifestly unreasonable under regulation 12(4)(b). She will also consider how the council dealt with the request under the EIR including if it provided appropriate advice and assistance and the time taken to deal with the request.

Reasons for decision

Is the requested information environmental information for the purposes of the EIR?

24. The Commissioner considers that open space enhancements (or improving the quality of local open spaces) would fall under regulation 2(1)(a) of the EIR as it is concerned with land. Regulation 2(1)(a) of the EIR provides the following definition:

"...any information in written, visual, aural, electronic or any other material form 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;"

25. The Commissioner also considers that this would be a plan for the purposes of regulation 2(1)(c) of the EIR which states:

"(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."

Regulation 12(4)(b) – manifestly unreasonable request

26. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose environmental information if 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 unreasonable implies that a request should be obviously or clearly unreasonable.
27. In this case, the council considers the request is manifestly unreasonable due to the time and cost of resources necessary to comply with the request.
28. Unlike the Freedom of Information Act 2000 (FOIA), the EIR does not have a provision where requests 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) may be engaged. The Commissioner

considers the section 12 cost provisions in the FOIA is a useful starting point.

29. Section 12 of the FOIA is the exemption that a public authority can use to refuse to comply with a request if it estimates that the cost of compliance would exceed the 'appropriate limit'. This 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.
30. 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;
 - 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.
31. In order to make a determination, the Commissioner has asked the council to explain its reasons for refusing the request as manifestly unreasonable.
32. The council explained that open space enhancements take many forms, from general maintenance to a total redesign and re-landscaping of an area. It also explained that these enhancements are mainly funded from revenue budgets and provided the following example: in relation to a park, the routine maintenance, replacement of damage bins/benches, safety in sections of play areas and general litter picking and cleansing would be funded from revenue budgets. Subsequently, a housing development is constructed nearby and a section 106 payment is made for public open space enhancement of the park.
33. The council explained that section 106 contributions are financial monies that are required by the planning process to mitigate the effect of individual applications within a given area, including at times improvements to existing open spaces. Additionally, it explained that historically, enhancements were generic in nature purely requiring 'enhancement of the open space'. However, now they can be quite specific in nature, for example to provide new bins to a specific area.
34. The council also explained that one site may only get section 106 contributions every 3-4 years, which could vary from £500 to several thousand pounds. In addition, the council explained that other means of funding are capital investments, for example to build a new play area, grant funding awards from various outlets, usually for specific projects for example, Heritage Lottery funding for restoration of a memorial in a

park and higher level stewardship funding from the rural payments agency, for open space maintenance.

35. Furthermore, the council explained that it processes on average 530 orders each year, which can be for anything. Of these, 130 are blanket orders which means that an order will be made to a supplier for a number of items, which may or may not relate to open space enhancements. They might be for replacement items due, for example, to damage or vandalism. The council provided the following example: it may order 20 bins from a supplier. Of those 20 bins, five might be replacements due to vandalism and 15 may be for open space enhancement. The five bins would not be considered within scope of the request as the request only relates to open space enhancements.
36. In relation to question 1(i), in order to determine whether it holds the requested information, the council explained that an officer would need to check in excess of 530 orders (including 130 blanket orders). The council provided an estimated time of 44 hours to do this.
37. The council also provided an estimate of 44 hours to locate all of the orders relating to open space enhancements. In addition, it explained that to retrieve the information relating to open space enhancements, the estimated time would be 44 hours. The council also estimated that to extract the information would also take 44 hours.
38. The council pointed out that the request was for information spanning a 10 year period. It explained that this meant that 10 years' worth of orders would need to be searched, equating to approximately 5300 orders.
39. Furthermore, the council estimated that it would take approximately 20 minutes per order, equating to an estimated 176 hours of officer time for each year's orders. The council explained that this equated to a cost of approximately £4,400 for each year's worth of orders; an officer's time for the 10 year period would be 1,760 hours, equating to an estimated cost of £44,000.
40. The council also explained that the estimated costs were based on files being extracted from its electronic systems where possible and filtered to assist and reduce the time needed for manual trawl. In addition, it explained that extracts of the electronic records may not always show all information requested, for example a record may contain orders to the same supplier but not for an open space enhancement. This means that an officer would have to manually trawl through other records included in those extracted, to ascertain whether the order relates to the requested information.

41. Additionally, the council confirmed that it had used the quickest method possible to search its records regarding its calculations for questions 1 and 2.
42. The Commissioner has considered the council's estimates. She notes that the request covers a 10 year period. She also notes that the council has explained that orders can contain information which does not relate to the requested information, but would still need to be searched. She has also considered the estimated times provided by the council.
43. The Commissioner notes the estimated time that would be needed in order to find information relevant to the first part of the complainant's request and the cost that it would entail. She does not consider that the council has demonstrated why it would take 1,760 hours to comply with the first part of the request. However, she does accept that complying with the first part of the request would exceed the cost limit. She notes the council's explanation that the electronic records may not always show all of the requested information and that it would need to manually trawl through other records to ascertain whether the orders related to the requested information.
44. She also accepts that because there would be approximately 1,300 blanket orders over the 10 years period, these orders would take longer to check in order to ascertain what part of the order fell within the scope of the request.
45. The Commissioner therefore accepts that the officer time required to compile a response to the first part of the request would constitute a disproportionate effort. She also considers that it would place an excessive burden on the council's resources if it had to respond to the request.
46. In her guidance on section 12¹ of the FOIA, the Commissioner explains that a public authority is not obliged to search for, or compile some of the requested information before refusing a request that it estimates will exceed the appropriate limit. Instead, it can rely on having cogent arguments and/or evidence in support of the reasonableness of its estimate.
47. Taking everything into account, even though the Commissioner considers that the council has not sufficiently demonstrated why it would

¹https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

take 1,760 hours to comply with the request, she does accept that, for the reasons set out above, compliance with the request would exceed the cost limit. The Commissioner therefore considers that regulation 12(4)(b) is engaged.

48. As the cost of compliance with the first part of the request would exceed the cost limit, the Commissioner has not gone on to consider whether compliance with the second part of the request would exceed the cost limit.
49. The Commissioner will go on to consider public interest considerations.

Public interest test

50. Regulation 12(4)(b) is subject to the public interest as set out at regulation 12(1)(b) of the EIR: in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exception

51. The council argued that considering all the circumstances of the case, the public interest in maintaining this exception outweighed the public interest in disclosing the information. It explained that processing the request would provide a large burden in terms of an officer's time, resulting in a considerable cost to the council.
52. The council also argued that compliance with this request would constitute a significant diversion of resources away from its core business activities, some of which are statutory. It explained that as a consequence, there would be a proportionally detrimental impact on its provision of services to the public.
53. Additionally, the council argued that it did not consider it was in the public interest to neglect its provisions of services to the public, in order to focus on one EIR request for information. It also pointed out that information regarding council spend and open space enhancements is routinely provided on its website and is searchable by the requester and the wider public.
54. The council confirmed that there is no statutory requirement to keep records at the level required in order to answer this request for information. It pointed out that it has a duty to publish all spends over £500 and also makes planning information available. It confirmed that this information is available on its website for the period requested.
55. Furthermore, the council explained that operational front line services carry out 'open space enhancements' as part of routine maintenance to areas, for example mowing the grass. It confirmed that these costs are

held within revenue budgets for each service and are also available online.

Public interest arguments in favour of disclosure

56. The council acknowledged the need for both transparency and accountability in relation to public spends. It also noted that there is a presumption of disclosure under the EIR.
57. The complainant explained that he considered that the information should be disclosed. He explained that the council had already told him that it does not keep records about what open space sites have been enhanced or what works have been completed at any specific open space site. He also pointed out that so far, the council had not identified a single enhancement of open space or told him what work was done, who completed the work, when the work started, when the work finished, how much the open space enhancement cost, etc. Furthermore, he explained that it made him wonder if the council knew if the work was actually completed.
58. The complainant also argued that this meant that the council could not prove that any money collected in open space contributions had actually been spent enhancing any open space facilities.
59. The complainant also explained that the links provided by the council did not contain all of the information he had requested.

Balance of public interest arguments

60. The Commissioner has considered the public interest arguments from both parties.
61. She accepts that there is a strong public interest in disclosure of environmental information in general, as it promotes transparency and accountability for the decisions made by public authorities in relation to environmental matters and public expenditure.
62. The Commissioner expects that there would be public interest in open space enhancements, as decisions regarding such enhancements would have an impact on the public generally; it also involves the use of public money. She therefore considers that it would be reasonable for the public to be able to access such information.
63. However, she considers that this needs to be balanced with what the request is for. In this case, the requester has requested detailed information over a 10 year period. She notes the council's explanation of what it would entail to try and provide the relevant information. The

Commissioner also gives weight to the fact that some relevant information is already available on its website.

64. The Commissioner also notes that the complainant has confirmed that he is considering submitting a planning application to the council and was concerned that any open space contributions he made would not be used for its intended purpose.
65. Additionally, the Commissioner notes that the council has provided the complainant with links to some relevant information covering the 10 year time span in his request.
66. Taking all of the above into account, the Commissioner is satisfied that regulation 12(4)(b) has been applied appropriately in this case and that the public interest in maintaining the exception outweighs the public interest in disclosure.
67. When refusing a request for environmental information under regulation 12(4)(b) on the grounds of costs, public authorities should provide the requester with appropriate advice and assistance.

Regulation 9 of the EIR – Advice and assistance

68. Regulation 9 of the EIR requires a public authority to provide advice and assistance to a requester, as far as would be reasonable to expect it to do so.
69. Regulation 9(3) states that where a public authority conforms to a Code of Practice, it will be regarded as having complied with its regulation 9 obligations.
70. Part 3 of the EIR Code of Practice provides guidance to public authorities regarding the recommended practice and steps to take when providing advice and assistance.
71. The council confirmed that it had provided the complainant with links to some of the relevant information on its website.
72. The Commissioner considers that it would be difficult for the council to have offered any meaningful advice about refining the request in order to provide the complainant with any information. She also notes that the council has provided the complainant with links to information on its website.
73. Taking the above into account, the Commissioner considers that the council has not breached regulation 9 of the EIR.

Procedural issues

74. The complainant submitted his request on 20 April 2018 and the council responded on 25 May 2018.

Regulation 5 - Duty to make available environmental information in request

75. Regulation 5(2) of the EIR provides that a public authority must respond to a request promptly and in any event no later than 20 working days after the date of receipt.
76. The Commissioner considers that the council breached regulation 5(2) as it took longer than 20 working days to respond to the request.
77. The complainant also requested a review on 25 May 2018. The council responded on 15 August 2018.

Regulation 11 – Representations and reconsideration

78. Regulation 11 of the EIR provides that if a requester is dissatisfied with a public authority's response to a request, the requester can ask for a review.
79. Regulation 11(4) provides that a public authority should respond promptly and no later than 40 working days after the date of receipt.

The Commissioner considers that the council has breached regulation 11(4) as it took longer than 40 working days to respond to the request for a review.

Other matters

80. The complainant also complained that the person who responded to his request initially, had also carried out the internal review.
81. The Commissioner considers that, as a matter of good practice, the review should be carried out by someone senior to the person who responded to the original request. If this is not possible it should be undertaken by someone trained in, and who understands, the EIR.
82. In the present case, the Commissioner notes that the internal reviews of 15 August and 28 November 2018 were signed by the person who had initially responded to the request. She also notes that in both internal reviews, the council helpfully explained that submissions had been received from other named officers and provided their job titles. The council also confirmed that the person who had initially responded to the request also provided submissions.

83. The Commissioner asked the council who had chaired the reviews. The council explained that although the person who had initially responded to the request had provided submissions, both reviews had been chaired by a member of staff who was senior to the person who dealt with the original request.
84. The council also explained that it would make it clear in future who had chaired any reviews.

Right of appeal

85. 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

86. 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.

87. 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

[Name of signatory]
[Job title of signatory]
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