

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 10 September 2019

**Public Authority:** Huntingdonshire District Council  
**Address:** Pathfinder House  
St. Marys Street  
Huntingdon  
Cambridgeshire  
PE29 3TN

#### **Decision (including any steps ordered)**

---

1. The complainants requested information relating to a section 106 agreement entered into by the council relating to a proposed skate park in Sawtry. The council provided some information and carried out searches for information on a number of occasions, however the complainants consider that further information must be held. The council then applied Regulation 12(4)(b) (manifestly unreasonable) and said it would not carry out further searches for relevant information.
2. The Commissioner's decision is that whilst Regulation 12(4)(b) was engaged by the request, the public interest in the exception being maintained does not outweigh that in responding further to the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - To respond again to the complainant's request, without relying upon Regulation 12(4)(b).
4. 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

---

5. On 25 June 2018, the complainants wrote to the council and requested information in the following terms:

*"All documentation and communications relating to an Agreement dated 1st May 2018 entered into by the applicant, Kler Group, HDC and CCC under section 106 of The Town and Country Act 1990 for a planning permission for land south west of Mill Cottage on the Gidding Road, Sawtry. Our request covers all third party communications you have received."*

6. On 5 July 2018 the council wrote to the complainants and said: *"In order to retrieve the relevant information from archived emails in a reasonable time it would be helpful to narrow the request down to specific subjects and content and also a clarification of who you deem to be third party, e.g. do you consider other councils to be third party."*

7. On 5 July 2019 the complainant's clarified their request by stating:

*"By third parties we include Sawtry Parish Council, Sawtry Youth Project, councillors from HDC, CCC and SPC. Also if you took advice or received assessments from experts or consultants they would be included. A list of consultees and their comments would be included under this third party heading as would any letters or emails you received from members of the public on this subject.*

*Our interest is in the section 106 agreement, and who proposed it, the negotiations and what information was used to conclude it and who you consulted before agreeing it."*

8. The narrowed request relates to a section 106 agreement made between the council and a developer to provide money to Sawtry Parish Council towards the building of a skate park in Sawtry.
9. The council did not initially receive this email, however following further correspondence between the parties the council confirmed that it had eventually received the clarification on 8 August 2018.
10. The council responded on 21 August 2018. It provided two documents and directed the requestors to other documents on its planning portal.
11. Following further correspondence the council wrote to the complainants on 13 September 2018 and disclosed a further two documents together with an officer report for a Development Management Committee which is available on its website.

12. On 17 September 2018 the complainant's wrote again to the council stating that the information which had been disclosed did not demonstrate any negotiations between the parties, no replies to emails or correspondence between Sawtry Youth Project, Sawtry Parish Council or any other parties. They questioned how the agreement could have been reached without further information being held. The council treated this email as a request for review.
13. The council provided the result of its internal review to the complainant on 27 September 2018. It outlined web links where further information might be found but refused to search for any further information on the basis that section 12 of the FOI Act applied.

### **Scope of the case**

---

14. The complainant contacted the Commissioner 22 October 2018 to complain about the way their request for information had been handled.
15. They consider that further information must be held by the council which should have been provided to them in response to their request. Specifically they raised the issue that the information which the council had provided previously does not explain how the section 106 agreement came about. They said:

*"From the documents sent it is impossible to know why HDC gave SYP £132,000 for a skate park. There is no application, no supporting documents, no discussion of the merits to spending the S106 money on this project or consideration of competing claims, such as the NHS.*

*HDC are asking us to believe it allocated £132,000 S106 money to an organisation which didn't ask it for it, supplied no documentation and they gave this money without even asking the landowners of the site, Sawtry Parish Council, for their views. This is very hard to believe. There must be more documents which HDC and its staff are wilfully withholding. We do not see how HDC is complying with its duty under the act and we look forward to your intervention. "*

16. During the course of the Commissioner's investigation the council wrote to the Commissioner on 26 November 2018 and said that it intended to carry out a further review of its decision. As a result, on 4 December 2018 the council disclosed further information to the complainants.
17. The Commissioner enquired of the complainant's if they were now content with the disclosure of the information. The complainant's responded saying that:

*"We have been sent a lot of material which is of no interest to us and having gone through the complete process with HDC we are no nearer to understanding why HDC has given £132,000 of public money for a skatepark supported by 41 people. Either this has been agreed without almost going through any processes at HDC and there is no or next to no paperwork or the paperwork is being concealed as it is embarrassing to HDC,*

*From what little we have seen there are major conflicts of interest and a member of staff seems to have misused her position at HDC to get a lobby group which she seems to be a part of this money. It is in the public interest that the full facts of this matter come out."*

18. Also during the course of the Commissioner's investigation, the Commissioner asked the council to consider whether the request should have been considered under the Environmental Information Regulations (EIR) rather than the FOI Act. The council confirmed that having reconsidered the information it agreed that the information is environmental information. It therefore applied Regulation 12(4)(b) in place of section 12 on the basis that responding further to the request would be manifestly unreasonable.
19. The Commissioner therefore considers that the complaint is whether the council was wrong to apply Regulation 12(4)(b) of the EIR to refuse to carry out searches for further information falling within the scope of the complainant's request for information.

## **Reasons for decision**

---

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

20. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose environmental information if the request 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.
21. In this case, the council argues that the request is manifestly unreasonable due to the time and cost of resources which would be necessary to comply further with the request, bearing in mind the time that it has already spent doing so.
22. 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 are a useful starting point in determining whether the Regulation has been correctly applied to refuse a request.

23. 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.
24. 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.
25. In order to make a determination, the Commissioner has asked the council to explain its reasons for refusing the request as manifestly unreasonable.

*The council's arguments*

26. The council said that it has already published a vast amount of information in line with planning regulations. It said that all relevant documents, comments etc. are placed on the planning file which is accessible to the public via its planning portal on its website.
27. It said that information about s106 agreements is available at <https://www.huntingdonshire.gov.uk/planning/community-infrastructure-levy-cil/>.
28. It said that all relevant committee papers and decisions are also available on its website at <https://www.huntingdonshire.gov.uk/council-democracy/>
29. It said that, in its view, it was clear from the outset that the complainant's request was too wide in scope. It had therefore provided advice and assistance to them as to how to formulate and narrow the request so that information could be provided and asked them to refine

their request. The complainant's subsequently did narrow the scope of their request by clarifying what they meant by third parties and expressing the focus of their interest in the matter.

30. The council said that in its letters of 27 September 2018 and 2 July 2019 it pointed out to the complainant's that the request would significantly exceed the appropriate limit. It argues that the additional work required to respond further would be manifestly unreasonable.
31. In its letter of 27 September 2018 it estimated that there were in excess of 700 emails potentially falling within the scope of the request. It argued however that where the complainant's were able to be more specific in their request they had still been able to provide and disclose information to them.
32. Having reconsidered the request again in July 2019, it said that in order to respond further to the request there would need to be searches within accounts of three different teams, Operations, Development Control and Planning. This would cover over ten different email accounts, some of which are archived, and would include generic email accounts. It considered that the time frame for the correspondence would date back until 2016 or earlier.
33. It therefore considered that the volume of emails which would be caught would, in fact, greatly exceed the 700 emails which it had quoted to the complainant in its response of 27 September 2018, and that it may fall within the thousands. It did not however provide any evidence to this effect to the Commissioner beyond this statement.
34. The council considers that whilst some searching could be done electronically; for example all emails within date range, each email would need to be individually scrutinised to verify if they hold information relevant to the request.
35. It estimated that scrutinising an email would take 3 minutes on average, totalling over 35 hours to review the 700 emails initially estimated. As noted however, after further consideration it now estimates that the amount of emails which would need to be considered is likely to greatly exceed its initial estimate of 700.
36. It also said that its policy is that information not deemed relevant or instrumental to the matter to be decided will not be retained and may be deleted. The Commissioner understands this point of argument to suggest that relevant information which outlines the complainant's concerns may not, in any event, be held by the council within any remaining information which has not yet been made public.

37. It therefore considers that any further searches on the matter will place a manifestly unreasonable burden on it.

*The complainant's arguments.*

38. As noted above, the complainant's central question is how, and why, there appears to be so few records demonstrating how a significant amount of money was agreed to be made for the purposes of a skate park on parish council land as a section 106 payment. They argue that the information which they have been provided with does not clearly explain how this proposal came about, and that the application does not appear to take into account the wishes of the whole community nor other potential recipients of the section 106 money.

39. In a letter to the council dated 29 March 2019 the complainants said to the council that:

*"Either HDC is withholding documents from us or this matter has been agreed without any formal process taking place, or a combination of the two. There is it seems no application by SYP, no documentation in support of the scheme, no evaluation of the scheme and its merits, no impact assessment and no discussion of the merits of other ways of spending this money."*

*The Commissioner's conclusions*

40. 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.
41. The council has not been entirely clear as to how it might have limited its searches to narrow the amount of emails caught within the scope of the request. It has not addressed whether it may have been able to narrow the amount of emails caught within the scope of its searches by using search terms more specific to the issues raised by the complainant's. The Commissioner considers that the number of emails which may be relevant to the request may be able to be narrowed further by the use of key search terms.
42. She also questions whether the council's estimate of it taking, on average, 3 minutes per email to determine whether an email is relevant or not is a realistic figure. The council did not state that it had carried out a sampling exercise to determine whether the 3 minutes per email estimate was appropriate or not. The Commissioner considers that an average of 3 minutes per email to determine whether it falls within the scope of the request seems to be an excessive figure. 700 emails, at a



more conservative figure of 1 minute per email, would still equal 11 hours work however, and given the time which has already been spent locating and providing other information the Commissioner accepts that the appropriate limit under section 12 could be exceeded.

43. The Commissioner notes that although the council outlined that the number of emails which might fall within the scope of the request had potentially grown following its further reconsideration, it did not carry out a sampling exercise to determine a more specific number of emails which might fall within the scope of the request. It simply argued that there would likely to be many more emails falling within its scope.
44. However, the Commissioner accepts that the officer time required to compile a response to the request would potentially constitute a significant burden. She also accepts that a large amount of information has already been made public and further information has been disclosed in response to the complainant's requests following a number of searches being carried out. These, though, have not provided enough information for the complainant's to be satisfied as to how the section 106 agreement was proposed, formulated and agreed.
45. In her guidance on section 12<sup>1</sup> 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.
46. Taking everything into account, even though the Commissioner considers that the council has not sufficiently demonstrated why it would exceed the appropriate limit under section 12 to comply with the request, she does accept that, for the reasons set out above, and given the searches previously carried out, compliance with the request would exceed the cost limit.
47. As stated, the Commissioner uses the costs limit under section 12 as a basis for her decisions on the application of Regulation 12(4)(b) where it is clear that a request would cause a manifestly unreasonable burden upon an authority.

---

<sup>1</sup>[https://ico.org.uk/media/for-organisations/documents/1199/costs\\_of\\_compliance\\_exceeds\\_appropriate\\_limit.pdf](https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf)



48. Based upon this approach, and given the council's arguments, the Commissioner considers that the exception in Regulation 12(4)(b) is engaged.

**Public interest test**

49. 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

50. 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.
51. The council also argued that compliance with this request would constitute a significant diversion of resources away from its core business activities. As a consequence, there would be a proportionally detrimental impact on its provision of services to the public.

Public interest arguments in favour of disclosure

52. The complainants believe that they already have evidence to suggest that the council, or officers of the council, have not acted appropriately in agreeing the section 106 agreement in this instance. They believe that the council has not followed policies and procedures when agreeing the condition. The council disputes that that is the case. The complainant's therefore want the council to provide any further information it holds in order to clarify exactly what happened which led to this agreement being proposed, negotiated and agreed.
53. As regards the complainant's question as to how the section 106 agreement came about, the council did provide a degree of further explanation to the complainant's in a letter copied to them dated 2 July 2019. It said that the Operations Team hear about potential projects in a variety of ways, both formal and informal. Once a suggestion is received and in line with the local Gap Open Space Analysis it is taken to the relevant Parish Council to see if the suggested project is supported. If it is, then the section 106 process will be taken forward.
54. It has disclosed that on this occasion, it has found that a declaration of interests was not made by a staff member. Although this was the case, it argues that this had no bearing on the other checks and processes in

place and it did not therefore influence the project being put forward in this instance. It said however that it is now reviewing its processes to ensure staff are aware of their responsibilities as regards declaration of interests.

55. Although the Commissioner notes this point, she has also been provided with a copy of an email dated 25 May 2018 from Sawtry Parish Council to the Head of Development at Huntingdonshire District Council. The email asks the District Council to provide further details surrounding the section 106 agreement. It is clear from the content of this email that the parish council was not aware of the section 106 agreement. The email states: *"Could you please investigate this and let the Parish Council know who included this, why, and why the Parish Council were not consulted.* It appears therefore that the processes outlined by the District Council were not followed in this instance in that, based upon this evidence, the support of the Parish Council does not appear to have been sought prior to the proposal for the section 106 being taken forward. The District Council responded stating that *"...the obligation resulted from comments received on behalf of the Sawtry Youth Project and this is set out in paragraph 7.93 of the report to the 22nd May 2017 Development Management Committee meeting"*.
56. The complainant's argue that this agreement appears to have been pushed forward at the expense of other potential recipients of the money, and there appears to have been little process or procedure used to determine whether that was appropriate or not. In a letter to the council dated 11 July 2019 the complainant's stated to the council.
- "Sawtry Youth Project has been awarded this large sum of public money without any assessment of its merits, value for money or consideration of other competing projects for this money and the pleas of NHS for extra money in Sawtry have been completely ignored."*
57. Although the council has provided further information to the requestors, who themselves believe they have the evidence necessary in order to be able to potentially confirm whether their assumptions are correct, they wish to have as much evidence as possible to clarify the position before considering what further steps may be needed to resolve the situation.
58. For its part, the council believes that it has explained where it has found flaws in the process, explained that it believes that it has otherwise acted appropriately and that the section 106 agreement was properly reached. It advised the complainant's to make a complaint to the local Government Ombudsman if they considered that any maladministration took place.

59. The Commissioner accepts that there is a public interest in creating greater transparency over this issue. Whilst the Parish Council had previously agreed in principle to the development of the skate park it had said to the electorate that it was for Sawtry Youth Project to fund, not the council. In its letter to the District Council the Parish Council said *"This is not a project that the Parish Council are planning and it was also felt by the Planning Committee that their business is being dictated to and driven by outside influences and not by the Parish Councillors."*
60. The Commissioner has outlined above that, whilst she has decided that the councils arguments were enough to justify the engagement of Regulation 12(4)(b), it did not provide a robust evidence base with which to fully support that argument.
61. The evidence provided by the complainant's and the council has not discounted the complainant's allegations that there are significant issues with the way in which the proposal was formulated and managed – most notably the failure to consult with the parish council and the absence of any clear records being disclosed of decisions and consultations on the principle of supporting the skate park in this way, rather than any other project.
62. The council's argument that the failure to declare a conflict of interests by one officer did not affect the overall agreement is weakened by the fact that the parish council does not appear to have known about the proposal, leading to it writing to the District Council asking it to explain what had occurred.
63. The complainants consider that a council officer, with conflicted interests in the matter, may have used her position to push for the section 106 agreement. They understand that there were significant other proposals for recipients of section 106 funds, but they have not been provided with evidence demonstrating whether, or why these were not considered or why they were not taken forward. For instance they have pointed to a local doctor's surgery which had previously expressed concerns that they may need to expand their services should the wider development of housing go ahead. The Commissioner understands, however, that the council did write to the complainants arguing that it considered that Sawtry has a shortage of Neighbourhood areas for play (NEAPS) and that this ultimately led to its decision. A Corporate Director for the council also wrote to the complainants in July 2019 arguing that that he had provided an explanation of its planning decision and provided other explanations in a letter to them dated 26 April 2016. The Commissioner has not however been provided with a copy of that letter.

## **Balance of public interest arguments**

---

64. The Commissioner has considered the public interest arguments from both parties.
65. The Commissioner accepts that a potentially significant burden would be placed upon the authority in responding fully to the request. The question for her though is whether the public interest in maintaining the exception outweighs the public interest in the information being disclosed.
66. The council also informed the complainant's of their right to make a complaint for maladministration to the Ombudsman if they consider that that is appropriate. The Commissioner is not aware whether the complainants did make a complaint, and if not, whether a complaint made at this point would be accepted or indeed whether it would be considered out of time by the Ombudsman. On the face of it, however, this would have been the advisable course of action for the complainant's to take to ascertain whether the council had acted appropriately or not. It is not within the Commissioner's powers to make such a judgement herself.
67. In suggesting that the complainant's make a complaint to the Ombudsman to investigate, an alternative potential remedy was therefore suggested which would not require the council to carry out further searches and respond further to this request.
68. The Commissioner considers that the public interest in maintaining the exception and allowing the council to refuse the request on the basis of the burden which would be caused needs to be balanced with what the request would clarify in this case.
69. 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.
70. The complainant's have requested more information based upon evidence which they argue suggests that the process leading to the provision of money for the development of the skate park did not follow proper procedures. The complainant's believe that they already have enough information in order to be able to state publicly what they consider might have occurred. They also consider that further

information may be helpful in determining whether that was the case or not and provide support to their arguments.

71. In effect, if the complainant's arguments are correct, the decision has left the residents of the parish in a position where a skate park may be developed but appropriate procedures have not been followed. They also argue that they have not been provided with any evidence as to whether alternative potential recipients of the funds were fully considered. As noted though, the council disputes this and argues that its planning decisions were appropriate and followed appropriate and robust procedures. The Commissioner also considers it pertinent to point out that, regardless of the outcome of the consideration of regulation 12(4)(b), it still remains possible that no more information on the topic is actually held. Nevertheless, the Commissioner is bound to limit the scope of this matter to the regulation applied and consider the merits of the matter as they stand.
72. The council has not provided fully set out evidence of the degree of burden which would be likely to be required to respond to the request. Nevertheless the Commissioner does consider that the burden may be significant, particularly bearing in mind the searches which have already been carried out. There is however also a significant public interest in clarifying what has occurred.
73. The Commissioner is satisfied that Regulation 12(4)(b) was correctly engaged by the council in response to this request, however she considers that the public interest in maintaining the exception does not outweigh the public interest in carrying out further searches to respond fully to the complainants request for information.
74. The Commissioner has therefore decided that the council was not correct to apply Regulation 12(4)(b) in this instance.

## Right of appeal

---

75. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

76. 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.

77. 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 .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**