

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

Date: 10 September 2019

Public Authority: West Berkshire Council
Address: Council Offices
Market Street
Newbury
Berkshire
RG14 5LD

Decision (including any steps ordered)

1. The complainant has requested information regarding an Environment Agency flood model for a particular site. West Berkshire Council withheld the information in its entirety citing EIR Regulation 12(4)(b) – manifestly unreasonable on the grounds of cost.
2. The Commissioner’s decision is that West Berkshire Council has appropriately relied on EIR Regulation 12(4)(b) to withhold the requested information and that the public interest favours maintaining the exception. Furthermore it has complied with the requirements of regulation 9 – advice and assistance, and regulations 5(2) and 7(1) in the time it took to respond to the request
3. The Commissioner does not require any steps.

Request and response

4. On 28 November 2018, the complainant wrote to West Berkshire Council ('the council') and requested information in the following terms:

"All correspondence between your Council and the Environment Agency in respect of the Environment Agency's Flood Model relevant to Burghfield sailing club – Theale recreational Lake.

(In this request, and in the paragraphs that follow, 'correspondence' should be taken to include copies of all meeting notes, and records of all telephone and other conversations.)

1. Copies of all correspondence between your Council and all parties who have made representations upon or contributed to the Environment Agency Flood Model and its application to this site, including but not limited to [redacted].

2. Please note that in this request for all relevant correspondence, we include correspondence on private servers used by your officers, not just e-mails sent and received through the '@westberkshire.go.uk' server. In this connection, we are aware that at least one of your officers – [redacted] – has been using a private Yahoo server in connection with this matter."

5. The council advised on 17 December 2018 that it was extending the deadline for a response by 20 working days due to the volume and complexity of information requested.
6. The council responded on 16 January 2019. It refused to provide the requested information on the basis of EIR Regulation 12(4)(b) – manifestly unreasonable. The refusal notice from the council gave some suggestions for narrowing the scope of the request.
7. The complainant requested an internal review on 18 January 2019.
8. Following an internal review the council wrote to the complainant on 15 February 2019. It upheld its decision to refuse on the basis of EIR Regulation 12(4)(b), due to the volume of information in scope of the request and the burden this would place on the council.
9. The complainant subsequently submitted a new request for the same information but with a reduced time period of 3.5 months. The council provided the held information in scope of this request to the complainant.

Scope of the case

10. The complainant contacted the Commissioner on 14 March 2019 to complain about the refusal of their original request and time it took the council to respond.
11. The complainant provided the following background to the complaint:
 - The complainant's client ('the Client') is proposing a residential planning development which is the subject of a planning inquiry.
 - The inquiry was adjourned to allow further negotiations between the Client, the council and the Environment Agency.
 - The complainant claims that information was shared between the council and the Environment Agency that was not placed in the publically available planning file which put the Client at a disadvantage. Hence the requirement for the information request.
 - Due to the time taken by the council to respond, the Client did not have time to ask for an internal review before the public inquiry resumed on 22 January 2019.
 - The complainant contends that the council should not be able to refuse the request on cost grounds "*due to the way it chooses to file electronic information.*"
 - Furthermore the complainant states that the environment agency had responded to a similar request. It provided the information within the required timescale, "*illustrating that our request was clearly not 'manifestly unreasonable' as a similarly resourced public authority has been able to comply with it in a short time frame.*"
12. The Commissioner therefore considers that the scope of the case is to determine whether the request is manifestly unreasonable, on cost grounds, as per regulation 12(4)(b) of the EIR.
13. The Commissioner will then determine whether the council complied with regulation 9 – advice and assistance and regulations 5(2) and 7(1) in the time it took to respond to the request.

Reasons for decision

14. Regulation 12(4)(b) states:

"(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(b) the request for information is manifestly unreasonable;"

15. 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 its officer time and cost.
16. Regulation 12(4)(b) of the EIR is designed to protect public authorities from exposure to a disproportionate burden or an unjustified level of distress, disruption or irritation, in handling information requests. In effect, it works in similar regards to two exemptions within the Freedom of Information Act 2000 ('FOIA'): section 12, where the cost of complying with a request exceeds the appropriate limit and section 14, where a request is vexatious.
17. The EIR differ from the FOIA in that there is no specific limit set for the amount of work required by an authority to respond to a request, as that provided by section 12 of the FOIA.
18. Specifically, the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004¹ ('the Fees Regulations') which apply in relation to section 12 of the FOIA are not directly relevant to the EIR - the cost limit and hourly rate set by the fees regulations do not apply in relation to environmental information. 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.
19. The Fees Regulations confirm that the costs associated with these activities should be worked out at a standard rate of £25 per hour per person. For local authorities, the appropriate limit is set at £450, which is the equivalent of 18 hours work.
20. The Commissioner is satisfied that Regulation 12(4)(b) sets a fairly 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'

¹ http://www.legislation.gov.uk/ukxi/2004/3244/pdfs/ukxi_20043244_en.pdf

unreasonable, rather than simply being 'unreasonable' per se. The Commissioner considers that the term 'manifestly' means that there must be an obvious or clear quality to the identified unreasonableness.

21. It should also be noted that public authorities may be required to accept a greater burden in providing environmental information than other information.

22. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will take the following factors into account:

- 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);
- the requirement to interpret the exceptions restrictively.

23. The council has provided the Commissioner with its rationale for applying the exception to disclosure provided by regulation 12(4)(b):

- the subject matter of the request involved of several officers across various services, being Legal, Transport and Countryside and Planning Services;
- the emails are not stored in a central file "*Planning, Transport and Legal services all have different file management systems which made it difficult for the information to be easily retrieved as it was not maintained within one central filing system. These file management systems were developed separately by each of the services some years ago*";

- the ICT department would have to search the officers' email accounts to locate and retrieve the correspondence which would have *"captured thousands of email threads and their separate attached documents, some of which would not have been relevant to the request."*
- in the reduced time period of 3.5 months for the revised request, in which the council subsequently provided the requested information, 350 emails had been identified;
- the council entered discussions with the environment agency around August 2016, therefore correspondence within scope of the request spans a period of over two years. The council stated it made *"a conservative estimate of one thousand emails"* being in scope for this period in its calculations. The council has not included time for determining whether information was held as *"as officers had advised that it was, and so the calculations provided below include the time taken to locate, retrieve and extract the information:*

Time taken to locate the information:

1000 emails x 2 minutes = 22 hours 20 minutes

Time taken to retrieve the information from the email or the attachment:

1000 emails x 5 minutes = 83 hours 20 minutes

Time taken to extract the information:

1000 emails x 3 minutes = 50 hours

Total: 166 hours 40 minutes, which would have exceeded the appropriate limit of 18 hours by 65 hours 40 minutes"

24. The council advised that it had not undertaken a sampling exercise as some information had already been collated and provided to the requester outside of the EIR process, giving a good indication of the time required to process the request and the large volume of in-scope information.
25. The council confirmed that it had based the estimate on the quickest method of gathering the information. It stated that the information would have to be gathered from individual accounts and not a database; therefore it was necessary to extract it from email trails and attachments once they had been located within the separate email inboxes; and that this could not be automated.

26. It confirmed that *"it would not be possible to undertake a simple search of officer's inboxes using key terms or filtering emails by sender / recipient as this would not have provided an accurate search. This was because the information requested related to the Environment Agency's Flood Model and not every email was likely to be entitled in this way."*
27. The council stated that it *"would have welcomed the opportunity to provide the information, if it had been possible to do so in order to show transparency with its process. Therefore when the second request was received from [redacted] with the narrower timescale, the Council would normally have refused it as being manifestly unreasonable due to the volume of information recorded and the time taken to locate, retrieve and extract it. However Planning Service requested that it still be considered, in order to assist the appeal process and every effort was made to provide it."*

Is the exception engaged?

28. The Commissioner has no basis upon which to dispute the council's assessment of the volume of information held, the description of its file structures, and the associated time estimate to respond to the request.
29. The complainant raises the point that the council should not be able to refuse the request on cost grounds *"due to the way it chooses to file electronic information."* Recommendations for EIR public authorities on record keeping, management and destruction are set out in the FOIA section 46 Code of Practice². Failure to comply with the code is not in itself a breach of FOIA or the EIR. However, following the code will help an authority to comply with the legislation, as such the Commissioner has a duty to promote good practice and conformity with the code.
30. However, having accepted the council's estimate of time, based upon the quickest retrieval method, the issue that the Commissioner must consider for the engagement of regulation 12(4)(b) is the proportionality of the burden on the council's workload of retrieving the information as it is currently stored.
31. The Commissioner has considered the nature of the request, taking account of the presumption in favour of disclosure and the requirement

² <https://ico.org.uk/media/for-organisations/documents/1624142/section-46-code-of-practice-records-management-foia-and-eir.pdf>

to interpret exceptions restrictively. The Commissioner accepts that the issue is important to the Client who is proposing the residential planning development. However she finds the burden on the council in complying with the request to be significant,. As such, she considers that the subsequent diversion of resources from other public duties is significant enough to engage the exception at 12(4)(b).

32. Having considered the volume of information in scope of the request, and the resultant time estimate, the Commissioner finds that it would be manifestly unreasonable on the grounds of cost to fulfil the request. The Commissioner has been guided by what is considered to be a reasonable time period under FOIA, being equivalent to 18 hours of work.
33. However she can only find that regulation 12(4)(b) is upheld if the public interest test at regulation 12(1)(b) favours such reliance. The Commissioner has therefore gone on to consider the balance of the public interest.

Balance of the public interest

34. Regulation 12(4)(b) is subject to the public interest test and therefore the Commissioner must determine whether the balance of the public interest lies in favour of maintaining the exception at regulation 12(4)(b) or in disclosing the requested information.

The public interest in the information being disclosed

35. The council states it considered the following public interest argument in favour of disclosure: "*Promoting transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views and more effective public participation in environmental decision making.*"
36. The complainant states that the information should be available in the public planning file. It relates to a public inquiry investigating the merits of a development being considered through the planning process and as such the information should be made available and in time to be presented by themselves to the inquiry.

The public interest in the exception being maintained

37. In favour of maintaining the exception the council states "*The volume of information requested would cause a disproportionate burden or unjustified level of distress, disruption or irritation to the Council.*"

Balance of the public interest arguments

38. The councils view is that the broadness of the request and the volume of information held would result in a significant burden on the council. It states that *"the level of resources and public funds required to comply with this request would be disproportionate to any public benefit, particularly as the information was required by the requester in order to further a disagreement with the Council. It is therefore our view that the public interest in withholding this information outweighed the public interest in supplying it."*
39. The Commissioner recognises the inherent importance of accountability and transparency within public authorities, and the necessity of a public authority in bearing some costs when complying with a request for information. However, 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.
40. The Commissioner appreciates that the information is of interest to the Client. However she regards the volume of work required to provide further granular detail is difficult to justify considering the strong public interest in ensuring that scarce public resources are not used disproportionately. She is also cognisant of the information already made available by the council and considers that this is sufficient to satisfy the public interest in transparency.
41. Furthermore, public interest in the scrutiny and oversight of local authority decision making in planning matters is met by the separate and distinct planning appeal process³. The Client is engaged in a planning appeal and the Commissioner considers that the EIR should not be used to circumvent the due process associated with it.
42. The Commissioner concludes that the value of the requested information to the Client is greater than its value for serving a wider public interest. As such, the public interest in the matter is not sufficient to justify the diversion of public resources that would be required to fulfil the request.
43. The Commissioner's position therefore, is that the public interest lies in maintaining the exception.
44. As such the Commissioner finds that the council is correct in its application of regulation 12(4)(b) of the EIR.

³ <https://www.gov.uk/appeal-planning-decision>

Regulation 9 – Advice and assistance

45. Regulation 9(1) provides 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.

46. 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 an applicant to refine a request if it is deemed that answering a request would otherwise incur an unreasonable cost.

47. The Commissioner is aware that the council invited the complainant to limit the scope of the request as part of the refusal notice. The Commissioner notes that a reduction in scope was subsequently provided by the complainant and the council responded by providing the revised requested information.

48. The Commissioner is therefore satisfied that the council has complied with the requirements of regulation 9(1).

Regulation 5(2) – Time for compliance

Regulation 7(1) – Extension of time

49. Regulation 5(2) states that, where a public authority holds environmental information, the 'information shall be made available [...] as soon as possible and no later than 20 working days after the date of receipt of the request.'

50. Regulation 7(1) permits that, where a public authority 'reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so', it may extend the time for compliance by a further 20 working days, to a total of 40.

51. In this case, the request was raised on 28 November 2018, the council informed the complainant of its intention to extend the time for compliance on 17 December 2018 and the refusal notice was issued on 16 January 2019. The council therefore advised the complainant 14 working days after the request was raised and completed its initial response within 33 working days.

52. In response to the Commissioners enquiries, the council advised "the original reason for the extension of time was due to the volume of

information that was caught by the request as we had been given a rough estimate by the officers involved of how much information they held. We had also consulted with IT about the length of time it would take them to retrieve the email correspondence from the various email inboxes."

53. It stated *"In addition some information had already been collated and provided to the requester outside of the EIR process, so this gave us a good indication of the length of time involved with processing the request. Consequently, the decision to refuse the request was not taken until it had been established who held the information and what they held and it was only then that it was appreciated it would be manifestly unreasonable to locate, retrieve and extract it to enable us to respond to the request."*
54. The Commissioner considers, having accepted the council's explanation regarding the complexity and volume of information, that it was reasonable to extend the time taken to respond to the request.
55. The Commissioner therefore finds that the council complied with regulation 7(1).

Right of appeal

56. 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

57. 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.
58. 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
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