

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

Date: 28 June 2020

Public Authority: Cornwall Council
Address: New County Hall
Treyew Road
Truro
TR1 3AY

Decision (including any steps ordered)

1. The complainant has requested information regarding a planning application.
2. The Commissioner's decision is that on the balance of probabilities, Cornwall Council has located all the information held in scope of the request. However, it breached Regulation 5(2) in failing to respond to the request within 20 working days.
3. The Commissioner does not require any steps.

Request and response

4. On 9 February 2019, the complainant submitted a request to Cornwall Council ('the council'). The council responded that it held 386 emails in scope of the request, which would exceed cost limits. The council gave the following advice:

"...We estimate that to provide a response to these questions would take in excess of 28 hours, this is due to the way the information is held in our IT systems.

There are a total of at least 386 documents/emails relating to this matter. These would each in turn need to be reviewed to see if any exemption would need to be applied and it was established that each document would take 4 minutes to review. The rest of the time charged was to logging and processing the request as well as seeking final sign off.

...As a guide, under the Freedom of Information Act, the appropriate limit has been specified in regulations and for local Government is set at £450. This represents the estimated cost of one person spending approximately 18 hours in determining whether the council holds the information, and locating, retrieving and extracting the information.

...We may be able to assist with your request if you are willing to narrow the terms of the search..."

5. On 10 March 2019 the complainant subsequently submitted a revised request in the following terms:

"All correspondence relating to planning application number PA18/08665 (redacted) from 27 November 2018 to date. Correspondence between Cornwall Council and myself can be excluded."

Further clarification:

"Could you please provide the maximum number of emails and documents that can be provided under the £450 limit, starting from the most recent and working backwards. From the figures provided in your letter this would equate to about 230 emails.

I think my original request stated that I did not need copies of the following emails and this still applies:

- *Emails and letters both from and to myself.*

- *Emails and letters from and to the Deviock Parish Council.*
 - *Emails and letters prior to 28 November 2018.”*
6. The council responded on 26 April 2019 and provided some information within the scope of the request (being 45 emails) but refused to provide the remainder. It cited regulation 12(5)(b) - the course of justice, as the basis for the refusal. The council also stated that after reviewing the information it had found that some items did not fall within the scope of the request.
 7. The complainant requested an internal review on 16 May 2019.
 8. Following an internal review, the council wrote to the complainant on 12 July 2019. It changed its position to release 13 emails that had originally been withheld in respect of regulation 12(5)(b). It confirmed that in responding to the request it had reviewed a total of 225 emails, taking 15 hours, and carried out an email audit taking a further 3 hours. It stated that it had removed emails from the disclosure that were duplicates or out of the scope of the request. The council advised it had not been possible to know about the duplicates and out of scope information until it had reviewed each email and document.
 9. The complainant made a further request to the council on 11 June 2019 for the remainder of the 386 emails that had been excluded from the revised request, as a result of the narrowed scope, in order to stay within cost limits. This request has been dealt with separately in decision notice FER0914315.
 10. During the course of the investigation the council identified two emails that remained withheld under regulation 12(5)(b). On reviewing the emails, it identified that one had already been sent to the complainant by the 'Head of Legal'. It decided that the balance of the public interest favoured releasing the other email and this was disclosed to the complainant on 24 February 2020. It is the council's position that it has now released all information that is in scope of the request.

Scope of the case

11. The complainant contacted the Commissioner on 14 August 2019 to complain about the way their request for information had been handled. Specifically that the council have only disclosed 58 emails out of the 386 that were in scope of the original request, and that it is unclear what records the council are withholding that relate to legal matters. The complainant does not believe that any records should be withheld on either legal or cost grounds. The complainant disputes that it would take

the council 4 minutes to review each of the 386 emails, and that there was no need to spend time reviewing duplicate emails, which could have just been sent anyway.

12. The complainant is concerned about information that the council originally stated was in scope and later identified as not relevant to the request *"It would be very strange if all the remaining 327 undisclosed emails are really irrelevant to my FOI request. It appears they do not want me to find out the real reasons for allowing the developer to illegally obstruct and drive over the public right of way."*
13. The Commissioner considers that in revising and resubmitting the request, the complainant has accepted the 12(4)(b) refusal which was given in regard of the original request made on 9 February 2019.
14. It is the council's position that following the internal review and the Commissioners investigation, it has released all information in scope of the revised request. It is not withholding any information in scope of the request.
15. The Commissioner therefore considers that the scope of this case is to establish whether, on the balance of probabilities, the council holds any further information in scope of the request. She will also consider if the council has incurred any procedural breaches.

Reasons for decision

16. Regulation 5(1) of the EIR states that: "a public authority that holds environmental information shall make it available on request." This is subject to any exceptions that may apply.
17. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. She will also consider the actions taken by the authority to check that the information is not held, and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held.
18. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)* in which it was stated that *"there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records"*. It clarified that the test to be applied as to whether or not information is

held was not certainty but the balance of probabilities. This is therefore the test the Commissioner applies in this case.

19. In discussing the application of the balance of probabilities test, the Tribunal stated that, *"We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."* The Commissioner has therefore taken the above factors into account in determining whether or not further information is held, on the balance of probabilities.

The Complainants view

20. The complainant outlines that in the council's response it states that 225 of 386 emails were reviewed however it only released 45 of these. Some were withheld due to the provisions of regulation 12(5)(b) and the remainder are not relevant to the request. The complainant was concerned that the council had not stated why they are not relevant.
21. Furthermore, that after the internal review the council released a further 13 emails. The complainant states that they have only received 58 emails out of 386 that are relating to the FOI request. *"It is clear that emails relating to legal matters are still being withheld but they have not informed me how many of the 328 emails I have not received is because they are treating them as exempt."*
22. The complainant disputes the time the council have allowed for searching for the information. He states that the planning application number appears on the subject line of all the emails, and that a database search would therefore take very little time using this as a search term.
23. It is the complainant's position that the council should not have spent some of the available time in removing duplicate emails and had been advised of this. The complainant disputes that the cost estimation of 4 mins per email includes time to review duplicates.

24. The complainant requests that the Commissioner should determine if the council are still withholding information due to regulation 12(5)(b) and if so whether it is in accordance with the law.
25. It is the complainants view that none of the 386 emails that the council identified as relating to the request should be exempted for legal or cost reasons.

The Council's response

26. For the sake of clarity, and in response to the complainant's issues above, the scope of this case is in regard to the revised request. Therefore the Commissioner's investigation with the council relates to whether it identified and released all the information within the scope of *"...the maximum number of emails and documents that can be provided under the £450 limit, starting from the most recent and working backwards."*
27. The council confirmed that the email audit found a total of 386 potentially in-scope and that that it had been able to review 225 of those within the £450 cost limit specified in the request.
28. The council confirmed to the Commissioner that it had reviewed the emails for disclosure from the most recent and working backwards, as articulated in the request.
29. The Council advised that following the internal review, and during the course of the Commissioner's investigation, it had released all of the information in scope of the request. For clarity, confirming that only duplicates and out of scope emails had not been disclosed.
30. The Commissioner asked why some emails would be deemed out of scope if the planning application number appears on the subject line of all of the emails. The council advised that some emails were regarding a complaint about a council officer, they did not deem these as relating to the planning application PA18/08665. Furthermore, it had excluded the following as per the complainant's instruction:

"I think my original request stated that I did not need copies of the following emails and this still applies:

- *Emails and letters both from and to myself.*
 - *Emails and letters from and to the Deviock Parish Council.*
 - *Emails and letters prior to 28th November 2018."*
31. Regarding the review of duplicate emails, the council explained that due to the way their systems hold information, duplicates can only be identified through manual checking. Emails are contained within the

trails of other emails. Therefore, it would not be possible to remove duplicates from the total number of emails to be checked within the agreed cost limit. The identification of duplicates is an unavoidable activity within the process, as such there was no way of avoiding it in the total number of in scope emails.

32. The council confirmed that no items or emails have been deleted or destroyed outside of the Council's retention policy in relation to this case.

Conclusions

33. The Commissioner appreciates that the complainant's fundamental position is that they should have access to the complete set of 386 records. However, in submitting the revised request, the complainant accepted the council's position regarding the cost limit and its cost estimate. The complainant therefore agreed a new scope with the set of information reduced to "*the maximum number that can be provided under the £450 limit*"... "*starting from the most recent and working backwards*" which they estimated to be "*about 230 emails.*" Therefore, it is for the Commissioner to decide whether, on the balance of probability, the council has provided all information within this specified set.
34. The Commissioner is satisfied that in carrying out a review of 225 emails, which it says it was able to do within the cost limit, the council has met the request estimate of "*about 230 emails.*" The Commissioner also notes the assurance provided by the council, that the 225 emails had been reviewed for release in time order, starting with the most recent of the complete set of 386.
35. The complainant was concerned that some emails were being withheld in terms of regulation 12(5)(b). However, having released further information during the course of the investigation, the council confirmed that it is not withholding any information in this regard from the 225 emails.
36. The Commissioner reviewed examples of duplicate and out of scope information that was identified by the council officer during the manual checking of the emails. She accepts the arguments presented by the council for not including such emails in the response, and the reason why the planning application number search identified some records that were out of scope. Furthermore, she observes that it would not have been possible to identify which of the 225 emails were duplicates before carrying out the manual checking process.
37. The Commissioner appreciates the complainant's frustration that they have only received 58 emails out of 386 identified originally. However, it

is the case that the number of in-scope emails was reduced to 255 with the submission of the revised request.

38. The Commissioner is satisfied that the council undertook appropriate actions to identify all information held in scope of the request. The council also confirmed that no information has been destroyed or deleted outside of the normal retention policy.
39. Taking all of the above into account the Commissioner is satisfied that, on the balance of probabilities, no further information in-scope of the request is held by the council.

Procedural matters

Regulation 5(2)

40. Regulation 5(2) of the EIR provides that in 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.
41. The complainant made their request for information on 10 March 2019. The council responded on 26 April 2019 and provided some information.
42. After the internal review on 18 July 2019, the council provided further information. It changed its position regarding some further information during the course of the Commissioner's investigation which was released to the complainant on 24 February 2020.
43. The Commissioner therefore concludes that the council failed to comply with the requirements of Regulation 5(2) in the time it took to respond to the complainant's request for information. This is both in terms of its initial response, which was outside of statutory timescales, and the final information which was provided 10 months later.
44. As the response has been provided no further action is required.

Right of appeal

45. 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

46. 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.
47. 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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