

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 24 March 2021

Public Authority: Hampshire County Council
Address: The Castle
Winchester
SO23 8UJ

Decision (including any steps ordered)

1. The complainant requested information about two different types of statutory notices issued by Hampshire County Council (the council) under the Highways Act 1980.
2. The council issued a refusal notice to the complainant, initially citing section 12(1) of the Freedom of Information Act 2000 (FOIA). During the Commissioner's investigation the council revised its position, confirming that it now wished to rely on regulation 12(4)(b) of the EIR when refusing to comply with the request.
3. The Commissioner's decision is that the council is entitled to rely on regulation 12(4)(b) of the EIR. Furthermore, as it has offered reasonable advice and assistance to the complainant, it has complied with regulation 9(1).
4. However, by failing to initially deal with the request under the EIR, the Commissioner has found that the council has breached regulation 14(3) of the EIR.
5. The Commissioner does not require the council to take any steps as a result of this decision notice.

Request and response

6. On 21 May 2020, the complainant wrote to the council and requested information in the following terms:

How many (a) s143 Highways Act 1980 notices, and (b) s154 Highways Act 1980 notices, have been issued by the Council in each of all the last 10 years in respect of the rights of way network in Hampshire?

7. The council issued a refusal notice on 19 June 2020, citing section 12(1) of the FOIA. It advised the complainant that he might wish to consider narrowing the scope of his request, suggesting that he could be more specific about the information that he wanted, and change the time parameters of the request.
8. On 22 June 2020, the complainant requested an internal review. On 30 June 2020, the council provided its response, confirming that it was satisfied that it had been correct to apply section 12(1) of the FOIA to his request. However, it stated that it believed that it should have provided a more detailed explanation of its decision in its original response to him.
9. The council confirmed to the complainant that its Countryside and Legal Services Team do not collate separate details of the number of section 143, or section 154, notices served each year, and that this information is contained only within case notes. It stated that in order to provide the information requested, an officer would have to review the entire database of obstruction reports and cases for the past 10 years, and that this would amount to 6519 cases. The council went on to say that if it allowed for 10 minutes to retrieve, review and collate the information from each case, this would equate to 543 hours of work.
10. It should perhaps be noted at this point that the estimated time of 10 minutes per record specified by the council would actually equate to 1086 hours of work, rather than the 543 hours quoted. However, in the council's representations to the Commissioner, it sets out the same final figure of 543 hours, but uses an estimated time of five minutes per record. The Commissioner has taken it to be that the latter response is the actual estimated figures which were used by the council.
11. The council also referred to section 16 of the FOIA in its internal review response to the complainant. It confirmed that since the start of April 2020, 304 cases had been logged across the county and that, given this, it anticipated that it could review approximately 3 months worth of cases within the prescribed 18-hour timescale relevant to the FOIA.

12. The council confirmed to the complainant that should he wish to narrow the terms of his request, then it would process this and respond within 20 working days of receipt.

Scope of the case

13. The complainant contacted the Commissioner on 1 July 2020, to complain about the way his request for information had been handled.
14. During the course of the Commissioner's investigation, the council confirmed that it now wished to rely on regulation 12(4)(b) of the EIR as its basis for refusing to comply with the request.
15. The Commissioner therefore considers the scope of her investigation to be whether the council is entitled to rely on regulation 12(4)(b) of the EIR in this case.

Reasons for decision

Is the information environmental information?

16. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR, rather than the FOIA, if it meets the definition set out in regulations 2(1)(a) to 2(1)(f) of the EIR.
17. Regulation 2(1)(c) of the EIR says that any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors listed in regulation 2(1)(a) and 2(1)(b) will be environmental information. One of the elements listed under 2(1)(a) is land.
18. It is the Commissioner's understanding that section 143 of the Highways Act 1980 provides authorities with powers to remove structures that have been erected or set up on a highway. Section 154 of the Highways Act 1980 allows authorities to issue notices to the owners or occupiers of land where a hedge, tree or shrub is overhanging, causing a danger and/or obstruction to roads or footpaths, requiring them to cut them.
19. The Commissioner considers that information relating to such notices, which are issued in accordance with the legislative procedures set out in the Highways Act 1980, concern the state of the elements of the environment under EIR 2(1)(a), namely land.

20. As a result, the Commissioner finds that the information requested meets the definition of environmental information set out within regulation 2(1) of the EIR.

Regulation 12(4)(b)- where a request is manifestly unreasonable

21. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request is manifestly unreasonable. Where it is found to be engaged, regulation 12(4)(b) of the EIR is also qualified by the public interest test.
22. There is no definition of 'manifestly unreasonable' under the EIR. The Commissioner considers that 'manifestly' implies that the request should be 'obviously' or 'clearly' unreasonable.
23. 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 FOIA; section 12, where the cost of complying with a request 'is too great', and section 14, where a request is vexatious.
24. The council has refused the complainant's request on the basis of cost and the burden on its resources; it makes no reference to the request being vexatious.
25. There are no appropriate cost limits under the EIR, and the considerations which are associated with the application of 12(4)(b) of the EIR on the grounds of cost are broader than those relevant to section 12 of the FOIA (which applies where the 'cost of compliance exceeds the appropriate limit'). Under EIR, a public authority must consider the proportionality of the burden or costs involved, and decide whether they are clearly and obviously unreasonable.
26. Whilst recognising the difference between section 12 of the FOIA and regulation 12(4)(b) of the EIR, the Commissioner still considers the 'appropriate limit' relevant to section 12 to serve as a useful guide when considering whether a request is manifestly unreasonable on the basis of costs. This is because the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations)¹,

¹ <https://www.legislation.gov.uk/uksi/2004/3244/contents/made>

are taken to give a clear indication of what Parliament considers to be a reasonable charge for staff time.

27. 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.

The complainant's position

28. The complainant has advised the Commissioner that he wanted to identify the extent to which the council were using legal notices under section 143, and section 154, of the Highways Act 1980, in order to establish whether they are using their legal powers responsibly. He also wanted to see if there had been any significant change in the number of notices which have been issued in the last 10 years.
29. The complainant questions the council's claim that the Countryside Service, or its legal department, do not record the number of relevant notices served each year. He has referred to a request made by another individual to Powys Council² for a similar request for information; he suggests that if Powys Council was able to provide the information requested in full, and within a very short space of time, then the council, which is larger both in size and resources available, should be able to do so. He therefore does not regard the council's suggestion that he narrow the time frame of his request from 10 years to 3 months to be reasonable, or acceptable.

The council's position

30. The council has set out some background information in order to provide the Commissioner with the history and context of the request. It has advised that for the past few years the complainant has been in regular contact with its Countryside Service about a boundary dispute and the issuing of a section 143 notice in relation to what had been regarded to be an obstruction of a Right of Way.
31. The council states that such issues have already been considered by way of its complaints process, and that (at the time of its response to the Commissioner) it was now a matter that was being dealt with by the

² [s143 Highways Act 1980 notices - a Freedom of Information request to Powys County Council - WhatDoTheyKnow](#)

Local Government and Social Care Ombudsman (the LGO). It argues that the complainant's concerns are already being dealt with through the appropriate channels, and that the council has already spent a substantial amount of money attempting to resolve his complaints, and requests for information.

32. The council has gone on to say that it believes that compliance with the request would result in a 'significant burden' and unreasonable pressure on its resources. It states that whilst this is of particular importance as it continues to respond to the current emergency situation caused by the COVID-19 pandemic (which has had an additional burden on its resources), given the amount of time that would be required to undertake the task of complying with the complainant's request, it would also be applicable in normal circumstances.
33. Given that the council had identified 6519 records as being potentially relevant to the request, the Commissioner had asked the council whether it had considered search terms such as '*s 143 Highways Act 1980 notice*' and '*s 154 Highways Act 1980 notice*' in order to limit the information captured during its searches.
34. In response, the council explained that such search terms cannot be utilised in its database system; issues are recorded by 'issue type' and it is not possible to perform a general search on all fields within the system. It confirmed that it used the following 'issue type' when identifying 6519 records in this case:
 - Obstruction/Fallen/Unstable tree
 - Obstruction/ Fencing
 - Obstruction/other
35. The council has confirmed that the Countryside Service do not specifically record the notices served. It states that in the majority of cases, it will be found that a section 143, or section 154, notice will not be required; however, each case would need to be individually viewed to determine if a notice had been served. The council has advised that it believes that the use of the above 'issue types' would capture records of all cases where notices could have been served to resolve an obstruction.
36. The council also confirmed to the Commissioner that there is no statutory requirement to maintain records within a particular system or format that would enable all notices served under the Highways Act 1980 to be readily identifiable and accessible. However, it has advised that, when a notice is served upon an address, an anonymised copy is made available for public inspection upon request, but only until that

time that the notice is complied with or enforced by the council i.e., notices are kept for inspection for a temporary period but are then removed once the notice has been complied with, or enforced.

37. As already stated in paragraphs 9 and 10 of this decision notice, the council had estimated that it would require one officer 5 minutes per record to locate, retrieve and extract the information relevant to the request, and that this would equate to 543 hours of time (6519 records x 5 minutes ÷ 60 minutes). It went on to advise the Commissioner that even if it were to reduce the estimated time to one minute per record, then this would equate to 108 hours, or £2700 (108 hours x £25), which would still significantly exceed the cost limit of £450 set by the Fees Regulations.
38. With regard to the council's consideration of the public interest test, it states that it recognises greater openness and accountability to be factors which would always weigh in favour of the disclosure of information. It goes on to refer to the benefit to the public of having more information available on topics which affect their lives, and that greater openness might enhance the quality of public debate on any issues, and could enhance accountability in the spending of public money.
39. In terms of the public interest arguments in favour of withholding the information, the council has said that it does accept that, in terms of its size and its resources, it is in a better position than some other county councils; however, it believes that compliance with this particular request would still place a substantial and unreasonable burden on its resources. It argues that it would prevent council officers from undertaking their other responsibilities, and could disrupt and interfere with public services. It states that this unreasonable burden would be made even more substantial, coming at a time when resources are already diverted because of the current COVID-19 pandemic.
40. With regards to the value of making the information requested available to the public, the council has argued that the request relates to information on a '*narrow topic*' and that the notices are not '*regularly sought after by members of the public*'. The council states that in the last seven years it has received only one other request for information about obstructions on Rights of Way, and that this had related to one specific location. It claims that the request relates to issues that are personal to the complainant, and that there is no public interest in releasing the information which has been requested.

41. The council also states that it is appropriate to take into account its previous correspondence with the complainant, and that this includes the provision of information on the Right of Way to which his complaint relates in response to a previous request. It argues that the questions he has been asking about matters relating to the Right of Way have been discussed at length, and that matters have now progressed beyond the council's internal complaints process. The council goes on to say that the allegations made by the complainant that it places an excessive reliance on litigation in cases involving section 143, and section 154, notices will be considered by the LGO, who will determine what information is required in order to consider the issue, and respond to the complainant.
42. The council has argued that the burden of complying with the request is '*too great*' in this case and that the balance of the public interest weighs in favour of withholding the information.

The Commissioner's view

43. Firstly, the Commissioner accepts the council's assertion that it is unlikely that there is a more efficient method of interrogating its database system in order to drastically reduce the 6519 records that have been identified as being potentially relevant to the request.
44. Furthermore, it is the Commissioner's view that the council's estimates of the time and cost to comply with the request are not unreasonable. Even if you took the lower figure cited by the council of one minute per record, which, in the Commissioner's opinion is unlikely to be achieved, the 108 hours of work that this would equate to still far exceeds the 18 hours set out within the Fees Regulations.
45. As previously stated, whilst it can be a useful starting point to consider whether the cost limits set by the Fees Regulations would be exceeded when considering whether a request is manifestly unreasonable under the EIR, it is not determinative in any way. However, the Commissioner does consider that if a public authority is able to demonstrate that the time and cost of complying with a request is obviously unreasonable, then regulation 12(4)(b) will be engaged.
46. The Commissioner is satisfied that, in this instance, the total cost of compliance with the request would be significant, and this would have a detrimental impact on the council. She is also of the view that compliance with the request would be at the expense of other work and the delivery of other services to the public. In addition, whilst the Commissioner accepts that access to the information is important to the

complainant, she has found some difficulty establishing what benefit compliance with the request would bring to the wider public.

47. Having taken all relevant factors into account, the Commissioner is satisfied that the resulting burden on resources and costs, and the disruption caused to other important services carried out by the council, should the request be complied with, would be disproportionate to the value of the request.
48. As a result, the Commissioner is satisfied that regulation 12(4)(b) is engaged, and she will therefore now go on to consider the public interest test.

The public interest test

49. The Commissioner accepts that public interest factors, such as proportionality and the value of the request, will have already been considered by a public authority in deciding whether to engage the exception, and that a public authority is likely to be able to 'carry through' the relevant considerations into the public interest test. This is indeed the case in this instance. However, regulation 12(2) of the EIR specifically states that a public authority must apply a presumption in favour of disclosure. In effect, this means that the exception can only be maintained if the public interest in refusing the request outweighs the public interest in responding.
50. The Commissioner considers that the public interest is best served in ensuring that a resource and capacity-stretched service is able to maximise its resources for the benefit of the public.
51. She has already determined that complying with this request would incur significant costs and place a demand on limited resources, and that it would distract the council from some of its other responsibilities. The Commissioner believes it to be appropriate to also take some account of the impact and additional burden that the COVID-19 pandemic has had on the council's resources.
52. The Commissioner has already confirmed that, in her view, there will always be some public interest in openness and accountability; however, in this case, it would appear likely that the primary motivation behind the request is to further the complainant's own private interests. Whilst this would not necessarily negate the possibility of a wider public interest in the information that has been requested, in this particular instance, the Commissioner has found it difficult to establish what benefit to the public in general would be derived from the release of the requested information.

53. Furthermore, with regards to the public interest arguments of openness and accountability, which support disclosure of information, the Commissioner regards it to be extremely pertinent to her consideration of matters that the council provides public access to all the notices that are issued (albeit for a limited period of time). Therefore, this provides for a considerable degree of openness and accountability with regards to the process which is followed when the council issues a notice.
54. There are important reasons why the exception at regulation 12(4)(b) exists. Both the FOIA and the EIR give the public unprecedented rights to access recorded information held by public authorities. However, it was not the intent of the legislation that compliance with requests would impede disproportionately and unfairly on the many other important duties that public authorities have to carry out, often with limited resources in place.
55. The Commissioner does have some sympathy with the complainant's position. He has seen a similar request to another public authority where, it would seem, compliance was possible without imposing any significant burden on that public authority's resources. However, different public authorities may record and hold information in different ways and using different electronic, or manual, systems.
56. The Commissioner also accepts 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. Therefore, public authorities may be required to accept a greater burden in providing environmental information than other information.
57. However, the Commissioner regards it to be the case that the release of details of a notice at the time that it is issued goes some way in meeting the public interest factors of openness and accountability in this case. In addition, having taken into account the amount of time and cost that processing this request would take, along with the likely resulting effect on the council's other functions, the Commissioner has concluded that, on balance, the public interest lies in favour of maintaining the exception at regulation 12(4)(b) in this instance.

Regulation 9 – Advice and assistance

58. Regulation 9(1) of the EIR 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.'

59. 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.
60. The council has provided the complainant with details on how it could narrow or refine his request in order to bring the request within the cost limits. It is the Commissioner's view that it would be difficult for the council to have offered any more meaningful advice about refining or narrowing the request.
61. Given the above, the Commissioner considers that the council has complied with the requirements of regulation 9(1) of the EIR in this instance.

Regulation 14 – Refusal to disclose information

62. Regulation 14(3) requires a public authority to provide the requester with a refusal notice specifying the exceptions within the EIR upon which it is relying.
63. In this instance the council only confirmed during the course of the investigation that it considered the request to fall under the EIR, rather than the FOIA. Its failure to deal with the request under the correct legislation means that it has breached regulation 14(3) of the EIR.

Right of appeal

64. 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

65. 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.
66. 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