

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

Decision notice

Date: 23 November 2021

Public Authority: North Somerset Council
Address: Town Hall
Walliscote Grove Road
Weston-super-Mare
BS23 1UJ

Decision (including any steps ordered)

1. The complainant made three separate requests from North Somerset Council ("the council") for information related to a planning decision. The council aggregated the requests and refused to comply under regulation 12(4)(b) (manifestly unreasonable request) of the EIR. Regulation 12(5)(b) (the course of justice) was also applied to two of the requests.
2. The Commissioner's decision is that the council was entitled to aggregate the requests and apply regulation 12(4)(b). Having made this decision, the Commissioner did not need to consider the application of regulation 12(5)(b).
3. The council breached regulation 14 by failing to inform the complainant correctly of the grounds of its refusal.
4. The Commissioner does not require any steps.

Request and response

5. On 18 September 2020, the complainant wrote to the council with three separate requests for information, which were made in the following terms:

6. Request A

"On Wednesday 19 August 2020, the Planning & Regulatory Committee agreed that permission be REFUSED on Application Town & Village Green Baytree School, Brookfield Walk Clevedon..."

...This FOI request asks for information (as defined section 84 of the FOI Act) leading up to the production of those reports and including any reports/finding found that were not considered to be carried forward for formal publication. EG on 16/09/2020 a councillor mentioned a National Trust property has some formal say on close land to the Application site, yet this is not referred in any reports documented on your web pages. This paragraph is given only an example not as a sole aspect.

Further, I require any information, but not limited to, documents, pre-planning notes, site meeting notes, emails, internal correspondence, telephone call notes, dates of any interaction with external bodies, committee notes, officers correspondence, general correspondence, analysis, issues raised/dismitted, briefing opinion; which may have lead to the 'formal' planning application and consequent REFUSAL relating to – Town & Village Green Application Baytree School, Brookfield Walk Clevedon."

7. Request B

"On Wednesday 16 Sept, the Planning & Regulatory Committee agreed that Planning permission be APPROVED on Planning Application 20/P/0605/R3 Baytree School, Brookfield Walk Clevedon - subject to Secretary of State intervention and agreement. This FOI request asks for information (as defined section 84 of the FOI Act) leading up to the production of those reports and including any reports/finding found that were not considered to be carried forward for formal publication. EG a councillor mentioned a National Trust property has some formal say on close land to the Application site, yet this is not referred in any reports documented on your web pages. This paragraph is given only an example not as a sole aspect.

I require any information, but not limited to, documents, pre-planning notes, site meeting notes, emails, internal correspondence,

memorandums, telephone call notes, dates of any interaction with external bodies, committee notes, officers correspondence, general correspondence, definitive/subjective analysis, issues raised/dismitted, briefing opinion; which may have lead to the 'formal' planning application and consequent approval relating to - Application 20/P/0605/R3 Baytree School, Brookfield Walk Clevedon."

8. Request C

Committee approved, subject to the view of the Secretary of State, Application 20/P/0605/R3 to build an extension to Baytree School on land adjacent to Brookfield walk, Clevedon. The land in question is Green Belt land and whilst informing the Committee [redacted] Development Manager clearly stated: '..... taking the balance of the overall decisions, we didn't feel that the loss of this particular piece of land to the proposed use would have a significant effect locally in that respect..... in the greenbelt is not directly a public open space issue. why we felt that this particular portion of the greenbelt land, perhaps has less somewhat less value than other parts in terms of fulfilling the functions of the green belt designation.'

Please provide the documentary evidence on which your officer based his statement 'this particular portion of the green belt land has somewhat less value than other parts'.

Please note I require factual evidence not explanation or reason pertaining to any specific or particular green belt land. I am seeking factual Council evidence by way of protocols, policies, procedure, formulas, even algorithms for any green belt land within the NSC boundary in determining its 'value' as per my original request."

9. The council gave one response, covering all three requests, on 20 November 2020. It refused to provide the requested information, citing regulation 12(4)(b) (manifestly unreasonable requests) and regulation 12(4)(e) (internal communications) as the basis for withholding the information in its entirety.
10. The complainant requested an internal review on 27 November 2020.
11. Following an internal review the council wrote to the complainant on 18 December 2020. It confirmed its position that regulation 12(4)(b) was applied separately to all three requests and regulation 12(4)(e) was applied to requests B and C.

Scope of the case

12. The complainant contacted the Commissioner on 27 December 2020 to complain about the way the requests for information had been handled. Firstly that the council had mishandled the requests by providing a single response. Secondly disputing the application of regulation 12(4)(b) and 12(4)(e) to withhold information, including whether sufficient advice and assistance had been given in line with the requirements of regulation 9.
13. During the course of the investigation, the council changed its position. It advised the Commissioner it was aggregating requests A, B and C into a single request, for which the information is withheld on the basis of regulation 12(4)(b). In addition, the council applied regulation 12(5)(b) to withhold information in scope of requests B and C. The council confirmed that it was no longer citing regulation 12(4)(e) in relation to any of the requests.
14. During a complaint investigation, the Commissioner will invite public authorities to review their position on a request. Decisions made by the Commissioner are based upon the final response that is given to a request. The Commissioner will not, therefore, be considering the earlier application of regulation 12(4)(e) to requests B and C.
15. In terms of the complainant's concerns regarding the council's handling of the requests, the Commissioner will consider whether the council breached any procedural regulations. Relevant to this case these are regulation 5(2) (statutory time limits), regulation 14 (issuing a valid refusal notice), and regulation 9 (advice and assistance).
16. The scope of the case, therefore, is to decide whether the council was correct to aggregate the requests and withhold information on the basis of regulation 12(4)(b). If 12(4)(b) is not engaged then the application of 12(5)(b) to requests B and C will be considered. The Commissioner will also decide whether the council made any procedural breaches in the handling of the requests.

Background

17. The council provided some background information:
 - Having identified a shortfall in the provision of special schools based on demand in the area, the council began the process of expanding an existing school into a second location. The development met some local opposition.

- The council made a planning application to itself for the expansion which was initially refused by the Planning and Regulatory Committee, but then granted a month later.
- The decision was formally appealed by the Environment Agency due to the proposal being on Green Belt land. The application was referred to the Secretary of State's Office (the Planning Casework Unit). At the time of the information request and internal review, the final decision was still outstanding.
- The Planning Casework Unit made a decision on 6 September 2021 to permit the development.
- On 8 October 2021, the Council received a pre-action protocol letter in respect of a judicial review on this decision. This means that the courts could quash the decision.

Reasons for decision

Regulation 12(4)(b)

18. Regulation 12(4)(b) of the EIR provides that

"(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;"

19. The council's position is that requests A, B and C have enough similarity in order to be considered together and refused on the basis of the disproportionate burden that would be placed on its resources.
20. 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 similarly 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.
21. 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.

22. 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 because 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.
23. The Fees Regulations confirm that the costs of a request should be worked out at a standard rate of £25 per hour. For local authorities, the appropriate limit is set at £450, which is the equivalent of 18 hours work.
24. 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 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.
25. It should also be noted that public authorities may be required to accept a greater burden in providing environmental information than other information.
26. 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;

¹ [The Freedom of Information and Data Protection \(Appropriate Limit and Fees\) Regulations 2004 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

- 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.

The council's position

27. The council advised that it has received 29 requests since September 2020 from the complainant in relation to the school expansion, 11 of which were escalated to internal review. The outcome of the internal reviews tended to be that more contextual detail was needed to explain the response. On some occasions the outcome was a recommendation to take the enquiry outside of the FOIA process as the service could provide more detail.
28. The council stated that the previous requests demonstrate that an atypical proportion of time has been spent on the complainant's requests. It stated that it has aimed to be as transparent as possible, often going beyond the requirements of the FOIA.
29. The council explained that it had aggregated the requests because they are:
 - made on the same date.
 - sent by the same requester.
 - directly linked to the proposed school expansion development.
 - all requesting information regarding the planning decisions. Request A is for the files and communications linked to the original planning refusal; B is for files and communications linked to why permission was subsequently granted; and C is for files and communications linked to how the location was decided.
 - asking for information held by the same key officers within the Planning team, and stored in the same location.
 - related to information already published as part of the planning process.

30. The council stated that of the 29 requests from the complainant relating to this development received over the past year, they have only amalgamated and applied 12(4)(b) to these three requests. It argued this is despite the common theme and the comparatively short space of time between the requests. The council stated that it was making every effort to avoid refusing the complainant's requests.
31. The council advised that on receipt of the request, it had identified the officers who would hold information in scope of the request. The officers carried out manual and electronic searches of their files including email accounts and network files.
32. The council advised that it had searched for records potentially holding information in scope of all three requests. These are stored in the same locations. From the search it found that the following volume of files would need to be manually reviewed for information in scope of the requests:
 - Planning team – over 800 files
 - Children's Services (made the planning application) – 1138 files
 - Major Projects team – 91 files. A sample of 5 files found 178 sub-files and 906 documents.
33. The council stated that whilst the files are easy to source, it would still need to review each of the records held in each of the circa 2000 files for information within the scope of requests A, B, or C.
34. The council has the ability to run automated searches on its email and collaboration systems. However due to the length of time the planning and development has been ongoing this would provide thousands of results which would still require a manual review to see if they contain information in scope of the requests. It advised that it has no automated search available for network folders.
35. The council considers that the breadth of detail asked for within each request is substantial.
36. The council acknowledged that the complainant considers each of the three requests to be independent. However it advised that it is the same council team, and officers who are dealing with each aspect of the planning applications. Therefore the source files to be checked for information in scope of requests A, B, and C are the same.
37. The council estimates that the review would take on average 5 minutes per file which would amount to approximately 166 hours. The council stated it had considered doing the search once only, looking for

information in scope of any of the three requests, rather than three times.

38. The council advised that it considers the quoted time of 5 minutes to be a reasonable estimate of time to read each file looking for information in scope of the requests. However it noted that even if this is reduced to 2 minutes there would still be around 70 hours of office time required.
39. The council had also considered the effort required in the context of the value of the information. The council stated that the Planning Casework Unit's decision was made with no outside influences and the requested information could have no bearing on the outcome.
40. The council therefore considers that the burden of resources necessary to respond to requests A, B, and C outweighs the public value in the information.

The complainant's position

41. The complainant is concerned that the council has not adequately considered the scope of each request, A, B, and C, individually. The complainant states that there is no similarity between the requests.
42. The complainant states that the land is the last green belt land in the area and the issues therefore effect the local population. It is therefore a poor value judgement of the council to consider that matters of costs outweigh the loss of green belt land.
43. The complainant raised concerns over whether the three requests had been considered as "Applicant Blind", as required by the EIR.
44. In regard to C the complainant questions why the council would need to consult the same set, and therefore volume, of information.
45. The complainant disputes the council's position that the withheld information has limited public value because it can have no bearing on the outcome of the planning decision. They argue that the case can be open to judicial review, which the Commissioner notes has subsequently happened. Furthermore that the public have a right to transparency in relation to information that illuminates the workings of the council.

Should the requests be aggregated?

46. The Commissioner's guidance on regulation 12(4)(b)² states: "As the FOIA fees regulations do not apply under the EIR, there is no specific provision for the aggregation of substantially similar requests for environmental information. Our position, however, is that there may be occasions where it is permissible to consider a number of EIR requests together when deciding if they are manifestly unreasonable on the grounds of cost. This is in line with the approach to requests considered manifestly unreasonable on the grounds that they are vexatious, where the context in which they are made can be taken into account"
47. The Commissioner has considered each individual request. She finds that the requests are similar enough to be considered together for the purposes of applying regulation 12(4)(b). This is on the basis that they cover the same broad information; being information regarding decision making on the planning application, which were all made by the same requester, at the same time.

Is the exception engaged?

48. The Commissioner has considered the complainant's concerns about the council not dealing with their requests as applicant blind. In most cases, no matter who the requester is, the Commissioner expects requests to be dealt with as applicant blind. However when an authority is deciding whether a request is manifestly unreasonable, the history of previous requests from the applicant may be relevant when considering the context in which the request is made, the burden it might impose, and the value of the request.
49. The Commissioner is sympathetic to the complainant's cited public interest concerns about the loss of green belt land. However she notes that the decision has been subject to formal appeal processes and remains the subject of an ongoing judicial review.
50. The Commissioner has considered the council's application of regulation 12(4)(b) to the requests. She has decided that it would require the council to spend a significant and disproportionate cost and effort in order to comply. Therefore, her conclusion is that the requests were manifestly unreasonable and regulation 12(4)(b) is engaged.

² <https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf>

Public interest

51. Regulation 12(4)(b) provides a qualified exception, therefore a public authority may only refuse a request that is manifestly unreasonable if the public interest in maintaining that exception outweighs the public interest in disclosure. Regulation 12(2) of the EIR also provides that the public authority must apply an explicit presumption in favour of disclosure. This means that exempt information must still be disclosed if the balance of the public interests does not favour maintaining any exceptions applied.

Public interest in favour of disclosure

52. The council advised that it has considered the public interest in the proposed expansion of the school, in particular the chosen location of green belt land. It concludes that there is a need for transparency over how the decision was reached.
53. The council states that public should also be able to have confidence that all environmental considerations have been fulfilled as part of the process.
54. The complainant states that the information is required to assist individuals in challenging decisions made in reference to the green belt land, and to promote accountability and transparency of the council's decisions and public spending. Furthermore they state that disclosure may bring to light information affecting public health and public safety.
55. The complainant also contends that the planned development is in contravention with the council's environmental policies. They state that there should be an obligation on the council to give a reasoned explanation for the decisions made, and that this will enable public oversight.

The public interest in the exception being maintained

56. The council advised that when the Planning Application was first submitted, public consultations were held, where details of which location was chosen and why were made public. All planning responses in support and objecting have been made public.
57. The council stated that at the point in time of the request and internal review, the referral to the Secretary of State was still undecided. The decision as to whether a public inquiry is to be called is made solely by the Secretary of State, and there is no mechanism by which the public can influence the decision. It stated therefore, that disclosure of the information at that time would not have any bearing on the outcome of the decision.

58. The council concluded that the Planning Casework Unit's decision was made with no outside influences and the requested information could have no bearing on the outcome. It therefore believes that the burden of the necessary resource required to be able respond to these requests outweighs the public value of the information.

Balance of the public interest

59. The Commissioner recognises the importance of accountability and transparency with regard to decision-making by public authorities and the necessity of a public authority in bearing some costs when complying with requests for information.
60. However, in considering the public interest test for this case, the Commissioner must assess whether the cost of compliance to, and impact on, the council is proportionate to the value of the request.
61. The Commissioner considers that the planning application has been the subject of formal appeal processes and remains the subject of an ongoing judicial review which may quash the decision of the Secretary of State's Office.
62. The Commissioner considers that the public interest is currently being served by the review and appeals processes. She concludes that the burden which would be imposed by compliance with the request to be manifestly excessive to the extent that it would be likely to impact on other public services.
63. It is, therefore, the Commissioner's decision that the public interest lies in maintaining the exception.

Presumption in favour of disclosure

64. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*, "*If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...*" and "*the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations*" (paragraph 19).
65. As covered above, in this case the Commissioner's view is that the balance of the public interest favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation

12(2), is that the exception provided by regulation 12(4)(b) was applied correctly.

66. As the Commissioner has decided that regulation 12(4)(b) applies to all three requests, she has not need to go on to consider the application of 12(5)(b) to requests B and C.

Regulation 9 - Duty to advise and assist

67. Regulation 9(1) of the EIR states 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."*

68. The Commissioner has considered whether the council provided adequate advice and assistance in relation to requests A, B and C.

69. In the internal review the council provided the following advice to the complainant in regard to A:

"Reading your request, it is my understanding that you are most interested in information that helped to shape the decision to refuse the application. There were three objections received: one from North Somerset Council, one from Highways England, and one from a neighbouring landowner. We could limit our searches to consider the correspondence held between the objecting parties. If you would accept this approach, please let me know and I will log this as a new request"

70. The complainant is dissatisfied that the council did not provide early advice on modifying request A. Rather this advice was given in the internal review, after which there would be further delay in order to make a new request with the associated statutory timescales.

71. The Commissioner is mindful of the fact that the council's obligation under regulation 9(1) only extends to what is reasonable.

72. It is the Commissioner's view that it would have been reasonable for the council to provide advice on modifying request A, as soon as possible and no later than the initial response. However as advice and assistance was given during the internal review no further steps are required in this regard.

73. The council advised the Commissioner that it could not provide further assistance to the complainant in regard to B or C because the requests would still also be refused under regulation 12(5)(b). The Commissioner therefore accepts the council's position that no advice could be provided in relation to these requests.

Regulation 14 of the EIR – Refusal to disclose information

74. Regulation 5(1) of the EIR states that, subject to any exceptions, environmental information must be made available on request. Regulation 5(2) requires that the information be made available promptly, and in any event no later than 20 working days after the date of receipt of the request. Where no information is held, Regulation 14(2) requires a refusal notice to be issued within that time.
75. Regulation 14 of the EIR requires that where a public authority refuses to disclose information under an exception, this is stated in writing within 20 working days.
76. In this case, the council changed its position during the course of the Commissioner's investigation. It advised the Commissioner it was aggregating A, B and C into a single request, whereas in the internal review response the council indicated that the requests were withheld individually on the basis of regulation 12(4)(b). The council also changed its position to apply regulation 12(5)(b) to withhold information in scope of requests B and C, and withdrew the application of regulation 12(4)(e) in relation to any of the requests.
77. The council failed to issue an adequate refusal notice and on this basis the Commissioner finds a breach of regulation 14. However as the council's position has been clarified in this decision notice, no further steps are required.

Right of appeal

78. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

79. 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.

80. 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

Janet Wyles
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