

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 September 2022

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

Decision (including any steps ordered)

1. The complainant has requested copies of correspondence held by Cornwall Council (the council) relating to a Local Development Order for Nansledan, which is an area situated on Duchy of Cornwall land.
2. The complainant has raised concerns that the council refused part of their request under regulation 12(4)(b) of the EIR - manifestly unreasonable.
3. The Commissioner's decision is that the council is entitled to rely on regulation 12(4)(b) of the EIR.
4. The Commissioner does not require the council to take any steps as a result of this decision notice.

Background, request and response

On 13 March 2021, the complainant submitted the following request to the council:

"....Please note that the reference to the council in the questions below should be taken to mean the council leader and his/her office, the Chief Executive (or similar) and his/her office, the council's planning department and the council's legal department.....

Please note that I am only interest in information generated between 1 August 2020 and the present day.....

.....Please note that the reference to the Prince of Wales in the questions below should taken to mean the Prince himself (irrespective of which of his titles he used including Duke of Cornwall), his Principal Private Secretary (ies), any other private secretaries and anyone in his private office able to correspond and communicate on his behalf.

.....Copies of letters should include any letterheads, any signatures, and any other design features.

1...During the aforementioned period did any of the organisations and individuals listed below write to the council about the Nansledan Local Development Order. This correspondence and communications will include but will not be limited to the request for such an order, the need for such an order, the implications of such an order, the granting of such an order and the conditions of such an order. If the answer is yes, can you, please provide copies of this correspondence and communication.

a...The Prince of Wales aka The Duke of Cornwall.

b...The Prince's Foundation.

c...The Duchy of Cornwall Estate including but not limited to its legal representatives.

2...During the period did the council write to any of the organisations and individuals listed in 1 a to c about the Nansledan Local Development Order. This correspondence and communications will include but not be limited to the request for such an order, the need for such an order, the implications of such an order, the granting of such an order, and the conditions

of such an order. If the answer is yes, can you, please provide copies of the correspondence and communication.

3...During the period has the council received any written complaints about the Nansledan Local Development Order. If the answer is yes, can you, please provide copies of these written complaints. If the complainant is a member of the public, please redact their names and personal details. But do not redact the names of any organisations, councillors and politicians who have complained.....

4...If information relevant to this request has been destroyed can you state when it was destroyed and why? In the case of correspondence and communication which has been destroyed can you identify the relevant authors and recipients. If destroyed documentation of any kind continues to be held in another form, can you, please provide copies of that destroyed documentation.

5. On 13 April 2021, the council provided its response to the complainant. It advised that some information was not held, and that other information was already accessible on its website.
6. The council also advised the complainant that it was refusing part 1(c) and part 2 of the request under regulation 12(4)(b) of the EIR; it stated that the amount of information was 'substantial' and that to deal with these parts of the request would require a significant cost and diversion of resources from its other work.
7. The council provided the complainant with some advice and assistance as to how their request could be refined, suggesting that they consider a significant reduction in the time parameters of their request, and/or provide details of the correspondence which they require in order to narrow the 'search function'.
8. On 16 April 2021, the complainant submitted a new request to the council; this was a repeat of their request of 13 March 2021, but with the omission of part 3.
9. On 29 April 2021, the council confirmed to the complainant that it was refusing their 'refined' request under regulation 12(4)(b), stating that the changes that they had made 'did not change the exceeds nature of the whole request'.
10. On 30 April 2021, the complainant requested an internal review, and on 29 June 2021, the council upheld its original decision.

Scope of the case

11. On 7 July 2021, the complainant contacted the Commissioner to complain about the council's handling of their request of 16 April 2021.
12. The complainant has raised concerns about the council's decision to apply regulation 12(4)(b) to their request of 16 April 2021. This is only relevant to part 1(c) and part 2 of the request, and it has been noted by the Commissioner that the complainant has not made any direct complaint about the council's response to any other parts of their request of 16 April 2021.
13. The Commissioner will therefore only decide whether the council is entitled to rely on regulation 12(4)(b) of the EIR as its basis for refusing to deal with part 1(c) and part 2 of the complainant's request of 16 April 2021.

Reasons for decision

Regulation 12(4)(b) – manifestly unreasonable

14. 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.
15. Although there is no definition of 'manifestly unreasonable' under the EIR, the Commissioner's opinion is that 'manifestly' implies that a request should be obviously or clearly unreasonable.
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 FOIA; section 12, where the cost of complying with a request 'is too great', and section 14, where a request is vexatious.
17. In this case, 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.
18. There are no appropriate cost limits under the EIR, and the considerations which are associated with the application of regulation 12(4)(b) on the grounds of costs are broader than those relevant to section 12 of the FOIA. Under EIR, the public authority must consider

the proportionality of the burden or costs involved, and decide whether they are clearly and obviously unreasonable.

19. The Commissioner considers the appropriate cost limits relevant to section 12 of the FOIA to serve as a useful guide when considering whether a request is manifestly unreasonable on the basis of costs. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations) confirm that the costs associated with the activities required to deal with the request should be worked out at a standard rate of £25 per person; for local authorities, the appropriate limit is set at £450, which is the equivalent of 18 hours work.

The complainant's position

20. The complainant has argued that their request of 16 April 2021, was sufficiently refined from previous requests that they had submitted to make it manageable and reasonable. They do not accept that the council has provided adequate justification for relying on regulation 12(4)(b) as its basis for refusing this request.

The council's position

21. The council states that they clearly informed the complainant that regulation 12(4)(b) of the EIR only applied to part 1(c) and part 2 of their request of 13 March 2021. Therefore, it should have been apparent that any new request would require some refinement of these elements, and that the removal of any other part of the request (such as part 3) would make little material difference.
22. The council has confirmed the Local Development Order folder held within its planning systems contains a total of 255 documents; 191 of these documents are publicly available. The council has said that it did not include this information within the time assessment that led to the application of regulation 12(4)(b) to the complainant's request.
23. The council has advised that it used two data management systems, ComplyKey and Microsoft Office 365 Security and Compliance (Office 365), to conduct a number of electronic searches for information which might be relevant to the request. It has also confirmed that it restricted the time parameters of the searches to the period of 1 August 2020, to 1 April 2021.
24. The council has explained that both of the electronic search systems used are capable of identifying emails by the email address, by either recipient(s) or sender(s), or by recipient(s) and sender(s). However, it states that neither system has the capability to search by specific teams or groups. The council has said that in order to do this, it would be

necessary to identify the email address of each of the relevant members of the team or group, and then include each one as an element of the search criteria.

25. The council has confirmed that an initial search of its email accounts using ComplyKey and Office 365 identified 27,209 emails, using the key terms 'Duchy of Cornwall' 'Local Development Order' and 'Nansleden' separately. A similar search with Office 365 then identified a total of 109,306 emails (before deduplication).
26. The council has confirmed that it then went on to include all three key terms within one search. This identified a total of 1283 emails - 393 emails with ComplyKey, and 890 emails (after deduplication) with Office 365.
27. The council has said that it calculated that it would take an average time of 4 minutes to review the information contained within each email to ascertain whether it was relevant to the request, which would equate to 89 hours of one officer's time. The council goes on to say that this calculation does not include consideration of any additional activities that would be required in order to provide the relevant information in response to the request, such as retrieving and extracting information, or the 3.5 hours taken to locate the information within its electronic systems.
28. The council argues that due to the amount of time it would take to deal with the request, it would be exposed to a disproportionate burden and/or an unjustified level of distress, disruption and irritation. It also states that the strain it would place on its resources could prevent it from being able to deliver mainstream services or answering other requests.

The Commissioner's view

29. 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 considers 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.
30. The Commissioner considers the search terms used by the council ('Duchy of Cornwall', 'Local Development Order', and 'Nansleden') to be reasonable. He is satisfied that the council could not have further refined its searches in order to meet the terms set out within the request.

31. The Commissioner has had regard to the Fees Regulations and the appropriate cost limit of £450 (which equate to 18 hours of one officer's time) previously referred to in paragraph 19 of this decision notice.
32. The Commissioner does not necessarily agree that the estimate given by the council of 4 minutes per email to identify just whether any relevant information is held is reasonable. Furthermore, the 3.5 hours claimed to carry out the searches appears to be excessive (and was, in part due to systems failures/delays which should not be taken into account).
33. However, in order for the request to fall within the cost limits, the Commissioner has calculated that the council officer dealing with the request would have, on average, a maximum time of 81 seconds to consider and deal with each of the 1283 emails. Given that some of these may be lengthy email chains and it may also be necessary to consider attachments to some of the emails, the Commissioner accepts on balance that an average time of 81 seconds per email is unlikely to be achievable.
34. It is the Commissioner's view that the cost of identifying and disclosing information relevant to the request would exceed the cost limit specified in the Fees Regulations and he is satisfied that this would result in a significant burden to the council.
35. Therefore, the Commissioner concludes that regulation 12(4)(b) is engaged in relation to the complainant's request of 16 April 2021, and he will now go on to consider the public interest test.

Public interest test

36. 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.
37. The council confirmed that it considered the following public interest factors in favour of disclosure:
 - It would increase access to information and allow scrutiny of the council's decisions.
 - It could make reasons for the council's decisions more evident and increase public understanding of the decisions that are reached.
 - It could enhance the scrutiny of the council.
 - It could contribute to the public debate on the issue and safeguard the democratic process.

- It could increase of public participation in decision making and the council's processes.
 - It could increase accountability for public spending and upholding standards of integrity and securing the best use of public resource, enhanced transparency of the council's actions and activities, ensuring justice and fair treatment for all.
38. The arguments put forward by the council in support of the public interest in maintaining the exception were as follows:
- The amount of time that it would take to deal with part 1(c) and part 2 of the request, would expose the council to a disproportionate burden or to an unjustified level of distress, disruption or irritation.
 - A strain on resources could prevent the council from delivering mainstream services or answering other queries.

The Commissioner's view

39. The Commissioner considers that there is always some public interest in the disclosure of information, This is because it promotes the aims of transparency and accountability which, in turn, promotes greater public engagement and understanding of the decisions taken by public authorities. It can also improve the public's confidence in the decisions made by a public authority.
40. The Commissioner fully appreciates that plans for any land or building development or regeneration scheme is likely to have an impact on the local community and environment; furthermore, there is always a public interest in knowing whether the council is following proper processes, attaining value for money, and taking appropriate steps to protect the public purse.
41. In this case, the request is for information about a Local Development Order that directly relates to a 'masterplan', setting out ideas for a substantial development within the area of Nansledan. As a result, there is likely to be a lot of public interest in the matter.
42. The Commissioner also accepts that because of the high profile position of the landowner in this case, the decisions that are reached into planning matters relating to the land that they own are likely to attract greater attention and scrutiny, and there will be a particular interest in ensuring that any decisions reached have been done so properly and fairly.

43. However, the Commissioner regards it to be pertinent to note that there is a considerable amount of information about the Nansledan Development Order that has been published on the planning pages of the council's website,¹ and this includes comments, consultations, reports, plans, and the final decision that was made on 16 March 2021 (before Request 3 was submitted).
44. It is the Commissioner's opinion that the published information provides the public with a good understanding of the plans for the development of the land, the consideration that was given to the application, the representations that were made, and the decision that was reached.
45. 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.
46. Having considered the information available, the Commissioner has decided that the public interest favours maintaining regulation 12(4)(b) of the EIR in this case. This is because he is satisfied that the burden to the council's finances and resources, should it be required to deal with the request, would be substantial; in the Commissioner's view such a burden would be disproportionate, and not in the public interest.
47. The Commissioner concludes therefore that the public interest in maintaining the exception at regulation 12(4)(b) outweighs the public interest in disclosure of the withheld information. The council is therefore not required to disclose this information.
48. 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).

¹ [PA20/08661 | The Nansledan Local Development Order \(2020\) \(draft\) \(the Order\) Article 38 Town and Country Planning \(Development Management Procedure\) \(England\) Order 2015 Regulation 19 the Town and Country Planning \(Environmental Impact Assessment\) Regulations 2017 | Land For Nansledan Development Quintrell Road Newquay Cornwall TR7 3DZ](#)

49. As covered above, in this case the Commissioner's view is that the balance of the public interests 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.

Regulation 9 – advice and assistance

50. Regulation 9(1) of the EIR says 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.

51. In this case, in its response to Request 2, the council advised the complainant that they may wish to consider significantly reducing the time parameters of the request, or be more specific about the correspondence they required, to allow for more refined search terms.

52. The complainant has stated that whilst the council may provide advice and assistance, it should not refuse a request on the basis that the requester has chosen an alternative way to refine their request.

53. However, the council had clearly explained to the complainant that regulation 12(4)(b) had been applied to parts 1(c) and 2 of their requests of 13 March 2021, and 16 April 2021, and that any refinements would have to be made to these specific parts in order for the request to become more manageable.

54. Whilst the council provided specific advice and assistance on how a request that was not manifestly unreasonable might be achieved, the complainant chose not to take this advice.

55. The complainant is entitled to determine how they wish to formulate a request. However, given that they chose not to refine those parts of their request of 13 March 2021, that the council had found to be subject to regulation 12(4)(b), the Commissioner has found some difficulty establishing what further advice and assistance the council could then have provided in response to the repeat request for this information.

56. The Commissioner is therefore satisfied that the council has met its obligations under regulation 9 of the EIR in this instance.

Right of appeal

57. 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

58. 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.
59. 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

Suzanne McKay
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