

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 4 November 2022

Public Authority: Norfolk County Council
Address: County Hall
Martineau Lane
Norwich
Norfolk
NR1 2DH

Decision (including any steps ordered)

1. The complainant requested from Norfolk County Council ("the Council") information relating to legal advice sought about the 'Norwich Western Link Road' project. The Council withheld the requested information under regulation 12(5)(b) (course of justice) of the EIR. The Council subsequently advised the Commissioner that it would also seek to rely upon the exception provided by regulation 12(4)(b) (manifestly unreasonable requests), due to the volume of the withheld information that had been identified.
2. The Commissioner's decision is that the Council was entitled to rely upon regulation 12(4)(b).
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 17 June 2021, the complainant wrote to the Council and made the following request:

I wish to see please a copy of each and every document (to include email letters) containing instruction(s) Norfolk County Council has submitted between 2018 and the present day to seek legal advice advice/opinion from either or both internal and external legal counsel (solicitors, barristers or other legal professional) on issues relating to the planning aspects of the

Norwich Western Link Road project. The Council responded on 10 December 2020. It refused request 1 under regulation 12(4)(b), and refused request 2 on the basis that it did not hold the information.

5. On 23 June 2021, the complainant wrote to the Council and made the following additional request:

Norfolk County Council has sought and received legal advice on the planning issues arising from and in connection with its decision to construct and operate a road through and over the River Wensum SAC. Please identify the nature and extent of all of this legal advice including whether the advice was internal, external and providing copies of any documents embodying the advice, including any document which recited/paraphrased the advice with sufficient detail that the recipient can read the actual legal advice or the summarised form supplied to third parties.

6. The Council responded on 11 August 2021. It refused the requests under regulation 12(5)(b).
7. Following an internal review, the Council wrote to the complainant on 15 September 2021. It maintained its original position.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled, and specifically that the Council was not entitled to withhold information under regulation 12(5)(b).
9. During the course of investigation, the Council informed the Commissioner that it would also seek to rely upon the exception provided by regulation 12(4)(b), due to the volume of withheld information.
10. The scope of this case and of the following analysis is whether the Council was entitled to rely upon regulation 12(4)(b) to withhold the requested information.

Reasons for decision

Regulation 12(4)(b) – Manifestly unreasonable requests

11. Regulation 12(4)(b) states that:

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;

12. The Commissioner has issued public guidance¹ on the application of regulation 12(4)(b). This guidance contains the Commissioner's definition of the regulation, which is taken to apply in circumstances where either the request is 1) vexatious, or 2) where the cost of compliance with the request would be too great. If engaged, the exception is subject to a public interest test.
13. In this case the Council considers that circumstance 2) is applicable.
14. The EIR do not provide a definition of what is manifestly unreasonable in terms of cost. This is in contrast to section 12 of the Freedom of Information Act 2000 ("FOIA"), under which a public authority can refuse to comply with a request if it estimates that the cost of compliance would exceed the "appropriate limit".
15. However, the FOIA "appropriate limit" can be a useful starting point in considering whether a request for environmental information can be refused as being manifestly unreasonable.
16. The FOIA appropriate limit is defined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations"). These define the appropriate limit in terms of the amount of time which staff would be expected to take in complying with a request.
17. The Fees Regulations state that the relevant activities, set out below, may be calculated/charged for at a flat rate of £25 per hour of staff time. For the Council, the appropriate limit under the Fees Regulations would be £450; that is, 18 hours of staff time.
18. Under FOIA, a public authority is only allowed to include the cost of certain activities in its estimate: determining whether the information is held; locating the information or a document which may contain the information; retrieving the information or a document which may contain the information; and extracting the information.

¹ <https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/refusing-a-request/#when-can-we-refuse-a-request-for-environmental-information-3>

19. However, since the Fees Regulations do not apply to the EIR, a public authority may take into account other activities and wider considerations in terms of what may render a request for environmental information "manifestly unreasonable". It is also the case, however, that a public authority is expected to accept a greater burden when considering requests for environmental information.
20. Whether considering a costs estimate under either FOIA or the EIR, the Commissioner expects any estimate to be realistic, sensible and supported by cogent evidence. He also expects that, where possible, a sampling exercise will have been carried out.

The Commissioner's analysis

21. In this case the Council estimates that the requested information is contained across approximately 1000 records, often in email chains. The Council has provided the Commissioner with a sample of 14 records, representing 112 pages of email correspondence and attachments. The Council argues that this information will be highly likely to fall under the exception provided by regulation 12(5)(b), as it represents the Council's communications with its legal advisors where it has sought legal advice, and is therefore subject to legal advice privilege. The Council argues that allowing for ten minutes to review each document and apply the terms of the EIR, would require 166 hours of officer time.
22. Having considered the Council's submissions, alongside a sample of the withheld information, the Commissioner recognises that the requested information will be highly likely to fall under regulation 12(5)(b).
23. However, the Commissioner also recognises that the proper application of the exception across such a large volume of information will consume significant public resources. This is because the EIR requires the Council to apply the exception in a rigorous and granular way that addresses the differing sensitivity of information. In this case, the Commissioner recognises that such an action would take far in excess of 18 hours. As such, the Commissioner is satisfied that regulation 12(4)(b) is engaged.
24. When considering whether the public interest favours maintaining the exception or actioning the request, the Commissioner has taken into account that there is an inherent public interest in openness and transparency by the Council, particularly in regards a highways project that will have a wide-ranging impact on the local area.
25. However, the Commissioner recognises that the purpose of the exception is to protect finite public resources from being unnecessarily consumed, and that, even in event that regulation 12(4)(b) was not engaged, the information itself is highly likely to be exempt under

regulation 12(5)(b). In the circumstances of this case, the Commissioner also considers that the public interest in openness and transparency is met by the formal planning process, which the highways project will be subject to, and which provides the public with the right to view and challenge the application.

26. Having considered the public interest arguments, the Commissioner finds the public interest in protecting public resources to be the stronger argument.
27. 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).
28. 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.

Right of appeal

29. 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

30. 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.
31. 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

Daniel Perry
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
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