

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 1 November 2022

Public Authority: Wealden District Council
Address: Vicarage Lane
Hailsham
East Sussex
BN27 2AX

Decision (including any steps ordered)

1. The complainant requested information from Wealden District Council ("the Council") about the public objections and comments regarding a particular planning application. The Council initially refused to provide the requested information citing section 12 of FOIA. Following the Commissioner's intervention, its final position was to cite regulation 12(4)(b) of the EIR (manifestly unreasonable) to withhold the information.
2. The Commissioner's decision is that the Council is entitled to rely on regulation 12(4)(b) of the EIR. The Council breached regulation 14(3) of the EIR as it incorrectly issued its initial refusal under FOIA and not the EIR.
3. The Commissioner does not require the Council to take any steps as a result of this decision notice.

Background, request and response

4. On 13 January 2022, the complainant wrote to the Council and requested information in the following terms:

"Hello, I have been asked to contact you with a Freedom of Information request for the public objections and comments that were submitted for Planning Application WD/2016/2796/MAO. These cover the period when the application was lodged on 16 Nov 2016 to the publication of the Decision Notice on 11 Jun 2021."
5. The Council responded on 27 January 2022 and refused to provide the requested information citing section 12(1) (cost limit) of FOIA.
6. The Council provided the complainant with some advice and assistance as to how their request could be refined, suggesting that the complainant could access a summary of the objections and comments in the officer report on its website. It advised it could provide 36 objections within the cost limit.
7. On 3 February 2022, the complainant requested an internal review, and on 17 February 2022, the Council upheld its original decision.

Scope of the case

8. On 11 April 2022, the complainant contacted the Commissioner to complain about the council's handling of their request.
9. Although the Council originally cited section 12(1) of FOIA, the request concerns planning matters so it should instead have been handled under the Environmental Information Regulations 2004 (EIR). The Council issued a revised final response to the complainant following the Commissioner's intervention, citing regulation 12(4)(b) of the EIR.
10. The Commissioner will therefore decide whether the Council is entitled to rely on regulation 12(4)(b) of the EIR as the basis for its refusal of the request.

Reasons for decision

Regulation 12(4)(b) – manifestly unreasonable

11. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
12. The Commissioner considers that a request can be manifestly unreasonable either if the request is vexatious, or where compliance with the request would incur a manifestly unreasonable burden on the public authority both in terms of costs and the diversion of resources.
13. The Council has relied upon the latter interpretation of regulation 12(4)(b), that it considers the amount of work required to comply with the request in full would bring about a manifestly unreasonable burden.
14. Under FOIA, the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') specify an upper limit for the amount of work required beyond which a public authority is not obliged to comply with a request. This is set at £450 for public authorities such as the Council.
15. The Fees Regulations state that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it;
 - and extracting the information from a document containing it.
16. The EIR differ from FOIA in that under the EIR there is no upper cost limit set for the amount of work required by a public authority to respond to a request.
17. While the Fees Regulations relate specifically to FOIA, the Commissioner considers that they provide a useful point of reference where the reason for citing regulation 12(4)(b) of the EIR is the time and costs that compliance with a request would expend. However, the Fees Regulations are not the determining factor in assessing whether the exception applies.

18. The Commissioner's guidance on regulation 12(4)(b)¹ states that public authorities may be required to accept a greater burden in providing environmental information than other information.
19. Regulation 12(4)(b) sets a robust test for a public 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". The Commissioner considers that the term "manifestly" means that there must be an obvious or clear quality to the identified unreasonableness.
20. Given the high burden referred to within paragraph 15, the Commissioner expects a public authority to provide both a detailed explanation and quantifiable evidence to justify why complying with a request would impose such an unreasonable burden on it, and therefore why regulation 12(4)(b) is engaged.
21. Where a public authority has shown that Regulation 12(4)(b) is engaged, Regulation 12(1)(b) requires that a public interest test is carried out to determine whether the arguments in favour of maintaining the exception outweigh those in favour of disclosing the requested information. A public authority may still be required to comply with a manifestly unreasonable request if there is a strong public value in doing so.

The complainant's position

22. The complainant has argued that all of the information requested had previously been published on the Council's website as objections to a planning application and that the Council chose to remove the objections from the website even though it knew that a judicial review was in progress. The complainant explained that every objection to the planning application is potentially material evidence in the Judicial Review and should be available to all sides.
23. The complainant rejected the suggestion that a summary of the objections and comments could be viewed in the officer report and claimed that the report does not satisfactorily summarise the objections and omits matters which are now part of this judicial review.

The Council's position

¹ <https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf>

24. The Council reconsidered its response under the EIR rather than FOIA and confirmed that it considered the request manifestly unreasonable in terms of cost and burden.
25. The Council explained that whilst it does hold the requested information, it is not held in an easily retrievable format. There are 918 comments held as separate documents, uploaded onto a record management system. The documents range from 1 to over 30 pages in length and having conducted a sample search, the Council has determined that it would take on average 30 minutes to download and interrogate each document. This equates to 459 hours, or 61 days to check if the letters are fit for public disclosure.
26. The Council has advised that in reviewing and extracting the information, it would also need to consider the application of Regulation 13 (personal data). The Council explained that, due to the nature of the documents, all 918 of them would likely contain personal data and manual analysis of each and every page would be required. The time needed to redact information is not covered by the cost limit under section 12 of FOIA, but may be taken into account when considering if a request is too burdensome under section 14 of FOIA. It is on this basis that similar arguments may be made under the EIR.
27. The Council acknowledged that it routinely publishes planning comments but explained that, in doing so, its website makes it clear that once an application is determined, comments made by an individual will be removed from the website and therefore no longer published. Individuals commenting on an application have a legitimate expectation that once determined, their correspondence will no longer be in the public domain.
28. The Council commented that the strain that would be placed on its limited resources to comply with the request would get in the way of being able to deliver mainstream services and answering other requests. Searching for, collating, and extracting the data would take a disproportionate amount of time, taking staff away from daily, operational work.

The Commissioner's view

29. While the Commissioner considers the Council's estimate of 30 minutes to examine each document to be generous, he does note that even if the cost estimate provided by the Council was halved it would still represent a significant amount of burden.
30. Therefore, the Commissioner concludes that regulation 12(4)(b) is engaged in relation to the complainant's request.

Public interest test

31. Regulation 12(4)(b) is subject to the public interest test. This means that, when the exception is engaged, public authorities also have to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
32. In its further response to the complainant, following correspondence from the Commissioner, the Council outlined its arguments in favour of disclosing the requested information. The Council recognised that there will always be strong public interest in knowing an individual's view about local development, the support or concerns expressed, the development's impact and whether the opinions expressed have been considered in the decision-making process.
33. The Council also outlined its arguments in favour of maintaining its reliance on regulation 12(4)(b) of the EIR. The Council stated that the request would place significant demands on its resources, particularly given that the information had previously been published, giving individuals ample opportunity to review the comments made and having the opportunity to download them if required.
34. The Council stated that its position is set against the backdrop that the Local Planning Authority has no statutory obligation to publish comments and it is not a requirement of the planning process.
35. Furthermore, the Council noted that the complainant stated within their request for a review that they considered the requested information to be material evidence in the judicial review proceedings. The Council explained that such proceedings have a set legal process to follow and any documentation or other evidence required to support the Judicial Review would be provided in accordance with the requirements of the Civil Procedure Rules. Therefore, on balance, the Council considers that the public interest in maintaining the exception outweighs the public interest in disclosing the withheld information.
36. The Commissioner agrees with the Council that the public interest favours maintaining regulation 12(4)(b) of the EIR. The financial and time burden that disclosing the withheld information would cause to the Council is substantial. In the Commissioner's view that burden would be disproportionate and not in the public interest.
37. The Commissioner's conclusion is that the public interest in the maintenance of the exception provided by regulation 12(4)(b) outweighs the public interest in disclosure of the withheld information. The Council is not, therefore, required to disclose this information.

38. 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).

39. 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

40. 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.
41. In its initial response to the request, the Council advised the complainant that they could access a summary of the objections and comments in the officer report on its website. It advised it could provide 36 objections within the cost limit, thereby indicating to the complainant that if they significantly narrowed the scope of their request they may be entitled to receive some information.
42. The Commissioner considers that this was an appropriate response in the circumstances. The Commissioner’s decision is that the Council met its obligations under regulation 9(1) of the EIR.

Other Matters

43. When providing its initial response and internal review outcome, the Council did not correctly identify that it should have handled the request under the Environmental Information Regulations. The Commissioner therefore recommends that the Council refreshes its knowledge of FOIA and the EIR so that it can respond to requests under the correct legislation as required.

Right of appeal

44. 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

45. 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.
46. 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

Michael Lea
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