

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

Date: 31 January 2022

Public Authority: Somerset County Council
Address: County Hall
The Crescent
Taunton
Somerset
TA1 4DY

Decision (including any steps ordered)

1. The complainant requested information relating to written authority for a named individual to maintain and prune certain trees. Somerset County Council (the 'Council') refused to confirm or deny whether the requested information was held on the cost of compliance grounds (section 12(2) of FOIA). At the internal review stage, the Council revised its position citing section 40(2) – the exemption for personal information. During the course of the Commissioner's investigation, the Council reconsidered its position and again cited section 12(2) of FOIA.
2. The Commissioner's decision is that the requested information is environmental as defined by the EIR. There is no equivalent 'neither confirm nor deny' provision within the EIR regulations. However, the Commissioner has determined that the Council was entitled to refuse the request by virtue of the exception in Regulation 12(4)(b) – manifestly unreasonable, for the reasons set out in this notice.
3. The Commissioner does not require the Council to take any steps as a result of this notice.

Background

4. The Commissioner understands that the request was made by one individual. The complaint brought to him was made by another individual using the same email address as the original requester. During the course of the Commissioner's investigation, the complainant confirmed that the intention had been that she and her husband had both made the request, subsequent internal review and complaint to the Commissioner.
5. However, given that the complaint to the Commissioner itself was made by the second individual only, this notice has been addressed to that individual and all references to 'complainant' in this notice are in the singular. Given that both individuals have communicated throughout the life cycle of this request and subsequent complaint using the same email address, the Commissioner is satisfied that both will have sight of his decision. Further, an anonymised version of this notice will be published on the Commissioner's website in due course.

Request and response

6. On 23 January 2021, the complainant wrote to the Council and requested information in the following terms:

"Whether [name redacted] has written authority from the Council to maintain and prune the 3 trees in question."
7. The Council initially advised that the request was submitted on 4 March 2021. The Commissioner queried this given the discrepancy in the dates, advising that the complainant had provided a screenshot of her request to a named Councillor dated 23 January 2021.
8. In reply, the Council has explained that:

"Looking at the history of the case, it appears that the requester had some prior communications with the Highways Team and with some Cllrs prior to the letter attached which is the first time the FOI Team were made aware of the issue.

The letter was dated 17th Feb and emailed to the FOI team by Highways colleagues at 18:02 on 3rd March (and logged the next working day). Clearly there is a delay between it being sent and logged which I suspect was part Covid related (looks like it was a physical letter via post and staff were working remotely at the time) and partly because it came in to the CEOs office, was then forwarded to Highways and then eventually to us (initially

forwarded by the CEOs PA to Highways on 24th Feb). This would be a hold up at our end so, from the information available, it looks as though [sic] the request would have likely been actually received at County Hall on or around 24th Feb.

I don't have a copy of the earlier correspondence you mention, but am aware from my investigations in to the request that the FOI followed on from previous discussions with colleagues, members etc due to the neighbour dispute over the maintenance of the trees."

9. The Council provided its substantive response to the request on 19 March 2021. It refused to confirm or deny that it held the requested information citing section 12(2) of FOIA – the cost of compliance.
10. The complainant requested an internal review on 20 March 2021. The Council failed to provide an internal review.

Scope of the case

11. The complainant initially contacted the Commissioner on 20 April 2021 to complain about the then outstanding internal review.
12. The Commissioner wrote to the Council on 18 May 2021 asking it to carry out an internal review. The Council did so and advised the complainant of the outcome of its review that same day.
13. As a result of its internal review, the Council revised its position and said that the requested information was exempt by virtue of section 40(2) – the exemption for personal information. It advised the complainant as follows:

"In this instance, I have discussed the issue of maintenance of trees situated on Council land by members of the public with the relevant service. As a general rule, where a member of the public expresses a desire to maintain trees for which the Council has a responsibility at their own cost, and using approved contractors, the Council would ordinarily grant such permission. This approach alleviates the burden on Council budgets and ensures the best possible value for Somerset citizens. Work on the trees in question has been carried out by an approved contractor and to a satisfactory standard. Given this, the Council will be taking no further action in relation to this matter."

14. On 4 June 2021, the complainant confirmed to the Commissioner that she remained dissatisfied following the internal review and wished him

to proceed with investigating her complaint into the Council's refusal to provide the requested information.

15. During the course of the Commissioner's investigation, the Council reconsidered its position and advised:

"Having considered this request again, I do believe on the balance of probability that the information is not held. To try to establish this absolutely would be likely to cause an unjustifiable level of disruption - digital records have been searched but for absolute certainty it would be necessary to search all paper archives. At the time of the request, because of the pandemic, access to council offices and physical records was extremely limited. Additionally, due to the duration for which the council have been working digitally, it is unlikely that any paper based records would relate to recent maintenance of the trees. For this reason, we felt that the legitimate interests of the requester and public in general could be just as well met by clarifying our policy on the maintenance of council trees by members of the public in general and specifically our position on the works undertaken on the trees in question and any further action we intended to take. This has been done. Whilst we have not been able to locate a letter of permission, it remains our assumption that any such document would require some redaction under 40(2) for reasons explained above. However, we would of course make available any elements of such correspondence that did not constitute personal data and such element would likely reflect the information supplied - that maintenance can be commissioned by members of the public at their own cost as long as approved contractors are engaged."

16. The Commissioner queried the steps the Council had taken to satisfy itself that, on the balance of probabilities, the requested information was not held. The Council also advised it had informed the complainant that:

"...we confirmed that the Council will generally accept offers from members of the public to maintain Council owned trees at their own expense as long as the works are undertaken by approved contractors. This is because it alleviates the burden on the public purse whilst ensuring, through use of approved contractors, that appropriate standards are met. On receipt of the complaint about the works undertaken in this case, the Council made enquiries and inspected the site. Whilst we have not established prior permission for the works, officers were satisfied that the works were completed to a satisfactory standard and have established that an approved contractor was used".

17. On 17 January 2022, the Council reconsidered its position again and advised both the complainant and Commissioner that it could neither confirm nor deny whether it held the requested information by virtue of section 12(2) of FOIA – the cost of compliance.
18. The Commissioner sought the view of the complainant as to the Council's reliance on section 12(2). On 19 January 2022, she disputed that it applied and submitted various other comments. Although some of the comments were not directly applicable to the Commissioner's investigation, he has responded to the complainant separately on those comments on 24 January 2022.
19. The Commissioner has first determined whether the requested information is environmental as defined by the EIR, and if so, whether the response provided by the Council was in compliance with the legislation.

Reasons for decision

20. This request was processed under FOIA rather than the EIR. When asked why by the Commissioner as part of his investigation, the Council explained this was:

"because the request was not for environmental information as such, rather for a copy of a letter to a third party giving that third party permission to maintain some trees on Council owned land".

21. The Commissioner will therefore start by considering the appropriate legislative regime applicable to the request.

Is the requested information environmental as defined by the EIR?

22. Regulation 2(1) of the EIR defines environmental information as being information on:

"(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)";

23. In the case under consideration here, the requested letter, if held, would permit the user to maintain the trees in question. In the Commissioner's view, such a letter would constitute a measure as defined in (c) above likely to affect the elements of the environment such as land and landscape as defined by Regulation 2(1)(a). He is therefore satisfied that the information falls within the definition of environmental information under Regulation 2(1)(c) of the EIR.
24. Therefore, the Commissioner considers that the Council should have handled the request under the EIR rather than under FOIA. He has adopted a pragmatic approach here to avoid any further delays in this case; rather than ordering the Council to provide a response under the EIR, the Commissioner has considered its FOIA submissions and explanations and applied them to the applicable EIR Regulation, which is 12(4)(b) – manifestly unreasonable (on cost grounds). There is no direct equivalent of section 12 in the EIR. However, the EIR do allow a public authority to refuse a request that is 'manifestly unreasonable'.

Regulation 12(4)(b) – manifestly unreasonable request

25. Although the Council refused to provide the information sought by the request on the basis of section 12(2) of FOIA, as explained above the Commissioner considers that this request should have been handled under the EIR.
26. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. A request can be refused as

manifestly unreasonable either because it is considered to be vexatious, or on the basis of the burden that it would cause to the public authority.

27. There is no definition of “manifestly unreasonable” under the EIR, but in the Commissioner’s opinion, manifestly unreasonable implies that a request should be obviously or clearly unreasonable. One such way a request could be manifestly unreasonable is if a public authority is able to demonstrate that the time and cost of complying with the request is obviously unreasonable.
28. Regulation 12(4)(b) of the EIR exists to protect public authorities from exposure to a disproportionate burden in terms of the amount of time and resources that a public authority has to expend in responding to a request. In effect, it is similar to section 12(1) of the FOIA, where the cost of complying with a request exceeds the appropriate limit.
29. As the Commissioner’s guidance on regulation 12(4)(b)¹ explains, whilst the section 12 cost provisions in FOIA are a useful starting point in determining whether the time and cost of complying with the request is obviously unreasonable, they are not determinative. Under the section 12 cost provisions the appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (‘the Fees Regulations’) at £450 for public authorities such as the Council. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours.
30. However, as noted the section 12 provisions are not determinative in deciding whether a request is also manifestly unreasonable. Furthermore, in assessing whether the cost or burden of dealing with a request is ‘too great’ under the EIR, public authorities will need to consider the proportionality of the burden or costs involved and decide whether they are clearly or obviously unreasonable.
31. This will mean taking into account all the circumstances of the case including:
 - the nature of the request and any wider value in the requested information being made publicly available;

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

- 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 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; and
 - 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.
32. In the case under consideration here, the Council has applied the 'neither confirm nor deny' ('NCND') element within the FOIA cost exemption (section 12(2)). In other words, the Council has said that to confirm or deny whether the requested information is held would in itself exceed the cost limit.
33. There is no 'NCND' equivalent within Regulation 12(4)(b). The Commissioner's guidance states:

"The EIR provide that a public authority can only refuse to confirm or deny whether it holds information if to do so would adversely affect the interests in regulation 12(5)(a) (international relations, defence, national security of public safety) and would not be in the public interest. The EIR differ in this respect from FOIA, where most exemptions include NCND provisions.

This means that if a public authority refuses a request under regulation 12(4)(b) it should still let the requester know whether or not it holds information falling within the scope of the request. We do, however, recognise that there will be a small proportion of cases where this simply isn't practicable. If the public authority isn't sure whether information is held, and the costs of establishing this are in themselves clearly and obviously unreasonable, then we would not expect the public authority to put itself to this expense. To do so would be counter to the purpose of the exception."

The complainant's position

34. In relation to the Council's ultimate reliance on section 12(2), the complainant said (only those extracts applicable to the Commissioner's remit have been replicated below, the Commissioner having replied separately to the remainder as referenced in the 'Scope' section above):

"Hiding behind section 12 of FOIA just gives them the opportunity to dive behind a wall and not need to do any searching for us. It is an 'out'.

Para 8 of the letter "it has therefore been our assumption that such a document is not held...!" i [sic] but then ramble on about searching archives. Why do they not want to help us? Is there some involvement with [name redacted]?

...

All we want is to protect our estate, our town and our county for future generations".

The Council's position

35. In support of its position that confirming or denying whether the requested information is held would exceed the cost limit, the Council provided the following submissions to both the complainant and the Commissioner:

"As previously explained, searches of our digital records have been made but have not led to the discovery of a document matching the request. It has therefore been our assumption that such a document is not held, given that the maintenance was fairly recent, and any associated permission was therefore also likely to be recent and in digital format. However, we cannot absolutely confirm or deny whether such a document is held without searching historical records in their entirety.

Having spoken to our Records Manager, we believe that there are 129 boxes of paper records in which such a letter, should it exist, may be held. This would cover a period of 6 years (with the most recent consignment received in 2016). Based on the experience of the Records Management Team of thorough appraisal of archived consignments, we estimate that each box would take approximately 1 hour to fully search and appraise (this is based on the assumption that some boxes might be easily dismissed but others would perhaps take a little longer). Additionally, retrieving and returning the archived boxes from our secure storage to a suitable appraisal location would take an estimated 24 hours. This is because the volume would require 3 van loads at 2 hours per van load and 2 staff. In total therefore, it is our estimate that to confirm or deny absolutely whether a document matching this request is held would cost:

129 hours appraisal @ £25ph [per hour] = £3,225

24 hours retrieval @ £25ph = £600

Total cost = £3825

This estimate is based on the quickest method of searching (with all digital repositories already checked) and whilst current restrictions prevent us undertaking a sampling exercise (to determine how long a thorough appraisal of each box would take), we have sought the guidance of our Records Management Team who have vast experience of such."

36. In terms of its EIR Regulation 9 obligations to advise and assist requesters as to how requests may be refined with a view to bringing them below the cost limit, the Council said:

"In terms of advising how you might refine the request to reduce the cost, I feel the appropriate measures have been taken. We have searched our digital holdings which represent the most likely locations for any recent correspondence. Additionally, we have explained our position with regard to maintenance of trees on public land by members of the public – we allow it as long as the maintenance is undertaken by approved contractors to a satisfactory standard. Given that the works in question were undertaken by an approved contractor and the standard of them is to the Council's satisfaction we would intend no further action irrespective of whether explicit permission is evidenced.

We have considered whether we can narrow down the boxes to be searched. Of the 129 held, 86 are predominately parish records. If we were to exclude these as unlikely repositories, we would still need to retrieve and search 43 boxes. The cost of this would still exceed the cost limit:

43 hours appraisal @ £25ph = £1,075

8 hours retrieval @ £25ph = £200

Total cost = £1,275

Given this, I feel we must apply the exemption as explained above. I hope this clarifies the Council's position and [sic] apologise for earlier confusion. I will send a copy of this letter to the ICO who will further consider your complaint."

The Commissioner's conclusion

37. The Commissioner has considered the Council's cost estimate and she regards it as clear, logical and convincing. She accepts that to comply

with the request, even on the narrowed estimate set out above, it would be necessary to search each paper record in the 43 non-parish boxes to identify whether it constitutes the requested information.

38. The Council has estimated the activities involved in trying to identify whether the requested information is held to take an hour per box (acknowledging that some may take less than this). However, based on the Council's calculation, this leads to an overall estimate of approximately 51 hours, and this is greater than the 18 hour upper limit for FOIA requests, set out in the Fees Regulations.
39. The Commissioner is satisfied that the allocation of the resources necessary to process the request would have a significant and disruptive impact on the Council's services. The Council initially dealt with the request between January 2021 and April 2021, a time when its resources were already under considerable pressure. The Commissioner recognises that the request was submitted ten months into the ongoing COVID-19 pandemic climate. He is aware that many public authorities have faced severe front line pressures and have re-deployed resources to meet those demands. He accepts that the Council does not have resources on hand such that it could absorb 51 hours work without this adversely impacting other service areas.
40. Turning to the value and purpose of the request, the Commissioner accepts that the complainant has genuine concerns about the work carried out on the trees in question. She believes she is entitled to receive the requested information if held.
41. The Commissioner acknowledges that the EIR do contain a presumption in favour of disclosure. However, it is also necessary to consider whether any burden which would be suffered by the Council (and its consequences) is proportionate to any benefit that would flow from disclosure, or as is the case here, from confirmation or denial that the requested information is held.
42. The Commissioner is aware that the complainant is unhappy with the work done to the trees in her neighbourhood. However, he is also mindful that the Council has since inspected the site and has explained that the work was carried out on the trees by one of the Council's approved contractors and to the Council's satisfaction. This means that irrespective of whether the Council was able to confirm or deny whether or not it holds the requested permission, the work has been authorised and approved by the Council.
43. Whilst acknowledging that the complainant remains dissatisfied with the work carried out to the trees, ultimately, he considers that if the Council was to comply, the detrimental impact on its provision of services would be disproportionate to the request's value. Further, the Commissioner

cannot see any wider interest in a confirmation or denial as to whether the requested permission is held, particularly given the Council's stance on approved contractors and it having inspected the trees in question and finding the work to be satisfactory.

44. Taking all the above into account, the Commissioner is satisfied that the Council has shown that compliance with the request would involve at least 51 hours work. This is an expense which the Council could not be expected to absorb without adversely affecting its service provision in other areas. Furthermore, the Commissioner finds that the burden would be so disproportionately excessive as to outweigh the other factors identified in paragraph 31 above.
45. The Commissioner's decision is therefore that it would be manifestly unreasonable, on the grounds of cost and the burden that would be placed on its resources, for the Council to comply with the request.

Public interest test

46. All the exceptions created under regulation 12 are subject to the public interest test. The public interest test means that even where the requested information is covered by an exception, a public authority can only rely on that exception if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure. Therefore, technically, regulation 12(4)(b) is subject to the public interest. However as its application can have no meaningful application where to confirm or deny whether the requested information is held would exceed the cost of compliance, as is the case here, the Commissioner has not considered the test. However, the Commissioner recognises that the balancing exercise undertaken in this case to determine whether the burden of complying with this request is proportionate to the value of the information requested has considered aspects of the public interest test.

Other matters

Internal review

47. The Council apologised for the delay in conducting the internal review in this case which it said was due to the review request being incorrectly "work-flowed" in its case management system such that it did not reach the officer responsible for carrying out internal reviews. The Council said it only became aware of the complainant's request for an internal review on receipt of the Commissioner's letter on 18 May 2021. The Commissioner notes that the Council then carried out its review that same day.

48. However, the Commissioner has deemed that the request constituted a request for environmental information in accordance with the EIR. Regulation 11 of the EIR (which deals with internal reviews), allows public authorities 40 working days in which to provide an internal review. In the case under consideration here, the Council provided its internal review in 39 working days, so there is no delay and no breach of Regulation 11 of the EIR.

Right of appeal

49. 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

50. 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.
51. 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

Laura Tomkinson
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF