

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 June 2022

Public Authority: The London Borough of Enfield
Address: Civic Centre
Silver Street
Enfield
EN1 3XA

Decision (including any steps ordered)

1. The complainant requested information from the London Borough of Enfield ("the Council") relating to the redevelopment of Palace Gardens Shopping Centre.
2. The Council refused to provide the requested information citing section 12(1) (cost limit) of the FOIA. The Council later accepted the Commissioner's view that the information is environmental and therefore relied on regulation 12(4)(b) (manifestly unreasonable) of the EIR.
3. The Commissioner's decision is that the Council was entitled to refuse to comply with the request in accordance with regulation 12(4)(b) of the EIR. However, he finds that the Council failed to provide reasonable advice and assistance and therefore failed to meet its obligations under regulation 9 of the EIR.
4. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with advice and assistance to help him submit a request falling within the appropriate limit.
5. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner

making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 16 April 2021, the complainant wrote to the Council and requested information in the following terms:

“Please provide all written pre-application advice provided by Enfield Council in regard to the potential redevelopment of Palace Gardens shopping centre”

7. The Council responded on 29 June 2021 and refused to provide the requested information citing section 12 (cost limit) of the FOIA as its basis for doing so.
8. On 30 June 2021, the complainant wrote to the Council to request an internal review.
9. Following an internal review, the Council wrote to the Council on 22 October 2021. It refused to provide the requested information citing section 12(1) of the FOIA.

Scope of the case

10. During the course of his investigation, the Commissioner wrote to the Council and set out his view that the requested information was likely to constitute environmental information as defined in regulation 2(1) of the EIR. The Council therefore revised its position and relied on regulation 12(4)(b) (manifestly unreasonable) to refuse the request.
11. The scope of this case and the following analysis is to determine if the Council has correctly cited regulation 12(4)(b) of the EIR in response to the request.

Reasons for decision

Is the requested information environmental?

12. Regulation 2(1) of the EIR defines environmental information as being information relating to:

“(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) and (b) 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).”

13. The Commissioner has not seen a copy of the requested information, but he is satisfied that it is environmental. The Commissioner considers that as the requested information relates to the redevelopment of a shopping centre, it would fall within regulation 2(1)(c) “activities affecting or likely to affect the elements and factors referred to in (a) and (b)”.

Regulation 12(4)(b) – manifestly unreasonable

14. 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.
15. 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.

16. In its submissions to the Commissioner, the Council has relied upon the latter interpretation of regulation 12(4)(b); that it considers the amount of work required to comply with this request in full would bring about a manifestly unreasonable burden.
17. 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.
18. 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.
19. 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.
20. 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.
21. 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.
22. 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"

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

means that there must be an obvious or clear quality to the identified unreasonableness.

23. Given the high burden referred to above, 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.
24. 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 Council's position

25. The Commissioner asked the Council to reconsider its handling of the request in accordance with the EIR. In its submissions to the Commissioner, the Council explained that it had reconsidered the request under the EIR. It revised its position citing regulation 12(4)(b) of the EIR as its basis for refusing to comply with the request. The Council provided the Commissioner with an explanation as to why it considered the request to be manifestly unreasonable.
26. The Council explained that in order to locate the requested information it would have to search the mailboxes of 18 Council Officers who worked on the Palace Gardens pre-application process.
27. The Council stated that one of the Officers had conducted a search of their email mailbox for information within the scope of the request. It took that Officer 3.5 hours to locate and retrieve all the information they held within their electronic files that fell within the scope of the request.
28. The Council explained that another Officer had also conducted a search of their email mailbox for the requested information. That search took three hours. Therefore, the Council calculated that it would take 58.5 hours for all 18 Council Officers to search their email mailboxes for information within the scope of the request. This equates to £1462.50 (58.5 hours x £25 = £1462.50).
29. The Council explained that once it had located all the information it holds within the scope of the request, it would then have to retrieve and extract that information which would take the cost of complying with the request further over the cost limit.

30. The Council confirmed that it had used the quickest possible method to search for the requested information. However, the Council explained that the broad nature of the request meant that it would have to review all the correspondence it located relating to the Palace Gardens pre-application process to determine whether it contained the advice requested.

The Commissioner's position

31. The Commissioner considers the Council's estimate of 58.5 hours to locate the requested information to be reasonable. This estimate was based on an appropriate sampling exercise. Even if the cost estimate provided by the Council was halved it would still be far in excess of the cost limit.
32. The Commissioner's decision is the request is manifestly unreasonable and therefore, the Council is entitled to rely on regulation 12(4)(b) of the EIR to refuse to comply with the request.

Public interest test

33. 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.
34. With regards to the public interest test, in its submissions to the Commissioner, the Council outlined its arguments in favour of disclosing the requested information. The Council stated that there is strong public interest in principle in transparency regarding the Palace Gardens development. The development is significant for the town centre and the residents utilising the town centre will be impacted. Therefore, the Council concluded that there should be a strong presumption in favour of disclosing the requested information.
35. The Council also outlined its arguments in favour of maintaining its reliance on regulation 12(4)(b) of the EIR. It stated that the time it would take to comply with the request would impact the Council's service delivery and divert resources from other customers of the planning department. The Council explained that it considers that it would take a significant amount of time to redact the personal data of Council and developer employees from the requested information. It estimated that it may take up to two days to carry out this redaction.
36. Furthermore, the Council explained that it has already provided the complainant with information relating to the design and planning application of the Palace Gardens development. It considers that

releasing further information relating to the development would only benefit the personal interests of the complainant and would not be in the public interest.

37. Therefore, the Council considers that on balance, the public interest in maintaining the exception outweighs the public interest in disclosing the withheld information.
38. 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 requested information would cause to the Council is substantial. In the Commissioner's view that burden would be disproportionate and not in the public interest.
39. 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).
40. 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

41. 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.
42. In both its initial response of 29 June 2021 and internal review response of 22 October 2021, the Council did not advise the complainant that they could refine their request to reduce the cost and burden of their request. Furthermore, the Council did not provide the complainant with suggestions on how to reduce the scope of their request.
43. The Commissioner's decision is that the Council did not provide the complainant with adequate advice and assistance and therefore

breached regulation 9 of the EIR. At paragraph 4 above the Council is now required to contact the complainant and provide advice as to how his request can be refined to bring it within the cost limit.

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: 0300 1234504

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

Ben Tomes
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