# Environmental Information Regulations 2004 (EIR)

# Decision notice

**Date:** **8 March 2022**

**Public Authority:** **The Planning Inspectorate**
**Address:** **Temple Quay House**
**2 The Square**
**Temple Quay**
**Bristol BS1 6PN**

## Decision (including any steps ordered)

1. The complainant requested a video recording of an appeal hearing from The Planning Inspectorate ("the PI"). The PI refused the request on the basis that it was manifestly unreasonable on grounds of cost (regulation 12(4)(b) of the EIR).

2. The Commissioner's decision is that the request was manifestly unreasonable, and that the balance of the public interest favours the exception being maintained.

3. The Commissioner does not require the PI to take any steps.

## Request and response

4. On 9 December 2020, the complainant wrote to the PI to request information of the following description:

> *"(Re: Recording of 3256190: 700 and 762 St Johns Road and St Johns Nursery site, Earls Hall Road, Clacton on Sea) I would like to be provided with the digital recording of the above appeal in a format I can view on an Apple MacBook. If it helps I have access to Microsoft Teams which you live streamed the event on."*

5. On 8 January 2021, the PI responded and refused the request under regulation 12(4)(b) of the EIR: manifestly unreasonable requests. It explained that a video recording of the appeal had only been made for its own, private purposes, and that, before disclosing the recording, it would be necessary to protect individuals' privacy. Due to the difficulties, time and expense it would take to convert the recording of the event (which had been "live-streamed") into a disclosable format, including redacting it, it considered that the request was manifestly unreasonable.

6. The complainant requested an internal review on 10 January 2021. The PI sent him the outcome of its internal review on 8 February 2021 and upheld its original position.

## Scope of the case

7. The complainant contacted the Commissioner on 5 February 2021 to complain about the way his request for information had been handled.

8. This decision covers whether the PI was correct to consider that the requested information was exempt from disclosure under the EIR, due to the request being manifestly unreasonable (regulation 12(4)(b)).

## Reasons for decision

### Regulation 12(4)(b) – manifestly unreasonable requests

9. 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. If engaged, the exception is subject to the public interest test.

10. In this case, the PI's position was that compliance with the request would place a manifestly unreasonable burden on its resources in terms of cost.

11. 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" as defined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations").

12. A public authority is expected to accept a greater burden when considering requests for environmental information. However, the "appropriate limit", as defined in the Fees Regulations, can be a useful starting point in considering whether a request for environmental information can be refused as being manifestly unreasonable on grounds of cost.

13. The Fees Regulations define the "appropriate limit" in terms of the amount of time which staff would be expected to take in complying with a request. It is set at £600 (24 hours) for central government departments, and £450 (18 hours) for all other public authorities. It is also specified that the relevant activities, set out below, may be calculated /charged for at a flat rate of £25 per hour of staff time

14. The Fees Regulations specify that 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.

15. However, a key difference between regulation 12(4)(b) of the EIR and section 12 of the FOIA is that, since the Fees Regulations do not apply to the EIR, a public authority may also take into account (under the EIR) any time that it would need to spend considering whether any of the information falling within the scope of the request is exempt (that is, whether any of the EIR exceptions is engaged), and the time and cost of making redactions.

16. Whether considering a costs estimate under either FOIA or the EIR, the Commissioner expects a public authority's 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 Planning Inspectorate's position**

17. In this case, the PI considered that the recording contained the personal data of certain individuals who had spoken at the appeal hearing. It considered that this could not be disclosed without breaching the data protection principles; that is, that it would be exempt from disclosure under regulation 13 of the EIR.

18. The PI's position is that not all of the recording comprises personal data. It asserted that, in order to identify the personal data, it would need to review the whole video recording which (since the hearing took place over four days) comprises 28 hours and ten minutes of footage. It stated that "the recordings would need to be carefully watched in their entirety to identify all instances that amount to personal data".

19. The PI explained that certain local residents spoke at the appeal hearing, and at times divulged personal opinions and details of their personal circumstances.

20. In support of this, the PI explained that it had carried out a sampling exercise to determine the amount of what it considered to be personal data on the recording. In conducting the sampling exercise, it identified an instance where an individual referred to their own personal family circumstances.

21. It explained that, whilst it holds a running order which may potentially make it quicker to locate the sections of the video where the local residents were speaking, it was aware that the individuals may have made additional comments at any point during proceedings, and stated that this "could potentially include comments that amount to personal data". It stated that the individuals also appeared on camera at certain times in addition to when they were presenting their evidence.

22. The PI also stated that the individuals' names, which were displayed on the screen, would need to be redacted.

23. The PI explained that, in order to redact the personal data, it would need to purchase specialist software.

24. It provided the following estimate of the costs which it would incur in being able to comply with the request:

    - Software: Adobe Premiere Pro £238 per annum (minimum contract, one year)

    - Integration and testing of software: 5 hours (£42.06 per hour, because this task will require senior executive officer grade): £210.30

    - Redaction: Locate and review recording to identify which sections require redaction & describing sufficiently so that technical expert can correctly redact: 30 hours (£25 per hour): £750

    - Specialist IT resource to undertake redaction utilising software: 3 hours (£25 per hour): £75

    - Transfer file to case file & for case officer to check that all correct: 3 hours (£25 per hour): £75

    - Total estimated cost: £1,348.3

25. Since this is considerably in excess of the "appropriate cost limit" set under the FOIA at £450, the PI's position is that the request was manifestly unreasonable.

**Is regulation 12(4)(b) engaged?**

26. In this case, the PI has not argued that it would be burdensome simply to locate and send the video recording to the complainant "as is". Its position is that the video is very lengthy and contains exempt material, which cannot easily be located and redacted prior to disclosure.

27. Specifically, the PI considers that the exception for third party personal data at regulation 13 of the EIR would be engaged with regard to parts of the recording. It has not alluded to any other exception which may apply. It has asserted that the time that it would take to locate the exempt material, and the process of redacting it, renders the request manifestly unreasonable.

28. As previously explained, under the EIR, it is possible to engage regulation 12(4)(b) on the grounds that potentially exempt material within the requested information needs to be located, considered and, if necessary, redacted prior to disclosure, if the time and cost of doing this can be said to be "manifestly unreasonable". This is different to the application of section 12(1) FOIA, when it is not permissible to factor in the cost of considering the requested information for exemptions, nor of redacting it.

29. In order to determine whether regulation 12(4)(b) is engaged in this case, it is, therefore, helpful to consider whether regulation 13 would be engaged. If regulation 13 would be engaged in relation to any or all of the video recording, then the time it would take to locate, consider and redact this information can be taken into account in terms of whether it would be manifestly unreasonable for the PI to accept this burden and comply with the request.

Consideration of regulation 13: third party personal data

30. The Commissioner considers that, for the reasons set out below, the PI has correctly identified that the video recording contains third party personal data. Moreover, he notes that other individuals' personal data are on the recording, as well as the local residents'.

31. However, it is not necessarily the case that personal data is exempt from disclosure in response to an EIR request. It is relevant, at this stage, to set out the nature of the appeal hearing, and who was able to attend/view it.

32. The Commissioner is aware that the hearing took place in a "virtual" setting, due to Covid restrictions being in place; specifically, over the video-conferencing platform Microsoft Teams. He has ascertained that the hearing was attended only by specific, invited individuals, as detailed further on in this notice.

33. It is relevant to his considerations that the hearing was, therefore, only attended by individuals who had asked/been asked to attend, all of whom had been provided with a specific electronic link in order to take part.

34. It is also relevant that the hearing was not, in this instance (despite the wording of the request) live-streamed to the public on the PI's website, nor on any other streaming channel, whilst it was taking place. The hearing could not, therefore, be viewed by chance by members of the public browsing on the PI's website. Nor could it be "attended" anonymously. The hearing could not be viewed by anyone who had not been provided with a link and who was not specifically identified during the meeting.

35. The definition of personal data is contained in section 3(2) of the Data Protection Act 2018 (DPA), which defines personal data as: "any information relating to an identified or identifiable living individual".

36. In this case, a number of living individuals were named and/or filmed during the recording of the appeal hearing. It is also possible that other individuals were referred to, during the course of the proceedings.

37. The Commissioner, therefore, is satisfied that a number of living individuals are identifiable on the video recording, either due to their actual appearance on the video, or by reference to their name.

38. As to whether the video recording "relates to" these living individuals, the Commissioner is satisfied that, due to the nature of the material, it does: it may relate to their professional lives (for example, the Planning Inspector, legal counsel, and officers from the planning authority), and/or in relation to their personal lives (for example, personal views and opinions about their local area and home life (the local residents)).

39. In the Commissioner's view, therefore, the video recording contains the personal data not only of the local residents who spoke at the hearing, but also of any other identifiable individuals who participated. It is also conceivable that other identifiable individuals may have been referred to in passing.

40. However, the fact that the information contains third party personal data would not be sufficient to engage regulation 13. The next step would be to consider whether disclosure of the personal data would be in breach

of any of the data protection principles; otherwise, regulation 13 would not apply.

41. This is because personal data can be processed in line with the DPA and the UK General Data Protection Regulation (GDPR). The relevant principle, set out at article 5(1)(a) of the GDPR, states that "personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

42. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can be disclosed if to do so would be lawful, fair and transparent.

43. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

44. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

> "processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"[1].

45. Therefore, in considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the EIR, it is necessary to consider the following three-part test:-

    i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;

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[1] Article 6(1) goes on to state that:-

> "*Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks*".

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA) provides that:-

> "*In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted*".

ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;

iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

46. In this case, the Commissioner is satisfied that the complainant is pursuing a legitimate interest. The appeal considered an application for the erection of 195 dwellings on a specific site, which had been refused. The complainant wished to have access to the full details of what was discussed, in order to be fully informed as to the basis on which the appeal was determined.

47. Regarding whether disclosure of the information would be necessary to meet the legitimate interest, the Commissioner has considered whether it is possible to obtain the relevant details pertaining to the appeal decision, by another means.

48. The PI asserted that the complainant would already have access to the "written representations" which were provided in evidence to the Inspector, since these are publicly available. However, the Commissioner has ascertained that these were provided to the PI in advance of the hearing, and are not a transcript of what was actually said on the day. He has also ascertained that no transcript, as such, exists in the public domain.

49. However, it is the case that a very large number of documents relating to the appeal are publicly available on the planning authority's website, and indeed the Appeal Decision is very detailed, and refers to the evidence that was submitted at the hearing.

50. Overall, the Commissioner considers that, whilst other available information goes some way towards meeting the legitimate interest in the disclosure of the information, disclosure of the video recording would, narrowly, be necessary in order to scrutinise the detail of what was said on the day.

51. With regard to the third part of the test – the need to balance the legitimate interest in disclosure against the rights and freedoms of the identifiable individuals – the Commissioner has considered the individuals' expectations of privacy, and the potential for harm that could be caused by disclosure.

52. He has considered this in light of his understanding of the nature of the proceedings as a whole, and also in light of the sampling exercise carried out by the PI.

53. The Commissioner understands that the Inspector explained to the attendees on more than one occasion that, whilst the PI was recording the proceedings, this was only for its own private purposes. Specifically, the PI informed the Commissioner: "During his opening remarks, the Inspector that held the inquiry said that the recording was being made 'for quality assurance purposes only' and that 'the recording will not be released publicly but will be retained by the Inspectorate until the judicial review period for the decision has expired'."

54. The Inspector did not advise the attendees that there was a possibility of the recording subsequently being disclosed, publicly, in response to an EIR request.

55. Taking the nature of the proceedings into account, the Commissioner considers that different individuals would have different expectations of the level of privacy to be afforded to their data, regardless of the opening remarks.

56. For instance, it is likely that the Inspector and legal counsel would have limited expectations of privacy, and moreover, would consider that little or no harm would be caused by the publication of their part in the proceedings. This is because they were professionals, engaged in their day to day employment, and well-used to speaking at public "in-person" appeals; it is likely that, despite the virtual format, this hearing would have felt no different, and their conduct would have been the same had the meeting been open to the public.

57. However, the Commissioner considers that the local residents speaking at the appeal hearing are likely to have different expectations. Whilst they may have been aware that they would be named in the published Appeal Decision, when speaking on the day they were likely to take the Inspector's opening remarks into account, and, in the Commissioner's view, to believe that the world at large would not be able to watch and hear them, either during or after the event.

58. The Commissioner is not aware that any transcript of the entire hearing has been either recorded or published.

59. The Commissioner is aware that the local residents' oral submissions were, necessarily, of a personal nature, and related to their experiences of living in the local area and the impact that the proposed development may have on their personal lives. He agrees with a view expressed by the PI: these individuals would be "less guarded" in their comments because of the Inspector's opening remarks, and because the hearing felt like a closed session rather than a public meeting. For example, the Commissioner notes that the sampling exercise carried out by the PI

revealed that one individual mentioned that they may need to leave, due to some personal circumstances which they specified.

60. The Commissioner is persuaded that certain of the personal data of the local residents, contained on the video recording, was of a personal and private nature and that the individuals were entitled to expect this data to remain confidential outside the confines of the hearing.

61. In his view, there would be no lawful basis for the disclosure of this information, because the rights and freedoms of those individuals would outweigh the legitimate interest being pursued.

62. For the purposes of determining whether regulation 12(4)(b) is engaged in this case, it is necessary only for the Commissioner to be persuaded that potentially exempt material exists on the video recording. Having considered the potential application of regulation 13, he is satisfied that this is the case.

Is the request manifestly unreasonable?

63. The Commissioner has, therefore, considered whether the PI is correct to assert that the time and cost of locating and considering potentially exempt information and redacting any relevant parts would be manifestly unreasonable.

64. He notes the argument provided by the PI: that, although a running order exists for the four-day event, it is not possible to ascertain precisely when any particular individual may have spoken or appeared on camera during the hearing throughout the four days. The Commissioner accepts that it would be necessary to review the four-day hearing in its entirety. This requires 28 hours and ten minutes of footage to be watched.

65. In addition, the Commissioner considers that a considerable amount of time would be needed to exercise judgment in determining whether any part of the material is exempt. It may be necessary to cross-reference the oral submissions with any published information, such as the Appeal Decision (which refers to certain of the evidence), as well as otherwise considering whether there may be a lawful basis for disclosure.

66. The Commissioner notes that the PI does not consider that exempt material can be edited out without purchasing, and staff being trained in the use of, specialist software. However, he is not aware whether the PI considered simply cutting out certain parts of the recording, without the use of specialist software, using more widely-available video editing software.

67. He also considers that the part of the PI's estimate which comprises five hours for new software to be tested, charged at "senior executive" rate of £42.06 per hour, is not reasonable. Although the Fees Regulations do not govern the EIR, the Commissioner normally expects the principle of charging for staff time at a flat rate of £25 per hour to apply across both FOIA and the EIR, when estimating the cost of compliance.

68. The Commissioner notes that the complainant, who accepts that certain material may need to be redacted from the recording, considers that the PI is a large public authority with a very large IT budget and should be able to comply with the request, regardless of cost. He (the complainant) also considers it unreasonable for the PI to apportion the costs of acquiring and being trained on any relevant new software to only one request, because the software, once acquired, could be used subsequently for its own purposes or in responding to other requests.

69. The Commissioner is not persuaded that those parts of the PI's costs estimate which relate to acquiring and being trained in using new redaction software, are sensible and realistic. Neither does he consider that names on screen would need to be edited out since these appear in the Appeal Decision, which is publicly available.

70. However, in view of the length of the video and the length of time it would take for the PI to be able to exercise an appropriate level of judgment over the potentially exempt parts of the recording, including potentially comparing the oral evidence with what was published in the Appeal Decision, he considers that, even if a cheaper way of editing out those parts of the recording could be identified, the request is manifestly unreasonable.

71. The exception at regulation 12(4)(b) is, therefore, engaged, and he has gone on to consider the balance of the public interests.

**The balance of the public interests**

72. 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.

73. Under regulation 12(2) of the EIR, public authorities are required to apply a presumption in favour of disclosure. Even where the exception is engaged, the information should still be disclosed if the public interest in disclosing the information is not outweighed by the public interest in maintaining the exception.

74. There will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation in environmental decision-making, all of which ultimately contribute to a better environment.

75. As the Commissioner's published guidance[2] on the application of regulation 12(4)(b) explains, the weight of this interest will vary from case to case, depending on the profile and importance of the issue and the extent to which the content of the information will actually inform public debate.

76. In this case, neither the PI nor the complainant has drawn the Commissioner's attention to any specific issues of significant public interest within the recording of the appeal hearing; for example, anything which may have been controversial or subsequently misrepresented in public, or which may shed light on any matters relevant to the Inspector's considerations, and the outcome of the decision, beyond what is already in the public domain. Indeed, the PI has remarked that it considers that course of the hearing, and the outcome, were "uncontroversial".

77. The exception at regulation 12(4)(b) exists to protect public authorities from exposure to disproportionate burden or to an unjustified level of distress, disruption or irritation in handling information requests. It is not in the public interest for public authorities to be diverted away from their core tasks, unless the burden is proportionate in view of the strength of the public interest in the disclosure of the information.

78. The question for the Commissioner is whether, in the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in the disclosure of the information.

79. In this case, the Commissioner is satisfied that there is already a large quantity of detailed information in the public domain about the matters which were considered at the appeal. As previously mentioned, this includes the written representations of persons giving evidence which, he understands, are publicly available.

80. The Commissioner also notes that the Appeal Decision (which was published a matter of days after the complainant made his request)

[2] https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf

contains details of all participants and refers to the issues they raised, as well as setting out in full the basis on which the Inspector's decision was made.

81. He also notes that, whilst members of the public could not "turn up" as they might do at an in-person hearing, anyone could express a prior interest in taking part in the virtual hearing (which was publicised in advance) by providing a name and email address, in order to receive an invitation and link.

82. The Commissioner is not aware of any specific public interest in the video recording being released. It appears, in this case, that the complainant simply believes that the PI should be prepared to accept any burden in terms of cost and time, in view of its large size and budget, in order to meet its obligations under the EIR.

83. However, the Commissioner considers that the burden on the PI to comply with the request would be significant. It would require at least one member of staff to watch the entire hearing, log all instances where they identified potentially exempt information, and then review all of those instances in order to make a decision about whether they may lawfully be disclosed. This diversion of resources away from the PI's core tasks would be considerable, which would not be in the public interest. There may also be some additional IT costs.

84. In the absence of there being any significant public interest in disclosure, the Commissioner is satisfied that, in this case, the balance of the public interests lies in the exception being maintained.

85. 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… 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).

86. 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

87. 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

88. 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.

89. 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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