

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

Date: 19 May 2023

Public Authority: Council of Queen Mary University of London
Address: Mile End Road
London
E1 4NS

Decision (including any steps ordered)

1. The complainant has requested correspondence relating to asbestos. The above public authority's ("the public authority") final position was to rely on regulation 12(4)(e) of the EIR (internal communications) to withhold the information.
2. The Commissioner's decision is that regulation 12(4)(e) of the EIR is engaged in respect of some, but not all of the information falling within scope and that where the exception is engaged, the balance of the public interest favours disclosure. The public authority also breached regulation 5(2) of the EIR in its handling of this request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information it has relied upon regulation 12(4)(e) to withhold. The public authority may make appropriate redactions to protect personal data.
4. The public authority 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

5. On 27 June 2022, the complainant wrote to the public authority and requested information in the following terms:

"I am looking for health and safety information about asbestos in the Queen Mary Medical Church Library at Whitechapel.

"Can you please provide any email correspondence from 1st January 2021 onwards, by Estates&Facilities and Health&Safety Department staff, which relates to asbestos and asbestos containing materials (ACMs) within the library.

"The library is usually referred to as Whitechapel Medical Library or Whitechapel Church Library or WCH Library so I would kindly request to use a combination of keywords to search for info:

asbestos OR ACM AND Whitechapel Church Library

asbestos OR ACM AND Whitechapel Medical Library

asbestos OR ACM AND WCH Library."

6. The public authority responded on 15 July 2022. It refused the request and relied on section 12 of FOIA (cost of compliance) in order to do so.
7. The complainant then submitted a fresh request on 29 July 2022 in the following terms:

"Can you please attempt the search for the period from 1st October 2021 to 30th April 2022? Can you please search for correspondence by the below health and safety staff and/or asbestos dutyholders?

Principal

Director of Estates and Facilities

Head of Health and Safety (Estates and Facilities)

Asbestos Manager

Director of Health and Safety

Professional Services Health and Safety Manager and training lead

Professional services Health and Safety Adviser

"The combination of keywords to search for info is:

asbestos OR ACM AND Whitechapel Church Library

asbestos OR ACM AND Whitechapel Medical Library

asbestos OR ACM AND WCH Library"

8. The public authority responded to the refined request on 24 August 2022. It now relied on section 36 of FOIA (prejudice to the effective conduct of public affairs) in order to withhold the requested information. It upheld this stance following an internal review.

Scope of the case

9. The complainant contacted the Commissioner on 27 October 2022 to complain about the way his request for information had been handled.
10. During the course of the investigation, the Commissioner informed the public authority that, for reasons that will be explained in more detail below, he considered that the information would be environmental and therefore the public authority needed to reconsider the request under the EIR.
11. The public authority issued a fresh refusal notice on 26 April 2023. It now relied on regulation 12(4)(e) of the EIR in order to withhold the information.
12. The Commissioner considers that the scope of his investigation is to determine whether the public authority was entitled to rely on regulation 12(4)(e) of the EIR to withhold the information.

Reasons for decision

Is the requested information environmental?

13. 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);
14. The information in question is on the management of asbestos. Asbestos-containing materials can, if not handled correctly, release harmful particles into the air and atmosphere which are a danger to human health. The quality of the management of such materials affects the likelihood and the severity of a release of particles into the atmosphere.
15. Therefore the Commissioner considers that this information is information both directly on a measure having environmental impact (or, more precisely in this case, preventing an environmental impact) and on the state of human health and safety in as much as it is affected by environmental measures.

Regulation 12(4)(e) – internal communications

16. Regulation 12(4)(e) of the EIR will apply to any communication that has been sent internally. A “communication” is something intended to transfer information from a person to one or more other people. This could include letters, emails or memos – or it could include private messages, audio or video recordings.
17. In order to be an “internal” communication, the particular communication in question must have remained within the public authority. It must not have been sent to, or copied to, anyone outside the organisation.
18. The withheld information in question consists of a series of email chains between senior individuals within the public authority. It also includes a

number of attachments to those emails. These include work permits, reports, minutes and agendas – as well as drafts of documents.

19. The Commissioner accepts that all of the emails that pass between (and only between) the public authority's managers will be internal communications.
20. The Commissioner's guidance states that, where those same emails include attachments, those attachments will also be internal communications – even if those attachments which were generated by, or have been shared with, external parties such as union reps and external contractors. This is because the attachments are only caught by the request because they are attached to internal emails falling within the scope of the request.¹ For this purpose, no distinction should be drawn between the email itself and anything attached to it. They must be considered as one single communication.
21. However, the Commissioner notes that there are also a number of other emails within the chains that have not stayed wholly within the public authority. This includes emails exchanged with the Health and Safety Executive (HSE) as well as emails exchanged with union representatives – who are, in this context, acting as representatives of their union, rather than as ordinary employees. These emails are not internal communications and so do not engage the exception.
22. The Commissioner notes that in some cases the email chains begin with external correspondence which is then shared internally. Where that is the case, any subsequent correspondence which shares the external correspondence will be an internal communication – providing that the correspondence remains within the organisation. As soon as one email in a chain is shared outside of the public authority, all the previous correspondence within that chain ceases to be an internal communication – because it has been seen by one or more external parties. The original external correspondence in each such chain does not engage the exception.

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-4-e-internal-communications/what-are-internal-communications/#forwarded>

Public interest test

23. Internal communications can only be withheld under EIR if the public interest favours maintaining the exception.

24. The public authority explained in its response that the balance of the public interest should favour maintaining the exception because:

“there is the need for our staff to have a ‘safe space’ in which to discuss issues and we believe disclosure would inhibit the free and frank provision of advice and exchange of views for the purpose of deliberation. It is essential that staff have freedom to express themselves openly, honestly and completely, or to explore options, when providing advice or giving and seeking views as part of the process of deliberation, such as in provision of professional advice. If staff feel deterred from exchanging views or inhibited in performing their jobs, this would not be in the public interest.”

25. The public authority also drew attention to its previous arguments in support of section 36 – which the Commissioner accepts may be relevant, as both section 36 and regulation 12(4)(e) are intended to provide protection for a public authority’s internal thinking space:

“No public authority employee can be expected to do their job constantly contemplating these exemptions. For example, there are always likely to be occasions when staff do or say things on the spur of the moment or in an unguarded manner, or simply need to voice controversial or unpopular statements or put forward choices. While exemptions are not to be used as a blanket, nor to cover anything up – which is certainly not the case here – [the exemption] in particular acknowledges the need for staff to have a level of freedom to do their jobs, which, for instance, a private sector employee would never have to contemplate.

“The requester states, ‘health and safety...is led by fact and evidence.’ QMUL Health & Safety respond that this statement shows a total lack of understanding of Health & Safety, particularly how it relates to safety communication and management, and further that the comment, ‘the management of asbestos, and asbestos-related decision-making, is governed by, publicly available, legal regulations and approved codes of practice’, shows a misunderstanding of risk-based legislation vs. prescriptive legislation, which recipients of internal emails would understand and if writing for an untrained external audience would take the time to ensure this was explained if required. Moreover, the requester claims that, ‘fear of judgement regarding the management of asbestos would only be possible if the decisions taken departed from the approved codes of practice.’ QMUL Health & Safety respond, ‘If only

this was true. This issue has taken up a disproportionate amount of time compared with other issues without any departure from the approved codes of practice.'

"The argument that the more we publish, the more we reassure is clearly untrue, as much information has already been released either via the FOIA, via the Trades Unions and the HSE. Meetings have been conducted and dozens of emails answered. This other activity and publication go some way to meeting the public interest. QMUL Health & Safety are unsure why this has not provided the reassurance apparently being sought, but releasing internal correspondence will not necessarily do this....

"Further, the requester argues the following point, presumably in support of the public interest, 'there is evidence to suggest historical wrongdoing. Previous surveys suggest that there were some urgent recommendations done by surveyors to remove or enclose hazardous asbestos material found in public access spaces, but these recommendations were not followed by QMUL for several years'. The QMUL Asbestos Manager and Head of Health & Safety for Estates and Facilities respond as follows, 'unfortunately we don't have any documents to advise why this decision was taken. We are only able to provide assurance that our current processes are acceptable. There is conflicting evidence in reports: some surveys say 'remove', some say 'manage', when the same area has been surveyed over a few years. Asbestos Management 'recommendations' do not mean we *have* to do [something], we take a risk-based approach; an approach the HSE support. On a side note, we have spoken to our external experts and in the 13 years of operating out of Whitechapel Library no staff have reported any asbestos related illnesses.'

"We believe that this request seems to be predicated on the belief of some form of 'wrongdoing' by QMUL in the eyes of some and that anything we provide will be read through the 'filter' of assumed guilt. This alone is not a reason to withhold information, as all FOI requests should be dealt with motive blind. However, it does add to our arguments about possible chilling effect on the behaviour of staff who, should they be accused of anything in the event of disclosure, would be likely to be a lot more circumspect in their written communications. This would inhibit the free and frank provision of advice and exchange of views and would not be in the public interest either. Moreover, this would have implications for all public authorities. As explained in the paragraph above, we dispute that the survey reports and what QMUL did in response to them 'suggest historical wrongdoing'; that is the requester's interpretation simply based on not all of the surveyors' recommendations being implemented. We have explained this above: it

is not 'wrongdoing' by any measure; a number of surveys were contradictory in parts and a risk-based approach is taken.

"QMUL is offended by the accusation that we are hiding something and refute the allegation that information is being withheld in order to prevent exposure of wrongdoing. We recognise that ultimately the only way to prove this unreservedly could be to supply the information. Nevertheless, rather than the need to exonerate the organisation specifically, our arguments concern the protection of our employees' ability to provide advice and exchange views now and in the future, and not necessarily just on this subject. If there were genuine suspicion of wrongdoing, that would favour the public interest in disclosure without doubt. However, as we believe is likely known by the requester, the HSE have been involved with this matter at the instigation of external parties, and would have identified anything of this nature.

"The claim that 'the public, including hundreds of students and visitors who were using the building for decades, have an interest in seeing the withheld information' is not credible. In reality, there are a small number of individuals known to be pursuing this matter relating to this building...

"The public interest test is arguably the pivotal aspect, as we consider that we have demonstrated that [the exemption] is engaged. We recognise that this can be a delicate balance. The ICO's guidance stresses that 'The public interest here means the public good, it is **not** what is of interest to the public; or the private interests of the requester.' The Whitechapel library is not a public building in the sense of a local authority library; it is used by the QMUL community at the campus of the Faculty of Medicine and Dentistry and is not open to the general public. QMUL knows that the concerns relating to asbestos are concentrated with a small group who have been in correspondence with the Health & Safety team, as opposed to 'the public' at large, from which there has been no outcry or alarm. There has been nothing in the media. However, as we have described above, QMUL's main concern is about the impact on future guidance, exchanges and deliberation if a precedent is set whereby information of this nature is disclosed into the public domain. This has implications for QMUL staff's ability to freely provide advice and exchange views for the purposes of deliberation."

26. In support of disclosure, the complainant pointed to the importance of the issue and the fact that the public authority did not appear to have removed asbestos-containing materials that had apparently been recommended for removal.

The Commissioner's view

27. The Commissioner considers that the balance of the public interest should favour disclosure.
28. He notes that the management of asbestos is a matter of considerable public importance. If left undisturbed, asbestos is relatively harmless – however, any activity which damages the surface of asbestos-containing material risks releasing harmful carcinogenic particles into the atmosphere. It is therefore vital that such activities are minimised, that, when such an activity is necessary, that it is carried out by appropriately qualified specialists and that proper containment measures are put in place to minimise the risk.
29. It is also important that the public in general and, in particular, frequent users of buildings containing asbestos, are aware of any asbestos that they might come into contact with.
30. It is not for the Commissioner to offer comment on how appropriate the policies and procedures the public authority has for managing asbestos are. It is his role to consider whether disclosure of the withheld information would assist the public in understanding the procedures the public authority has in place, the rationale for those procedures and how consistently they are being followed. In his view, disclosure would aid public understanding.
31. The public authority has suggested that the discretion it is granted by the legislation, in order to manage asbestos, increases the public interest in withholding the information. In the Commissioner's view, the opposite is true. The broad discretion the public authority is granted increases the public interest in understanding how that discretion is being exercised.
32. A better understanding of the issues would allow interested staff to challenge the public authority's stance – if they consider it necessary to do so. The fact that the public authority may find such a challenge uncomfortable does not mean that it would not be legitimate.
33. The Commissioner recognises that there are occasions when staff need to have candid conversations and that these can be inhibited if those staff are concerned that their views and opinions will become public knowledge.
34. However, the Commissioner also recognises that the individuals in question are either senior individuals within the organisation, or have responsibilities relating to health and safety, or both. He considers that such individuals should be robust and not easily deterred from providing

candid advice – particularly when it relates to the health and safety of staff and students.

35. The EIR start with a presumption in favour of disclosure. The Commissioner considers that the balance of the public interest in this case should favour disclosure.
36. The Commissioner notes that the withheld information contains a considerable amount of personal data which will need to be redacted, prior to disclosure, so that the public authority complies with its obligations under data protection legislation. This will include (but will not necessarily be limited to) contact details and the names and job titles of junior members of staff.

Procedural matters

37. The public authority breached regulation 5(2) of the EIR as it failed to deal with the request under the EIR, within 20 working days.

Right of appeal

38. 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

39. 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.
40. 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

Roger Cawthorne
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