

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 12 May 2023

Public Authority: Royal Borough of Windsor and Maidenhead
Address: Town Hall
St Ives Road
Maidenhead
SL6 1RF

Decision (including any steps ordered)

1. The complainant has made two requests for information held by Royal Borough of Windsor and Maidenhead (the council) relating to its contract with a ground maintenance business.
2. The council initially refused the requests under section 14(1) - vexatious requests, of the Freedom of Information Act 2000 (FOIA). During the Commissioner's investigation, the council confirmed that it was also relying on section 12(1) - cost limit, of FOIA, as its basis for refusing the complainant's requests.
3. Whilst the Commissioner finds that it is the EIR that is the correct information access regime, he has decided that the council is entitled to refuse both requests under regulation 12(4)(b) - manifestly unreasonable, of the EIR.
4. The Commissioner does not require further steps.

Request and response

5. On 14 August 2022, the complainant made the following two requests for information:

Request 1

"Tivoli Grounds Maintenance Contract.

Can you please supply a copy of the –

1. Monthly Key Performance Indicator scores for 2021/22 plus scores for April 2022 to 1st Aug 2022.
2. Play Area Performance Indicator - background data used to calculate the score for April 2022 to 1st August 2022 So for instance, records of dates sites were inspected & maintained, joint inspection records, complaints, adverse comments on."

Request 2

"Tivoli Grounds Maintenance Contract

Can you please supply a copy of all the variation orders issued from 1st Jan 2021 to 31st July 2022."

6. On 13 September 2022, the council advised the complainant that it was refusing both of their requests under section 14(1) of FOIA; at the internal review stage, the council then upheld this decision.

Scope of the case

7. The council advised the Commissioner that it should have cited section 12(1) of FOIA as well as section 14(1) in its refusal notice to the complainant; the council also issued a fresh refusal notice to the complainant confirming this position.
8. In the circumstances of this case, the Commissioner regards it to be appropriate to consider the council's handling of both Request 1 and Request 2 within this one decision notice.
9. The Commissioner will firstly decide whether the requested information falls within the scope of FOIA, or the EIR.
10. The Commissioner will then consider whether the council is entitled to refuse to comply with Request 1 and, or, Request 2.

Reasons for decision

Is the requested information environmental?

11. Information must be considered for disclosure under the terms of the EIR, rather than the FOIA, if it meets the definition of "environmental information" as set out within [regulation 2](#) of the EIR.
12. The complainant's two requests are for information held about the activities and performance of Tivoli (the contractor), a private business which has a contract with the council to provide ground maintenance services; this includes activities such as the management of hedges, vegetation and grass on council land, and inspections and maintenance of communal areas, such as sports pitches, and playgrounds.
13. The Commissioner is satisfied that all the requested information meets the description of environmental information set out within regulation 2 of the EIR, and that this is the correct information access regime in this instance.
14. In effect, regulation 12(4)(b) of the EIR works in similar regards to the two exemptions within FOIA that have been cited by the council; [section 12](#), where the cost of complying with a request 'is too great', and [section 14](#), where a request is vexatious.
15. Therefore, the Commissioner considers the council's arguments in support of both section 14(1) and section 12(1) of FOIA, to be relevant, and transferable, to regulation 12(4)(b) of the EIR.

Regulation 12(4)(b) – manifestly unreasonable

16. 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. Where it is found to be engaged, regulation 12(4)(b) of the EIR is also qualified by the public interest test.

The complainant's position

17. The complainant has said that they have concerns about ground maintenance work carried out (or not carried out) by Tivoli, and whether health and safety requirements are being met.
18. The complainant has confirmed that they had felt it necessary to send weekly emails to the council for a number of months; this was because the council was not responding to confirm that they would take action in response to the serious health and safety concerns that they had raised. The complainant has said that it was only when a local [newspaper](#)

published details about issues relating to one particular playground that the council had taken action.

19. The complainant has referred to details they have received in response to eight previous information requests that they had made to the council, stating that this shows that Tivoli provided inaccurate information at an Overview and Scrutiny meeting held on 18 November 2021. The complainant has said that it is important that the requested information is released in order to fully address this matter.
20. The complainant has argued that it would not require significant time or resources to provide the information they have requested, and that it is in the public interest to release the information.

The council's position

21. With regard to the burden of dealing with the requests, the council has explained that there are forty-two play areas within the borough and that the playground inspections are all individual documents. It has said that fifteen of the play areas are inspected daily and the other 27 are inspected up to three times a week.
22. The council has aggregated the two requests, stating that it has calculated that to deal with them both would require approximately 3162 individual records to be reviewed. It has stated that using an estimated time of one minute per record, this would take at least 52 hours of one officer's time.
23. The council has said that even if the scope was further narrowed to a shorter time frame, it would still be too broad, and the review of forty-two play areas, each with multiple weekly reports, would place an unjustified burden on its resources.
24. The council has also provided the Commissioner with a copy of six previous requests that it has received from the complainant since December 2021, about the council's contract with Tivoli; the council has said that it has done its best to try and provide a response on each occasion.
25. The council has also provided the Commissioner with a copy of a letter which it sent to the complainant on 25 August 2022; this contains an offer to meet the complainant to discuss any evidence and concerns that they may have about Tivoli's performance; the council has said that the complainant did not accept this invitation.
26. The council states that the complainant's contact with the council about issues relating to the contract with Tivoli has been "significant". The council's letter to the complainant of 25 August 2022, refers to 475

emails having been received in the 90 days prior to a meeting which was held between the parties in June 2022. The council has said that the majority of these emails set out details of the complainant's dissatisfaction with the Tivoli contract.

27. The council states that the complainant has engaged separately with relevant departments before then submitting requests for the same information using FOIA. It has also said that it believes that the complainant is using FOIA as a means of circumventing the terms of an agreement that they had signed when their employment with the council ended.
28. The council has also referred to photographs taken by the complainant of individuals whilst they are working, stating that such action is intrusive and has caused distress to its staff, whom it has a duty to protect. The council has said that it has had to advise the complainant that it would consider legal action if these activities continued.
29. The council states that it has reached a point where it believes that it can show that the two requests that it has now received form evidence of part of an ongoing campaign. It states that it believes that to deal with these requests would have an unjustified and disproportionate effect on itself and its staff.

The Commissioner's view

30. Regulation 12(4)(b) of the EIR is designed to protect public authorities from exposure to a disproportionate burden or an unjustified level of distress, disruption or irritation in handling information requests.
31. As the Commissioner considers "manifestly unreasonable" and "vexatious" to be essentially the same, he has had regard to his [guidance](#) on section 14(1) of FOIA in this case.
32. The Commissioner's guidance states that when considering whether a request is vexatious, it is appropriate to have regard to the following:
 - The burden (on the public authority and its staff)
 - The motive (of the requester)
 - The value and serious purpose (of the request)
 - Any harassment or distress (of and to staff)
33. It should be noted that the consideration of whether regulation 12(4)(b) is engaged is not restricted to the four themes set out above, and there may be other relevant factors that should be taken into account.

34. The council has aggregated the two requests submitted by the complainant on 14 August 2022, claiming that the cost of compliance would exceed the cost limits set out within the [Freedom of Information and Data Protection \(Appropriate Limit and Fees\) Regulations 2004](#).
35. Whilst the FOIA fees regulations do not apply to requests made under the EIR, the Commissioner considers that they provide a clear indication of what should be considered to be a reasonable allocation of resources when dealing with requests under the EIR in terms of staff time. Under the fees regulations, a public authority like the council is expected to commit up to 18 hours of staff time dealing with a request.
36. As the FOIA fees regulations do not apply under the EIR, there is no specific provision for the aggregation of substantially similar requests; however, the Commissioner does not consider it to have been unreasonable for the council to have considered the collective burden of dealing with the two requests in this particular instance.
37. Whilst the council has not provided evidence of any sampling exercise carried out, the Commissioner is satisfied that the information available is sufficient for him to conclude that the time required for compliance would far exceed 18 hours of one officer's time; therefore, he is satisfied that the requests would cause a burden to the council, both in terms of cost and resources.
38. With regard to the motive of the requester, and the value and purpose to the two requests, it is the Commissioner's view that the matters to which the requests relate are not trivial; that is, the upkeep and maintenance of public areas, and the health and safety of individuals.
39. However, the Commissioner considers the following factors to also be relevant to his consideration of whether regulation 12(4)(b) is engaged in this instance:
 - The volume of correspondence received from the complainant in a short time period in the months prior to the submission of Request 1 and Request 2.
 - The behaviour of the complainant in that same time period, and the distressing effect that this had on staff.
 - The council's invitation to the complainant to discuss any concerns and evidence that they have about the performance of the contractor.
40. Taking into account the above factors, and also the burden of costs and resources required to comply with request 2, the Commissioner is

satisfied that Request 1 and Request 2 are manifestly unreasonable, and that regulation 12(4)(b) is engaged.

41. The Commissioner has gone on to consider the public interest test associated with the application of regulation 12(4)(b).

Public interest test

42. Regulation 12(4)(b) of the EIR is subject to the public interest test; this means that even after the exception is engaged, the request can only be refused if the public interest in maintaining the exception outweighs the public interest in disclosing the information. Under the EIR, there is a presumption in favour of disclosure.
43. There is always a public interest in openness and transparency, allowing for public understanding and accountability in relation to the activities of a public authority.
44. The Commissioner accepts that public interest factors, such as proportionality and the value of the request, have already been considered when deciding whether the exception is engaged in this case.
45. It is the Commissioner's view that the complainant has some legitimate reasons for making the requests; they have said that they believe that there have been issues with the performance of the contractor, and that this has had an effect on the public and their safety.
46. The Commissioner regards there to be a strong public interest in the disclosure of information that relates to health and safety and the welfare of the public. It is important that the public are able to have confidence that the council is protecting its residents, and openness and transparency is an important element in providing an assurance that the council, and its contractors, are delivering services that meet health and safety requirements, and that public money is also not being poorly spent.
47. However, the Commissioner must consider the burden of dealing with the two requests, and the additional factors set out within paragraph 39 of this decision notice, when balancing the public interest in disclosure against maintaining the exception at regulation 12(4)(b) in this instance.
48. The Commissioner has also taken into account the fact that should any individual believe that there is an issue with the performance of the council, or its contractors, then there are appropriate mechanisms in place to pursue such concerns.
49. The Commissioner regards the key question here to be whether the public interest in complying with the request is substantial enough to

justify the severe impact placed on the council as a result of the burden of the requests, and also the complainant's behaviour and their actions (including the level of correspondence they were sending) at the time that the requests were received.

50. The Commissioner has decided that, in the circumstances of this case, the public interest in disclosure of the requested information does not outweigh the public interest in maintaining the exception at regulation 12(4)(b). Therefore, the council was not obliged to comply with Request 1 or Request 2.

51. 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).

52. 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.

Other matters

53. The Commissioner wishes to make the point that the analysis in this decision notice is specific to Request 1 and Request 2, the burden that would result from compliance, and also the particular circumstances that were relevant to the time period in which those requests were made.

54. However, given that he has recognised the strong public interest in the issues to which these requests relate, the outcome of this decision notice cannot be taken as giving an indication as to what the Commissioner's conclusion would be in response to requests for information about the same, or similar issues, submitted in the future.

Right of Appeal

56. 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

57. 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.

58. 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

Suzanne McKay
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF