Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 August 2023

Public Authority: Hastings Borough Council
Address: Hastings Town Hall
Queens Square
Hastings
TN34 1TL

Decision (including any steps ordered)

1. The complainant has requested for a list of all documents relating to the Hastings Harbour Quarter project (HHQ). Hastings Borough Council (HBC) provided some of the information but has withheld the remaining information under regulation 12(4)(b) of EIR (manifestly unreasonable requests) and regulation 12(4)(c) of the EIR (requests formulated in too general a manner).

2. The Commissioner's decision is that HBC were correct to rely on regulation 12(4)(b) of EIR to withhold some of the information. As this exception applies to the whole request it has not been necessary to consider regulation 12(4)(c).

3. The Commissioner does not require HBC to take any steps as a result of this decision.

Request and response

4. On 12 October 2022, the complainant wrote to HBC and requested information in the following terms:

> 1) "Please send me a list of all documents that pertain to the Hasting Harbour Quarter project. There is no longer a requirement or need to have these documents restricted since the project is no longer going ahead.

2) Please send the following documents from URL (https://hastings.moderngov.co.uk/ieListD...) -33. Hastings Borough Council Housing Company pdf icon PDF 152 KB (Council Decision). Additional documents:

Restricted enclosure 18 View the reasons why document 33./2 is restricted
Restricted enclosure 19 View the reasons why document 33./3 is restricted
Restricted enclosure 20 View the reasons why document 33./4 is restricted
Restricted enclosure 21 View the reasons why document 33./5 is restricted

3) Please send the following documents.

The options development agreement
The strategic outline case
The programme of community consultation"

5. For clarity, the Commissioner has dealt with each part of the request separately as shown above.

6. HBC provided a response to the complainant's request on 10 November 2022.

Part a):

"Please send me a list of all documents that pertain to the Hasting Harbour Quarter project. There is no longer a requirement or need to have these documents restricted since the project is no longer going ahead.

7. HBC explained that it no longer had access to the email account of a senior officer who had dealt with the HHQ project and therefore were unable to provide some of the information. However, it provided a list of documents it held at the time in response to this part of the request.

Part b):

Please send the following documents from URL (https://hastings.moderngov.co.uk/ieListD...) -33. Hastings Borough Council Housing Company pdf icon PDF 152 KB (Council Decision). Additional documents:

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8. HBC explained that the complainant's request which pertains to "33. Hastings Borough Council Housing Company pdf icon PDF 152 KB (Council Decision)" had no relevance to the HHQ project as this information relates to HBC Housing Company.

   Part c):

   Please send the following documents.

   The options development agreement
   The strategic outline case
   The programme of community consultation"

9. In its response, HBC confirmed that it did not hold the 'Options development agreement' or the 'programme of community consultation'. However, it confirmed that the 'strategic outline case' is information that is publicly available and shared a link with the complainant of how they can access this information. On 21 November 2022, the complainant requested an internal review challenging HBC's claim that it did not hold some of the information.

10. During the internal review HBC informed the complainant that a discovery/forensic search was performed on 24 November 2022 by HBC's IT department which discovered a vast number of items containing the keyword 'Hastings Harbour Quarter'. Due to the number of items discovered HBC invited the complainant to meet with it to establish the information they required.

11. The complainant declined the offer of a meeting and raised a complaint with the Commissioner. HBC provided its internal review on 9 March 2023 and have refused to disclose the remainder of the information citing regulation 12(4)(b) (manifestly unreasonable) and 12(4)(c) of EIR (request formulated in too general a manner).

Scope of the case

12. The Commissioner considers the scope of his investigation to be to determine whether HBC were correct to withhold the information on the basis of regulation 12(4)(b).

13. The Commissioner will also consider whether HBC have provided an appropriate response to part b) of the complainant's request.

Reasons for decision

14. 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).

15. The Commissioner agrees that the requested information is environmental information falling within the scope of regulation 2(1)(a) of the EIR as it relates to the HHQ project and therefore HBC was right to handle the request under EIR.

Regulation 12(4)(b)- Manifestly unreasonable requests

16. 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 vexatious, or on the basis of the burden that it would cause to the public authority.

17. 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.

18. 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.

19. 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 HBC. 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.

20. 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 EIR, public authorities will need to consider the proportionality of the burden or costs involved and decide whether they are clearly or obviously unreasonable. This will mean taking into account all the circumstances of the case including:

    1) the nature of the request and any wider value in the requested information being made publicly available.

    2) the importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue.

[1] https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/manifestly-unreasonable-requests-regulation-12-4-b-environmental-information-regulations/

3) 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

4) 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.

21. Where a public authority claims that regulation 12(4)(b) is engaged on the basis of cost, it should provide the requester with advice and assistance where reasonable to help them refine the request so that it can be dealt with within the appropriate cost limit. This is in line with the duty under regulation 9(1) of the EIR.

22. In its submission to the Commissioner, HBC stated that following the forensic search carried out by its IT department using keywords 'Hastings Harbour Quarter', revealed 2532 items which are spread between 143 locations namely 126 mailboxes and 17 SharePoint sites.

23. During the Commissioner's investigations, HBC provided a copy of an email it had sent to the complainant advising that it had identified a vast amount of correspondence relating to the HHQ project. It explained that to go through each bit of correspondence and identify if any further documents were held would take a considerable amount of time. HBC stated that it expected the exercise to exceed the relevant cost limit. It therefore invited the complainant to attend a meeting in order to discuss the information they wanted.

24. HBC have explained that the original search results did not provide this amount of correspondence because forensic/discovery searches are only carried out in exceptional circumstances when it believes that data has been permanently deleted by users. It explained that forensic searches allow its IT department to recover permanently deleted information and this system manager capability is not available to its staff.

25. HBC have argued that to go through each correspondence and identify if any further documents are held would take a considerable amount of time that would exceed the cost limit. HBC says that it would take 3 minutes to review each item which equates to approximately 7596 minutes or 126 hours. The Commissioner has calculated the cost involved to be the sum of £3150.

26. It says that due to the large amount of correspondence uncovered following the discovery search and the complexity and volume of the information found, it is impractical to comply with the request as it does not have the resources to do so.

27. The Commissioner has considered the information request together with the complainant's submissions challenging HBC's decision. He considers the main points of the complainant's arguments to be as follows:

    1) 12(4)(b) Manifestly unreasonable due to volume does not apply.

    2) The claimed volume of documents conflicts with the previous claim that the list of 9 documents was a comprehensive list.

    3) Regulation (12(4)(c) – Requests formulated in too general a manner does not apply.

    4) HBC have cited various factors for non-disclosure without specifying the exception reason.

    5) Public interest test not applied correctly.

    6) Safe Space argument does not apply.

    7) Maintaining the confidentiality of discussions argument does not apply.

    8) The Reviewer has a potential conflict of interests.

28. The complainant has requested for a list of all documents relating to the HHQ project. The Commissioner's view is that due to the broad nature of the request, it is likely that the search results using the keywords Hastings Harbour Quarter would reveal a substantial amount of information. However, the Commissioner considers that HBC could have provided more detail of its reliance on the exemption.

29. In reaching his decision, the Commissioner has considered the length of time HBC claims it will take to review each item, which is 3 minutes. While he considers 3 minutes to be excessive, the Commissioner recognises that, in the absence of any sampling exercise, even if the time estimate is reduced by two thirds, this would equally be burdensome on the public authority, because of the large amount of information uncovered.

30. In considering whether the cost or burden of dealing with the request is too great, the Commissioner has considered the Upper Tribunal case of Craven v The Information Commissioner and the Department of Energy and Climate Change [2012] UKUT442 (AAC)[2]. In this case, the Upper Tribunal stated that, "Taking the position under the EIR first, it must be right that a public authority is entitled to refuse a single extremely

[2] https://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=3682

burdensome request under regulation 12(4)(b) as "manifestly unreasonable", purely on the basis that the cost of compliance would be too great (assuming, of course, it is also satisfied that the public interest test favours maintaining the exception). The absence of any provision in the EIR equivalent to section 12 of FOIA makes such a conclusion inescapable." (Paragraph 25). When this case was subsequently appealed, the Court of Appeal affirmed the finding.

31. The Commissioner has considered HBC's submission that the information is spread through 143 locations and acknowledges that it would take a large amount of time to locate and review all the information in order to comply with the request. He is therefore satisfied, with HBC's explanation that to go through each bit of correspondence and identify if any further documents were held would impose an unreasonable burden upon it. The Commissioner has therefore decided that regulation 12(4)(b) of EIR is engaged.

32. As the Commissioner's decision is that regulation 12(4)(b) is engaged, he will now consider the public interest in this case.

Public interest test

33. The public interest test will consider whether, in the circumstances of this case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

34. The Commissioner recognises that there will always be a 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, all of which ultimately contribute to a better environment.

35. However, the Commissioner also recognises that this must be balanced against the impact that responding to the request would have on the public authority's ability to carry out its duties. The cost of providing a response in this case would be expensive and time consuming, to the point where it would be considered unreasonable under FOIA.

36. Public authorities have limited resources and there is a strong public interest in them being able to protect those resources in order to carry out their wider obligations fully and effectively.

37. Considering that the potential development of the HHQ project was about 8 years ago and the correspondence relating to the project had been put beyond use, the Commissioner agrees that there is little public interest in this subject matter.

38. As part of considering the public interest test the Commissioner must bear in mind the presumption in favour of disclosure under the EIR regime. The

Commissioner considers that in all the circumstance of this case the balance of public interest does not favour disclosure of the requested information in this case, and that the Council is therefore entitled to rely on regulation 12(4)(b) as its basis for not responding to the request.

Regulation 9-advice and assistance

39. 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.

40. On 25 November 2022 HBC wrote to the complainant and invited them for a meeting to discuss the information they had requested. It explained that the meeting would be with its Marketing & Major Projects Managers one of whom was involved with the HHQ project. HBC requested dates and times that would be suitable for the complainant to attend the meeting. As stated above the complainant declined this offer to meet with the public authority and raised a complaint with the Commissioner.

41. Whilst the Council did not specifically encourage the complainant to revise or refine their request, nevertheless, the Commissioner is satisfied that the aim of the meeting was to establish precisely what information the requester required.

42. The Commissioner therefore does not agree that regulation 12(4)(c) is engaged as he considers the issue to be the volume of information uncovered following the forensic searches carried out by HBC's IT department.

43. As the Commissioner does not consider the exception to be engaged, he has not gone further to consider the public interest test.

Procedural matters

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44. The Commissioner has considered HBC's response to part b) of the request in which it stated:

> "In respect of your request for restricted documents: the link does take me to the Cabinet meeting dated 11 September 2017 however, the Hastings Harbour Quarter report is item No 28 - Potential New Development. The restricted documents you have requested relate to item No 33 as listed below and has no relevance to the Hastings Harbour Quarter and as such not part of this request. (A separate email was sent to you on the 27 October 2022 - to date no response has been received).

Item No 33 - Hastings Borough Council Housing Company pdf icon PDF 152 KB (Council Decision) Additional documents:

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Restricted enclosure 19 View the reasons why document 33./3 is restricted
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45. The Commissioner does not consider that HBC has handled this aspect of the request in accordance with the relevant legislation. In his view, the complainant submitted a valid request. Whether the request relates to the HHQ project or not, HBC were obliged to confirm why the information could not be disclosed based on the relevant exemptions/exceptions contained in the EIR or FOIA. It is not for the public authority to determine what the relevance of the information requested is. By merely stating that the information requested does not relate to the HHQ project but is restricted, is not in line with the legislation.

Right of appeal

46. 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

47. 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.

48. 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 .....

Esi Mensah
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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