Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **23 November 2022**

Public Authority: **Rother District Council**
Address: **Town Hall**
Bexhill-on-Sea
East Sussex
TN39 3JX

Decision (including any steps ordered)

1. The complainant requested information relating to the location of badger setts and planning documents relating to this. The council refused the request under Regulation 12(4)(b) (manifestly unreasonable request).

2. The Commissioner's decision is that the council was correct to apply Regulation 12(4)(b).

- The Commissioner does not require the council to take any steps.

Request and response

3. On 28 December 2021 the complainant wrote to Rother District Council ('the council') and requested information in the following terms:

> "I write with regard to my unanswered information request under EIR 2004 I expected a response outcome in 20 days that has not been forthcoming to date. It is now day 26 and no outcome has been forthcoming. I Expected you to respond in 20 days or write with regard to your reasons for delay. You should note failure to provide a outcome . The penalty is a fine. There are no financial or custodial penalties for failure to provide information on request or for failure to publish information. But you could be found in contempt of court for failing to comply with a decision notice, enforcement notice, or information notice.
>
> My request: Start of Request 02-12-2021
>
> Please provide under information request the following Grid Reference location as longitude or latitude or TQ Grid Reference position of badger setts which was encountered on all planning matters since 2016.
>
> please for each of these provide :
>
> 1) CEMP mitigation report from contractor on site supplying with mitigation methods report or known as CESMP indicated by the council.
>
> 2) Any legal correspondence with contractor or applicant in respect to breach of CEMP I expect this information to be complied with under the Freedom Information Act and subject to GDPR."

4. The council responded on 20 January 2022. It refused the request on the basis that Regulation 12(4)(b) applied (manifestly unreasonable requests).

5. Following an internal review, the council wrote to the complainant on 11 March 2022. It upheld its position that Regulation 12(4)(b) is applicable

Reasons for decision

6. The following decision notice analyses whether the council was correct to rely upon Regulation 12(4)(b) to refuse the request for information.

7. 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. The exception can be applied where it would create a manifestly unreasonable burden upon the authority to respond to the request for information.

8. The Freedom of Information and Data Protection (Appropriate Limit and Fees) sets out an appropriate limit for responding to requests for information under FOIA. The limit for local authorities is £450, calculated at £25 per hour. This applies a time limit of 18 hours. Where the authority estimates that responding to a request will exceed this limit the authority is not under a duty to respond to the request.

9. Although there is no equivalent limit within the EIR, in considering the application of Regulation 12(4)(b) the Commissioner considers that public authorities may use equivalent figures as an indication of what Parliament considers to be a reasonable burden to respond to EIR requests. However, the public authority must then balance the cost calculated to respond to the request against the public value of the information which would be disclosed before concluding whether the exception is applicable.

10. In estimating the time and burden which it would take to respond to a request, the authority can consider the time taken to:

    - determine whether it holds the information
    - locate the information, or a document which may contain the information
    - retrieve the information, or a document which may contain the information, and
    - extract the information from a document containing it.

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

12. The council said that in order to respond to the complainant's request for information, it would need to search through each application manually in order to identify whether relevant information is held.

13. It clarified that it has no way to reduce this number in order to identify relevant planning applications which hold the information which the complainant has requested.

14. It clarified that its systems do not have the functionality to allow electronic searches of its database in order to identify relevant planning application documents which would hold the information requested.

15. It said that without reading each document, it would not know whether it would contain any of the information requested.

16. It clarified that it would therefore need to search through its entire planning portal in order to identify relevant planning applications which hold information relevant to the complainant's request for information.

17. The council clarified that it holds 7792 planning applications falling within the relevant period of 6 years. It attached a list of these for the complainant's aid. It calculated that that to review all of the files for relevant information would take in the region of 60-100 hours. Taking an hourly rate of £25 this would amount to in excess of £1500.

18. The Commissioner notes that this would equate to approximately 2 minutes to review a planning file to determine whether any relevant information is held within it.

19. On this occasion, the Commissioner did not ask the council to carry out a trial search of planning files in order to establish an average figure of the time it would take to review each file. The complainant has also made other, similar requests, for information to other authorities. The relevant councils have provided average time estimates to search a planning file after searching a small number of applications to determine whether relevant information is held. The two other councils which carried out the searches provided an average time period of 12- 20 minutes for searching each planning file. Due to the nature of planning laws, planning files will be similar between authorities. The Commissioner is satisfied, therefore, that the council's estimate of 60–100 hours is a reasonable estimate.

20. The Commissioner is therefore satisfied that the time it would take to carry out the necessary searches would far exceed the appropriate limit of 18 hours set by the FOIA fees regulations for local authorities outlined in paragraph 8 above.

21. The complainant has alleged that if councils are unable to provide the information, then they are not complying with their obligations under the National Planning Framework. This is not, however, a matter which the Commissioner has the power to consider. He must merely consider whether the council is correct in applying the exception.

22. The Commissioner notes that there is a public value in the information being disclosed in this case. However, the Commissioner considers that the costs outlined above are so extensive that the public value in the disclosure of the information would not make the request reasonable in this case.

23. Having considered the council's position the Commissioner is satisfied that the exception in Regulation 12(4)(b) has been correctly engaged by the council. The Commissioner has therefore gone on to consider the public interest test required by Regulation 12(1)(b).

Regulation 12(1)(b) - public interest test

24. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

25. 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, all of which ultimately contribute to a better environment.

26. The complainant's request relates to how planning activities take into account mitigation where badger setts have been identified near to land which developers wish to build on. There is a public interest in the public being aware of the measures which are taken to protect the environment, and species such as badgers, where a development is proposed.

27. However, in this case, the council has explained that the resources which would be required in order to respond to the complainant's request for information would be significant and disproportionate compared to the public interest in the disclosure of information which would shed light on this. It also noted that the complainant could carry out searches himself should he wish to do so.

28. The Commissioner agrees that there is insufficient wider public interest in this matter to justify the considerable time and effort it would take the council to comply with the request. The Commissioner is therefore satisfied that, in this case, the balance of the public interest lies in the exception being maintained.

Regulation 12(2)

29. 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.

30. As set out 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(1) – duty to provide advice and assistance

31. Broadly, Regulation 9(1) of the EIR provides that, where an authority is refusing the request because an applicant has formulated a request in too general a manner, the authority must provide advice and assistance to the requestor, insofar as it would be reasonable to expect the authority to do so, to allow them to reframe the request so that relevant information can be provided.

32. The council said that it had refined the report previously provided to decisions for major applications only. This gave a list of 67 applications, which it provided to the complainant. It said that the decision notices for these are available for the complainant to view on the website for each application.

33. It also clarified that if the complainant were to narrow down the scope of his request for information and provide the site addresses and planning application references or the post code of any specific area which he was interested in, it could then search for relevant information.

34. The Commissioner decision is that the council has therefore complied with the requirements of Regulation 9(1) of the EIR.

Right of appeal

35. 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

36. 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.

37. 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 .....

Ian Walley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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