



Neutral citation number: [2024] UKFTT 00372 (GRC)

Case Reference: EA/2023/0488

First-tier Tribunal  
General Regulatory Chamber  
Information Rights

Decided without a hearing on: 24 April 2024  
Decision given on: 9 May 2024

Before

TRIBUNAL JUDGE HAZEL OLIVER  
TRIBUNAL MEMBER STEPHEN SHAW  
TRIBUNAL MEMBER EMMA YATES

Between

MADELEINE BRETtingham

Appellant

and

INFORMATION COMMISSIONER

Respondent

**Decision:** The appeal is Dismissed

## REASONS

### Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 8 November 2023 (IC-250878-Y3W3, the “Decision Notice”). The appeal relates to the application of the Freedom of Information Act 2000 (“FOIA”) and the Environmental Information Regulations 2004 (“EIR”). It concerns information about expenditure data for a specific housing estate requested from the London Borough of Southwark (the “Council”).
2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. On 4 March 2023, the Appellant wrote to the Council and requested the following information (the "Request"):

*"Can you please supply all historic expenditure data for the Nunhead Estate (including Tilling House, Creed House, Goodwin House, Glover House and Lancefield House)*

*1/ For the last 5 years*

*2/ For the last 10 years*

*Can this include:*

- 1. Repairs costs and number of jobs listed by programme of works. Including Responsive repairs, Major works, Cyclical maintenance, Technical services, and all other works programmes.*
- 2. 'Main Trades' costs, and number of jobs, such as drainage, carpentry, brickwork, and any others.*
- 3. Administrative costs.*
- 4. Dept repayments.*
- 5. A key for any acronyms or codes.*

*Can you please also supply the number of 1, 2, 3 and 4 bedroom flats on our estate, broken down by building if possible.*

*Referring to your internal review response to my previous request on 16th February, please advise if this request is likely to be in the cost limit or if not how to bring it within the cost limit.*

4. The Request followed an earlier request from the Appellant which requested similar information but without any limit on time. On 11 November 2022 the Council had refused the majority of this earlier request based on cost of compliance. The refusal letter stated, *"The Council has calculated that for this request, a sample of one item of data for one year to locate, retrieve and extract the data from our system alone would take over 6 hours before it could then be assessed by estates, housing blocks and types of work. This is based on a total of 110,000 internal repairs conducted in a single 12 month period. This figure does not include external work, cyclical maintenances and other aspects identified in your request. If this sample was extrapolated for several years and in turn for other types of works it will far exceed the appropriate time/cost"*.

5. The Council responded to the Request on 26 May 2023 by providing documents about major works and a breakdown of numbers of flats. The response did not explain why they were not providing all of the requested information.

6. The Appellant requested an internal review on 28 May 2023, on the basis that they had also asked for the costs of repairs in general. The Council responded on 12 October 2023 and relied on section 12(1) FOIA to refuse to provide the remainder of the requested information. The review response acknowledged that the review outcome was late and that the original response did not explain why the information was not being disclosed. The letter advised, *"Your request was for the responsive repairs for the Nunhead Estate, all blocks, over a 5 year period and 10 year period. In our response letter to a previous similar FOI (ref 5466487) dated 11 November 2022, you were*

*advised of the scale of number of repairs for a single year period alone would exceed the appropriate limit threshold, and in this request covers multiple years of repairs. Therefore Section 12 still applies, this part of your appeal is not upheld.”*

7. The Appellant complained to the Commissioner on 27 July 2023. The Commissioner commenced an investigation after the Council had provided the outcome of its internal review. The Commissioner decided:

- a. The request falls under both FOIA and EIR.
- b. The Council were correct to rely on Section 12(1) FOIA to refuse the request.
- c. With regards to any environmental information, the Council were entitled to rely on Regulation 12(4)(b) to refuse the request and the public interest favours maintaining the exception.
- d. The Council complied with its obligations under Section 16 of FOIA and Regulation 9 of the EIR to offer advice and assistance.

### **The Appeal and Responses**

8. The Appellant appealed on 14 November 2023. Her grounds of appeal are:

- a. The Council breached deadlines and did not respond to the Request or the internal review until the Commissioner was involved.
- b. They have been attempting to get details of repairs spending on the estate for 18 months.
- c. This Request was significantly narrower in scope than her original request, and there are other estates (including Heygate) where similar request have been granted.
- d. She asked for further guidance if the Request wasn't sufficiently narrow and the Council ignored this.

9. The Commissioner's response maintains that the Decision Notice was correct. The Commissioner says that breaches of time limits were acknowledged during the investigation. In relation to the scope of the Request, the Commissioner says that the only reduction from the original request was the timeframe, and the level of advice and assistance provided by the Council is what they would reasonably be expected to provide. The Heygate estate example was distinguished by the Council during its investigation, and different requests cannot be used as a comparison. The Commissioner submits that the Council has provided a reasonable time estimate that is "*sensible, realistic and supported by cogent evidence*".

10. The Commissioner had included an application to strike out the appeal in the response. The Appellant submitted a response to this application which provides further information, and we have taken into account in making this decision as discussed below.

### **Applicable law**

11. The relevant provisions of FOIA are as follows:

**1 General right of access to information held by public authorities.**

- (1) *Any person making a request for information to a public authority is entitled—*
  - (a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

(b) if that is the case, to have that information communicated to him.

.....

**12 Exemption where cost of compliance exceeds appropriate limit.**

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

.....

**58 Determination of appeals**

(1) If on an appeal under section 57 the Tribunal considers—

- (a) that the notice against which the appeal is brought is not in accordance with the law, or
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

12. The relevant provisions of the Environmental Information Regulations 2004 (“EIR”) are as follows.

2(1) ...“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form 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) and (b) as well as measures or activities designed to protect those elements;

.....

5(1) ...a public authority that holds environmental information shall make it available on request.

.....

12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) An exception to disclosure applies under paragraphs (4) or (5); and
- (b) In all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

12(2) A public authority shall apply a presumption in favour of disclosure.

.....

12(4) For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that –

.....

- (b) the request for information is manifestly unreasonable;

13. **FOIA.** The “appropriate limit” under section 12(1) is £600 for central government and £450 for any other public authority (regulations 3(2) and 3(3) of the Freedom of Information and Data Protection (Appropriate Limits and Fees) Regulations 2004). Costs are estimated at a rate of £25 per person per hour (Regulation 4(4)). This means that the limit for a public authority (which is not central government) is exceeded after 18 hours of work. The costs which a public authority can take into account are set out in Regulation 4(3) as follows: (a) determining whether it holds the information; (b) locating the information, or a document which may contain the information; (c) retrieving the information, or a document which may contain the information; and (d) extracting the information from a document containing it. Requests from the same person can be aggregated for the purposes of assessing costs if they relate to the same or similar information and are received within 60 consecutive working days (Regulation 5).

14. A public authority does not have to provide a precise calculation of the cost of complying with a request, only an estimate is required. However, it must be a reasonable estimate. ***McInerney v Information Commissioner and the Department for Education*** [2015] UKUT 0047 (AAC) para 40 states, “[s12(1)]...depends on an estimate and...the issue for the Commissioner is whether the estimate is reasonable. If the public authority relies on the section before the Tribunal it will take the same approach as the Commissioner would.”

15. **EIR.** The EIR do not contain a specific provision on costs of compliance, but regulation 12(4) (b) can be relied on if the cost or burden of dealing with a request is too great (see the Upper Tribunal decision in ***Craven v The Information Commissioner and the Department of Energy and Climate Change*** [2012] UKUT442 (AAC)).

## Issues and evidence

16. The issues are:
- a. Does FOIA or EIR apply to the Request?
  - b. Was the Council entitled to rely on section 12(1) FOIA to refuse to provide the withheld information?
  - c. Was the Council entitled to rely on regulation 12(4)(b) EIR to refuse to provide the withheld information?

17. By way of evidence and submissions we had an agreed bundle of open documents which includes the appeal, response and Appellant’s reply to the strike out application, together with supporting evidence.

## Discussion and Conclusions

18. ***Does FOIA or EIR apply to the Request?*** We agree with the Commissioner’s position that both FOIA and EIR potentially apply to the Request. Purely internal works would not be information on the environment, even under the wide definition in EIR. However, major external and/or structural works which relate to a particular building or estate are likely to be measures which affect elements of the environment and so fall under EIR. Requests for environmental information are expressly excluded from FOIA in section 39 and must be dealt with under EIR.

19. The Commissioner has issued guidance on calculating costs where a request covers both FOIA and EIR - [Calculating costs where a request spans different access regimes \(section 12 and regulation 12\(4\)\(b\)\) v1.2 - FOIA and EIR guidance \(ico.org.uk\)](#). This guidance suggests first

considering the costs of responding to the whole request under FOIA. If the request is refused under FOIA, the public authority should still go on to consider the right of access under EIR. This should take into account only the costs of providing environmental information. However, this can include the costs of collating all the information falling within the scope of the request as long as doing so is a necessary first step because they cannot otherwise isolate the environmental information. We have considered this guidance and agree that it is an appropriate way of dealing with the cost of compliance in such cases.

20. **Was the Council entitled to rely on section 12(1) FOIA to refuse to provide the withheld information?** The Council provided information to the Commissioner about the work involved in responding to the Request as follows:

*“The council ran a report on the information requested (10 years of data for the 5 names properties on the Nunhead Estate) which resulted in a list of 6,751 records.*

*Out of these 6,751 records, there are 5,329 individual job descriptions describing the minor repairs undertaken. Each of the 6,751 records would need to be reviewed to assess the type and status of the job, whether an invoice was raised, what costs are associated with it etc.*

*As a minimum, spending 5 minutes assessing each records, this exercise would far exceed the appropriate limit of 18 hours / £450...*

*...The Council has used the quickest methods for searching and extracting the requested information, by first downloading a dataset from ‘iWorld’, the electronic data management system and then using the filtering function in Excel to provide the figures above.”*

21. The Commissioner considered that the Council estimated reasonably that it would take more than 18 hours to respond to the Request. We agree. The Council has explained the number of records and the method they would need to use to provide the detailed information requested by the Appellant. The suggestion of five minutes per record may well be an overestimate. However, even if this is reduced to one minute per record, this would total 112 hours.

22. The Appellant says that there are other estates where similar requests have been granted. This was considered by the Commissioner during his investigation. The Council explained that the Heygate estate request was for only four years and was not for the level of breakdown sought by the Appellant, and the Lesbury estate request was also for a narrow timeframe and involved total figures. We are satisfied that the Council has explained its position and the Appellant’s Request would genuinely involve a considerable amount of additional work.

23. We therefore find that the Council was entitled to rely on section 12(1) FOIA to refuse to provide the withheld information. The Council’s reasonable estimate shows that the cost of compliance would exceed the appropriate limit of £450 (18 hours of work).

24. **Was the Council entitled to rely on regulation 12(4)(b) EIR to refuse to provide the withheld information?** This breaks down into two issues.

25. **Was the Request manifestly unreasonable?** The costs/hours limit in FOIA can be used as a starting point in assessing whether a request is manifestly unreasonable. It is not appropriate, however, to apply this limit strictly under EIR. The test is different from the test in FOIA, and there is also the presumption of disclosure which we have taken into account.

26. We have considered again the information from the Council about the number of records and the time it would take to provide the information. Although the information covered by EIR is likely to be a small subset of all of the requested information, we accept that it would be necessary to analyse all the records to identify and extract the environmental information. This is a cost which can be taken into account, as set out in the Commissioner's guidance and explained in paragraph 19 above. This is likely to involve a similar amount of time as providing the information under FOIA. Again, even at only one minute per record, this would come to a total of 112 hours. We find that it would be manifestly unreasonable to require the Council to spend this amount of time in responding to the parts of the Request which fall under EIR.

27. *In all the circumstances of the case, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?* Unlike under FOIA, the exception in EIR is subject to the public interest test. We can order disclosure in the public interest, even where the Request is manifestly unreasonable.

28. Some points in the Appellant's appeal and response to the strike out application are relevant to the public interest in disclosure. She says that they have been attempting to get details of repairs spending on the estate for 18 months. The response to the strike out application sets out some background to the Request, explaining that she is a member of the Tenants and Residents Association and is attempting to obtain figures on how the estate is managed because they are suffering from disrepair. This is an issue which potentially affects all tenants of the estate, not just the Appellant. It is also of wider public interest for transparent information to be published about how the Council carries out repairs. We accept that there is public interest in disclosure of the information.

29. We have considered whether this interest is outweighed by the public interest in maintaining the exception, and find that it is. Responding to the Request in its current form would take the Council a considerable amount of time – to the extent that we have found it is manifestly unreasonable. This would divert the Council's time and resources from other matters and so would not be in the public interest. The Appellant (and other tenants) could obtain some of the information they seek from narrower and more targeted requests. In all the circumstances, it would be entirely disproportionate and not in the public interest to require the Council to respond to the Request under EIR. We therefore find that the Council was entitled to rely on regulation 12(4)(b) EIR to refuse to provide the withheld information.

30. **Other matters.** The Appellant has complained about the Council's delay in responding to her Request and failure to provide guidance. It is disappointing that the Council did not initially provide a proper response to the Request and did not provide an internal review outcome until they were asked to do so by the Commissioner (although we note that some guidance was provided in the internal review outcome). However, these are not matters that the Tribunal can decide. Our role is limited to deciding whether the Commissioner's decision was in accordance with the law, and we find that it was.

31. We dismiss the appeal for the reasons explained above.

Signed Judge Hazel Oliver

Date: 8 May 2024

**Correction**

Pursuant to rule 40 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009/1976, on 15 June 2024 the Tribunal corrected references to regulation 12(1)(b) EIR which were made in error and replaced them with references to regulation 12(4)(b) EIR.