

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

Decision notice

Date: 25 July 2013

Public Authority: Bridgend County Borough Council
Address: Civic Offices
Angel Street
Bridgend
CF31 4WB

Decision (including any steps ordered)

1. The complainant requested various information regarding the decision to close the Berwyn Centre. Bridgend County Borough Council (BCBC) refused to comply with the request by virtue of regulation 12(4)(b) of the Environmental Information Regulations 2004 ('the EIR') on the basis that the costs of complying with the request made it manifestly unreasonable.
2. The Commissioner's decision is that BCBC has incorrectly relied on regulation 12(4)(b) of the EIR. The Commissioner has also recorded a breach of regulation 9(2)(b) of the EIR.
3. The Commissioner requires BCBC to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response under the EIR to the complainant's request without relying on regulation 12(4)(b).
 - Where appropriate, provide assistance to the complainant in refining his request in compliance with regulation 9(2)(b).
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 1 October 2012, the complainant wrote to BCBC requesting the following information in respect of the decision to close the Berwyn Centre on the basis of a report which revealed the costs of keeping it safe and secure and research which had revealed further problems and which concluded that the building would not survive another winter safely without significant investment:

"...copies of both 'report' and also any written documentation you hold that constitutes both the stated research and the expert opinion on the viability of the Centre, economic or otherwise.

I would also be grateful for a copy of the full minutes of the Council meeting where the decision to demolish was approved and also any written information you hold that demonstrates the point in time where the Centre's viability first came in doubt/was first discussed and any steps you took to rectify it prior to it falling into disrepair..."

6. BCBC responded on 24 October 2012. It stated that:

"Whilst we can confirm that we hold the information requested, we have estimated that the cost of complying with your request will exceed £450."

7. BCBC also informed the complainant it might be able to supply some information if he could refine or reduce his request to more manageable proportions and resubmit it so that it brings the cost within the appropriate limit. The complainant was also informed that it may be prepared to consider his request under Section 13 of the FOIA if he paid for a full search and retrieval. Additionally, BCBC provided the complainant with links to various Cabinet reports it considered relevant and copies of the following documents:

- Condition Survey August 2007
- Disability Access Audit 2010
- Condition Survey 2010 (hard copy)
- Asbestos Survey (hard copy)

8. Following an internal review, BCBC wrote to the complainant on 16 November 2012. It divided the complaint's request into the following four parts:

- 1) *"both 'report'*
- 2) *any written documentation you hold that constitutes both the stated research and the expert opinion on the viability of the Centre, economic or otherwise;*

- 3) *...full minutes of the Council meeting where the decision to demolish was approved ...*
 - 4) *...any written information you hold that demonstrates the point in time where the Centre's viability first came in doubt/was first discussed and any steps you took to rectify it prior to it falling into disrepair..."*
9. It confirmed that it was satisfied with its response to parts one and three, but considered that parts two and four should have been considered under the EIR as they fell within the definition of Environmental Information under regulation 2(1)(f). It declined to provide any additional information by virtue of regulation 12(4)(b) of the EIR. Its public interest test arguments in favour of maintaining the exception included the point that it would need to retrieve correspondence and information stretching back pre 2006. Finally, it again informed the complainant that it may be able to supply some information if he could refine or reduce his request either by a shorter time period or to a narrower field.

Scope of the case

10. The complainant contacted the Commissioner on 2 January 2013 to complain about the way his request for information had been handled and expressed dissatisfaction with BCBC's response on a number of grounds. These included that it was not clear to him which parts of the request BCBC had provided answers too and what information was being withheld. He also stated that he would have been happy to work with BCBC to narrow down his request, but without knowing what it actually holds it was impossible for him to narrow it down, therefore he believes BCBC to be in breach of section 16 of the FOIA.
11. The complainant also expressed dissatisfaction with BCBC's reliance on regulation 12(4)(b) in relation to costs, as it provided no evidence as to how that decision had been arrived at.
12. The complainant also expressed doubts that all of the information falling within the scope of parts two and four of his request would constitute environmental information as defined by regulation 2(1) of the EIR but stated that even if did, he did not consider that equating section 12 of the FOIA with regulation 12(4)(b) of the EIR was legitimate.
13. The complainant also disagreed with BCBC's public interest test stating that at a local level, there is a great interest in learning the justification behind a sudden announcement that a building that has been in existence and in use for over one hundred years is to be demolished with no notice or prior consultation with the community it serves, and at

a wider level, there is a public interest in ensuring that all decisions of this type are taken with regard to proper evidence, sound judgement and due process.

14. The complainant further stated that he had no idea that the information falling within the scope of his request would pre-date 2006. His understanding was that the issues were live and easily accessible in registered files. He was of the view that BCBC seemed to be relying on arguments that it maintains a less than rigorous records management system in citing regulation 12(4)(b) and saw this as a convenient way to bypass its information rights obligations.
15. The complainant did however acknowledge that point four of his request could have been more focused and confirmed that he would be content to just receive the information captured by his point two insofar as it relates to the statements put forward on BCBC's website. As the complainant is not satisfied that he has received all relevant information BCBC holds in this respect, the Commissioner has therefore considered both points two and four of his request for information.
16. The Commissioner also notes that the complainant is satisfied with parts one and three of his request as broken down by BCBC in its internal review. These parts of the request do not therefore form part of the Commissioner's investigation.

Reasons for decision

Is the information environmental information?

17. The Commissioner has first considered whether the requested information would constitute environmental information as defined by regulation 2(1) of the EIR. Regulation 2(1)(c) includes measures (including administrative measures) and formation on plans or activities affecting or likely to affect the elements of the environment, one of which is land. Whilst regulation 2(1)(f) is concerned with information relating to:

"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, by any of the matters referred to in (b) and (c);"

18. The Commissioner notes that the subject of the request is for information in respect of a building used as a historic community centre and former miners' hall, previously used for educational purposes but which has been deemed to be in such a state of disrepair that it should

be demolished. He therefore considers all information falling within the scope of both point two and point four of the complainant's request is likely to constitute environmental information as defined by regulation 2(1) (c) and 2(1)(f) of the EIR.

Regulation 12(4)(b) – Manifestly unreasonable

19. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose environmental information to the extent that the request for information is manifestly unreasonable. There is no definition of 'manifestly unreasonable' under the EIR, but the Commissioner's opinion is that 'manifestly' implies that a request should be obviously or clearly unreasonable.
20. In this case, BCBC considers that the request is 'manifestly unreasonable' due to the time and cost necessary to comply with the request. It has argued that complying with the request would place an unreasonable burden on its resources in terms of expense.
21. Unlike the FOIA however, the EIR do not have a provision where a request can be refused if the estimated cost of compliance would exceed a particular cost limit. However, the Commissioner considers that if a public authority is able to demonstrate that the time and cost of complying with the request is obviously unreasonable, regulation 12(4)(b) will be engaged. The Commissioner considers the section 12 costs provision in the FOIA is a useful benchmark, acting in this case as a starting point for the Commissioner's investigation.
22. Section 12 of the FOIA states that a public authority is not obliged to comply with a request for information if it estimates that the cost of complying would exceed the appropriate cost limit. In this case, the cost limit is £450 as set out in section 3(2) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations'). This must be calculated at the rate of £25 per hour, effectively giving a time limit of 18 hours.
23. A public authority is only required to provide a reasonable estimate or breakdown of costs. Regulation 4(3) of the Fees Regulations states that an authority, when estimating whether complying with a request would exceed the appropriate limit, can only take into account the costs it reasonably expects to incur in:
 - determining whether it holds the information;
 - locating the information, or documents containing it;
 - retrieving the information, or documents containing it; and
 - extracting the information from any documents containing it.

24. The Commissioner therefore asked BCBC to provide a reasonable estimate or breakdown of costs to assist with his investigation of this complaint.
25. BCBC informed the Commissioner that deciding whether it holds the information would require an extensive search in a number of locations and responding would entail substantial and disproportionate financial and administrative burdens on it. It divided its estimate of costs into parts two and four of the complainant's request.

Part two

26. BCBC initially informed the Commissioner that it had identified at least 37 officers of the Authority that have been involved in the Berwyn Centre and may hold relevant information. It added, that seven of the officers have now left the Authority and their email accounts are routinely deleted therefore it no longer holds any information these officers may have held. However, for the remaining officers, BCBC estimated that it would take an average of at least two hours for each officer to retrieve their archived information from email accounts and hard copy files.

27. It estimated that:

" This would equate to 30 officers x 2 hours = 60 hours (hourly rate of £25 = £1500)"

Part four

28. In respect of point four of the complainant's request, BCBC informed the Commissioner that it had identified 20 officers that "*would have to trawl through their information*" which would take on average, at least two hours to retrieve information they hold from email accounts and hard copy files.

29. It estimated that:

This would equate to 20 officers x 2 = 40 hours (hourly rate of £25 = £1000)

30. Whilst this may in fact represent a reasonable estimate of the time and costs of complying with the request, the Commissioner could see no evidence to show how it had been arrived at or if it included all information falling within the scope of the request. The Commissioner therefore contacted BCBC explaining that whilst it is not expected to provide a complete breakdown of costs, it is expected to provide a 'reasonable estimate'. He therefore asked BCBC to provide further information in respect of its existing arguments suggesting that as a

starting point it should provide separate estimates for its email and hard copy records.

31. In respect of the email records, the Commissioner queried whether a specific search using the 'Berwyn Centre' as the key words might yield the necessary results relatively quickly.
32. In terms of the hard copy file, he asked that the estimate should include the estimated total number of files and details of the process or processes necessary to search each of these files for relevant information. He suggested that BCBC might complete the process for one file and multiply it by the total number of files to provide an overall estimate for this category of the information.
33. The Commissioner also queried the fact that BCBC had made no reference to other electronic information besides email records. He asked BCBC to provide details of how it had been able to discount the existence of any potentially relevant information from other electronic sources. In the alternative, if BCBC considered that it did hold other relevant electronic information, that it provided a reasonable estimate of the time/costs of complying with the request in respect of this type of information.
34. Based on the fact that the decision to demolish the Berwyn Centre was relatively recent, the Commissioner also asked BCBC if it might hold a more central record of information in relation to the Centre.
35. BCBC's response to the Commissioner confirmed that it had estimated that the 30 officers holding relevant information in respect of part two of the request each had at least one hard copy file in relation to the Berwyn Centre. It also stated that its estimate referred to in paragraph 27 of this notice:

"... is a reasonable estimate based on officers searching through their emails and files in order to identify and extract the information that has been requested."
36. It added that it would be very difficult to break this down further without actually undertaking the necessary work.
37. In respect of the Commissioner's query regarding the email search, BCBC stated that whilst its ICT department had confirmed that it is possible to search for emails containing the word 'Berwyn', it does not alter the timescale in terms of undertaking this task and the need to read through the information and extract it.
38. BCBC also confirmed that it had not discounted the existence of potential relevant information from other electronic sources and had

been advised that a number of departments within the Authority have electronic databases regarding the Berwyn Centre. It added that it had taken into account this electronic information within the average of at least two hours estimated for each officer involved with the Berwyn Centre.

39. The Commissioner was also informed that there is no central database or centrally held file in relation to the Berwyn Centre.
40. The Commissioner considered that this response failed to provide the requested reasonable estimate of costs and contacted BCBC to inform it that he was no further forward in this respect. He also informed BCBC that this was his final attempt in this regard and reminded BCBC that he had previously asked it to take one file of average or similar size and content and complete the process or processes of determining, locating, retrieving and extracting the information to arrive at an estimate for the total time necessary to complete this process for all paper files.
41. The Commissioner therefore asked BCBC to provide the following information:
 - *"An estimate of how long it will take an individual officer (not ICT official) to check their emails for relevant information...."*
 - *Confirmation of the total number of paper files.*
 - *Confirmation of whether the paper files are approximately the same size and content.*
 - *An estimate of the time necessary to check one representative file with details of the process or processes involved in doing so...*
 - *An estimate of the time taken to check all other electronic records including the databases referred to in your letter of 12 March 2013."*
42. BCBC's response confirmed that it had corresponded with all relevant officers still employed by the Authority to determine how many paper files are held in relation to the Berwyn Centre. It added that only 22 officers to date had responded therefore it could not provide an exact figure. However, from the responses received, it had been confirmed that there are 26 paper files and two box files held which vary in size from 20 pages to 500 plus pages.
43. BCBC also confirmed that it had asked a relevant officer to undertake the task of checking their electronic and paper files for relevant information and attached an email from the officer.
44. The email confirms he has a total of 251 emails in his Microsoft outlook folder holding relevant information, of which, 49 contain attachments. He added that all of the emails relay a story that has led to the decisions and production of the technical information to pass to the service

directorate to make a decision on the future of the Centre. He further stated that he had spent time trying to piece together a semblance of order which led to the development and production of the reports already produced and published and estimated that it had taken him two hours to date and was approximately half way through the exercise on the emails.

45. The individual also confirmed that he had a number of electronic files and six hard copy files containing work undertaken on the site over the past number of years and estimated that it would take a further two hours to collate the information after which he would need the interaction of other technical officers in the authority to provide a complete picture.
46. The Commissioner has considered this response and is concerned that of the 30 officers identified as holding relevant information in respect of part two of the request, only 22 had responded.
47. In respect of the 26 paper files, the Commissioner considers that merely stating that they vary in size from 20 pages to 500 plus tells him very little regarding their average size and content or the process or processes necessary to determine, locate, retrieve and extract the relevant information.
48. With regard to the Microsoft outlook folder, the Commissioner is unclear why the identified 251 emails and the 49 attachments cannot be printed and supplied to the complainant.
49. He also considers that merely stating that it would take two hours to collate the relevant information from *'a number of electronic files and six hard copy files* fails to provide details of the necessary process or processes involved.
50. The Commissioner also notes that BCBC did not inform him of the role of the individual tasked with providing the estimates referred to in paragraphs 44 and 45 of this notice, and whether he could be considered a representative or typical sample of the relevant officers.
51. Whilst the Commissioner acknowledges that BCBC has attempted to provide a reasonable estimate of costs, he remains unconvinced that this is what it amounts to and has therefore no option but to conclude that on the basis of the information provided, that the cost of complying with the request does not make it manifestly unreasonable. His decision in respect of BCBC's reliance on the regulation 12(4)(b) of the EIR is therefore that it is not engaged. As he has concluded that regulation 12(4)(b) is not engaged, it is not necessary to consider the public interest test.

Procedural issues

Regulation 9 – Advice and assistance

52. Regulation 9(2)(b) of the EIR states that where a public authority decides that an applicant has formulated a request in too general a manner, it shall-
- (a) *"ask the applicant ...to provide more particulars in relation to the request; and*
 - (b) *assist the applicant in providing those particulars."*
53. The Commissioner notes that whilst BCBC did in fact ask the applicant to provide more particulars to assist in refining his request, that it failed to assist the complainant in providing those particulars. By not providing this assistance, BCBC has breached regulation 9(2)(b) of the EIR.

Other matters

Engagement with the Commissioner

54. The Commissioner wishes to highlight that in its correspondence BCBC informed the Commissioner that whilst it:
- "...is happy to co-operate in settling this complaint, it should be recognised that it is placing an undue burden on employees involved in responding to the matters raised and proving a diversion of resources from the normal conduct of the Authority's activities in providing public services."*
55. Whilst the Commissioner is mindful of the burden complying with requests for information under the EIR or FOIA places on public authorities especially in this time of constrained resources, he expects every public authority to engage with him sufficiently to enable him to thoroughly investigate each complaint. However, he does not consider that BCBC sufficiently engaged with him during this investigation and had it done so, it may have been able to provide him with a reasonable estimate of costs.

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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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

Andrew White
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