

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

**Date:** 15 April 2015

**Public Authority:** Royal Borough of Greenwich  
**Address:** The Woolwich Centre  
Wellington Street  
Woolwich  
SE18 6HQ

**Decision (including any steps ordered)**

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1. The complainant requested information about planning objections from the Royal Borough of Greenwich (the 'Council'). Initially, the Council said it did not hold this information; however during the Commissioner's investigation the Council revised its position. It instead wished to rely on the cost and burden of complying with the request, citing regulation 12(4)(b), manifestly unreasonable, of the EIR.
2. The Commissioner's decision is that the Council has correctly applied the exception for manifestly unreasonable requests at regulation 12(4)(b) of the EIR. He also finds that the requested information constitutes environmental information and therefore should have been considered under the EIR from the outset.

**Request and response**

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3. On 7 July 2014 the complainant wrote to the Council and requested information in the following terms:

*"How many times in the last 12 months, has the Greenwich planning department has [sic] counted objections received after the stated deadline, that have resulted in an application being referred to committee.*

*I would like to receive this information electronically."*

4. On 1 August 2014 the Council responded. It denied holding the requested information.
5. The complainant requested an internal review on 5 August 2014. The Council sent her the outcome of its internal review on 29 August 2014. It upheld its original position, specifying that it does not record information on objections received after the planning deadline.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 19 November 2014 to complain about the way her request for information had been handled.
7. She contended that the Council must hold the requested information because it knows "*how many objections were received, for each and every application made, the dates those were received, and the details of outcomes*".
8. The Commissioner initially set out to investigate whether the Council holds any information relevant to the request. However, during the investigation, the Commissioner asked the Council to explain how it recorded late objections and what it did with any such submissions; the Council conceded that it does indeed hold late objections but not as a separate record.
9. The Council explained that if an objection is received prior to the officer's report being finalised, upon which the application decision is then made, that objection may be taken into consideration dependant on timeframes. It said that objections can be made via the planning portal on the Council's website, by email and by letter, and that verbal objections are not accepted as there would be no audit trail.
10. The Council confirmed it now wished to revise its position in relation to the request and instead rely on the cost and burden aspect of manifestly unreasonable, regulation 12(4)(b) of the EIR. The Commissioner asked the Council to write to the complainant to tell her about the new exception it wished to engage. He also asked the Council to provide him with its arguments in support of its reliance on regulation 12(4)(b).
11. On 15 January 2015 the Council wrote to the complainant explaining that it now intended to rely on regulation 12(4)(b). In accordance with the requirement to provide advice and assistance under regulation 9 of the EIR, the Council suggested the complainant consider refining her request to a specific address or addresses with a view to bringing the request under the cost limit. The complainant declined to do so and

instead confirmed that she wished the Commissioner to investigate the Council's revised position.

12. The Commissioner can only consider a public authority's final position in relation to its handling of a request. In this case, he has therefore determined whether the Council was correct to handle the request under the EIR, together with its reliance on regulation 12(4)(b) to withhold the requested information.

## **Reasons for decision**

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13. The Commissioner has first considered whether the requested information constitutes environmental information.

### **Regulation 2 - Is any of the information environmental?**

14. Information is environmental if it meets the definition set out in regulation 2 of the EIR. Regulation 2(1)(a) covers the state of the elements of the environment, including water, soil, land and landscape. Regulation 2(1)(c) provides that information is environmental where it is on:

*"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 [2(1)](a) and (b) as well as measures or activities designed to protect those elements"*

15. In both the Commissioner's and the Council's view, the information requested by the complainant constitutes environmental information under regulation 2(1)(c) as it concerns a measure, specifically plans, and any associated objections to those plans. The plans which are for developments, changed use of land and so forth are likely to affect several of the elements of the environment referred to in 2(1)(a).
16. The Commissioner has concluded that the requested information is environmental. It was not clear from the Council's responses both to the request and to the Commissioner's investigation whether it had handled the request under FOIA or the EIR. However, in response to a repeated specific query from the Commissioner on 6 January 2015, the Council confirmed on 12 January 2015 that it considered the correct regime for this request to be the EIR. The Commissioner agrees with this view for the reasons already explained.

### **Regulation 12(4)(b) – manifestly unreasonable**

17. The Commissioner has next considered whether the Council was correct to rely on this exception. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request is manifestly unreasonable.
18. Where the exception is engaged it is subject to a public interest test under regulation 12(1)(b) to determine whether the information should be disclosed in spite of the exception applying.
19. A request can be manifestly unreasonable for two reasons: firstly, if it is vexatious and secondly where it would incur unreasonable costs for a public authority or an unreasonable diversion of resources to provide the information. This is not a charge to the requestor, but a consideration of the cost to the authority in searching for and providing the information.
20. In this case the Council said that searching for the relevant information would be a disproportionate diversion of its resources to the extent that responding to the request would be manifestly unreasonable.
21. The EIR do not provide a definition of what constitutes an unreasonable cost. This is in contrast to section 12 of the FOIA under which a public authority can refuse to comply with a request if it estimates that the cost of compliance would exceed the 'appropriate limit'. This appropriate limit is defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations) as £600 for central government departments is £600 and £450 for all other public authorities.
22. The FOIA allows a public authority to consider the above amount by charging the following activities at a flat rate of £25 per hour of staff time:
  - Determining whether the information is held;
  - Locating the information, or a document which may contain the information;
  - Retrieving the information, or a document which may contain the information; and
  - Extracting the information from a document containing it.
23. Although the above Regulations are not directly applicable to the EIR, in the ICO's view they can provide a useful point of reference when public authorities argue that complying with a request would incur an unreasonable cost and therefore could be refused on the basis of regulation 12(4)(b).

24. A request may therefore exceed the above limit and yet still require a response from the authority. Under the Regulations the circumstances of each individual case will determine whether the request is manifestly unreasonable or not.
25. However, the Commissioner accepts that the fees regulations provide a useful starting point where the reason for citing regulation 12(4)(b) is the time and cost of a request but they are not a determining factor in assessing whether the exception applies.
26. The Commissioner is satisfied that Regulation 12(4)(b) sets a fairly robust test for a public authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is 'manifestly' unreasonable, rather than simply being 'unreasonable' per se. The Commissioner considers that the term 'manifestly' means that there must be an obvious or clear quality to the identified unreasonableness.
27. It should also be noted that public authorities may be required to accept a greater burden in providing environmental information than other information. This was confirmed by the Information Tribunal in the DBERR case<sup>1</sup> where the tribunal considered the relevance of regulation 7(1) and commented as follows (paragraph 39):

*"We surmise from this that Parliament intended to treat environmental information differently and to require its disclosure in circumstances where information may not have to be disclosed under FOIA. This is evident also in the fact that the EIR contains an express presumption in favour of disclosure, which FOIA does not. It may be that the public policy imperative underpinning the EIR is regarded as justifying a greater deployment of resources. We note that recital 9 of the Directive calls for disclosure of environmental information to be "to the widest extent possible". Whatever the reasons may be, the effect is that public authorities may be required to accept a greater burden in providing environmental information than other information."*

28. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will take the following factors into account:

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<sup>1</sup> Department for Business Enterprise and Regulatory reform v The Information Commissioner and Platform. Appeal no. EA/2008/0097

- Proportionality of the burden on the public authority's workload, taking into consideration 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;
  - The nature of the request and any wider value in the requested information being made publicly available;
  - The importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue;
  - 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;
  - The presumption in favour of disclosure under regulation 12(2);
  - The requirement to interpret the exceptions restrictively.
29. In its response to the Commissioner's enquiries, the Council explained that it considered the request to be manifestly unreasonable because the information which has been requested would mean a search would have to be performed on its electronic database to locate where the files are stored for each application. These applications have a reference number which indicates where each paper file is held. The Council estimated that for the requested 12 month period there are 120 paper files. The Council submitted a CD of evidence, with personal data redacted, showing what is held on a typical paper planning file.
30. It explained that these files are stored in the Council's main office and at another office at a different address, and also at the Council's off-site archive storage facility (TNT).
31. For those files held by TNT, the Council said it would need to email TNT to request the box or boxes containing the relevant files, which would then be delivered the next working day.
32. For those files held at the other office location, the Council said an officer would have to visit the office, search the boxes and pull out the relevant boxes which it estimated would take approximately 3-4 hours.

It said that an officer would need to read the entire file for each planning application and extract the information relating to the number of objections received, and specifically those received after the consultation period. The officer would also have to identify from this

information whether any of those objections submitted out of time were included in the report that went to the committee for a decision.

33. The Council estimated that it will take one officer approximately three hours to read each planning file to extract and retrieve the information. Based on its estimate that there are 120 cases, the Council said it would therefore take 360 hours to comply with the request. Using the FOIA and Regulations guidelines, the Council said that at a cost of £25 per hour for staff time, this would equate to a minimum cost to the Council of over £9000.
34. The Council later revised its position and, on 6 March 2015, it wrote to the Commissioner to confirm that it had reduced the estimated time it would take an officer to read one file from three hours to one. However, at £3000 this would still exceed the cost limit.
35. It said that in addition to the tasks listed previously, the officer would have to look through the correspondence and retrieve the information relating to the objections which can be in the form of an email or an automated response form from the website. The officer would have to look at the date the document was received, compare those dates to the closing date of the consultation period and ascertain when the case went to committee.
36. The complainant has said that she cannot accept that to assimilate via a computerised records system, the number of late objections received, and the number of approvals granted in these cases, would exceed a reasonable cost in 'man-hours' to investigate. The Commissioner is satisfied that the Council does not hold the requested information electronically. He would also like to draw attention to the fact that the EIR is concerned with recorded information that is actually held by a public authority, not what a complainant believes should be held.
37. In relation to the burden imposed by this request, and based on the sample file sent in which there were 41 pages of consultation responses alone, the Commissioner considers the Council's estimate to be reasonable and for it to be a significant burden.
38. The Commissioner has taken into account the presumption in favour of disclosure and the requirement to interpret the exceptions restrictively and accepts that when an exception from the EIR is cited, the arguments in favour of the citing of that exception must be sufficiently compelling to outweigh these factors. However, in the particular circumstances of this case, the Commissioner has found that the time and cost of dealing with the request would impose a disproportionate burden upon the Council when weighed against the value of the requested information being made public. He therefore considers that

the exception is engaged and has gone on to consider the public interest test inherent in this exception.

### **Public interest test**

39. All exceptions in the EIR are subject to the public interest test. Therefore, in deciding whether the information should be withheld the Commissioner has had to balance the public interest in maintaining the exception against the public interest in disclosure.
40. In favour of disclosing the requested information, the Council recognised the public interest in the disclosure of the information to maintain openness and transparency in relation to all planning applications.
41. The Commissioner has taken into account the general public interest in transparency and accountability. He is also mindful of the presumption in favour of disclosure and the need to read exceptions restrictively.
42. In relation to the public interest in maintaining the exception, the Council said it had to protect itself from a disproportionate burden and strain on resources. The Council advised that compliance with this request would divert staff engaged in planning matters to spending an excessive amount of time extracting and locating the information, which would divert its resources from its core public functions.
43. The Commissioner has taken into account the burden and distraction that would be imposed on the Council and the wider public interest in protecting the integrity of the EIR and ensuring that they are used responsibly.
44. On balance the Commissioner finds that the public interest favours maintaining the exception as the burden imposed on the Council would be significant. The Commissioner's view is that the complainant's request would not fulfil any wider environmental issue.
45. Therefore, in all the circumstances of the case the Commissioner finds that the public interest in maintaining the exception in regulation 12(4)(b) outweighs the public interest in disclosure.

### **Other matters**

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46. In this case, the Commissioner has found some of the Council's responses to his investigation to be unclear or unanswered which has resulted in him having to make additional checks, thereby causing delays to his investigation.



47. The Commissioner would remind the Council to specify in its responses and internal review outcomes whether it has handled a request under FOIA or the EIR.

## Right of appeal

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48. 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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

49. 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.
50. 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 .....**

**Rachael Cragg**  
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**Information Commissioner's Office**  
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