

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

Date: 7 August 2018

Public Authority: West Berkshire District Council
Address: Council Offices
Market Street
Newbury
Berkshire
RG14 5LD

Decision (including any steps ordered)

1. The complainant has requested information regarding planning enforcement actions.
2. The Commissioner's decision is that West Berkshire District Council is entitled to rely on regulation 12(4)(b), for manifestly unreasonable requests, to refuse to comply with the request.
3. The Commissioner does not require West Berkshire District Council to take any steps.

Request and response

4. On 26 November 2017 the complainant wrote to West Berkshire District Council ('the council') and requested information regarding 269 planning enforcement actions that had been advised to him in a previous FOIA request:

"I require further information regarding the 269 cases detailed:

Postcode of each case

Reason for each enforcement action

Outcome of each enforcement action

Priority given to each enforcement action e.g. High, Medium, Low"

5. The council responded on 21 December 2017 and refused to provide the requested information citing the exception at EIR regulation 12(4)(b) - manifestly unreasonable. The council stated it believes *"that this request is the result of your disagreement with the Planning Service in their decision not to take formal action in relation to the fly posting issues you have reported."*
6. Following an internal review the council wrote to the complainant on 8 February 2018. It maintained its original decision and provided a full explanation for citing the exception at EIR regulation 12(4)(b).

Background

7. The council presented the Commissioner with a number of emails to give background to the information request.
8. The complainant contacted the council on 17 June 2017 to report instances of flyposting by a particular establishment in the area. The planning officer responded on 4 July 2017 stating that it was low priority and enforcement action would be taken when time was available to do so.
9. The complainant contacted the council on 15 October 2017 to enquire why it had not taken enforcement action; he also reported that a camera and parking machines had been installed in a car park without planning permission.
10. The complainant contacted the Council on 4 November 2017 asking why he had not received a reply to his earlier email and making the following FOI request:-

"Since the issue of fly posting has taken so long with no action, I am making a Freedom of Information request. I wish to know all the planning enforcement actions that were dealt with from 27/6/17 to date, how many hours planning enforcement staff spent on each one and how many staff are employed in the planning enforcement department."

11. The council responded to the request on 16 November 2017:

"No of cases between 27/6/17 to date = 269

No of enforcement officers = 2

It is not possible to supply the number of hours spent on each case as this information is not recorded."

12. The subsequent request made on the 26 November 2017, which is the subject of this case, and the responses from the council are detailed in the request and response section above.

13. On 26 November 2017 the complainant wrote to the Head of Development and Planning stating that he had not received a response to earlier emails regarding the alleged planning breaches. The council responded on 27 November 2017 stating *"that the alleged breaches were considered to be a low priority and due to reduced resources it was not possible to investigate them further."* The council advises that they also treated this as a *"stage 1 complaint"* and as such the Head of Development and Planning responded on 19 January 2018 reiterating the previous response.

14. On 21 January 2018 the complainant requested that his complaint be considered under *"stage 2 of the council's complaints procedure."* The council responded on 8 February 2018 and *"concluded that the Council had not been at fault in its handling of the alleged breaches, as enforcement action was discretionary and the Planning Service considered them to be low priority."*

15. The council advises that the stage 2 complaint had not been raised at the time of refusing the EIR request on 21 December 2017, however it was available at the time of the internal review of the request, sent on 8 February 2018.

Scope of the case

16. The complainant contacted the Commissioner on 18 February 2018 to complain about the way his request for information had been handled. Specifically that disclosure had been refused on the grounds that the

request was manifestly unreasonable, giving his opinion that the data is held electronically and should be easily extracted.

17. The Commissioner considers the scope of the case is to determine whether the council was correct to rely on regulation 12(4)(b) to withhold the requested information.

Reasons for decision

Regulation 12(4)(b) – manifestly unreasonable requests

18. Regulation 12(4)(b) states that:

"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;"

19. The Commissioner considers that regulation 12(4)(b) is designed to protect public authorities by allowing them to refuse requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress and are therefore vexatious or manifestly unreasonable.
20. This will usually involve weighing the evidence about the impact on the authority against the purpose and value of the request. This should be judged as objectively as possible; in other words, would a reasonable person think that the purpose and value are enough to justify the impact on the public authority.
21. The Commissioner's guidance¹ on vexatious requests explains that the relevant consideration is whether the request itself is vexatious, rather than the individual submitting it. Sometimes it will be obvious when requests are vexatious, but at other times it will not. In such cases it should be considered whether the request would be likely to cause a disproportionate or unjustified level of disruption, irritation or distress to the public authority. This negative impact must then be considered against the purpose and public value of the request. A public authority can also consider the context of the request and the history of its relationship with the requester when this is relevant.

¹ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

22. The exception will typically apply in one of two sets of circumstances; either where a request is vexatious, or where compliance with a request means a public authority would incur an unreasonable level of costs, or an unreasonable diversion of resources. The council initially argued the former however after questions from the Commissioner it provided submissions to support the latter; namely that meeting the full terms of the request would cost prohibitive by placing an unjustifiable demand on its resources.
23. The considerations associated with the application of regulation 12(4)(b) of the EIR on the grounds of cost are broader than in the FOIA equivalent (at section 12), which explicitly permits a public authority to refuse a request purely on the basis of the time and cost implications of compliance. However, while recognising the differences between section 12 of the FOIA and regulation 12(4)(b), the Commissioner considers that the 'appropriate limit' in section 12 may serve as a useful guide when considering whether a request is manifestly unreasonable on the basis of costs. This is because the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations"), which have the effect of prescribing the "appropriate limit," is taken to give a clear indication of what Parliament considers to be a reasonable charge for staff time.
24. The Fees Regulations state that a public authority's estimate that compliance would exceed the appropriate limit can only take into account the costs it would reasonably expect to incur in:
 - determining whether it holds the requested information;
 - locating the information;
 - retrieving the information; and
 - extracting the information.
25. The Fees Regulations confirm that the costs associated with these activities should be worked out at a standard rate of £25 per hour per person. For local authorities, the appropriate limit is set at £450, which is the equivalent of 18 hours work.
26. While the equivalent section 14(1) of the FOIA effectively removes the duty to comply with a request, regulation 12(4)(b) of the EIR only provides an exception. As such the EIR explicitly requires a public authority to apply a public interest test (in accordance with regulation 12(1)(b)) before deciding whether to maintain the exception. The Commissioner accepts that public interest factors, such as proportionality and the value of the request, will have already been considered by a public authority in deciding whether to engage the exception, and that a public authority is likely to be able to carry through the relevant considerations into the public interest test.

However, regulation 12(2) of the EIR specifically states that a public authority must apply a presumption in favour of disclosure. In effect, this means that the exception can only be maintained if the public interest in refusing the request outweighs the public interest in responding.

The complainant's position

27. Regarding the purpose of the request, the complainant stated: *"There appears to be no control over the work of the Planning enforcement Department, so I am concerned about how their workload is allocated and prioritised. My FoI request would give the details on this, but West Berkshire Council is obviously terrified of revealing the truth to the general public."*
28. The complainant disagrees that the information is hard to extract: *"As I have pointed in my request this information is held electronically, and it should be a simple case of querying a database or at least looking at a spreadsheet of the information. There is no need for an officer to spend 15 minutes looking at each case as suggested in the West Berks review. The information that I have requested should be contained in separate fields in a database, or separate columns of a spreadsheet. It would not be in some huge lump of data where it would need separating out."*

The council's position

29. The council considers that the complainant's motive for submitted the EIR request is that the planning service was unable to investigate alleged breaches and as a *"means to vent his frustration at this."* It proposes that this is a *"misuse of the EIR as the request appeared to have been submitted as a result of a disagreement with the Planning Service in their decision not to take action against the alleged breaches that had been reported."*
30. The council stated that it doesn't consider there to be a public interest argument for making the information available because planning authorities have no statutory duty to undertake enforcement activity. It expanded that this is especially regarding the question of how limited public resources are *"being spent on enforcement that is considered low priority, particularly when there are higher priority issues that officers need to focus on."*
31. The council informed the Commissioner that in order to extract the information it would be necessary for a planning officer to examine each of the 269 case files. It estimates it would take 15 minutes per case to read through and extract the requested items of information. The

planning team consists of two officers who would be diverted from delivering mainstream services in order to answer the request thus disrupting the planning services ability to perform its core function within its service targets.

32. Following some further enquiries from the Commissioner, the council expanded the detail of the estimated time and cost it would take to provide the information falling within the scope of this request:

- The council already knows that "*electronic case files are held on the 269 planning enforcement cases*" therefore no further cost would be incurred in determining whether the information is held.
- In order to locate the information it would take "*15 mins to read through each case file to locate the postcode, reason and outcome for the enforcement action and the priority given to each one.*

15 mins x 269 case files = 67.25 hours"

- The process to retrieve and extract the information would take "*2 minutes to copy and paste the information from each of the 269 files.*

2 x 269 case files = 8.96 hours"

- The council concluded:

"Total number of hours for these activities = 76.21 hours

Total cost of officer's time @ £25 per hour = £1,905.25"

33. The council confirmed to the Commissioner that it considered this to be the most time efficient method available for providing the requested information.

The Commissioner's view

34. As stated previously, in cases where it is not obvious that a request is vexatious the Commissioner will consider the negative impact of the request against the purpose and public value.

35. The Commissioner recognises that issues, such as those raised by the complainant originally to the planning service, are often a concern to individuals and residents in an area. She also acknowledges that the FOIA/EIR provide useful vehicles for the public to gain insight into the rationale behind decisions, such as the prioritisation of work, made by public authorities. In this case it would appear that the complainant is seeking to assure himself that a fair process is being followed.

36. The Commissioner has considered the council's assertion that the complainants motive for the request is a "*means to vent his frustration*" at the planning service. This is one possible interpretation, however she cannot find, in the arguments presented, that it is a matter of fact.
37. The council has stated its view is "*that there was no public interest in making the information publicly available, particularly since there is no statutory duty requiring planning authorities to undertaken enforcement activity.*" Whilst the Commissioner agrees that the lack of statutory duty could reduce the potential for public scrutiny she recognises that there is always some inherent interest in the fair and proper utilisation of publically funded resources.
38. The council has provided arguments to assert that significant public resources would be diverted from the planning service to deal with the request, estimating 76.21 hours of officer time. It has confirmed that the estimate is based on the most efficient method available for querying the information. Despite the complainant's assertions, the Commissioner finds no firm basis upon which to dispute this.
39. The Commissioner is satisfied that it would be manifestly unreasonable, on the grounds of cost, for the council to work through the 269 case files to locate and retrieve the requested information. The time it would take to do so, even if the council had overestimated the effort involved threefold, would exceed a reasonable time period. In reaching this view, the Commissioner has been guided by what is considered to be a reasonable time period under FOIA.
40. Regarding the requestor's expectations that the information should be simple to extract, the Commissioner notes that the assumptions upon which this position is based do not appear to be correct. The council does not have spreadsheet columns detailing the specific fields listed and therefore the information would have to be pulled from a narrative form which lends further credence to the timescales proposed by the council.
41. The Commissioner considers that this would be a significant diversion of the planning service resource leading to an inevitable disruption in the delivery of core services. However, the council can only rely on regulation 12(4)(b) if the public interest favours such reliance. The Commissioner has gone on to consider, therefore, whether or not the cost outlined above is proportionate to the value of the request. This involves considering the balance of the public interest.

Balance of the public interest

42. Regulation 12(4)(b) is subject to the public interest test and therefore the Commissioner must determine whether the balance of the public interest lies in favour of maintaining the exception at regulation 12(4)(b) or in disclosing the requested information.
43. The council recognises that disclosing the requested information would promote transparency and accountability of the council in spending public money as well as raise public awareness of the enforcement work carried out by the council and its non-statutory nature.
44. In favour of maintaining the exception the council has set out that responding to the request would place a disproportionate burden on the council and divert resources from delivering mainstream services. It also considers that the request is a misuse of the EIR.
45. Whilst the Commissioner accepts that the purpose and value of the request is significant to the complainant, and potentially (but not presently evident) to local residents, she considers it has limited wider significance. The core purpose of the request, as stated by the complainant, relates to the ability of the council to adequately control the work into the planning service. The Commissioner notes that the complainant has followed the council's complaints procedure in this regard, she therefore considers that a more appropriate avenue to pursue these concerns further would be via the Local Government Ombudsman.
46. The Commissioner considers that complying with the request would present a significant burden to the council and impact on its ability to provide planning services to local residents. She does not consider that the inherent public value in transparency is suitably significant to warrant the disruption of the service.
47. In order to accept that the public interest in disclosure outweighs that in maintaining the exception, the Commissioner considers that the public interest would need to extend beyond that identified here. It is, therefore, the Commissioner's position that the public interest lies in maintaining the exception.
48. As such the Commissioner finds that the council is correct in its application of regulation 12(4)(b) of the EIR.

Right of appeal

49. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

50. 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.
51. 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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