

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 23 August 2019

Public Authority: Hinckley and Bosworth Borough Council

Address: Council Offices
Argents Mead
Hinckley
Leicestershire
LE10 1BZ

Decision (including any steps ordered)

1. The complainant has requested copies of all correspondence between particular parties relating to a specific planning application. Hinckley and Bosworth Borough Council ("the Council") cited section 12 of the FOIA to refuse the request.
2. The Commissioner's view is that the request should have been handled under the Environmental Information Regulations ("the EIR") as opposed to the Freedom of Information Act ("the FOIA").
3. The Commissioner's decision is that although the Council was incorrect to rely on section 12 to refuse the request, she is of the view that the request was manifestly unreasonable. Therefore it was correct to refuse the request but it should have cited regulation 12(4)(b) of the EIR. The Commissioner is also of the view that the Council has provided adequate advice and assistance in order to help identify the focus of the complainant's research with a view to answer the request. However, as the Council discovered it held more information that it initially said it did, over 20 working days after the request was made, it has breached regulation 5(2). The Commissioner requires no further steps to be taken by the Council.

Request and response

4. On 1 October 2018, the complainant wrote to the Council and requested information in the following terms:

"All and any correspondence between council members, officers, Horiba Mira, the University of Leicester, Leicestershire County Council and Historic England concerning Bosworth battlefield or related to planning application 18/00425/FUL from 1 January 2018 to the date of this request. By correspondence I mean the content of any form of written communication which has been used that the council holds, including any communications sent or received by officers and members relating to this request using personnel communication channels such as, but not limited to, emails, texts etc. If any of this is subject to a FOI Act section 21 exemption, I'd be grateful if you could let me know where it can be found under the terms of section 16."

5. The Council responded on 23 October 2018. It stated that the cost of compliance of the request exceeded the appropriate limit.
6. Following an internal review, the Council wrote to the complainant on 12 November 2018. It stated that some of the information it held relating to the request would need to be withheld under section 43 of the FOIA and it would need to extract the information that could be disclosed. The Council further explained that its search for information within the scope of the request had retrieved too many emails to review and extract the information requested. At the time of the internal review, the Council advised that it would take an average estimated two minutes to review each email file and to extract the non section 43 information. From the searches it had performed at that time, the Council then explained that it would take 26.5 hours to review and extract the information that was requested.

Scope of the case

7. The complainant contacted the Commissioner on 19 November 2018 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of this investigation will focus on whether the Council has handled the request made on 1 October 2018 in accordance with the FOIA or EIR. Specifically, the Commissioner will consider whether it was correct to refuse the request under section 12 of the FOIA.

Reasons for decision

Is the information environmental?

9. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;*
 - d) *reports on the implementation of environmental legislation;*
 - e) *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c);*
 - f) *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 elements of the environment referred to in (b) and (c)*
10. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why the information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
11. The Commissioner's interpretation of the phrase 'any information... on' is that it will usually cover information concerning, about, or relating to the measure, activity, factor etc. in question. It is not necessary for the

information itself to have a direct effect on the elements of the environment, or to record or discuss such an effect.

12. The Commissioner has considered the purpose and contents of the information request. As the request is relating to correspondence relating to a planning application, the Commissioner would deem this to be an administrative measure or plan that is likely to affect the environment.
13. The Commissioner is satisfied that the information contains written information on measures - specifically, activities - affecting or likely to affect the state of the elements of the environment, specifically, soil, land and landscape. Therefore the Council should have addressed the request using the correct legislation, being the EIR.
14. The Council originally cited section 12 of the FOIA in its correspondence with the complainant, however, the Commissioner will be assessing the handling of the request under the EIR exception regulation 12(4)(b), which the Council subsequently quoted after the Commissioner's initial engagement.

Regulation 12(4)(b) – Requests that are manifestly unreasonable

15. Regulation 12(4)(b) provides:

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

16. The Commissioner has issued public guidance¹ on the application of regulation 12(4)(b). This guidance contains the Commissioner's definition of the regulation, which is taken to apply in circumstances where either the request is 1) vexatious, or 2) where the cost of compliance with the request would be too great. In this case the Council considers the latter to be applicable.
17. The EIR does not contain a limit at which the cost of compliance with a request is considered to be too great. However, the Commissioner's guidance suggests that public authorities may use *The Freedom of Information and Data Protection (Appropriate Limit and Fees)*

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<https://ico.org.uk/media/fororganisations/documents/1615/manifestlyunreasonablerequests.pdf>

*Regulations 2004*² ("the Regulations") as an indication of what Parliament considers to be a reasonable charge for staff time. The Regulations specify that £450 is the appropriate limit for local government authorities, and that the cost of complying with a request should be calculated at £25 per hour; this applies a time limit of 18 hours.

18. For the purposes of the EIR, a public authority may use this hourly charge in determining the cost of compliance. However, the public authority is then expected to consider the proportionality of the cost against the public interest of the request before concluding whether the request is manifestly unreasonable.

Is the exception engaged?

19. The Council initially explained to the complainant and the Commissioner that it had started to address the request and was withholding some information using another exemption of the FOIA. The Council advised it had begun to sift through the available information in order to extract information that it was able to disclose from the documents containing withheld material. It then advised that it detected that there were more emails than originally expected. To review all of the correspondence within the scope of the complainant's request, then extract what was actually within the scope of the request would exceed 18 hours of officer time before considering the exemptions it might have had to apply.
20. The complainant argues that the Council is not extracting the available information, but redacting the information that is being withheld. The complainant further argues that section 12 of the FOIA does not allow time for considering exemptions or making redactions, therefore the Council should comply with the FOIA and address the request substantively. However, as previously explained, the Commissioner will be assessing the complaint under the EIR which has slightly different provisions.
21. The Commissioner has considered the Council's submissions and recognises that a significant amount of recorded information is held that would fall within the parameters of the complainant's request.
22. In response to the Commissioner's enquiries, the Council had emphasised the fact that the calculations it had made were not for redacting any information nor considering exemptions, it was to review

² <http://www.legislation.gov.uk/uksi/2004/3244/regulation/3/made>

the 3,870 emails that the search for key terms within the request had resulted in.

23. To explain further, the Council said that to locate all of the correspondence between the parties that was requested would involve searching through 43 email inboxes. This had resulted in the 3,870 emails that may have been within the scope of the request but needed to be reviewed first.
24. In her enquiries to the Council, the Commissioner asked if the Council had used the quickest way of searching for information within the scope of the request. For instance, if it held a planning file that would have contained this information, rather than having to search 43 separate email inboxes. The Council responded to confirm that the method of searching the individual inboxes is the quickest and most efficient way of making all other correspondence on the electronic planning file, available to members of the public.
25. The Council explained that when it was using section 12 of the FOIA to address the request, it had undertaken an exercise to identify the emails relating to the project and the final results of the search brought up 3,870 emails which the Council considered could be relevant to the scope of the request. Taking a conservative estimate of 1 minute for each email to identify and determine which emails were in scope and then extract and prepare the data for release would bring the total to 64.5 hours, the resulting staff time would work out to £1,612.50.
26. The Council also explained that the cost can also be calculated based upon 43 email accounts over 10 month's data using an average minimum 1.5 hours to locate, retrieve and extract the relevant data from each account for 10 months, reconfirming that the total is 64.5 hours.
27. However, once the Council reconsidered the disruption of the request under regulation 12(4)(b) of EIR, rather than the costs limit of FOIA, the Council could further estimate that locating the emails, reviewing the information and redacting where necessary would take considerably longer than 1 minute per email. The Council made a more considered estimate of 5 minutes per email and said that this would be a "modest average" required to perform these tasks, this would amount to nearly 322 hours (or 43.5 working days) of staff time.
28. On this basis the Commissioner accepts that the request is manifestly unreasonable within the meaning of regulation 12(4)(b).

The public interest test

29. Regulation 12(4)(b) is subject to the public interest test set out in regulation 12(1)(b). This specifies that a public authority may only rely on an exception if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Public interest arguments for disclosure

30. Within its response to the Commissioner, the Council acknowledged that there is a presumption in favour of disclosing information. It said that any decision to refuse access to information was not taken lightly. The Council said it holds in high regard the need for promoting transparency and accountability in respect of planning matters.

Public interest arguments for maintaining the exception

31. Public services have a duty to use their resources efficiently and the Council does not consider that the time required to comply with this request would be an effective use of time. With the project being of national and international importance, the Council considers that it is likely that the disclosure of emails located would provide very little, if any, addition information beyond that which is already in the public domain.
32. The Council said it is also unsure whether the purpose of the request is solely to achieve transparency and hold the Council to account, or to seek out information which will then provide the basis for lengthy additional correspondence, causing the Council significant further disruption and distress.
33. The Council argued that in the Commissioner's guidance regarding regulation 12(4)(b), it is explained that the public interest in maintaining the exception lies in protecting public authorities from exposure to disproportionate burden or to an unjustified level of distress, disruption or irritation in handling information requests. Manifestly unreasonable requests can place a strain on resources and get in the way of public authorities delivering mainstream services or answering other requests.
34. It is the view of the Council that the disruption and burden of complying with the request is disproportionate to the public interest of disclosure.

Balance of the public interest test

35. The Commissioner recognises the inherent importance of accountability and transparency in decision-making within public authorities, and the necessity of a public authority bearing some costs when complying with

a request for information. However, in considering the public interest test for this matter, the Commissioner must assess whether the cost of compliance is disproportionate to the value of the request.

36. The Commissioner recognises that the request relates to a subject matter that is likely to have significant environmental implications. The disclosure of information about this matter will allow the public to understand the process that the Council has followed in addressing this, as well as information that it has based its decisions upon.
37. However, the Commissioner recognises that the volume of held emails, spanning a range of individuals and subjects, would require significant public resources to be applied in order to fully comply with the request under the EIR. Whilst the Commissioner has noted the comments submitted by the complainant, there is no immediate evidence available to the Commissioner that suggests the actions taken by the Council have been incorrect, improper, or subject to a lack of transparency.
38. Having considered the relevant factors in this, the Commissioner has concluded that the public interest favours the maintenance of the exception.

Regulation 9 – Advice and assistance

39. Regulation 9(1) provides that:

A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

40. This regulation places a duty on a public authority to provide advice and assistance to someone making a request. The Commissioner considers that this includes assisting an applicant to refine a request if it is deemed that answering a request would otherwise incur an unreasonable cost.
41. In this case the Council has followed this and the complainant refined his request further. The Council provides evidence to show this. It shows that the complainant responded with:

"On this basis I would be happy to restrict the search to cover only the period from 1 August 2018 to the date of my request. I am also happy to exclude the democratic services team and legal managers and advisors"

42. However, although the complainant refined his request to correspondence between fewer people within a shorter timeframe, the Council explained that the bulk of information that was retrieved within

the initial searches was correspondence between the fewer people during the refined time period, therefore the new request also exceeded the costs limit. Within the Council's submissions, it stated the following:

"The application was published in our Planning Committee extracts on 21 August 2018, and was subsequently printed in both local and national press. Bringing details of the application into the public domain attracted interest from many varying parties. As a result, the bulk of the emails date from after 1 August 2018. The council therefore stood by our original decision to apply Section 12"

43. Whilst appealing the Council's response to the refined request, the requestor submitted a separate request for information. This request was more focused in terms of specific information required in line with the advice we provided to the requester. The request was for:

"I would like to put in a new FOI request asking for the same information I did last time but limited to the period from 20 August to 10 October and limited to information contained only in the official and private (where information relates to official business) email accounts of Hinckley and Bosworth Borough Council Councillors and the Council's Chief Executive or his office."

44. The Council advised it responded to this request in full, providing all of the information requested and that response was supplied within the statutory timescale of 20 working days. The Council therefore believes that advice and assistance was provided to the requestor during the handling of their requests and it has responded in full where it has been able to do so.
45. The Commissioner is satisfied with the Council's efforts to provide advice and assistance and considers that it has complied with regulation 9(1).

Regulation 5(2) – Time for compliance

46. Regulation 5(2) states that information should be made available no later than twenty working days after the date of receipt of the request.
47. In this case the Council discovered further held information while completing its submissions to the Commissioner. As this discovery took place after twenty working days, the Council has breached regulation 5(2).

Right of appeal

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@justice.gov.uk

Website: 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

Andrew White
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