

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

Date: 28 June 2020

Public Authority: Cornwall Council
Address: New County Hall
Treyew Road
Truro
TR1 3AY

Decision (including any steps ordered)

1. The complainant has requested information regarding a planning application. Cornwall council withheld in the information in its entirety citing regulation 12(4)(b) – cost of compliance.
2. The Commissioner’s decision is that Cornwall Council has appropriately relied on section 12(4)(b) to withhold the requested information and that the public interest favours maintaining the exemption. However, it breached regulation 14 in failing to provide a refusal notice within the required timescales.
3. The Commissioner does not require any steps.

Request and response

4. On 9 February 2019, the complainant submitted a request to Cornwall Council ('the council'). The council's response stated that it held 386 emails in scope of the request, which would exceed cost limits. It gave the following advice:

"...We estimate that to provide a response to these questions would take in excess of 28 hours, this is due to the way the information is held in our IT systems.

There are a total of at least 386 documents/emails relating to this matter. These would each in turn need to be reviewed to see if any exemption would need to be applied and it was established that each document would take 4 minutes to review. The rest of the time charged was to logging and processing the request as well as seeking final sign off...

5. On 10 March 2019 the complainant submitted a revised request, which is covered by decision notice FER0867513. However, the request is copied here to give background to this decision notice:

"All correspondence relating to planning application number PA18/08665 (redacted) from 27 November 2018 to date. Correspondence between Cornwall Council and myself can be excluded."

Further clarification:

"Could you please provide the maximum number of emails and documents that can be provided under the £450 limit, starting from the most recent and working backwards. From the figures provided in your letter this would equate to about 230 emails.

I think my original request stated that I did not need copies of the following emails and this still applies:

- *Emails and letters both from and to myself.*
- *Emails and letters from and to the Deviock Parish Council.*
- *Emails and letters prior to 28 November 2018."*

6. On 11 June 2019, the complainant wrote to the council and requested information in the following terms:

"I made a freedom of information request in early February 2019 and the reference number was 202005310030. I was informed in early March that there were 386 documents and emails relating to my request and that this was too time consuming and costly. Therefore, on 10 March I narrowed my request and on the 26th of April was provided with 225 out of the 386 documents and emails under FOI request reference 101004359163. I am now requesting the remaining 161 documents and emails that could not be provided from the earlier FOI request (101004310030 and 101004359163). Since it is over 60 working days since my last request I do not believe the cost of my previous request should be aggregated with my current request."

7. The council initially dealt with this request as part of an internal review into the preceding request.
8. Following the intervention of the Commissioner, the council provided a response on 16 April 2020. It stated that the council considered the request to be an aggregation of the previous request and as such refused to provide the requested information on the basis of EIR Regulation 12(4)(b) – manifestly unreasonable.
9. Due to the time that had passed, and following discussions with the council on the matter, the Commissioner found there to be no value in requesting that the council provide an internal review as the opportunity to reconsider their position would be provided during the course of the investigation.

Request history

10. The initial request was made on 9 February 2019. The council responded and said that 386 emails were held but that the cost to respond would exceed cost limits. The complainant reduced the scope accordingly therefore this request was superseded.
11. The complainant made a revised request on 10 March 2019, dealt with in decision notice FER0867513 *"Could you please provide the maximum number of emails and documents that can be provided under the £450 limit, starting from the most recent and working backwards. From the figures provided in your letter this would equate to about 230 emails."*
12. The second and follow-up request, made on 11 June 2019, was for the remaining documents and emails. The council did not initially provide a proper response to this request, rather it responded as part of an internal review into the request of 10 March 2019. Following discussions with the Commissioner, the council provided a refusal notice on 16 April 2020, on the basis of regulation 12(4)(b).

Scope of the case

13. The complainant contacted the Commissioner on 14 August 2019 to complain about the way their request for information had been handled. Specifically, that the council had not treated it as a new request. Also, that as the request was made over 60 working days since the previous request, the council should not be refusing on the basis of the aggregated burden to deal with both requests.
14. The Commissioner considers the scope of this case is to establish whether the council has correctly engaged the exception at regulation 12(4)(b). If it has, then she will consider where the balance of public interest lies. She will also consider the requirements of regulation 9 to provide advice and assistance, and the time taken by the council to respond to the request.

Reasons for decision

Regulation 12(4)(b)

15. Regulation of the EIR 12(4)(b) provides that

"(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;"

16. The council's position is that the request is manifestly unreasonable because it would impose a significant burden on the council in terms of officer time and cost.
17. Regulation 12(4)(b) of the EIR is designed to protect public authorities from exposure to a disproportionate burden or an unjustified level of distress, disruption or irritation in handling information requests. In effect, it works in similar regards to two exemptions within the Freedom of Information Act 2000 ('FOIA'): section 12, where the cost of complying with a request exceeds the appropriate limit and section 14, where a request is vexatious.

18. The EIR differ from the FOIA in that there is no specific limit set for the amount of work required by an authority to respond to a request, as that is provided by section 12 of the FOIA.
19. Specifically, the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004¹ ('the Fees Regulations') which apply in relation to section 12 of the FOIA are not directly relevant to the EIR because the cost limit and hourly rate set by the Fees Regulations do not apply in relation to environmental information. 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.
20. 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.
21. The Commissioner is satisfied that regulation 12(4)(b) sets a fairly robust test for an 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.
22. It should also be noted that public authorities may be required to accept a greater burden in providing environmental information than other information.
23. 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:
 - 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;

¹ <http://www.legislation.gov.uk/uksi/2004/3244/contents/made>

- 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.

The council's position

24. The council provided the Commissioner with the time analysis it completed, before issuing the refusal notice for the original request of 9 February 2019. It calculates at least 28 hours to respond to the request, across the activities to locate, retrieve, review and extract the information. The Commissioner notes that the analysis indicates that a sampling check was undertaken to verify the estimate.
25. The council references the point that it responded to the narrowed down version of the request made on 10 March 2019 and provided information up to the cost limit. It had then referred back to the timing analysis undertaken for the original request when it decided to refuse this subsequent request for the remaining 161 emails.
26. The council, therefore considered the two revised requests together when deciding whether the second was manifestly unreasonable on the grounds of cost, as well as giving consideration to public interest arguments.
27. The council stated it did so because it considered the request manifestly unreasonable in the context in which it was made. This context being that the complainant split the original request into two parts, by narrowing the request down and then asking for the remaining information.
28. The council states that it considers this request for the remainder of the information to be a form of aggregation. If the council provided the information, the end result would be that the complainant had obtained the full original request which it states was justifiably refused on the grounds of cost.
29. The council advised that when considered together, the two requests place a disproportionate burden on the council. This would put a strain and resources and prevent the council from delivering other mainstream services or answering requests.

30. The council purports that it has received similar requests for information to be provided, up to a cost limit. And that, if the remaining information were to be provided, the concept would set a precedent that requests can be split into two in order to avoid the legislation.
31. The council reported that it subsequently received a similarly worded request from the complainant, for information up to the cost limit for the same address. It states that the significant difference was the planning application number, and the council had also provided a substantial amount of information in response to that request.

The complainant's position

32. The complainant believes the council should not have aggregated the requests, also stating that this following request was made over 60 working days later.
33. The complainant's view is that *"it does not seem right that of the 386 emails that Cornwall Council initially identified as being relevant to my FOI request that only 59 have been released to me."*
34. The complainant considers that the council are using the legislation in order to withhold information that they do not wish to be released, and that officer time is not the issue for the council.
35. The complainant considers that the council are withholding information because they do not want *"the real reasons for allowing the developer to illegally obstruct and drive over the public right of way"* to come to light.

Is the exception engaged?

36. The Commissioner's guidance states that as the FOIA fees regulations do not apply under the EIR, there is no specific provision for the aggregation of substantially similar requests for environmental information. Her position, however, is that there may be occasions where it permissible to consider a number of EIR requests together when deciding if they are manifestly unreasonable on the grounds of cost. This is in line with the approach to requests considered manifestly unreasonable on the grounds that they are vexatious, where the context in which they are made can be taken into account.
37. The Commissioner has considered the nature of the request, being in respect of planning application to develop a dwelling and concerns regarding its access and the impact on users of a footpath adjoining the site. The Commissioner does not doubt that the matter is important to the complainant, and possibly the local community.

38. The information pertaining to this request may provide the complainant with further insight into the decision making process regarding the planning application. The Commissioner is mindful, however, that the complainant has received some information in this regard, and that she has confirmed that these were the most recent documents held by the council, being the subject of the related decision notice FER0867513.
39. In answering the earlier request of the 10 March 2019, the Commissioner notes the burden already incurred by the council in reviewing 225 of the 386 potentially in-scope emails, which met the cost limit of £450 outlined by the Fees Regulations. Whilst not binding to the consideration of factors within the EIR, it does provide a useful guide as to the level of burden experienced.
40. The Commissioner is mindful that the complainant accepted the council's refusal of their original request on cost grounds. She is sympathetic to the position of the council regarding the aggregation of the subsequent requests to achieve the scope of the original request.
41. The Commissioner is, however, also of the opinion that the bar regarding what makes a request "manifestly unreasonable" is, and ought to be, reasonably high. It is insufficient to claim that regulation 12(4)(b) is engaged purely because a request may require substantial effort to comply.
42. Conversely, the Commissioner has considered the additional burden in answering this request, in the context of the former request that has been already been answered. Although the remaining information may possibly illuminate further the issue raised by the complaint regarding the footpath, she considers this a matter of local concern that does not justify additional diversion of the resources from delivering other services. The Commissioner is therefore satisfied that the council has demonstrated that the request is manifestly unreasonable.
43. For the reasons set out above the Commissioner concludes that the complainant's request dated 11 June 2019 is manifestly unreasonable and therefore the council was entitled to engage the exception at regulation 12(4)(b).

Public interest in favour of disclosure

44. Regulation 12(4)(b) provides a qualified exception, therefore a public authority may only refuse a request that is manifestly unreasonable if the public interest in maintaining that exception outweighs the public interest in disclosure. Regulation 12(2) of the EIR also provides that the public authority must apply an explicit presumption in favour of disclosure. This means that exempt information must still be disclosed

unless there is an overriding public interest in maintaining any exceptions applied.

45. The complainant has identified a need for transparency in the planning matter, specifically regarding impacts cited on a public right of way.
46. The council acknowledged the general public interest factors to promote openness and transparency, to allow understanding of decision making processes, to give insight into how public money is spent, to allow a better understanding of planning issues and awareness of environmental matters.

The public interest in the exception being maintained

47. The council referred the Commissioner to the considerable burden that would be imposed on it, already described above, when considering the aggregation of the requests.
48. It said this would result in the diversion of resources away from its core business and would have a proportionally detrimental impact on its provision of services to the public. Fundamentally, preventing the authority from delivering mainstream services or answering other requests.

Balance of the public interest

49. The Commissioner recognises the importance of accountability and transparency with regard to decision-making by public authorities and the necessity of a public authority bearing some costs when complying with requests for information. However, in considering the public interest test for this case, the Commissioner must assess whether the cost of compliance to, and impact on, the council is proportionate to the value of the request.
50. The Commissioner appreciates that there may be some local interest in the planning issue, and that a further release of information could, perhaps, provide the complainant with further insight into the issue raised.
51. However, the Commissioner considers that the public interest identified has been served, to some degree, by the earlier request which reviewed two thirds of the information in scope of the request, and that being the most recent information. Whilst the general public interest in openness and transparency would be served if disclosure of the requested information could have been achieved readily and at proportionate cost, the council has demonstrated that it would be a costly and time

consuming action, which would divert available resources away from other services.

52. Whilst the Commissioner accepts that the request had a purpose and value, she nevertheless considers the burden that would be imposed by compliance with the request to be manifestly excessive to the extent that it would impact on other services.
53. It is, therefore, the Commissioner's decision that the public interest lies in maintaining the exception.

Presumption in favour of disclosure

54. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*, "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).
55. As covered above, in this case the Commissioner's view is that the balance of the public interest favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(b) was applied correctly.

Regulation 9 – Advice and assistance

56. Regulation 9(1) of the EIR 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."

57. 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.
58. The council had already provided advice and assistance in regard to the original request and invited them to narrow their request. This resulted in the complainant's subsequent requests.

59. The Commissioner considers that it would be difficult for the council to have offered any more meaningful advice about refining or narrowing the request in order to provide the complainant with further information.
60. Taking the above into account, the Commissioner considers that the council has complied with the requirements of regulation 9(1) of the EIR.

Procedural matters

61. Regulation 5(1) of the EIR states that, subject to any exceptions, environmental information must be made available on request. Regulation 5(2) requires that the information be made available promptly, and in any event no later than 20 working days after the date of receipt of the request. Where no information is held, Regulation 14(2) requires a refusal notice to be issued within that time.
62. The request was made on the 11 June 2019. The council did not provide a proper response to the request, rather it referred to it in an internal review response for the previous request. Following the intervention of the Commissioner, the council provided a response on 16 April 2020.
63. In responding 10 months after the request, the Commissioner concludes that the council failed to issue an adequate refusal notice within timescales and thus breached Regulation 14 of the EIR.

Right of appeal

64. 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

65. 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.
66. 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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