

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 July 2022

Public Authority: Newry, Mourne & Down District Council

Address: Newry Office
Monaghan Row
Newry
BT35 8DJ

Decision (including any steps ordered)

1. The complainant submitted an information request to Newry, Mourne & Down District Council ("the Council") relating to evidence provided by applicants in a public right of way dispute.
2. The Commissioner's decision is that the Council was entitled to withhold the requested information under regulation 12(4)(b) and that it has complied with the requirement of regulation 9(1) (advice and assistance).
3. The Commissioner does not require the Council to take any further steps.

Request and response

4. On 14 June 2021, the complainant wrote to the Council and requested information in the following terms:
 - “1. A copy of the evidence provided by the applicant(s) (redacted appropriate) in support of their Investigation Initiation Application Form.
 2. A copy of the scores awarded against each criteria within Scoring System.
 3. Is there a threshold score to be achieved that informs the Council decision to prioritise routes? If so, what is it?
 4. If there is no threshold score to be achieved and it is based on the achievement of the highest number of points; if you only receive one application, does this mean that it will be prioritised for investigation and that this is sufficient criteria to apply in terms of value for money and available budget?
 5. Page 6, Point 2 states that priority will be given to those routes which offer most benefit to users – Does the term ‘users’ refer to those who have initiated the investigation? If it only refers to those who have initiated the investigation, how are the ‘users’ who own the property categorised?
 6. Re: Page 6 of Access to Countryside Procedures 6th bullet point, does the term ‘interested party’ refer to those who completed the Investigation Initiation Application Form?
 7. Where is the right of reply for the landowners to feed into the assertion process prior to investigation and priority list being drawn up?
 8. In addition, the process makes provision for the applicant to appeal scorings but there is no appeal process identified for landowners who dispute the scoring. Can you please document the appeals process for both parties?
 9. Page 10, last paragraph, when does the three-month period of negotiation with landowner commence?
 10. Appendix 1 – 4th Box: ‘Survey line of Path etc.’ how is the survey undertaken?

11. Confirmation of whether there is a timescale for each part of the process.
 12. Page 20, 1st paragraph, last phrase of 'no real dispute as to its status', what does this mean?
 13. Page 20 – USER EVIDENCE Section:
 - I. What is a witness evidence form?
 - II. What information does it request/should be included?
 - III. 'basis of user evidence' does this refer to the applicant(s) only?
 - IV. 'As many as possible should be submitted, fully completed by member of the public' – does this refer only to the witnesses involved in the application?
 - V. Can the landowners and their cohort complete Witness Evidence Forms?
 14. Are we entitled to a copy of the evidence presented by the applicant(s) on the basis of 'an open and transparent process'. This should ensure that all relevant information is provided to Council for consideration and allow for a fair and fully informed recommendation. If we are not entitled to a copy, can you please explain why.
 15. We are currently engaged in legal proceedings regarding the laneway; so, does the Council investigation run in parallel or can it be 'mark time' until we have finalised the current legal case?"
5. On 9 July 2021, the Council responded to the request, answering all parts of the request bar question one, to which it cited regulation 12(4)(b).
 6. The complainant requested an internal review on 11 July 2021 questioning both the Councils' refusal to release the information and its handling of the request under EIR rather than the Freedom of Information Act (FOIA).
 7. The Council responded on 9 August 2021 and maintained its original position. It also disclosed further information which, at the time of the Council's response, had not been considered for disclosure. It also amended the Council's decision to withhold the evidence forms under regulation 12(5)(d) and regulation 13(1), in addition to 12(4)(b).

Scope of the case

8. The complainant contacted the Commissioner on 30 August 2021 to complain about the way their request for information had been handled.
9. Based on the information requested and the length of time passed, the Commissioner wrote to the complainant on 25 June 2022 to see if the complainant had already received the relevant information through other channels.
10. The complainant responded stating that the matter had not been resolved and that they would like the Commissioner to carry on his investigation.
11. In line with his usual practice, the Commissioner contacted the Council on 7 June 2022 to clarify whether 12(4)(b) on its own could cover the whole request.
12. In response the Council explained that they believed that all three exceptions were engaged.
13. The Commissioner's investigation has focused on whether the Council is entitled to rely on regulation 12(4)(b) of the EIR to refuse to disclose information within scope of the request, and the balance of the public interest. He has also considered whether there was a breach of regulation 9(1) of the EIR. The Commissioner will also go on to consider the other exceptions relied upon, should regulation 12(4)(b) not apply.

Reasons for decision

14. 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); and
 - (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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)."
15. The Commissioner notes the complainant's opinion that their request should have been handled under FOIA as they believe that their request does not meet the definitions contained within regulation 2(1)(a).
16. The Commissioner has not seen a copy of the requested information, however he is satisfied that it is environmental. The Commissioner considers that as the requested information relates to evidence submitted to dispute a public right of way, it would fall within the definition at regulation 2(1)(c) and/or 2(1)(e).
17. He will next consider the Council's refusal to provide the requested information on the basis of regulation 12(4)(b) of the EIR.

Regulation 12(4)(b)-manifestly unreasonable

18. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. A request can be categorised as manifestly unreasonable on the grounds that it is vexatious or, as in this case, because of the cost associated with complying with it. Regulation 12(4)(b) is subject to the public interest test under regulation 12(1)(b).

19. The EIR does not contain a limit at which the cost of complying 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) Regulations 2004 as an indication of what Parliament considers to be a reasonable charge for staff time. It has been determined that £450 is the appropriate limit for public authorities that are 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.
20. 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 value of the request before concluding whether the cost is excessive. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken to:
 - determine whether it holds the information
 - locate the information, or a document which may contain the information
 - retrieve the information, or a document which may contain the information, and
 - extract the information from a document containing it.
21. Where a public authority claims that regulation 12(4)(b) is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit. This is in line with the duty under regulation 9(1) of the EIR.

The Complainant's position

22. In their complaint to the Commissioner and in their request for an internal review, the complainant comments how they consider the Councils approach to the request "overinflated the work required in calculating the costs". The complainant goes on to comment how it appears that "two different departments spending 15 hours each to undertake the same role appears an inefficient way of dealing with it."
23. It is the complainant's belief that any evidence provided by the applicant, in support of the investigation, has to be relevant and as such "does not require the Council to scrutinise to establish relevancy".

24. Because of this the complainant questions whether all 300 A4 pages are relevant, or whether the Council have extended the search to include information that sits outside of the request.
25. Furthermore they highlighted, to the Council, that there is publicly available guidance¹ that has been issued to all local councils which identifies that councils can share relevant information relating to applications for rights of way and actively encourages them to do so.

The Council's position

26. With regards to question one of the request, in its submissions to the Commissioner and in its initial response to the complainant, the Council explained that it had identified over 300 A4 pages of "potentially relevant information" and that it would take in excess of 18 hours to review and process the relevancy of the information.
27. It then explained how it had reached this decision "using a base calculation of 3 minutes per A4 sheet which equals 15 hours for review by the Compliance Team and 15 hours for review by the Service Team."
28. The Council further explained that this calculation did not take into account the time spent on the other 14 parts of the complainant's request.
29. In its submissions to the Commissioner, the Council explains, that the document referenced by the complaint, earlier in this notice, states that information gathered by district councils for public right of way "may be accessible under FOIA-not shall but may."

The Commissioner's view

30. The Commissioner considers that the Council's estimate of 30 hours to review and process the requested information to be reasonable. This estimate was based on an appropriate sampling exercise. The Commissioner also notes that this time does not take into the time the Council has spent in answering the other parts of the complainant's request.

¹ <https://fdocuments.net/document/ehs-red-book-a-guide-to-public-rights-of-way-and-access-to-the-countryside.html>

31. The Commissioner accepts that there is value to the requested information for the complainant. However, for the reasons the Council has given, the cost of identifying and disclosing the requested would run into many hours and be a burden to the Council.
32. The Commissioner's decision is therefore that the Council is entitled to rely on regulation 12(4)(b) of the EIR in respect of the request as a whole.
33. As the Commissioner considers that regulation 12(4)(b) applies to all of the requested information, he has not gone on to consider the Councils application of 12(5)(d) and 13(1).

Regulation 12(1)(b)-public interest test

34. As the exception is engaged for the information, the Commissioner has considered the associated public interest test required by regulation 12(1)(b). The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. When carrying out the test the Commissioner must bear in mind the presumption towards disclosure provided in regulation 12(2).

Public interest in disclosing the information

35. The Council acknowledges that disclosure of the requested information would demonstrate and promote openness and transparency.
36. The Council also acknowledges that there is a public interest in environmental decision making.

Public interest in maintaining the exception

37. In its internal review, the Council states that although there is public interest in environmental matters generally "private interests are not in themselves the same as the public interest and what may serve those private interests are does not necessarily serve a wider public interest."
38. In addition, there is a considerable public interest in protecting a public authority from exposure to disproportionate burden or to an unjustified level of distress, disruption, or irritation in handling information requests.

39. Furthermore, dealing with manifestly unreasonable requests can place a strain on resources and get in the way of public authorities delivering mainstream services or answering other requests. As stated in its response, the Council stated that to deal with this specific request would divert important resources away from delivering frontline services to the public.
40. The Council has proactively disclosed information regarding the initial request where it was able to within the cost limits.

Balance of the public interest

41. 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.
42. Given that the interested parties would be notified of the Council's decision concerning the investigation, disclosure at this stage would appear to be duplication of effort and resources by the Council, which does not serve the public interest.
43. The Commissioner agrees with the Council in this case that the public interest favours maintaining the regulation 12(4)(b) exception. The financial and time burden that disclosing the requested information would cause to the Council is unreasonable. In the Commissioner's view that burden would be disproportionate and not in the public interest.

Regulation 9-advice and assistance

44. Regulation 9(1) of the EIR says 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.
45. The advice and assistance it will be reasonable for the public authority to provide will vary according to the circumstances and wording of the request. However, as a general rule, the Commissioner would normally expect a public authority relying on a claim that a request would impose a manifestly unreasonable burden to offer advice and assistance to help the requestor refine their request to one which imposes a more reasonable burden.
46. The Council considered that, given the scope of the request it was difficult to offer any suggested refinement, however it did encourage the complainant to discuss any refinement that they might have to bring the request within the timescale with the Compliance Team.

47. Furthermore, it suggested the complainant discuss any concerns they had with the Rights of Way Case Officer directly.
48. The Commissioner considers that there was no advice that the Council could have reasonably given the complainant, other than that already provided, to help them narrow down their request so that the burden of complying with it could be reduced.
49. As such, the Commissioner finds the Council complied with its obligations under regulation 9(1).

Right of appeal

50. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

51. 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.
52. 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

Phillip Angell
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF