

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 23 November 2022

Public Authority: Kent County Council
Address: Sessions House
County Hall
Maidstone
Kent
ME14 1XQ

Decision (including any steps ordered)

1. The complainant requested information from Kent County Council ('the council') relating to the location of badger setts and planning documents relating to this. The council refused the request under Regulation 12(4)(b) (manifestly unreasonable request).
2. The Commissioner's decision is that the council was correct to apply Regulation 12(4)(b).
 - The Commissioner does not require the council to take any steps.

Request and response

3. On 28 December 2021 the complainant wrote to the council and requested information in the following terms:
- “Please provide under information request the following Grid Reference location as longitude or latitude or
- TQ Grid Reference position of badger setts which was encountered on all planning matters since 2016.
- please for each of these provide :
- 1) CEMP mitigation report from contractor on site supplying with mitigation methods report or known as CESMP indicated by the council.
 - 2) Any legal correspondence with contractor or applicant in respect to breach of CEMP.
- I expect this information to be complied with under the Freedom Information Act and subject to GDPR.”
4. The council initially applied Regulation 12(4)(b) and other exceptions, however during the course of the Commissioner's investigation, the council reconsidered its position and applied Regulation 12(4)(b) (manifestly unreasonable requests) to refuse the entire request for information.

Reasons for decision

5. The following decision notice analyses whether the council was correct to rely upon Regulation 12(4)(b) to refuse the request for information.
6. 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. The exception can be applied where it would create a manifestly unreasonable burden upon the authority to respond to the request for information.
7. The Freedom of Information and Data Protection (Appropriate Limit and Fees) sets out an appropriate limit for responding to requests for information under FOIA. The limit for local authorities is £450, calculated at £25 per hour. This applies a time limit of 18 hours. Where the authority estimates that responding to a request will exceed this limit the authority is not under a duty to respond to the request.

8. Although there is no equivalent limit within the EIR, in considering the application of Regulation 12(4)(b) the Commissioner considers that public authorities may use equivalent figures as an indication of what Parliament considers to be a reasonable burden to respond to EIR requests. However, the public authority must then balance the cost calculated to respond to the request against the public value of the information which would be disclosed before concluding whether the exception is applicable.
9. In estimating the time and burden which it would take to respond to a request, the authority 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.
10. 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.
11. The council highlighted that planning applicants can upload documents onto its planning systems themselves. As such, the documents will not have a set title, as the planning applicants can name the documents according to their own file naming systems.
12. It clarified that its key word search systems can scan document titles and descriptive fields, but are not able to search document's contents.
13. It clarified, therefore, that its systems do not have the functionality to allow electronic searches of its database in order to identify relevant planning application documents which would hold the information requested.
14. It said that it would therefore need to search through its entire planning portal in order to identify relevant planning applications which hold information relevant to the complainant's request for information.
15. The council clarified that approximately 1,400 cases are held falling within the scope of the relevant request period.

16. It explained, that after sampling a number of files in order to determine whether relevant information is held, it estimated that it would take, on average, 12 minutes per file to determine whether relevant information is held within it.
17. This would equate to approximately 280 hours of work in order to respond to the request.
18. The complainant alleged that if the council is unable to provide the information, then it is not complying with its obligations under the National Planning Framework. The council noted that in terms of individual planning applications, it would be able to identify and provide that information where necessary, however there is no obligation upon it to be able to identify such documents as a whole, across all of its planning applications. This is not a matter which the Commissioner has the power to consider. He must merely consider whether the council is correct in applying the exception.
19. The Commissioner notes that there is a public value in the information being disclosed in this case. However, he considers that the costs outlined above are so extensive that the public value in the disclosure of the information would not make responding to the request reasonable in this case.
20. Having considered the council's position the Commissioner is satisfied that the exception in Regulation 12(4)(b) has been correctly engaged by the council. The Commissioner has therefore gone on to consider the public interest test required by Regulation 12(1)(b).

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

21. 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.
22. There will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation, all of which ultimately contribute to a better environment.
23. The complainant's request relates to how planning activities take into account mitigation where badger setts have been identified near to land which developers wish to build on. There is a public interest in the public being aware of the measures which are taken to protect the environment, and species such as badgers, where a development is proposed.

24. The council clarified that it recognised that there is a public interest in the council being transparent and accountable about its work and responsibilities in protecting the environment. It noted that badgers are specifically protected by legislation, indicating that there is a heightened interest in their protection. It recognised an enhanced public interest in the disclosure of documents that improve public knowledge and discourse on this matter.
25. However, in this case, the council has explained that the resources which would be required in order to respond to the complainant's request for information would be significant and disproportionate compared to the public interest in the disclosure of information which would shed light on this. It also noted that the complainant could carry out searches himself should he wish to do so.
26. The Commissioner agrees that there is insufficient wider public interest in this matter to justify the considerable time and effort it would take the council to comply with the request. The Commissioner is therefore satisfied that, in this case, the balance of the public interest lies in the exception being maintained.

Regulation 12(2)

27. 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.
28. As set out above, in this case, the Commissioner's view is that the balance of the public interests 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(1) – duty to advise and assist

29. Broadly, Regulation 9(1) of the EIR provides that, where an authority is refusing the request because an applicant has formulated a request in too general a manner, the authority must provide advice and assistance to the requestor, insofar as it would be reasonable to expect the authority to do so, to allow them to reframe the request so that relevant information can be provided.
30. The council said that it could not provide any advice on how the complainant could submit a more manageable request. It said that the only way to access the information is to search through its planning application database, which is already available to the public. The head

of Planning and Applications also explained to the complainant that the likely outcome of it carrying out such searches would be that legal correspondence falling within the scope of the request would be unlikely to be held.

31. If the complainant were to narrow down the scope of his request for information, for instance, by reducing the time period he was requesting the information for, he would be able to carry out the same searches which the council would in order to identify any documents relevant to the request for information.
32. The Commissioner's decision is that the council therefore complied with the requirements of Regulation 9(1) of the EIR.

Right of appeal

33. 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

34. 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.
35. 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

Ian Walley
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