

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 21 March 2022

Public Authority: London Borough of Southwark
Address: 160 Tooley Street
London
SE1 2QH

Decision (including any steps ordered)

1. The complainant requested information about a 'healthy streets' initiative in Dulwich. The London Borough of Southwark (the 'Council') handled the request under the EIR and provided some of the requested information. It refused to provide the remainder citing Regulations 12(4)(b) (manifestly unreasonable request) and 12(4)(e) (internal communications). At the internal review stage, the Council partly revised its position and said it was relying solely on Regulation 12(4)(b), explaining that the request was 'manifestly unreasonable' on cost grounds.
2. The Commissioner's decision is that the Council was entitled to rely on Regulation 12(4)(b) for the reasons set out in this notice. He finds that the associated public interest test favours maintaining the exception. However, the Council breached Regulation 11(4) as it failed to provide an internal review within 40 working days.
3. The Commissioner does not require the Council to take any steps as a result of this notice.

Request and response

4. On 14 September 2020, the complainant wrote to the Council and requested information in the following terms:

"Our Healthy Streets - Dulwich, Phase 2

Under the Freedom of Information Act, I request the following information:

Between August 1st 2019 and Sept 13th 2020:

1. A copy of Southwark's database with the processed survey results for all responses (categorised by the methods used, including but not limited to: electronic, public meetings and paper correspondence) for the Southwark Phase 2 'Our Healthy Streets Dulwich' (OHSD) survey, including street and postcode (but excluding, in accordance with GDPR, house numbers and names). Specifically, I wish to see the breakdown of these results categorised by the six locations and/or junctions proposed under the consultation, showing the respondent's street and postcode.
2. Southwark Council's and Councillors' internal documents (including, but not limited to: emails, formal documentation) in relation to the Our Healthy Streets Dulwich Phase 2 survey results, assessment and findings.
3. Southwark Council's and Councillors' emails and meeting notes with interested Consultation Groups (including but not limited to: Southwark Cyclists, Dulwich and Herne Hill Safe Routes to School, Mums for Lungs, Clean Air Dulwich, Living Streets, Dulwich Society, OneDulwich and the Dulwich Society Travel and Environment Committee) with regard to Our Healthy Streets Dulwich Phase 2 and 3.

I understand from email correspondence that Southwark has this data analysed already."

5. The Council responded, late, on 17 February 2021. It provided some information (for part 1 of the request) but refused to provide the remainder (for parts 2 and 3), citing Regulations 12(4)(b) (manifestly unreasonable request) and 12(4)(e) (internal communications) of the EIR. It said that the associated public interest tests favoured maintaining these exceptions.
6. The complainant requested an internal review on 28 February 2021 in relation to parts 2 and 3 of his request only. Having not received the Council's internal review result, the complainant contacted the Commissioner.

Scope of the case

7. The complainant initially contacted the Commissioner on 12 April 2021 to complain about the way his request for information had been handled. At that point, he complained about the then outstanding internal review.
8. Under the EIR, a public authority has up to 40 working days in which to notify a requester of the outcome of its internal review. The Commissioner wrote to the Council on 11 May 2021 asking it to either provide a copy of its internal review if complete, or to carry out an internal review within ten working days.
9. On 13 May 2021, the Council sent the Commissioner a copy of its internal review which was dated 29 April 2021. The Council had partly revised its position. It now said it no longer wished to rely on Regulation 12(4)(e) but maintained that Regulation 12(4)(b) applied to the entire request. It explained that parts 2 and 3 of the request were 'manifestly unreasonable' on cost grounds and set out why.
10. On 28 May 2021, following receipt of the outcome of the Council's internal review, the complainant informed the Commissioner that he remained dissatisfied. He asked the Commissioner to investigate whether the Council had correctly relied on Regulation 12(4)(b) of the EIR.
11. The complainant did not ask the Commissioner to consider the delay in him receiving the substantive response to his request. The Commissioner notes the Council's apology within that response and its explanation that its capacity to respond was impacted by the Covid-19 pandemic and the resultant need to divert its resources. However, given that the complainant's original complaint concerned the internal review, the Commissioner has considered the delay in the Council providing the outcome of its internal review in this case.
12. The Commissioner has considered whether the requested information constitutes 'environmental information' for the purposes of the EIR. He has also determined whether the Council was entitled to refuse parts 2 and 3 of this request on the basis of Regulation 12(4)(b) of the EIR.

Reasons for decision

13. The Commissioner has first considered whether the Council was correct to handle the request under the EIR.

Is the requested information environmental information?

14. Regulation 2(1) of the EIR defines environmental information as any information in any material form 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) and (b) 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 considers that the phrase “any information...on” should be interpreted broadly. In this case the requested information concerns information associated with a specific planning application.

16. The Council told the Commissioner it considered that the request fell under the EIR for the following reasons:

“The council handled the information request under EIR as information was being sought about the council’s programme called Our Healthy Streets Dulwich Phase 2 and 3. This programme (part of the Streetspace scheme) contributes to the borough’s long-term goal of creating a safer, cleaner and greener

place for all by putting measures in place to help reach key targets on carbon emissions by 2030. It is intended to improve air quality, road safety and accessibility as well as reduce pollution, noise and traffic levels. This is being achieved by air quality modelling and monitoring active traffic and travel data and using data analysis and methodology to deliver the programme outcomes.

In line with the definition of environmental information as set out under Regulation 2(1), the council considers that the requested information relates to many environmental matters affecting the state of the elements, factors, measures and activities, cost-benefit and the state of human health and safety.”

17. The Commissioner is satisfied that the requested information constitutes environmental information and that the Council was correct to handle the request under the EIR.
18. 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 request

19. Regulation 5(1) states that:

“a public authority that holds environmental information shall make it available on request”.

20. Regulation 12 of the EIR states that:

“(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

(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;”

21. The Commissioner considers that a request can be manifestly unreasonable for two reasons, firstly if it is vexatious and secondly where it would incur unreasonable costs for a public authority or an unreasonable diversion of resources.
22. The EIR do not provide a definition of what constitutes an unreasonable cost. This is in contrast to section 12 of FOIA under which a public authority can refuse to comply with a request if it estimates that the cost of compliance would exceed the "appropriate limit". This appropriate limit is defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") as £600 for central government departments and £450 for all other public authorities.
23. Although the Regulations are not directly applicable to the EIR, in the Commissioner's view they can provide a useful point of reference when public authorities argue that complying with a request would incur an unreasonable cost and therefore could be refused on the basis of regulation 12(4)(b).
24. The Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time:
 - Determining whether the information is held
 - Locating the information, or a document which may contain the information;
 - Retrieving the information, or a document which may contain the information; and
 - Extracting the information from a document containing it.
25. The appropriate limit in this case would be £450.

The complainant's position

26. The complainant did not provide any specific submissions *per se* as to why he believes his request was not manifestly unreasonable, although the Commissioner notes that he was under no obligation to do so. Instead, he asked the Commissioner to review the Council's reliance on Regulation 12(4)(b).

The Council's position

27. The Council responded to the Commissioner's investigation as follows:

"Information relating to this programme incorporates a wide range of terminology due to the large number of individuals involved and the change of scheme name during the time period

of the information requested. Therefore, multiple searches would need to be conducted involving a range of key words in each search location.

In addition, some correspondents will only have used the term "Dulwich" and omitted other helpful search terms such as "phase 2" or "phase 3" which means that retrieving the information involves reading through each item of correspondence to ascertain whether it is relevant to the request.

Taking a sample of one team involved in the programme, the council would need to review in excess of 3,000 items relating to this project to retrieve the requested information. The council has calculated that for this sample team, locating, retrieving and extracting the requested information would take over 150 hours and at a rate of £25 per hour this equates to a cost of £3,750.

The calculation uses the following data:

Number of emails = 3,000 minimum

Time taken to locate, retrieve and extract each record = 3 minutes

The calculation is as follows:

Expected number of hours = 150 (3,000 items x 3 minutes)

Expected cost = £3,750 (£25 staff cost x 150 hours)

This calculation would need to be extrapolated from one team to multiple teams involved in the programme and therefore the total cost to the council would far exceed this figure.

As a result, the council maintains the view that applying the exception under Regulation 12(4)(b) is appropriate for this particular information request."

28. The Commissioner notes that the Council's internal review result also incorporated the majority of above rationale and sample calculation.

The Commissioner's decision

29. The size of the burden the Council has outlined is considerable, particularly given the effective cost limit of 18 hours and £450.
30. The Commissioner therefore accepts that the request was manifestly unreasonable and therefore Regulation 12(4)(b) of the EIR would be engaged.

Public interest test

31. Regulation 12(4)(b), like most EIR exceptions, is subject to a public interest test and therefore a public authority may be required to take on a manifestly unreasonable request if there are very strong public interest factors in favour of disclosure.

Public interest arguments favouring disclosure

32. The complainant has not explained why disclosing the information would be in the wider public interest.
33. The Council submitted the following arguments in favour of disclosure in its response to the request, and reiterated in its internal review result that these arguments apply:
- Transparency;
 - Providing the public in the local area with the opportunity to challenge the council on its policies and activities relating to this issue; and
 - Raising the profile of the issue in order to encourage public debate.
34. In its submissions to the Commissioner, the Council acknowledged the following public interest factors in favour of releasing the requested information:
- “The council is acutely aware of the general public interest in the transparency and accountability of local authorities and that both the FOI and EIR legislation promote the following:
 - a greater public awareness of environmental matters
 - a free exchange of views
 - more effective participation by the public in environmental decision-making
 - More specifically, the council acknowledges that the Streetspace scheme was principally designed to improve the environment in London, and hence meets the criteria of environmental information of which EIR legislation has a presumption in favour of disclosure.
 - The issue of Low Traffic Neighbourhoods, now referred to as Streetspace schemes, is one of significant public interest, and has also been politically sensitive. The scheme in Dulwich in particular has attracted strong reactions from local residents and

stakeholders, with some fully supporting the scheme, and others opposing the measures and challenging the process in which they were delivered. Hence the council is aware that information relating to the scheme is likely to be of interest to many.

- The aim of Streetspace schemes is to promote active travel through walking and cycling, and to reduce traffic, air pollution, noise pollution and accidents. This matter therefore has an impact on many, and their ability to mobilise in the borough, including drivers, cyclists, pedestrians and public transport users.”

Public interest arguments favouring maintaining the exception

35. The Council’s public interest arguments prior to the Commissioner’s investigation are centred on Regulation 12(4)(e), which it is no longer relying on.

36. In its submissions to the Commissioner, the Council argued against disclosure for the following reasons:

- The council has already published online a large amount of data relating to the Dulwich Streetspace scheme and detail about each phase of the project¹. The level of data already in the public domain demonstrates the council’s commitment to openness and transparency.
- The council holds the view that the information of interest and significance to members of the public has been published and that the significant amount of data being requested by the complainant is unlikely to be of the same interest and significance to the public, rather only of personal interest to the complainant.
- A large volume of the information requested by the complainant is administrative in nature (emails/meeting notes), which we do not consider would inform public debate in any meaningful way.
- Despite delivering the Streetspace scheme at a challenging time, the council was proactive in terms of community engagement throughout the programme and ensuring the local community and road users were furnished with relevant information. This engagement involved:

¹ <https://www.southwark.gov.uk/transport-and-roads/improving-our-streets/live-projects/our-healthy-streets/our-healthy-streets-dulwich>

- Statutory and non-statutory public consultations to gather feedback from residents and road users
- An Equality Impact Assessment with bespoke engagement
- Regular newsletters at each stage of the engagement and decision making process
- Publication of traffic monitoring data
- Publication of consultation results in a detailed summary form
- The council plans to continue reviewing the Dulwich Streetspace scheme during 2022 which will involve further community engagement and taking on board public feedback. This again demonstrates the council's commitment to involve the public in decision-making, and to ensure that the public is supplied with adequate and relevant information about changes to their local environment.
- Whilst the council is aware that public authorities should accept a greater burden in providing environmental information, council officers would have to be diverted away from their core duties to spend many hours searching, extracting and reviewing all of the information held in relation to the request.
- Due to the size of the programme and the large number of number of individuals, members and organisations involved, a sample exercise shows that to carry out searches to locate, retrieve and extract information relevant to the request would take a minimum of 150 hours of staff time.
- The third and final phase of the Streetspace programme has recently been implemented. This will involve ongoing work by the council to review the measures, whilst also fulfilling its day-to-day obligations. We are of the view that compliance with the request would cause disruption to the council's ability to meet its obligations during a particularly busy and challenging time."

Balance of the public interest

37. Since the Commissioner is satisfied that the exception at regulation 12(4)(b) is engaged, it follows that he accepts that the request is manifestly unreasonable. The question is whether the public interest in maintaining the exception is strong enough to outweigh the public interest in disclosure.
38. In this case, the Commissioner notes that the information in question relates to the specially protected category of emissions, as well as other

environmental factors such as noise, etcetera. There will always be an inherent public interest in disclosure of such information.

39. The Commissioner recognises that there is an inherent expectation of transparency and accountability in relation to the way in which public money is spent and to the Council's decision-making, particularly in relation to projects which may impact the environment. He also acknowledges that public confidence in local Streetspace matters will increase the more open the process is to scrutiny.
40. However, the Commissioner notes that the Council has published information relating to the Streetspace project on its website, and that further public feedback and review will be sought and taken into consideration this year. In the Commissioner's view, this meets the transparency and public involvement aspects of the public interest.
41. Furthermore, the Commissioner notes that some of the requested information (for part 1 of the request) was provided to the complainant as part of the Council's substantive response.
42. The Commissioner considers that the public interest in this case lies in ensuring that the Council's resources are used effectively. Since the Council has already publicly shared some of the information it holds via its website, the Commissioner has decided that there is greater public interest in it being able to focus its resources on core Council matters relating to the ongoing project itself, rather than on continuing to deal with a request for information which would place a significant burden on it.
43. The Commissioner has carefully considered the public interest arguments on both sides. The Commissioner accepts that compliance with the request would cause the Council an unjustified burden for the reasons set out above. There is a considerable public interest in protecting public authorities from burdensome requests, where the value of the requested information does not justify the work required to comply with the request.
44. The Commissioner has therefore decided that the balance of the public interest favours maintaining the exception at regulation 12(4)(b) of the EIR. As a result the Council was entitled to rely on that exception to refuse the request.

Regulation 12(2) - Presumption in favour of disclosure

45. 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)²: “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).

46. 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 in favour of disclosure provided for in regulation 12(2), is that the exception provided by regulation 12(4)(b) was applied correctly.

Procedural Matters

Regulation 9 – advice and assistance

47. Regulation 9 of the EIR requires public authorities to provide reasonable advice and assistance to individuals making (or proposing to make) information requests.
48. 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.
49. In this particular case, the Council advised the complainant as follows:

“We are conscious of our duty to advise and assist under Regulation 9 of the Environmental Information Regulations and have explored how Southwark Council may best assist you to request the relevant information which we hold.

However we have concluded that narrowing down the request would still result in a large amount of records being interrogated which would also exceed the cost limit”.

²https://assets.publishing.service.gov.uk/media/5d7a6a2340f0b61d01bba991/SGIA_44_2019.pdf

50. The Commissioner accepts that the Council has considered its advice and assistance obligations. He cannot readily identify how the complainant could refine his request in this case.
51. The Commissioner is satisfied that the Council has complied with Regulation 9 of the EIR.

Regulation 11 – Representations and reconsiderations

52. Regulation 11(1) of the EIR provides the right for requesters to request a review of the handling of their request. Specifically, Regulation 11(1) states that:

“...an applicant may make representations to a public authority in relation to the applicant’s request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request”.

53. Regulation 11(4) of the EIR requires that where an applicant requests that an authority reviews its response to a request for information under Regulation 11(1) that the authority notifies the applicant of its decision as soon as possible and no later than 40 working days after the date of receipt of the representations.
54. The complainant’s original complaint to the Commissioner concerned the then outstanding internal review, which he had requested on 28 February 2021.
55. The Council provided its internal review outcome on 29 April 2021, 42 working days after receipt. The Commissioner notes that the Council thanked the requester for his patience but did not offer any specific reason(s) for the delay.
56. In this case, the Council breached Regulation 11(4) of the EIR by failing to provide its internal review within 40 working days.

Other matters

57. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. This will align with the goal in his draft “Openness by Design strategy”³ to improve standards of
-

³ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in his "Regulatory Action Policy"⁴.

⁴ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

58. 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

59. 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.

60. 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

Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF