

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 12 March 2024

Public Authority: Bristol City Council
Address: City Hall
PO Box 3399
Bristol
BS1 9NE

Decision (including any steps ordered)

1. The complainant has made three requests for information from Bristol City Council ("the Council") relating to a specific planning application and development. The Council aggregated all three requests and refused to comply with them on the grounds of cost under regulation 12(4)(b) (manifestly unreasonable requests) of the EIR.
2. The Commissioner's decision is that the Council is entitled to aggregate Request 1 and Request 2 and refuse to comply with them under Regulation 12(4)(b). However, the Council is not entitled to aggregate Request 3.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to Request 3 (Council reference 39640709). The Council should either disclose the information or, in respect of any information it intends to withhold, issue a refusal notice within the meaning of regulation 14 of the EIR providing a basis for withholding information. In doing so, the Council should note the points raised in 'Other matters'.
4. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 27 July 2023, the complainant wrote to the Council and made **Request 1** in the following terms:

“On the 31st May Development Control A committee voted to refuse planning permission for application 22/03924/P - Broadwalk Shopping Centre. On the 5th July the committee considered the application again and voted to grant planning permission.

Please provide me with any correspondence regarding application 22/03924/P and matters relating to Broadwalk that occurred between any of the following after the 31st May meeting and before the 5th July meeting: - The members of Development Control A committee - Council Officers - The Mayors Office - The Broadwalk developers and any agents of the Broadwalk developers (which includes but is not limited to: Savills, Savills Development, Savills Planning, Galliard Homes, BBS Capital, Keep Architecture, Arup)

Whatsapp correspondence between the parties mentioned previously is also subject to the foi act and this request . Please ascertain existence of messages exchanged via WhatsApp regarding matters relating to Broadwalk that occurred between any of the following after the 31st May meeting and before the 5th July meeting: - The members of Development Control A committee - Council Officers - The Mayors Office - The Broadwalk developers and any agents of the Broadwalk developers (which includes but is not limited to: Savills, Savills Development, Savills Planning, Galliard Homes, BBS Capital, Keep Architecture, Arup)”

6. On 20 August 2023, the complainant wrote to the Council and made **Request 2** in the following terms:

“Please provide me with all correspondence and lobbying (including but not limited to WhatsApp messages , deleted messages , deleted emails etc) regarding application 22/03924/P and matters relating to Broadwalk, , particularly relevant is correspondence that includes the words ‘broadwalk ’ and ‘redcatch quarter’ , that occurred between the 30th May and the 1st of June 2023 between but not limited to :

- The members of Development Control A committee -
- Council Officers
- The Mayors Office -

The Broadwalk developers and any agents of the Broadwalk developers (which includes but is not limited to: Savills, Savills Development,

Regulation 12(4)(b) – Manifestly unreasonable requests

12. Regulation 12(4)(b) states that:

“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;”

13. 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. If engaged, the exception is subject to a public interest test.

14. In this case, the Council considers that circumstance 2) is applicable.

15. The EIR do not provide a definition of what is manifestly unreasonable in terms of cost. This is in contrast to section 12 of the Freedom of Information Act 2000 (“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”.

16. However, the FOIA “appropriate limit” can be a useful starting point in considering whether a request for environmental information can be refused as being manifestly unreasonable.

17. The FOIA appropriate limit is defined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Fees Regulations”). These define the appropriate limit in terms of the amount of time which staff would be expected to take in complying with a request.

18. The Fees Regulations state that the relevant activities, set out below, may be calculated/charged for at a flat rate of £25 per hour of staff time. For the Council, the appropriate limit under the Fees Regulations would be £450; that is, 18 hours of staff time.

¹ <https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/refusing-a-request/#when-can-we-refuse-a-request-for-environmental-information-3>

19. Under FOIA, a public authority is only allowed to include the cost of certain activities in its estimate: 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.
20. However, since the Fees Regulations do not apply to the EIR, a public authority may take into account other activities and wider considerations in terms of what may render a request for environmental information "manifestly unreasonable". It is also the case, however, that a public authority is expected to accept a greater burden when considering requests for environmental information.
21. Whether considering a costs estimate under either FOIA or the EIR, the Commissioner expects any estimate to be realistic, sensible and supported by cogent evidence. He also expects that, where possible, a sampling exercise will have been carried out.
22. In respect of the aggregation of requests under the EIR, the Commissioner's guidance explains the following:

"Furthermore, as the FOIA fees regulations do not apply under the EIR, there is no specific provision for the aggregation 'of substantially similar' requests. Our position, however, is that there may be occasions where it is permissible to consider a number of EIR requests together when deciding if they are manifestly unreasonable because of cost or burden. This is in line with the approach to requests considered manifestly unreasonable on the grounds that they are vexatious in the wider sense, where the context in which they are made can be taken into account."²

The Commissioner's position

23. The Commissioner has considered the available correspondence (between the complainant and Council), and submissions that he has requested from the Council.
24. In determining this case, the Commissioner must first consider whether it is permissible for the Council to aggregate the requests, before then deciding if regulation 12(4)(b) is engaged.

² <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-4-b-environmental-information-regulations-manifestly-unreasonable-requests/#differences>

Aggregation

25. As emphasised by the Commissioner's guidance, whether the aggregation of requests is permissible will depend on the context.
26. In the context of this case, the Commissioner notes that request 1 and request 2 were made in short succession, and that the Council had not had the opportunity to respond to request 1 before it received request 2. The Commissioner therefore considers that it is reasonable for the Council to aggregate these requests.
27. However, in respect of request 3, the Commissioner notes that this request was made following advice and assistance that the Council had provided about making a refined request, and that the request appears (to the Commissioner) to have been refined to specific teams and individuals. However, this does not appear to have been taken into account by the Council in its internal review.
28. The Commissioner has therefore concluded that it is reasonable for the Council to aggregate Request 1 and Request 2 when considering the application of regulation 12(4)(b).
29. However, the Commissioner has concluded that it is not reasonable to aggregate Request 3 with the other requests, and that it must be considered on a separate basis.
30. The Commissioner requires the Council to issue a fresh response to Request 3 (Council reference 39640709). The Council should either disclose the information or, in respect of any information it intends to withhold, issue a refusal notice within the meaning of regulation 14 of the EIR providing a basis for withholding information. In doing so, the Council should note the points raised in 'Other matters'.
31. In respect of Request 1 and Request 2, the Commissioner must proceed to consider whether regulation 12(4)(b) has been correctly applied.

Regulation 12(4)(b)

32. The Commissioner understands that, in respect of Request 1, the Council has undertaken an initial search of all emails held dated between 31 May 2023 and 5 July 2023, using the search terms 'Broadwalk Shopping Centre', 'Broadwalk', and 'Redcatch Quarter'. This search has retrieved approximately 1,500 records, each of which would need to be individually checked for relevance. The Council argues that, even allowing for 4 minutes for each record to be reviewed, this would take 100 hours of officer time.

33. The Commissioner has considered the Council's position. Whilst it is not clear to the Commissioner whether the Council has undertaken a sampling exercise, he is satisfied that even reducing the Council's time estimate by half would require 50 hours of officer time. The Commissioner is therefore satisfied that compliance with Request 1 would be manifestly unreasonable.
34. As the Commissioner has already found that it is reasonable for the Council to aggregate Request 1 and Request 2, the Commissioner is likewise satisfied that the Council is entitled to rely upon regulation 12(4)(b) to refuse them.
35. When considering whether the public interest favours maintaining the exception or actioning the request, the Commissioner has taken into account that there is an inherent public interest in openness and transparency by the Council, particularly in regards a development that will have a wide-ranging impact on the local area.
36. However, the Commissioner recognises that the purpose of the exception is to protect finite public resources from being unnecessarily consumed. In the circumstances of this case, the Commissioner also considers that the public interest in openness and transparency is met by the formal planning process, which the development will be subject to, and which provides the public with the right to view and challenge the application. The Commissioner is also mindful that the Council has already disclosed (as noted in paragraph 9) a significant amount of contextual information about the matter, spanning over 180 pages of correspondence between involved parties.
37. Having considered the public interest arguments, the Commissioner finds the public interest in protecting public resources to be the stronger argument.
38. 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).
39. As covered 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.

Other matters

40. The Commissioner notes, for the benefit of both parties, that this decision has only found that the Council is not entitled to include Request 3 in its aggregation and refuse to comply with it on that basis.
41. In issuing a fresh response to Request 3, the Council is entitled to issue a new refusal notice should it consider this applicable under the EIR. This includes if the Council considers that compliance with Request 3 in its own right would engage regulation 12(4)(b).
42. The Commissioner also notes that the complainant has made later requests, including on 7 October 2023 (which is the subject of decision notice IC-277741-W7F5), which may include some of the information sought by Request 3. The Commissioner reminds the Council that it should issue a response to Request 3 based on the circumstances present when it was received.

Right of appeal

43. 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

44. 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.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Daniel Perry
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