

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 13 October 2016

Public Authority: Salford City Council
Address: Salford Civic Centre
Chorley Road
Swinton
M27 5DA

Decision (including any steps ordered)

1. The complainant requested information from Salford City Council (the Council) relating to a regeneration development. The Council refused one part of the request under regulation 12(4)(b) of the EIR because it was manifestly unreasonable, and the other part under regulation 12(5)(e) because it disclosure would have an adverse effect on confidentiality of commercial interests.
2. The Commissioner's decision is that regulation 12(4)(b) has been cited correctly, and that the balance of the public interest favours maintaining the exception. However, the Commissioner considers that the Council has not met its obligations under regulation 9(2) in providing sufficient advice and assistance to the complainant. She also finds that regulation 12(5)(e) does not apply to the second part of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide assistance to the complainant on how to reduce the scope of his request so that it is no longer manifestly unreasonable.
 - Respond to item 2 of the request without refusing it under regulation 12(5)(e).
4. The public authority 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 2 March 2015, the complainant wrote to the Council and requested information in the following terms:

"1. Please provide all correspondence between SCC, ECF and other partners re the Development Trust Account.

2. Please also supply details of payments to date made in to the account [with source] and payments gone out of the account with items explained."

6. The Council responded on 30 March 2015 and refused both parts of the request under regulation 12(5)(e) as disclosure would adversely affect confidentiality of commercial interests.
7. The complainant wrote to the Council to query why the request had been handled under the EIR rather than the Freedom of Information Act 2000. The Council responded on 29 April 2015 and confirmed the reasons why it had done so.
8. Following this the complainant asked for an internal review of the Council's refusal of his request. The Council wrote to the complainant on 22 December 2015 and stated that item 1 of the request was now being refused under regulation 12(4)(b) because it was manifestly unreasonable, and that item 2 was still refused under regulation 12(5)(e).

Scope of the case

9. The Commissioner considers the scope of the case to be whether item 1 of the request can be refused under regulation 12(4)(b), and whether item 2 of the request can be refused under regulation 12(5)(e).

Reasons for decision

Case background

10. The Development Trust Account (DTA) is an account linked to a development project within Salford. It is reported to cost approximately £16m, and aims to create over 800 homes as well as commercial sites.¹

Is the information environmental?

11. In the Council's response to the complainant of 29 April 2015 it explained why it had handled the request under the EIR rather than the Freedom of Information Act 2000:

"The appropriate regime for information that is "environmental" is the EIR. Environmental information is defined by regulation 2 of the EIR. Briefly, subparagraph 2(1)(a) of the EIR defines environmental information as material on the state of the elements of the environment including the land and landscape.

Subparagraph 2(1)(c) extends this definition to include information on measures such as policies, legislation, plans and activities affecting or likely to affect the elements described in paragraph 2(1)(a) as well as measures and activities designed to protect those elements. Information might not seem to be obviously environmental but could still fall under the definition. For example, financial information would be classed as environmental information if it related to the costs of redeveloping land and building a new development."

12. The Commissioner considers this clearly explains why the information is environmental as per the EIR, and so the correct regime to handle the request is the EIR rather than the Freedom of Information Act 2000.

Regulation 12(4)(b) – manifestly unreasonable

13. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose environmental information to the extent that the request for information is manifestly unreasonable. There is no definition of 'manifestly unreasonable' under the EIR. The Commissioner considers

¹ <http://www.manchestereveningnews.co.uk/business/16m-rental-scheme-built-part-9406459>

<http://www.englishcitiesfund.co.uk/salford.html>

that 'manifestly' implies that the request should 'obviously' or 'clearly' be unreasonable.

14. A request can be manifestly unreasonable for two reasons: Firstly, if it is vexatious; and secondly, where complying with the request would incur unreasonable costs for the public authority, or where there would be an unreasonable diversion of resources. In this instance, the Council is relying on the latter reason, and its arguments were entirely based on the resources that would be required to comply with item 1 of the request.
15. Unlike for requests handled under the Freedom of Information Act 2000, the EIR does not have a set cost limit for a public authority to determine whether a request is manifestly unreasonable. Additionally, the EIR does not prescribe only four activities that can be taken into account when evidencing why compliance with the request would be manifestly unreasonable. The Council can take into account any reasonable activity that might be required to comply with the request.
16. The Council stated that at the time of the request the project had been ongoing for 10 years, and due to the cost of the project there was naturally a large amount of correspondence. In its internal review the Council stated:

"Since discussions commenced with regard to Salford Central in 2006 there are a total of 13,796 stored e-mails with a total size of 3.9 MB. Many of the e-mails have attachments or multiple attachments. There are additionally a large number of paper documents and 15 volumes of files. To locate, retrieve and extract information pertaining specifically to the Development Trust Account [DTA] would be far too extensive a task."
17. The Commissioner asked the Council to elaborate on some of these details, and also expand on the other tasks that would be involved in complying with the request. The Council was able to confirm that the 15 volumes of manual files were approximately 9,500 sheets. This was done based on the length of the files rather than a count, which the Commissioner considers is reasonable given that it is known how large a 500 sheet ream of paper is.
18. In relation to the other activities involved, the Council confirmed that whatever information was extracted as being specifically relevant to the DTA would need to be checked for possible exceptions that applied. It cited the likely exceptions for this information as:
 - Regulation 12(4)(d) – information still in the course of completion

- The Council stated that the project is still live, so much of the information would relate to an ongoing project and thus be afforded some protection by this exception. The Council would also need to consider what the balance of the public interest was.
 - Regulation 12(5)(b) – adversely affect the course of justice
 - The Council stated that the relevant information was likely to contain legal advice, and thus disclosure would reveal information subject to the legal professional privilege. The Council would need to consider the implications for these interests, and what the balance of the public interest was.
 - Regulation 12(5)(e) – adversely affect commercial interests
 - As a multi-million pound development project there would be information which relates to the commercial and economic interests of the project's stakeholders. The Council would also need to consider the implications for these interests, and what the balance of the public interest was.
 - Regulation 13(1) – personal data
 - Primarily names and contact details of the numerous individuals who have been involved in the project. In order to determine whether the details should be disclosed the Council would be required to consider whether the rights to individuals' privacy would outweigh any legitimate interest in disclosure.
19. The Commissioner considers that the cited exceptions are reasonable under the circumstances. Given the volume of information that is potentially relevant to the request, it is easy to see how these considerations would take the Council a significant amount of time to complete.
20. The Council also confirmed that to determine what information comes within the scope of the request and is suitable for disclosure would be burdensome, and that it is not obvious which parts of the electronic and manual records will come within the scope of the request. Whilst the Commissioner considers that it might be possible to conduct thorough checks of the electronic records using specific search terms, this does not apply to the manual records. The Commissioner agrees with the Council that the task would be burdensome given the volume of potentially relevant information.

21. The Commissioner is satisfied that the Council has demonstrated that there is a voluminous amount of potentially relevant information, and that to identify this information and determine whether it is suitable to be disclosed would represent a burden to the Council's resources. The sheer volume of information and considerations required for the relevant exceptions make compliance with the request not only unreasonable, but manifestly so. The Commissioner has therefore decided that the exception is engaged under the circumstances and has gone on to consider the balance of the public interest.

Arguments in favour of disclosure

22. The complainant referred the Commissioner to an article regarding regeneration developments in Salford which stated that:

"based on official Salford City Council figures, developers have evaded over £42million in planning fees and obligations over the last two years, while failing to provide over 1,000 affordable houses. As the city's schools are bursting, developers have contributed just £17,000 to funding extra places."

23. There is serious local concern that developments such as the project in this request are not contributing their fair share to community resources. There is a clear public interest in being able to obtain information which would indicate whether this project is doing so.
24. The project is taking up a significant proportion of public money, and – as is evident from the volume of correspondence on the project – a large amount of staff time for Council employees. There is an inherent argument for transparency into the use of public resources, and this argument has to be proportionate to the amount of resources that is being expended. In this instance, the Commissioner considers that this is far from negligible.

Arguments in favour of maintaining the exception

25. The DTA is designed to help manage the budget for the project so that each phase is properly funded. In the Commissioner's view, the correspondence that would be specifically about the DTA will unlikely provide clarity on the particular subjects the complainant has highlighted. The account is not linked to any developer obligations to provide affordable homes, or whether sufficient contributions will be made towards public services, so a public interest argument based on those lines is not strictly applicable in this instance.
26. The exception was designed to protect public authorities from complying with manifestly unreasonable requests. There is a strong public interest

argument in allowing public authorities to do so as it protects resources, so that they might be committed to other services.

Balance of public interest

27. The Commissioner considers that the balance of the public interest favours maintaining the exception. Whilst she notes the public concerns surrounding the New Bailey project, these do not specifically relate to the DTA in itself. The Commissioner is also mindful of the work that would be required to comply with this manifestly unreasonable request, and does not consider it would be in the public interest to have the Council comply with it.

Regulation 9 – advice and assistance

28. Under regulation 9(2) of the EIR a public authority must do the following:

(2) Where a public authority decides that an applicant has formulated a request in too general a manner, it shall –

(a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and

(b) assist the applicant in providing those particulars.

The Commissioner views this as an obligation for public authorities to help requesters reduce the scope of manifestly unreasonable requests, where those requests have been refused because the burden of compliance is too great.

29. The Council cited regulation 12(4)(b) at its internal review, and addressed its regulation 9(2) obligations as follows:

“it has been considered that even if the request was refined any information would fall under the exception in Regulation 12[5][e]”

30. The Commissioner does not agree that this is true. Firstly, the Council has determined that there is much more complexity to the information than that which might adversely affect commercial interests, so this sentence is far from a sufficient summation of the vast sum of information that is held. Secondly, the Council has stated that the project has been established for 10 years, so there is potentially information where any adverse effect is diminished to the point where it is no longer valid to withhold the information. Thirdly, as will become evident in the following section, the Commissioner is not convinced that all of the information regarding the DTA should be withheld under regulation 12(5)(e); so there is merit in allowing the complainant to

identify information of relevance which could potentially inform the public about the ongoing development.

31. The Commissioner considers that the Council has not met with its obligations to provide advice and assistance in relation to this request. The Commissioner asks that the Council inform the complainant on how to reduce the scope of his request so that it is no longer manifestly unreasonable.

Regulation 12(5)(e) – commercial interests

32. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information if to do so would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
33. The Commissioner has put the reasoning for this aspect of her decision inside a confidential annex. She appreciates this limits the understanding of the reader, but it is necessary under the circumstances. What the Commissioner can reveal is that she and the Council have a difference of opinion about whether the exception applies.
34. Having studied the Council's submissions the Commissioner is not convinced that the exception applies. Her decision is that the Council cannot rely on it to refuse the request and so must provide a new response to the complainant.

Right of appeal

35. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

36. 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.
37. 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

**Gerrard Tracey
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