

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 30 November 2021

Public Authority: Cheshire East Council
Address: Westfields
Middlewich Road
Sandbach
Cheshire
CW11 1HZ

Decision (including any steps ordered)

1. The complainant requested correspondence and communications between any officers and executives of Cheshire East Council (the council), third parties and councillors regarding or linked to a planning application and subsequent appeals made by him.
2. The council applied Regulation 12(4)(b) (manifestly unreasonable) to withhold the information.
3. The Commissioner's decision is that the council was not correct to apply Regulation 12(4)(b) to refuse to respond to the request.
4. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
 - To respond to the complainant again, not relying upon Regulation 12(4)(b).
5. 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 Freedom of Information Act 2000 (FOIA) and may be dealt with as a contempt of court.

Request and response

6. On 4 July 2020 the complainant wrote to the council and requested information in the following terms:

"I hereby request all correspondence and communications records between any Officers and Executives of Cheshire East, third parties and Councillors regarding or linked to my planning application and subsequent appeals.

I have previously received some information but made a request for further full disclosure as below; The dates are from 7 February 2020 to date."

7. The council said that it did not receive the request until 27 July 2020. Further clarification of the request was sought, and was provided by the complainant on 29 July 2020. The council then responded on 22 September 2020, applying Regulation 12(4)(b) of the EIR (manifestly unreasonable request).
8. Following an internal review it wrote to the complainant on 26 October 2020, maintaining its initial decision.

Scope of the case

9. The complainant contacted the Commissioner on 22 November 2020 to complain about the way his request for information had been handled.
10. He argues that his request is not manifestly unreasonable, and that the exception was therefore wrongly applied.

Reasons for decision

Regulation 12(4)(b) - Request is manifestly unreasonable

11. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. A request can be refused as manifestly unreasonable either because it is considered to be vexatious, or on the basis of the burden that it would cause to the public authority.

12. In this case, the council argued that the request was manifestly unreasonable on the grounds that to comply with it, when aggregated with two other previous requests it had responded to already, would impose a significant burden on it, in terms of cost and consumption of resources.
13. Regulation 12(4)(b) of the EIR exists to protect public authorities from exposure to a disproportionate burden in terms of the amount of time and resources that a public authority has to expend in responding to a request. In effect, it is similar to section 12(1) of the FOIA, where the cost of complying with a request exceeds the appropriate limit.
14. Under the FOIA, the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') specify an upper limit for the amount of work required beyond which a public authority is not obliged to comply with a request. The Fees Regulations provide that the costs associated with dealing with a request (determining whether the requested information is held; finding the information, or records containing the information; retrieving the information or records; and extracting the requested information from records) should be worked out at a standard rate of £25 per hour per person. For local authorities, the appropriate limit is set at £450, which is the equivalent of 18 hours work.
15. The EIR differ from the FOIA in that under the EIR there is no upper cost limit set for the amount of work required by a public authority to respond to a request.

While the Fees Regulations relate specifically to the FOIA, the Commissioner considers that they provide a useful point of reference where the reason for citing regulation 12(4)(b) of the EIR is the time and costs that compliance with a request would expend. However, the Fees Regulations are not the determining factor in assessing whether the exception applies.

16. Regulation 12(4)(b) sets a robust test for a public authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is "manifestly unreasonable", rather than simply being "unreasonable" *per se*. The Commissioner considers that the term "manifestly" means that there must be an obvious or clear quality to the identified unreasonableness.

17. The Commissioner's guidance on regulation 12(4)(b)¹ states that public authorities may be required to accept a greater burden in providing environmental information than other information.
18. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will consider the following factors:
- the proportionality of the burden on the public authority's workload, taking into consideration the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services;
 - the nature of the request and any wider value in the requested information being made publicly available;
 - the importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue;
 - the context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester;
 - the presumption in favour of disclosure under Regulation 12(2) of the EIR; and
 - the requirement to interpret the exception restrictively.

The complainant's position

19. The complainant argues that:

"I believe my planning application was not properly handled and although they have provided some information from past requests, they have not provided a large part of the correspondence I requested. I am bound to ask why?"

¹ <https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf>

The council's position

20. The council provided some background to the request, and highlighted that the request of 27 July 2020 was the final of three requests relating to the complainant's planning application, which was refused. It said that after receiving the third request over the same issue of the planning application, it made the choice to aggregate the requests when formulating its response and decided Regulation 12(4)(b) was applicable in order to refuse it.

21. Request 1 was received on 13th January 2020, and was for:

"For clarity, I am referring to all Councillors on the Northern and Southern Planning Committees, the Strategic Planning Committee, all Ward Councillors and any other persons or members of the public who have been involved with, advised upon, commented upon or by any method communicated with any Cheshire East Planning Officers regarding my planning application. In terms of Cheshire East Officers, it is the Case Officer [name of case officer redacted] and all his superiors and colleagues within Planning."

22. The council said that it had taken around 12 hours to respond to this particular request, and provided in the region of 37 documents to the complainant in responding to this. The complainant then asked for an internal review to be carried out, which took another four hours for the council to complete.

23. The council also said that within this request the complainant suggested that he distrusted one particular planning officer's actions in dealing with his application, and that the request was made, in part, to ensure that the officer had acted appropriately. In his request the complainant had stated:

"My main but not exclusive reason for doing so is a clear history of email trail exchanges between [name of case officer redacted] and [name of company redacted] about both of my planning applications [planning application reference numbers redacted] which suggest the email trail disclosed is incomplete. Can you also ensure disclosures of any emails held by the originally allocated case officer to my planning applications."

I wish to be satisfied that my planning applications have not been inappropriately influenced which is pertinent since I have a current new application in process [planning application reference number redacted] and both of these parties are again involved. It appears for example, that [name of case officer redacted] was unaware of our

application [planning reference number redacted] until [company name redacted] informed him of the application which it seems he then took steps to take over as case officer from a colleague who had already been appointed. Is this correct? I want to be satisfied that my planning applications are being fairly, impartially, and appropriately considered."

24. Request 2 was made on 4 March 2020 for:

"Further to correspondence with [name of case officer redacted], I request disclosure of all current and future correspondence between Planning Officers and any third parties in relation to my Planning Application [planning reference number redacted]."

25. The council said that it took 4-5 hours to deal with this particular request.

26. The third request is the current request. The council argues that it located and retrieved 85 documents which would appear to fall within the scope of this. It sent a copy of these documents to the Commissioner to support its arguments.

27. The council said that the complainant is requesting copies of documents which were not published in its online planning files. The requests therefore required manual trawls of Outlook email accounts and locally held folders for the additional documents. The documents being requested were not statutory documents and there was no requirement to publish them, or even to retain them. However, as officers had retained the documents they were held and were within the scope of the request.

28. The council clarified that, in the main, the correspondence is between the applicant's agent and the council discussing various aspects of the then ongoing application – arranging site visits, meetings etc; and exchanges with an agent the objectors had employed to argue their case.

29. It said that it had advised the complainant to make a corporate complaint if he was unhappy with the way in which his planning application had been considered. It also suggested that if he wanted to appeal the decision, he should contact HM Planning Inspectorate.

30. The complainant subsequently made a corporate complaint on 1 April 2020 restating his concerns, but this was not upheld. This was escalated on 24 June 2020 to Stage 2, which was also not upheld. It said that the complainant could then have escalated the matter to the Local Government and Social Care Ombudsman (LGSCO), but the council said that it does not appear that he has done this as its complaints team received no further correspondence.
31. The planning matter was also the subject of a planning appeal, which was dismissed by an independent Planning Inspector in October 2020. The council considers that if due process had not been followed then the Inspector would have highlighted this in his decision.
32. It argued that the current request is the third request for information. At least 20 hours have already been spent determining what information is held, prior to locating, retrieving, and extracting it. As the requests for information all relate to the same matter, they were aggregated into one request. As previously stated, it argues that the time which the authority has already spent considering the requests is in excess of the appropriate limit of 18 hours used for the determination of requests under the FOIA.
33. It said that the council accepts that there is a greater burden in the disclosure of environmental information, but noted that the planning process is already transparent and open to public scrutiny – all documents relevant to the decision-making process have been published.

The Commissioner's analysis

34. In reaching her decision, the Commissioner has taken into account the presumption in favour of disclosure under Regulation 12(2) of the EIR. She also notes the requirement to interpret the exception restrictively.
35. She has also taken into account that the council is not a small authority, and that it has significant resources available to it.
36. She notes that the request primarily serves the personal and private interest of the complainant rather than the public as a whole, however she considers that there is an underlying expectation that planning decisions and activities will be taken in as transparent a way as possible. There is therefore a wider public value in information of this sort being disclosed to some degree.

37. Regulation 12(4)(b) sets a robust test for an authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is "manifestly" unreasonable, rather than simply being "unreasonable" per se. The Commissioner considers that the term "manifestly" means that there must be an obvious or clear quality to the identified unreasonableness. It requires something *more* than simply being an 'unreasonable' request.
38. The complainant's wider issues related to the council's action in relation to his planning application. He was unhappy that the decision was made to refuse the application, and appealed the decision to the Planning Inspectorate, but this proved to be unsuccessful. The request for information was however made before the Planning Inspectorate's decision was issued. At the time of the request, therefore, the complainant was still in the process of appealing that decision.
39. The Commissioner has considered the council evidence; the level of disruption which it has described would occur in responding to the request, and the background arguments to support its position. The complainant has had his complaint reviewed under the council's corporate complaints procedure on two occasions and had the right to seek further, independent oversight by the LGSCO. He has now had a response from the Planning Inspectorate over the council's planning decision, albeit that at the time of his request for information this had not yet been decided. The purpose and value of the request largely relate to the complainant's own private interests; his own planning applications.
40. The Commissioner has also taken into account the burden which the prior requests had already placed upon the council. They were over the same issue, and the Commissioner accepts that it was appropriate for the council to aggregate the time for all of the three requests. However, the complainant only made two prior requests for associated information. This is not excessive, and he was entitled to be concerned about matters relating to his planning applications when previous applications had been refused. However, the complainant provided no evidence in support of his suggestion that a particular council officer may have been biased, and the Commissioner has therefore placed no weight on this point.

41. The Commissioner accepts that to comply with the request it would be necessary to consult each of the 85 documents falling within the scope of the request to extract the requested information. It would then be necessary to redact any personal data (in accordance with the Data Protection Act 2018). Under the EIR, the time it would take to consider and redact information can be taken into account in estimating the burden which responding to a request would place on an authority, unlike under the FOIA.
42. The council did not estimate how long it considered it would take to respond to this individual request as a whole. It also did not carry out a sampling exercise in order to provide a more substantive estimate on the time it would take to complete this. Whilst carrying out a sampling exercise is not a requirement of the Regulations, failing to carry out such a test leaves the council with much weaker evidence of the burden which responding to the request would create.
43. It did however provide the Commissioner with a copy of the information it had located.
44. At an average of 5 minutes per document, for 85 documents, the council would require approximately seven hours of work to complete a review. This would be in addition to the time it took to respond to the previous requests, and on top of the time which it took to locate the information falling within the scope of this request.
45. However, based upon viewing copies of the withheld document, many of the documents in question are very short, and it would take much less time than this to complete a review. At 2 minutes per document, it would take the council less than 3 hours to complete its review of the documents concerned.
46. The test for applying this exception is whether the request is "manifestly unreasonable". As mentioned previously, this means that there must be an obvious or clear quality to the unreasonableness. The exception should also be applied restrictively.
47. There have been two previous requests for information, which were not excessive, and the council has not persuaded the Commissioner that responding to this further request would entail a huge degree of additional work or cost. There will be a burden placed upon the council in providing a response to this request, but the council has not demonstrated that this would be a manifestly unreasonable one.

48. The Commissioner is not therefore satisfied that the council has provided the evidence necessary to demonstrate that the request has the obvious or clear quality of unreasonableness which the exception requires in order to be applicable.
49. The Commissioner's decision is therefore that that the council was not correct to rely on Regulation 12(4)(b) as a basis for refusing to disclose the requested information.
50. The Commissioner would like to note that, although she has found the exception is not engaged on this occasion, this might not be the case in any future citing of "manifestly unreasonable" for further requests received by the council from the complainant over this issue. She has made her decision in this case on balance, and recognises that many of the factors set out in paragraph 19 are present. The complainant's requests for information have created a clear burden on the council. With the decision of the Planning Inspectorate, independent oversight of the council's actions has therefore now occurred on the council's actions. Following the completion of the corporate complaints' procedure, the complainant also had the ability to take forward any further concerns he had with the LGSCO, without creating a burden on the council by making a number of requests under the EIR.

Other matters

51.

- a) *The Commissioner notes that the requested information relates to the complainant's planning application about his own personal property.*
- b) *The Commissioner considers that some of the withheld information will therefore be personal data relating to the complainant. The council should have considered the requested information for disclosure to him under his rights under the Data Protection Act 2018 prior to it considering the remainder of the information for disclosure under the EIR.*
- c) *The Commissioner has therefore written to the council, separate to this decision notice, informing them of this requirement.*

Right of appeal

52. 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

53. 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.
54. 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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