

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 25 March 2013

Public Authority: West Sussex County Council
Address: County Hall
West Street
Chichester
West Sussex
PO19 1RG

Decision (including any steps ordered)

1. The complainant has made a number of requests for CON29 information in respect of various named properties. The council has refused to provide the information requested on the basis that to do so would be "manifestly unreasonable" as per regulation 12(4)(b). The council also indicated that it would typically charge £15 per request. The Commissioner's decision is that the council has correctly applied regulation 12(4)(b), but has breached regulation 8(3) by proposing to levy an unreasonable charge. In addition, he has found that the council has failed to comply with regulation 9(1) by not clarifying with the complainant the form or format in which the information was being sought.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation:
 - Discuss with the complainant whether inspection as a format is still desired and, if so, consider whether it would be reasonable for it to provide the information in that format under regulation 6(1)
3. 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 contempt of court.

Request and response

4. On 17 January 2012, the complainant wrote to the council and requested information in the following terms:

"Please accept this request for the following information in relation to [a named address] for records containing the information necessary to answer question 2(a – d), 3.2, 3.4 (a – f), 3.6 (a – l), 3.7 and 3.11, of the CON29R form.

I request that the data be made available for my inspection in the same format as it is inspected by council searchers; preferably in electronic form, but if not it may be in any reasonable format that is easily accessible..."

5. In addition to this request, of which the complainant has supplied the Commissioner with a copy, he has also provided a list of other named properties in respect of which requests for CON29 information have been made. The list indicates that between 17 January 2012 and 24 April 2012 the complainant submitted 273 requests for CON29 information.
6. On 24 February 2012, the council refused to disclose the information in respect of the requests made by the complainant up to this date, applying regulation 12(4)(b). It stated its basis for applying regulation 12(4)(b) was that *"the requests, over a six week period, now number over 100 and... this places a significant burden on the authority..."* The council also noted that the service sought by the complainant *"attracts a cost-recovery fee of £15 per search"*.
7. The complainant asked the council to review its position on 12 March 2012. In particular, he queried the council's £15 charge and its application of regulation 12(4)(b).
8. The council provided a response to the complainant's request for a review on 25 April 2012, maintaining both its charging policy and application of regulation 12(4)(b).

Scope of the case

9. The complainant contacted the Commissioner on 30 April 2012 to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider the council's application of regulation 12(4)(b) to the requests. In addition, the complainant queried the council's justification for its £15 fee and noted

that he had "*not requested the council to provide the data, merely the opportunity to inspect*".

10. In light of the matters raised by the complainant, in this notice the Commissioner has considered the council's handling of the complainant's request for "inspection" of the information, its application of regulation 12(4)(b) and whether the charge which it proposed to levy was reasonable within the meaning of regulation 8(3).

Regulation 2 – environmental information

11. The Commissioner began by considering whether the requests made by the complainant are requests for environmental information as defined by regulation 2(1) of the EIR.
12. The Commissioner considers that the information which is necessary to address the CON29 questions referred to in the complainant's requests falls within regulation 2(1)(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". The Commissioner considers all of the information requested to be measures likely to affect one or some of the elements referred to in regulation 2(1)(a).

Regulation 9(1) – advice and assistance

13. Regulation 9(1) of the EIR states: "A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants."
14. In the course of the Commissioner's investigation, he noted that the council did not appear to have addressed the issue of inspection in either its initial refusal or its review, despite the inclusion of the word "*inspection*" in the complaint's request. Regulation 6(1) provides an applicant with the right to request that information be made available in a particular form or format. It is the Commissioner's view that although regulation 6(1) may appear primarily to be concerned with the form or format information is provided in; it should be interpreted broadly and does provide a right to request the inspection of environmental information. A public authority should comply with this preference unless, in accordance with regulation 6(1)(a), it is reasonable to make the information available in another format, or, in accordance with regulation 6(1)(b) the information is already publicly available in another format.
15. In response to the Commissioner's initial enquiries about this case the council stated "*it is denied that [the complainant] has been refused access to inspect the information. [The complainant] has requested the*

information be provided to [them]." The Commissioner wrote back to the council seeking further representations on this point as, due to the wording of the request, it appeared to him that inspection had clearly been sought.

16. The council responded by explaining that the complainant had been submitting requests to it since April 2009. In that period, the complainant had always requested information be provided "*in any reasonable format that it easily accessible*", in the manner expressed above, but had never previously sought physical inspection. Consequently, the council clarified that its interpretation of the request was "*for the information to be provided in written form in the usual way but without charge*".
17. Having reviewed the correspondence on the case, the Commissioner is not able to accept this interpretation of the request. Most significantly, the language of the request clearly indicates that "*inspection*", as a format, is being sought. Furthermore, in correspondence dated 28 February 2012, in other words prior to the council's review, the complainant stated "*I would ask the council to reconsider its charging strategy or provide PSG staff access to data in an alternative format*". The Commissioner is of the view that such comments should have highlighted to the council that inspection, as a form, was being sought.
18. If there was any doubt on what was being requested, the council should have clarified this point with the complainant under its duty at regulation 9(1) to provide "advice and assistance". The Commissioner is mindful of the fact that the council's obligation under regulation 9(1) only extends to what is reasonable. His view is that it would have been reasonable for the council have engaged with the complainant regarding his request to inspect the information sought. However, it did not do so and consequently the issue of inspection was not dealt with by the council in its correspondence with the complainant. The Commissioner therefore finds that the council has failed to comply with regulation 9(1).

Regulation 12(4)(b) – manifestly unreasonable

19. Regulation 12(4)(b) states that a public authority may refuse to disclose environmental information if the request is "manifestly unreasonable". There is no definition of manifestly unreasonable under the EIR, but the Commissioner's opinion is that "manifestly" implies that a request should be obviously or clearly unreasonable.
20. Based upon its understanding of the requests as seeking information in written form, the council has stated that the requests "*impose an unreasonable administrative burden on a public service which may compromise the ability of the service to meet its obligations to other users*". In essence, this is due to the significant amount of time which

the council considers it would take to respond to the complainant's requests.

21. Unlike the Freedom of Information Act (2000) (FOIA), the EIR do not have a provision where a request can be refused if the estimated cost of compliance would exceed a particular limit. Nevertheless, the Commissioner considers that, under the EIR, if a public authority is able to demonstrate that the time and cost of complying with a request is obviously unreasonable, regulation 12(4)(b) will be engaged.
22. The Commissioner is mindful of the fact that environmental information has been deemed to warrant its own access regime and therefore the detailed provisions of the FOIA cannot be transposed into the EIR. Nevertheless, the Commissioner considers it reasonable that, where appropriate, the FOIA should inform his understanding of the EIR.
23. Whilst there is not a directly equivalent provision of section 12 in the EIR, regulation 12(4)(b) makes clear that the intention of the EIR is not to place an obligation on public authorities to respond to any information request regardless of the burden of processing that request. To this effect, the Commissioner's view is that Parliament has given some indication, in section 12 of the FOIA, of what it would consider an acceptable burden for an information request to impose upon an authority. Section 12 of the FOIA provides that a public authority is not obliged to provide information where to do so would exceed 18 hours work.
24. The council's position is that "*each individual EIR request [would] take around half an hour...*" and therefore that it is the volume of requests which have been submitted which would make responding to them "manifestly unreasonable" under regulation 12(4)(b).
25. First, the Commissioner has considered the reasonableness of the council's estimate that it would take approximately half an hour to process each request. Obtaining the information sought requires the council to consult its Geographical Inspection System (GIS). The GIS system represents "*collated data in order to provide local search results*". The council has explained that the GIS system contains a large volume of data collated from sources across the council.
26. The council has further explained that in order to answer requests of the type outlined in paragraph four above, the officer processing the request would have to search for the named address on the GIS system. This would bring up a map of the relevant geographical area, but would not instantaneously provide answers to the questions sought in respect of the particular named address identified in the request. Instead, layers of information are displayed to the left of the relevant geographical area.

These layers equate to the relevant CON29 questions. For example, there is a "road network layer" which displays A roads in red, B roads in purple and C roads in pink.

27. Consequently, as the council has put it, *"staff need to analyse the GIS information to determine its relevance to the specific property in question, and the impact on that property"*. Given the GIS system does not return the information in respect of a named property, as sought by the requests, that this step would be required seems entirely reasonable to the Commissioner. As is clear from the "road network" example used above, each question may involve multiple layers of information which will have to be considered in order to determine their relevance to the property specified in a given request.
28. The Commissioner notes that in the sample request of 17 January 2012 supplied to him by the complainant answers in respect of six questions are sought. Taking the request to be representative, this would mean that the council's estimate is based on a time of five minutes per question. In light of the various strands of information displayed on the GIS which would need to be analysed, combined with the fact that many of the questions have multiple subsections to them, the Commissioner considers the council's estimate of half an hour per request to be reasonable.
29. Nevertheless, if the request were to simply take half an hour to process there would clearly be no question of regulation 12(4)(b) being engaged. It is, from the council's perspective, the aggregation of the requests within a particular timeframe which leads to complying which them being "manifestly unreasonable". In response to this, the complainant has argued *"each request is discrete and self-contained; none is reliant or relates to another and accordingly I would ask that [they are] dealt with individually"*.
30. However, under section 12 of the FOIA, where a public authority estimates that the appropriate limit is likely to be exceeded, it can include the costs of complying with two or more requests if the conditions laid out in regulation 5 of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 are satisfied. Those conditions require the requests to be:
 - Made by one person, or by different persons who appear to be acting in concert or in pursuance of a campaign;
 - Made for the same or similar information; and
 - Received by the public authority with any period of 60 consecutive working days.

31. Given the requests have all been made by the complainant for CON29 information within a period of 60 consecutive days the Commissioner considers it clear that, had the requests been made under the FOIA, the conditions laid out in regulation 5 would be satisfied.
32. The council's review, where it maintained its application of regulation 12(4)(b), was made on 25 April 2012. In the sixty days prior to this, the spread sheet provided by the complainant indicates that 170 requests for CON29 information in respect of different named properties were submitted. Having accepted the council's estimate of 30 minutes per request as being reasonable, this leads to a time estimate of 85 hours.
33. For the sake of thoroughness, the Commissioner has also considered the number of requests on the spread sheet at the point at which the council issued its first refusal under regulation 12(4)(b) on 24 February 2012. Between 17 January 2012 and 24 February 2012 104 requests were submitted within a 39 day period. Based on the council's time estimate, this equates to 52 hours or work.
34. It therefore seems clear to the Commissioner that, had the requests been made under the access regime of the FOIA, the council would have been entitled to refuse them under section 12 of the Act. Having regard to the comments in paragraphs 22 and 23 above concerning using section 12 of the Act to inform the understanding of regulation 12(4), this has led the Commissioner to conclude that regulation 12(4)(b) is engaged. Given the council's estimate of the time required to comply with the requests is so far in excess of the appropriate limit set out in the FOIA, the Commissioner considers that these requests are clearly unreasonable within the meaning of regulation 12(4)(b).
35. The Commissioner is therefore satisfied that in the particular circumstances of this case, based on the considerations outlined above, complying with these requests would be manifestly unreasonable and that regulation 12(4)(b) is engaged.

Public interest test

36. Regulation 12(4)(b) is a qualified exemption and therefore subject to the public interest test at regulation 12(1)(b) which states that information can only be withheld if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the information

37. The Commissioner accepts that there is a strong public interest in disclosure of environmental information in general as it promotes transparency and accountability for the decisions taken by public authorities and public expenditure.

38. The complainant has described the requests submitted as being "*driven by the number of [its] customers and not a desire to disrupt or annoy*". Consequently, the complainant has demonstrated a generic business need for the information and, accordingly, it may be that there is some economic advantage, at least to the complainant, to the information being disclosed. However, the Commissioner would note that it is not clear whether the complainant has individuals waiting for the information requested in order to complete land/property transactions which does temper the weight he is able to place on this factor.

Public interest arguments in favour of maintaining the exemption

39. The council considers that the public interest is served in ensuring that a resource and capacity stretched service is able to maximise its resources for the benefit of the public. The council's position is that, as compliance with this request would incur significant costs/resources it would divert the council from carrying out its other responsibilities. Therefore, compliance could be achieved at the expense of work which is also of significant importance to the delivery of other services to the public.
40. The Commissioner is mindful of the presumption in favour of disclosure set out in regulation 12(2) and the concurrent duty to interpret the exceptions restrictively. Nevertheless, having regard to paragraphs 32 and 33 above, the time which it would take the council to respond to the requests is far in excess of what would be permitted if the information were not environmental and the requests were being processed under the FOIA.
41. The Commissioner considers that there is a strong public interest in the council being able to carry out its core functions without the disruption that would be caused by complying with requests that would impose a significant burden in terms of both time and resources. The Commissioner is of the view that there is a very strong public interest in public authorities being able to carry out their wider obligations fully and effectively, so that the services they have responsibility for providing are delivered. The Commissioner is also mindful of the fact that the public authority's ability to comply with requests submitted by other requesters, likely for a smaller volume of information, would be undermined if it had to routinely deal with requests demanding significant resources.
42. There are important reasons why the exception at regulation 12(4)(b) exists. Both the FOIA and the EIR give the public unprecedented rights to access recorded information held by public authorities. However, it was not the intent of the legislation that compliance with requests would impede disproportionately and unfairly on the many other important duties that public authorities have to carry out, often with limited resources in place.

43. Having regard to the extent of time which processing the requests would take, along with the likely resulting effect on the council's other functions, the Commissioner is of the view that, on balance, the public interest lies in favour of maintaining the exemption.
44. Consequently, the Commissioner considers that the council has correctly applied regulation 12(4)(b) in this case.

Regulation 8(3) – a reasonable amount

45. Public authorities often levy a charge for providing information of the type sought in this case under the Local Authorities (England) (Charge for Property Searches) Regulations 2008 ("the CPSR"). The Commissioner's position is that regulation 5(6) specifically disappplies the charging provisions under the CPSR. In Kirklees v Information Commissioner, the Tribunal accepted that regulation 5(6) has this effect. Therefore, where information is environmental in nature, public authorities should levy charges in accordance with the EIR. This position also acknowledges the primacy of EU legislation whereby European law, such as the EIR, takes precedence over domestic law.
46. Having established that the information requested is environmental information within the meaning of regulation 2(1), the charging regime which the council must comply with is that contained in the EIR. Regulation 8 provides a general right for public authorities to charge for the provision of environmental information.
47. Regulation 8(3) of the EIR states that, "a charge under paragraph (1) shall not exceed an amount which the public authority is satisfied is a reasonable amount." The Commissioner's position is that a "reasonable charge" under regulation 8(3) can only cover the costs of disbursements incurred in providing the information, such as postage and photocopying. He does not accept that factors such as the costs of staff time spent complying with a request can be taken into account.
48. The council disagrees with this interpretation. Instead, it has essentially argued that it is entitled to charge for CON29 property related information on a cost recovery basis. In its review of 25 April 2012, the council explained that its £15 charge was principally designed to account for: staff costs (£8.50), IT/digestation (£6.10) and internal supports costs (£0.90). In its review, the council justified the inclusion of staffing costs on the basis that the requests are for "*a service provided by staff to produce the data by reference to the CON29 procedure and not simply locating and retrieving that information*".
49. The Commissioner considers it unlikely that the regulations intended for a public authority to be able to charge for the same work necessary to respond to a request in some instances, but not others. With this in

mind, the Commissioner considers that it would be illogical, and contrary to the general scheme of regulation 8, for a public authority to be prohibited from charging for locating and retrieving information in some scenarios; but allowed to do so in others. Whether the information is being provided on paper or to be inspected, the degree of work for the public authority involved in locating and retrieving the relevant information will be comparable. As regulation 8(2)(b) clearly prohibits work being charged for time locating and retrieving information where that information is to be inspected by the applicant, it must follow that this activity cannot be charged for where the copies of the information are provided to the applicant. The Commissioner therefore disagrees with the council's position.

50. The Commissioner notes that regulation 8(2) explicitly addresses the scenarios in which the drafters of the EIR considered public authorities to be prohibited from charging for environmental information. Regulation 8(2)(b) prohibits charging where an applicant inspects environmental information. Similarly, regulation 8(2)(a) prohibits charging where environmental information is available on a "public register or list". What regulations 8(2)(a) and 8(2)(b) have in common is that they prohibit charging based upon the form in which the information is to be provided to the applicant. Once the information has been collated, where information is inspected or publically available the form in which the applicant views the information does not cause any additional cost to the public authority. From regulation 8(2), which outlines where charging is prohibited, the Commissioner's view is that it follows that regulation 8(3), which outlines where charging is permitted, must be interpreted as applying to scenarios where the form in which the information is provided causes public authorities additional cost. Most commonly, this will be where paper copies of the information are requested. It is on this basis that the Commissioner views a "reasonable amount" as extending to disbursements, necessitated by the form in which the information is provided, such as postage and photocopying costs.
51. The Commissioner's decision is that the public authority did not process the information request in accordance with the EIR. Specifically, it breached regulation 8(3) because it calculated the charge which could be imposed on a cost recovery basis. As explained above, the Commissioner's view is that a "reasonable amount" in these circumstances is restricted to the disbursement costs associated with making the information available in the specified form ie postage and photocopying costs. The Commissioner has upheld the the application of regulation 12(4)(b), based upon the council's understanding that information was being sought in written form. However, he finds that the council failed to comply with regulation 9(1) and requires it to take the step set out in paragraph two above.

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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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

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