

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 December 2013

Public Authority: Birmingham City Council
Address: Council House
Victoria Square
Birmingham
B1 1BB

Decision (including any steps ordered)

1. The complainant requested information concerning the redevelopment of Birmingham New Street station and Pallasades Shopping Centre. The Commissioner's decision is that Birmingham City Council (the Council) was correct to say that information for the first request is held by Network Rail and not by the Council. However, it incorrectly applied regulation 12(4)(a) in its response to the second request as it does hold relevant information.
2. The Council has subsequently amended its position to state that the second request is manifestly unreasonable as per regulation 12(4)(b). The Commissioner's decision is that the request is manifestly unreasonable and that the public interest test favours maintaining the exception. No further action is required.

Background

3. The redevelopment of Birmingham New Street station and Pallasades Shopping Centre is known as the Gateway Plus scheme. Part of this scheme is the redevelopment of the station, which is known as New Street: New Start.¹

¹ <http://www.newstreetnewstart.co.uk/about-the-development/faqs.aspx>

4. In 2008 the Council disclosed an executive summary of the business case which is freely available in the public domain. This gives a brief analysis of the background for the project, the problems that need to be addressed, results from the project's appraisal and also its overall conclusions.

Request and response

5. On 17 September 2012, the complainant wrote to the Council and requested information in the following terms:

"I am interested in the breakdown of costs and benefits in the Birmingham Gateway Plus scheme.

As there has been no detail

** on costs of the production of stainless steel exterior cladding, installation of stainless steel cladding, demolition and reconstruction of the central core for construction of the skylight, conversion of the lower car park space into additional concourse area, architects' fees, civil engineering consultants' fees, construction contracts, etc;*

** on the quantification of benefits of Gateway Plus and the alternatives (only the Executive Summary Report version of the Gateway Business Case is available on the internet)*

could you please provide the full information that is held."

6. The Council responded on 3 October 2012 and stated that whilst it did back the project it was being "delivered" by Network Rail in partnership with Mace. No mention was made about what information – if any – was held. The complainant subsequently requested a review of this response.
7. On 16 October 2012 the Council provided its internal review response. This stated that the information was not held for both requests and that the complainant should approach Network Rail. It stated that whilst Network Rail is not a public authority as defined by the Freedom of Information Act, it is under the terms of the EIR.
8. Whilst the Council did not cite the exception, by stating the information is not held it was applying regulation 12(4)(a).

Scope of the case

9. The complainant contacted the Commissioner on 30 January 2013 to complain about the way his request for information had been handled.

10. The Commissioner considers the scope of the case to be whether the Council's position in relation to the complainant's two requests is in accordance with its obligations under the Act.

Reasons for decision

Is it environmental information?

11. Regulation 2 of the EIR states that:

2. (1) *In these Regulations –*

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other 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;*
- ...
- (e) *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c);*

12. The Commissioner considers that the requests met the definition of environmental information provided in 2(1)(c) and 2(1)(e). The development of Birmingham New Street station would impact of the land and landscape as well as produce a number of environmental factors due to construction work. Any costing of this work would meet regulation 2(1)(e), and any plans or economic analysis of the potential benefits of the programme would meet either 2(1)(c) or 2(1)(e).

Regulation 5(1) – duty to make environmental information available on request

13. Regulation 5(1) of the EIR means that a public authority has a duty to provide environmental information available upon receiving a request. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.

First Request

14. In his investigation, the Commissioner sought to understand the Council's involvement with the project and determine what responsibility it would have in the areas of the project that are relevant to the complainant's request.
15. The Council explained that it is not responsible for the construction work in the project. It was involved in the planning applications and has provided funding through a Section 106 agreement² but it was not involved in the construction work and does not hold recorded information relating to costs associated with specific elements of the construction work.
16. The Commissioner accepts this as valid. The land the station is built on and the immediate surrounding area is owned by Network Rail. Therefore it follows that Network Rail would be likely to retain the relevant information about the costs of production. Whilst the Commissioner considers that it is possible some information relevant to the complainant's first request might have come into the Council's possession, the Council has assured the Commissioner it has conducted the necessary searches and has not located any relevant information.
17. The Commissioner also enquired whether the information could be held on behalf of the Council. The Council explained that it was not the author or the party in control of the information and that it had no legal entitlement to access of the information within the project agreement between itself and Network Rail. The Commissioner has seen the relevant sections of the agreement between Network Rail and the Council and he is satisfied that the Council does not have legal

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/7770/151363.pdf See page 3 for further details.

entitlement to the records held by Network Rail related to the construction costs.

18. The Commissioner notes that the request relates to specific elements of the project that is being carried out by Network Rail and its principal contractor Mace, and not by the Council. Based on this the Commissioner is satisfied that the Council does not hold the information as per regulation 3(2) and therefore the Commissioner's decision is that no information is held for the complainant's first request.

Regulation 12(4)(b) – manifestly unreasonable

Second Request

19. During the course of the Commissioner's investigation the Council changed its position with regards to the second request. It stated that rather than holding no relevant information, a copy of the project business case is held on its behalf by a project contractor.
20. The Council stated that the business case is in excess of 8,000 pages and covers the "development and evolution" of the project. The Commissioner enquired whether there was other information held which would outline the benefits of the Gateway Plus project or its alternatives but has been informed that this is the only information held by the Council.
21. The Council's position is that the business case is exempt because it considers the request to be manifestly unreasonable, as per regulation 12(4)(b). In the EIR there is no appropriate cost limit for a request as there is under the Freedom of Information Act. However, regulation 12(4)(b) allows public authorities to refuse requests where handling the request would be a grossly oppressive burden. To do this it must be demonstrated that the request contains a substantial amount of information, there are real concerns over the content of the information that might be disclosed, and that it is not easy to separate the potentially exempt information.³
22. To determine whether the Council is correct to apply regulation 12(4)(b) the Commissioner will go through the arguments for maintaining the exception, as well as those for disclosing the withheld information. If the Commissioner finds that the request is manifestly

³ Further information can be found in the Commissioner's [guidance](#) (see para 67 – 72)

unreasonable then he will consider the public interest test as required by regulation 12(1)(b).

Arguments that the request is not manifestly unreasonable

23. If a project involves the use of public funds then there is an inherent argument for transparency and accountability. It is important to promote transparency of public spending to ensure that the public is aware of how resources are being used. Similarly it is important to show how public funds are spent so that those in positions of authority can be held to account for their decisions. In this case, the project costs several hundred millions pounds. Whilst not all of the money is coming from the Council the Commissioner considers that its contribution as a funding partner is substantial, which means that the argument for transparency and accountability carries notable weight.
24. The complainant has argued that there is not a considerable amount of information available in the public domain about this project. He considers that there is not enough specific and detailed information about the benefits that this project will bring. The Commissioner has conducted his own searches and based on those considers that the complainant's argument is valid, and that this would add greater weight to the argument in favour of disclosing the withheld information.
25. The Commissioner considers that the purpose of the request is not unreasonable. It is a request to obtain information concerning the spending of large sums of public money and would be likely to be of interest to the public and not just the complainant. The Commissioner also notes that the request is not phrased in such a way that would make it offensive to a reasonable individual working at a public authority. This adds weight to the argument that regulation 12(4)(b) does not apply.

Arguments that the request is manifestly unreasonable

26. The Council has argued that it is likely that the business case would contain information covered by exceptions in the EIR. In particular, it has explained there is a strong possibility that elements of the information are confidential. The Gateway Plus project is being carried out by Network Rail and features the involvement of a number of public authorities and other organisations. The Council has argued that it would be required to check through the business case to determine what information should be disclosed without causing harm to any of the other parties involved in the project.
27. The Council stated that the contractors who hold the business case have also explained that the document contains detailed technical

information about the project as well as information that is commercially sensitive. Based on this the Council has argued that it would need to review the document to identify information that might be exempt under regulations 12(5)(d) (confidentiality of proceedings) and 12(5)(e) (confidentiality of commercial or industrial information).

28. The Commissioner accepts this argument as valid. Such a vast project involving a number of different business partners would be likely to produce information that is confidential both in regard to the proceedings involved in carrying out the project, and to the commercial information surrounding a project of this magnitude. Therefore the Council would be required to review the business case in order to determine what information was exempt and what should be released into the public domain.
29. The Council's main argument to support its view that the request is manifestly unreasonable is the size of the business case. It comprises of 8,000 pages and the Council argue that to decide what information should be disclosed and what information was exempt would require a disproportionate amount of resources.
30. To support its arguments the Council cited decisions from the First-Tier Tribunal. In the case of *Salford City Council v ICO and TieKey Accounts (EA/2012/0047)*⁴ the Tribunal accepted that the request was manifestly unreasonable as Salford City Council was able to demonstrate that to comply with the request would require it to review 2,715 pages. It was also argued that the information was intended for internal use and was not intended for external publication, which meant that to prepare it for disclosure would be problematic for Salford City Council. The Commissioner notes that the information involved in the Salford City Council case is significantly less than the information in this case, and accepts that it would not be straightforward to analyse all of the information held within the business case.
31. The Council also highlighted the First-Tier Tribunal case of *Dr Little v ICO and the Welsh Assembly Government (EA/2010/0072)*:

"38. It is clearly not possible to identify all the situations in which a request will be manifestly unreasonable. In the DBERR case, the Commissioner gave two examples of where a request may be

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<http://www.informationtribunal.gov.uk/DBFiles/Decision/i873/20121030%20Decision%20amended%2031-10-12%20EA20120047.pdf>

manifestly unreasonable because of the time involved in complying with it. The first is where the time required is clearly disproportionate to the importance of the issue at stake. The second is where the time required is so substantial that it would significantly interfere with the normal conduct of the authority's activities or entails a significant diversion of resources from other functions. The Additional Party in the DBERR case suggested that a request is manifestly unreasonable where it both imposes a significant burden on the public authority and either (i) has no serious purpose or value, and/or (ii) is designed to cause disruption, annoyance or harassment.

39. The Tribunal in that case accepted, as we do, that in these scenarios, the request may properly be described as being manifestly unreasonable. This is subject to two caveats, however. The first is that these should be regarded only as examples. Whether a request is or is not manifestly unreasonable must depend on the facts of each case. Second, in considering whether a request is manifestly unreasonable, it is not appropriate to embark on the public interest balancing exercise. Pursuant to regulation 12(1)(b), that must be undertaken only after it is clear that the exception is engaged.”⁵

32. The Tribunal in that case went on to say that the EIR does not require a public authority to comply with a request if doing so would significantly interfere with its normal functions. It added that, because compliance with the request would have required 57 days of the public authority's time in that case, it accepted the request would place a considerable burden on the public authority and divert significant resources from its statutory functions.
33. Regarding the two examples of manifestly unreasonable requests mentioned in paragraphs 38 and 39 of the Tribunal's judgement, it is clear that the second – that the time required is so substantial that it would significantly interfere with the normal conduct of the authority's activities or entails a significant diversion of resources from other functions – is particularly appropriate in this circumstance. The Commissioner has accepted that the request has a serious purpose and would be of value to the wider public interest. However, the question is

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[http://www.informationtribunal.gov.uk/DBFiles/Decision/i475/\[2010\]UKFTT_EA20100072_\(GRC\)_20101230.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i475/[2010]UKFTT_EA20100072_(GRC)_20101230.pdf)

- whether complying with the request would result in a significant diversion of the public authority's resources from other functions.
34. The Council has put forward its own estimate for the time and resources required to handle the business case in accordance with the EIR. It offered what it considered to be a minimum estimate of 3 minutes per page, which takes the total time required to 400 hours or 57 working days (at 7 hours per day). The Council has argued that the estimate of 3 minutes is a minimum mean average as there will be pages containing technical information which would require much longer to determine whether the information should be disclosed or withheld.
 35. The Commissioner is mindful that the Council would not necessarily be required to view all 8,000 pages of the business case, as it is likely that there would be some pages or possibly sections which would not require careful study as it would be clear that the information contained is not sensitive. Despite this, the Commissioner considers it would not be simple to determine whether the majority of the information contained in the business case should be disclosed. Therefore, the Commissioner has accepted that the Council's estimate is reasonable, and whilst it might later emerge that the figure is somewhat less than 400 hours he does not envisage that it would be significantly lower.
 36. To support its use of regulation 12(4)(b) the Council also explained the resources that would be needed to adequately handle this request. It stated that its Privacy and Information Law team employs two full-time solicitors with experience of working with complex requests, and that Council policy is that a solicitor consider public interest tests for any request under the EIR. It argued that handling this request would stop the solicitor from being able to take on other work and assist in the other requests that the Council receives, and this would be an unwarranted disruption upon the department's services. The Commissioner accepts this argument as valid and considers that it gives significant weight to the argument that the request is manifestly unreasonable. The amount of work involved would create a considerable disruption to the Council's ability to handle other requests and is viewed by the Commissioner as a significant burden upon the Council's resources.
 37. The Council also argued that it would be required to consult with the other partners involved in the project to determine their views on disclosure of the business case. It was argued that this would take an additional 105 hours, due to the number of other organisations involved and the complexity of the information contained within the business case. The Council also stated that it would be required to do

so, and failure to do so could result in Judicial Review proceedings being instigated.

38. The Commissioner is not convinced by the council's view that such lengthy consultations would be required. While he notes the number of partners involved and the speculative possibility of legal proceedings, it is ultimately the responsibility of the Council as the holder of the information to determine what should be disclosed and what can be withheld. However, the Commissioner does agree that consultations would be required as he would not expect the Council to have complete knowledge of all the information contained in the 8,000 pages of the business case, and accepts that time would need to be spent contacting other organisations involved in the project.

Commissioner's conclusion

39. When reaching his conclusion as to whether the request can be refused under regulation 12(4)(b), the Commissioner is mindful that the request must be manifestly unreasonable and not just lacking reason. This is a much higher burden of proof and one that requires evidence of a significant interference or disruption in the Council's regular duties.
40. The Commissioner has considered all of the arguments put forward in this decision. When determining whether the request is manifestly unreasonable he has afforded appropriate weight to the arguments for accountability and transparency, as well as the reasonable nature of the complainant's request. He has also noted that there is not much information about the Gateway Plus available in the public domain.
41. However, the Commissioner's decision is that the request is manifestly unreasonable. Whilst there is much in favour of the request it is absolutely clear that to handle it appropriately would be an unwarranted burden. The amount of information held, the work that would be required, and the impact upon the Council's resources shows that the request would cause a severe disruption to the Council's services, one that is not necessitated by factors in favour of the request.
42. As the Commissioner's decision is that the request is manifestly unreasonable he has gone on to consider the public interest test. The Commissioner notes that regulation 12(2) applies a presumption in favour of disclosure.

Public interest arguments in favour of disclosing the withheld information

43. As mentioned previously there is a public interest in transparency and accountability in projects which rely on public funds. Due to the

substantial amount of public money afforded to this project this argument carries significant weight.

44. The Commissioner is mindful that there is not much significant detail about the project in the public domain. He is of the view that disclosure of information within the business case – even taking into account information contained therein which may be withheld under 12(5)(d) and 12(5)(e) – would help improve the public's knowledge about the project and would inform public debate about use of public resources.

Public interest arguments in favour of maintaining the exception

45. It has been demonstrated that for the Council to handle the request within the provisions of the EIR would require a substantial amount of Council resources. These resources would have to be diverted away from handling other requests and the other functions and duties of the Council. The Commissioner does not consider that this would be in wider interests of the public, and is of the view that the handling of manifestly unreasonable requests is rarely in the public interest.

Balance of public interest test

46. Having considered the relevant public interest test the Commissioner's decision is that the public interest favours maintaining the exception. There is a strong public interest in ensuring that the Council can maintain sound administrative practices, and this would be disrupted through the volume of work required in handling the complainant's request.
47. As the public interest test favours maintaining the exception, the Commissioner's decision is that the Council is entitled to refuse the request under regulation 12(4)(b). No further action is required.

Other matters

Inaccurate position regarding information held

48. The Council's original response to both the complainant and the Commissioner was that no information was held. Given the amount of relevant information that has since emerged the Commissioner considers that the Council should have been able to determine earlier that it held information relevant to the complainant's request. He asks that in future the Council makes greater attempts to identify potential relevant information.

Can the information be obtained from Network Rail?

49. In its internal review the Council referred to the Commissioner's decision FER0087031⁶ which stated that Network Rail was a public authority under the terms of the EIR. However, this decision was successfully appealed to the First-Tier Tribunal and so Network Rail is not considered to be a public authority under the terms of the EIR⁷ (there have been no further decisions on this matter to date). This means that the complainant can ask for information from Network Rail but is not afforded the rights of access provided by the EIR.
50. The Commissioner does not expect every public authority to be knowledgeable of every decision from the First-Tier Tribunal. However, he would expect a public authority to check to make sure a decision it was referring to was still relevant.
51. Whilst the Council's position is that the information is held by Network Rail, the Commissioner will determine whether the Council holds any relevant information.

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[http://www.ico.org.uk/~media/documents/decisionnotices/2006/DECISION_NOTICE_FER0087031.ashx](http://www.ico.org.uk/~/media/documents/decisionnotices/2006/DECISION_NOTICE_FER0087031.ashx)

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<http://www.informationtribunal.gov.uk/DBFiles/Decision/i102/Network%20Rail.pdf>

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: GRC@hmcts.gsi.gov.uk

Website: <http://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

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