

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 4 October 2016

Public Authority: Cornwall Council
Address: County Hall
Truro
TR1 3AY

Decision (including any steps ordered)

1. The complainant has requested the location of a named council officer on a given day, reports relating to a specified planning application, and correspondence between the named council officer and third parties. Cornwall Council (the council) initially withheld the location of the officer under regulation 13 as it considered that it was personal data, it provided some information and withheld other material under regulation 12(4)(b) as it would be manifestly unreasonable to provide the information. The complainant asked the Commissioner to investigate the application of regulation 12(4)(b).
2. The Commissioner's decision is that the council was correct to rely on the exception in this case to withhold the requested information.

Request and response

3. On 21 April 2015 the complainant made the following request for information under the FOIA for:

"1. I made a request for information as to the location of [named council officer] on 5/2/15. This is an important issue as it brings into question the honesty of a publicly employed person. I therefore wish to have this information.

2. All reports e.g. ecologist reports, highways etc are matters of public interest with regards to this case and should therefore be placed on the

Council's Planning websites. Why are these not already on there? I would be happy for them to be placed online as this is where they should be. If not I would like copies of these and any other documentation.

3. I wish to have all the correspondence between [named council officer] and third parties (both internal and external) with regards to this case as well as any deleted documents. Clearly all information will be placed within an electronic folder and should be easily accessible."

4. Following a decision notice on the matter (FER0582758)¹, the council responded on 2 February 2016 and relied on Regulation 12(3) to withhold the information at part 1 and Regulation 12(4)(b) to withhold the information at part 3. The council provided links to the information requested at part 2.
5. The council provided an internal review on 8 March 2016 in which it maintained its original position.

Scope of the case

6. The complainant contacted the Commissioner on 28 April 2016 to complain about the way his request for information had been handled. This complaint relates to a previous complaint in which the Commissioner found that the council had failed to treat the request as a new request, rather than a request for internal review. The Commissioner therefore ordered the council to issue a response to the request. The complaint in this case is about that response. The complainant has asked the Commissioner to consider whether the information should have been disclosed to him.
7. During the course of the investigation, the council disclosed information requested at part 1, and the complainant agreed that he was satisfied with the council's response on this. Therefore, the only part of the request that remains to be considered in this notice is part 3.
8. The Commissioner considers the scope of the case to be to determine whether the council has correctly applied the exception at regulation 12(4)(b) to the information requested at part 3.

¹ FER0582758 - https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1560422/fer_0582758.pdf

Reasons for decision

Regulation 12(4)(b) – manifestly unreasonable request

9. Regulation 12(4)(b) says that a public authority may refuse to disclose environmental information if the request is 'manifestly unreasonable'.
10. The Commissioner considers that the regulation will typically apply in two sets of circumstances: firstly, where a request is vexatious; or secondly, where compliance meant a public authority would incur an unreasonable level of costs, or an unreasonable diversion of resources. In this case, the Council has argued that responding to the request would place an unreasonable burden on resources. It has also made arguments relating to the negative cumulative effect the requests and enquiries made by the requester have had on the council, culminating in this request.
11. Unlike the FOIA and specifically section 12, the EIR does not contain a provision that exclusively covers the time and cost implications of compliance with a request. The considerations associated with the application of regulation 12(4)(b) of the EIR instead are broader than section 12 of the FOIA. In particular the Commissioner recognises that there may be other important factors that should be taken into account before a judgement can be made that environmental information can be withheld under the exception.
12. Under the EIR, there is no statutory equivalent to the "appropriate limit" – the cost limit beyond which a public authority is not obliged to comply with a request – described at section 12 of the FOIA. Therefore it is important to consider other factors such as the proportionality of the burden on the public authority's workload, taking into consideration the size of the public authority; the requirement, under regulation 12(1) of the EIR, to consider the public interest test; the EIR's express presumption in favour of disclosure; and the individual circumstances of the case.
13. Whilst The EIR does not contain a limit at which the cost of compliance with a request is considered to be too great, the Commissioner's guidance suggests that public authorities may use The Freedom of Information and Data Protection (Appropriate Limit and fees) Regulations 2004 ("the Regulations") as an indication of what Parliament considers to be a reasonable charge for staff time. The Regulations specify that £450 is the appropriate limit for local government authorities, and that the cost of complying with a request should be calculated at £25 per hour; this applies a time limit of 18 hours.

14. For the purposes of the EIR, a public authority may use this hourly charge in determining the cost of compliance. However, the public authority is then expected to consider the proportionality of the cost against the public value of the request before concluding whether the request is manifestly unreasonable.
15. In addition to this, the prescribed activities set out in the Regulations do not apply to the EIR, and therefore when calculating the time it would take to comply with the request, the public authority may include any activity that it needs to undertake to fulfil the request. This includes the time taken to determine whether any exceptions apply, as well as the time to locate, retrieve and extract the information.

Is the exception engaged?

16. The council initially informed the complainant that it estimated it would take 63 hours to respond to part 3 of the request.
17. It stated that there are 424 emails falling within the scope of the request. It advised that these would each in turn need to be reviewed to see if any exemptions would need to be applied and it was established that each email would take 5 minutes to review each email totalling 2120 minutes.
18. It was also established that file checks within the council's corporate filing database would need to be undertaken. The council calculated that there are 168 documents to check at 5 minutes each totalling 840 minutes.
19. The council also explained that due to the nature of some of the information held, it would need to undertake third party consultation as well as liaising with council officers. It estimated that this would take approximately 615 minutes. This includes 11 third parties (at 15 minutes each) and 15 officers (at 30 minutes each). The rest of time estimated was due to mail meter searches, logging and processing the request as well as seeking final sign off, at 210 minutes in total. This totals 63 hours.
20. The Commissioner asked the council to undertake a sampling exercise in order to provide a realistic estimate based on cogent evidence.
21. The council has explained that the requested information can be located in the relevant electronic planning file on its 'UNIFORM' system; the results of a mail meter search, and individual searches of relevant officers own records for any additional information held outside these sources.

22. Based on information at these locations, the council then sampled 10% of the requested information which consisted of 40 emails from the email audit system and 20 documents from the Online Planning file system. The total time taken to locate, extract and retrieve the information in the sample was 3 hours and 42 minutes. The council used this figure to produce a more accurate overall time estimate to review all the information, giving an overall figure of 37 hours.
23. The council acknowledged that this is obviously under its original time estimations however it confirmed that it still feels that regulation 12(4)(b) applies in this instance.
24. As much of the time the council had included in its estimate was concerned with determining whether exceptions apply, the Commissioner asked the council to confirm the likelihood of an exception applying, and advise which exceptions were likely to apply.
25. The council confirmed that following the sampling exercise, it was able to determine that the exceptions in play were regulation 12(3) personal data, regulation 12(4)(e) internal communications, and regulation 12(5)(f) voluntary supply of information provided by third parties.
26. It said that regulation 12(3) was likely to apply to the names and contact information of people raising queries with the planning application, as well as the names and work contact details of back office council staff.
27. With regard to regulation 12(4)(e) the council said that this was likely to apply to internal emails between council officers and elected officials at the council debating the best way forward for the application.
28. The council argues that regulation 12(5)(f) may also apply in respect of the third parties who have made comments on the planning application and have done so with the expectation that the information will be treated in confidence. The council advised that these third parties range from the school about which the planning application relates, to third party organisations.
29. In deciding whether the request was manifestly unreasonable, the council has also considered the wider circumstances of the request. It has explained that the planning application to which this request relates has been subjected to other forms of independent investigation. The Commissioner notes that the complainant's house is adjacent to the proposed all weather sports pitch, and that throughout the planning process; he has raised concerns primarily about the noise impact on his family and other residents.

30. The council argues that the background of the complainant's interactions with the council on the matter has had a cumulative effect on the burden this request has on the council's resources. The council has said that the requests and other correspondence regarding the planning permission have taken a scattergun approach, and that dealing with them has placed a high cost and burden on the council up to the date of the request in question here.
31. The complainant has had extensive dealings with the council regarding the planning application over the last two years. This includes extensive correspondence, requests for information, complaints which have been seen through the council's internal complaints system and which have in turn been referred to the Local Government Ombudsman. In addition to this, the planning decision has been challenged by the complainant via the Judicial Review process.
32. The council therefore considers that a significant proportion of the council's resources have already been expended in dealing with the requester on the matter of this planning permission. To this end, the council wrote to the complainant in June 2015, following this request but prior to the response, asking him to modify his behaviour and assigning a single point of contact.
33. The council has also argued that the request being made during the process of the Judicial Review, which he instigated, indicates an unwillingness to accept the decisions and findings that have been made in relation to the planning application. The council is therefore of the view that this request is unreasonably persistent. As such when the time taken to comply with the request is added to the time and resources expended on this matter, the council does not consider that it would be proportionate to comply with the request.
34. The Commissioner accepts that the time it would take to respond to the request, and the likelihood that a number of exceptions apply means that the exception at 12(4)(b) is engaged, particularly in light of the background to the request and the complainant's dealings with the council more broadly.

Public interest considerations

35. As stated above, unlike section 12 of the FOIA, regulation 12(4)(b) does not simply require the public authority to prove that the time it takes to respond to the request will exceed a specified amount of time or a set cost limit. The public authority must also consider the proportionality of the cost of the request against its value to the public.

Public interest in maintaining the exception

36. It is the council's position that the estimated time it would take to comply with the request would expose it to an unjustified level of distress, disruption or irritation. It argues that complying with the request would place a strain on resources which could prevent the council from delivering main stream services or answering other requests, particularly in light of the time spent dealing with the complainant's preceding requests and enquiries.
37. The council sees this burden as disproportionate particularly in light of the two years of engagement it has had with the complainant on the matter of the planning permission and the various associated requests, complaints and enquiries with both the Planning Department and Legal Services. The Commissioner therefore recognises that the decision to refuse this request as manifestly unreasonable could be seen as a decision to defend the council from further costs in addition to those already expended.
38. In addition to this, the council is of the opinion that the public interest in the information requested by the complainant has been served by the independent investigations both within the council and externally, such as the Judicial Review. Indeed, it has suggested that since the complainant brought the Judicial Review against the council, he would likely have been provided with access to much, if not all of the information requested.
39. The council believes that the requester refuses to accept the decisions and findings of the council and independent bodies in respect of the planning application in general, and this is why he has requested the information, and why he continues to pursue the request despite the independent courses of action that have been taken in respect of it.
40. The council argues therefore that the continued requests, such as this one, serve little or no public interest; rather they are designed to further the personal interests of the requester and his desire to overturn the planning permission. It has said that the request also represents part of an unfounded allegation against the named officer. The Commissioner has seen the complainant's correspondence to the council in which he stated that the named officer "*mislead, misinterpreted and misdirected public officials.*" The council has also suggested that the part of the request which asked for the location of the officer on a given day is part of the complainant's personal complaint about them. The Commissioner also notes that the Judicial Review also considered these concerns, but did not find in the complainant's favour on these points

Public interest in disclosure

41. The council has identified general public interest arguments in favour of disclosing the information. It acknowledges that disclosure could:
- Promote openness and transparency,
 - allow the public to understand decision making processes,
 - allow the public to understand how finances are spent,
 - allow the public to understand how planning matters are dealt with, and
 - promote a greater awareness and understanding of environmental matters.
42. In correspondence with the council in January 2016, shortly after the decision notice FER0528758 ordered the council to respond to the request, the complainant put forward arguments in favour of disclosing the information. He argued that there is a wider public interest to his request, and therefore the estimated time it would take to comply would be proportionate. He argues that there is a public interest in disclosing environmental information *"because it supports the right of everyone to live in an adequate environment."* He argues that this is an important case, and the presumption should therefore fall on disclosure.
43. He explained that over 120 people have written to the council to object to the planning permission, and that more than 300 people have signed a petition against it. He therefore considered that there was a strong public interest in disclosing the reasons why the development was granted. He has argued that the officer he named in his request had ignored the advice of environmental health officers and in doing so has potentially put the health of local residents at risk from noise and light pollution. He adds that the named officer *"mislead, misinterpreted and misdirected"* council officials, and therefore the requested information needs to be disclosed.
44. The complainant also argued that the Local Government Ombudsman was *"clearly so concerned by Cornwall Council's behaviour that they opened an investigation into this planning application."* He stated that it is a matter of public interest to understand why a planning officer behaved in this manner, and if there is systematic and ingrained misconduct in the planning department.
45. With regard to the council's position that the time it would take to respond to the request is disproportionate, the complainant has suggested that either the estimate is disingenuous or the council has

created a dysfunctional system to ensure that transparency is impossible.

46. He reiterated most of these arguments when the Commissioner invited him to submit his public interest arguments. He added that the costs of the Judicial Review to the council, and therefore to the tax payer, which he estimates as in excess of £30,000, justifies the council releasing the documents. He suggests that this would ensure that tax payers are not forced again to pay for the council's mistakes.
47. He also added that his view was that the information should already be in the public domain, given the circumstances of the Judicial Review Judgement which found that the council had made an error in one aspect of the planning permission, and the cost to the tax payer.
48. He acknowledged that it may well be '*tiresome*' for the council to provide him with the requested information, but he argues that it is '*more tiresome for the public to see day centres being closed down, children's services being reduced, old age care being limited etc., because [the council] cannot behave in a lawful manner.*'

Balance of the public interest

49. The Commissioner recognises that whilst the complainant has put forward public interest arguments, these relate primarily to a public interest in being assured that the planning application process was handled in accordance with the law. This is a process which has now been reviewed by the High Court. It is clear to the Commissioner that the complainant has invested heavily both financially, and in time and energy as he has been pursuing the planning application for some time. Whilst recognising the accountability arguments that the requestor has submitted, the reasons for him being against the planning permission are for the most part personal as they relate to the health of his family. The Commissioner therefore finds that whilst there are some general public interest arguments in favour of disclosing the information, the complainant also has a very personal reason for requesting the information as part of his desire to have the planning permission overturned.
50. In the matter of the Judicial Review of the planning application, the complainant informed the Commissioner that he was awarded costs "*due to an unlawful condition*" that the council had applied. The Commissioner has had sight of the Judgment and notes that the Mr Justice Gilbert refused to make an order quashing the planning

permission.² However, he did find the complainant successful in that one of the conditions of planning permission was *"unacceptable"*. It is in relation to this specific aspect that the complainant was awarded costs. However, the Commissioner notes that the remaining aspects of the Judicial Review were unsuccessful.

51. The complainant argues that the public deserves to know the truth about a planning application that he says was found to be unlawful in the High Court. The Commissioner considers that the very fact that the planning permission was subject to a Judicial Review, and that the judgment is a publically available document goes a long way to serve the public interest in the planning permission and associated information. She notes in particular that the Judicial Review covered concerns about the information put before the planning committee by the named council officer, and whether the committee was misled. She recognises that the Judgement had not been handed down at the time of the request or the response, but she understands that the complainant began the process of applying for a Judicial Review in October 2013.
52. The Commissioner finds that the fact that the complainant himself instigated a Judicial Review of the planning permission shows how strongly he feels about the matter. However, she observes that the fact that the Judicial Review covered the points he has raised concerns about is evidence that the matters have already received scrutiny via one of the highest authorities available.
53. In addition, the fact that the complainant has pursued this matter to the Local Government Ombudsman (as well as the Judicial Review), means that the public interest in knowing whether the planning permission was properly and fairly granted was being met through these other avenues.
54. Consequently, the Commissioner cannot see that asking the council to carry out the hours of work required to comply with the request, on top of the resources already expended in dealing with the related requests and other interactions with the complainant on this matter would be proportionate in this case.
55. The Commissioner has had regard to the arguments of both parties in this case, and finds that on balance, and the disruption and burden that the request would cause would not be justified by the level of public interest that exists. She finds that the request is manifestly unreasonable.

² [2016] EWHC 1264 (admin)

Right of appeal

56. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

57. 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.
58. 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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