

## Environmental Information Regulations 2004 (EIR)

### Decision notice

**Date:** 5 October 2017

**Public Authority:** Coventry City Council

**Address:** Council House  
Earl Street  
Coventry  
West Midlands  
CV1 5RR

#### Decision (including any steps ordered)

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1. The complainant made a request to Coventry City Council (the Council) for information on a proposed new road. The Council refused to provide the requested information and cited regulation 12(4)(b).
2. The Commissioner's decision is that the Council is entitled to rely on the exception at regulation 12(4)(b) and, in the specific circumstance of this case, the public interest lies in maintaining the exception.
3. The Commissioner finds that the Council did not provide adequate advice and assistance as required under regulation 9 of the EIR. She requires the Council to provide reasonable advice and assistance to aid the complainant in refining his request.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

#### Request and response

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5. On 5 April 2016, the complainant wrote to the Council and requested information in the following terms:

*"Under the provisions of the Environmental Information Regulations, please provide all information that you hold relating to such a potential*

*new road development. This would include any reports, plans, cost-benefit analysis and possible route option information. This will include the documentation within which the claimed merits of such a road have been "identified", and any evidence claimed to substantiate such merits. The information may be held independently by Coventry council or will be included in communications to or from other public agencies."*

6. The Council responded on 4 May 2016 and refused to provide the requested information citing the following exceptions:
  - Regulation 12(4)(d)<sup>1</sup>
  - Regulation 12(4)(e)<sup>2</sup>
  - Regulation 12(5)(e)<sup>3</sup>
7. The Council provided an internal review on 15 June 2016 in which it maintained its original position.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 16 July 2016 to complain about the way his request for information had been handled.
9. During the course of the investigation, it became apparent to the Commissioner that not all information held by the Council had been considered for disclosure. Following further questioning by the Commissioner, the Council confirmed that it also held a large amount of correspondence related to the proposed new road. It explained that in order to avoid applying regulation 12(4)(b)<sup>4</sup> on the basis of costs, the Council had restricted its searches to the documents named in the request (*"reports, plans, cost-benefit analysis and possible route option information"*).

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<sup>1</sup> the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data

<sup>2</sup> the request involves the disclosure of internal communications

<sup>3</sup> a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest

<sup>4</sup> the request for information is manifestly unreasonable

10. The complainant confirmed to the Commissioner that he did not accept the Council's interpretation of his request and considered that further information should have been considered, specifically, correspondence by the Council regarding the proposed new road.
11. The Commissioner notes that the complainant specifically stated "*all information*" held by the Council in relation to the new road. She considers that the Council was incorrect to refine the request without informing the complainant or providing him with the opportunity to refine his request such that it is useful to him.
12. The Council then sought to rely on regulation 12(4)(b) of the EIR as it considered it would be manifestly unreasonable to make all information held on the proposed new road.
13. The Commissioner therefore considers the scope of the investigation to be whether the Council are entitled to rely on regulation 12(4)(b) to refuse to comply with this request.

## **Background**

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14. At the time of the request, the Council was considering a proposal for a new road linking the A46 with either the A452 or A45. The complainant set out the content of his request by proving the Council with an agenda for a Council meeting which stated that "*proposal should take account of the potential for a new road linking the A46 Stoneleigh Junction with Kirby Corner and subsequently to the A452 and A45*".

## **Applicable legislation**

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15. As the request is for information relating to a proposed new road, the Commissioner considers that the withheld information is caught by the definition of environmental information at regulation 2(1)(c)<sup>5</sup>. The Council was therefore correct to handle the request under the terms of the EIR.

## **Reasons for decision**

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<sup>5</sup> <http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made>

16. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose environmental information to the extent that the request for information is manifestly unreasonable.
17. The EIR do not provide a definition of "*manifestly unreasonable*". The Commissioner considers that in order for a request to be considered "*manifestly unreasonable*", there must be a clear and obvious unreasonable element to the request.
18. A request can be manifestly unreasonable for two reasons: where the request is vexatious and where the public authority would incur unreasonable costs or an unreasonable diversion of resources. The Council has sought to rely on the exception on the grounds of the costs of compliance.
19. Unlike the Freedom of Information Act 2000 (FOIA), there is no appropriate cost limit under the EIR and the application of the exception should be based on a consideration of the proportionality of the cost with respect to the request and the wider value in the requested information being made available.
20. The Commissioner considers the appropriate limit set for requests falling under the FOIA to be a useful starting point when determining whether a request is manifestly unreasonable under the EIR.
21. The appropriate limit is defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations) as £600 for Central Government departments and £450 for all other public authorities.
22. The Regulations state that where the cost of complying lies in the staff time required to comply with the request, public authorities should apply a flat rate of £25 per hour, equivalent to more than 24 hours work for Central Government departments and 18 hours for other public authorities.
23. Whilst the Commissioner will take the appropriate limit into account, it is not determinative for the purposes of the exception. The Commissioner must make her decision based on whether the cost complying with the request is 'clearly' or 'obviously' disproportionate to the public interest in disclosure.

### **The Council's position**

24. The Council explained that it was not possible to provide a detailed estimate of the time required to provide all of the information as it had not, as yet, identified all of the email correspondence that may exist pertaining to the named project.

25. The Council explained that it had undertaken a limited exercise to identify the emails relating to the project in one staff member's email account. The staff member is a senior officer in the Transportation team. The Council located 1006 emails relating to the A46 project dated between 2009 and April 2016.
26. The Council estimated that an average of 2 minutes per email would be required to identify emails falling within the scope of the request. The Council explained that this would exceed 33 hours of staff time to locate emails within one staff member's email account.
27. The Council further explained that reviewing the located emails, reviewing the information and redacting where necessary would take considerably longer than 2 minutes per email. The Council explained that it considered 5 minutes per email would be a modest average required to perform these tasks, this would amount to nearly 84 hours (or 11 working days) to deal with one officer's emails.
28. The Council confirmed that it considered that five other team members and one councillor would be required to perform this task. The Council also explained that it was aware of three staff members, who had subsequently left the Council, whose email accounts may be accessible.

### **The Commissioner's position**

29. The Commissioner has reviewed the Council's arguments and her own guidance when considering whether the exception at regulation 12(4)(b) is engaged.
30. The Commissioner's guidance for section 12<sup>6</sup> of the FOIA states at paragraph 21:

*"A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate"*
31. The Commissioner considers this guidance also applies when assessing regulation 12(4)(b) of the EIR in relation to the cost of compliance.
32. The Commissioner is not persuaded by the estimate of 2 minutes per email to identify whether each email falls within the scope for the

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<sup>6</sup> [https://ico.org.uk/media/for-organisations/documents/1199/costs\\_of\\_compliance\\_exceeds\\_appropriate\\_limit.pdf](https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf)

request. She considers that with a project of this scale, it will likely be rapidly apparent that an email will fall within the scope of the request.

33. She will, however, accept an estimate of 2-5 minutes per email to review the emails falling within the scope of the request and redact where appropriate.
34. Unlike FOIA, there are no restrictions on the activities that can be included in a costs estimate under the EIR. However, as set out in paragraph 29, the estimate must be reasonable.
35. The Commissioner has taken into account the time it would take the Council to consider whether any information in scope is exempt. The Commissioner considers that it would be reasonable to include redaction burden in the specific circumstances of this case.
36. The Council has previously explained to the Commissioner that the project was in its early stages and it would be likely to rely on other exceptions under the EIR, namely the exceptions named in paragraph 6 of this notice, for a significant portion of the information held.
37. The Commissioner, therefore, considers the Council's estimate of 2-5 minutes per email to locate, identify, review and, where necessary, redact the information to be a reasonable estimate.
38. The Commissioner has given consideration to the Council's explanation that the 1006 emails located are the emails located by one staff member only. This results in a minimum of 1006 emails that would require review and is likely to be far in excess of this figure as the Council considers that at least a further five staff members and one councillor will be required to undertake this activity. The Council also confirmed that it was aware of three other staff members who had since left the organisation and emails could be accessed if required.
39. The Commissioner has also given consideration to regulation 7(1)<sup>7</sup> of the EIR which states:

*Where a request is made under regulation 5, the public authority may extend the period of 20 working days referred to in the provisions in paragraph (2) to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is*

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<sup>7</sup> <http://www.legislation.gov.uk/ukxi/2004/3391/regulation/7/made>

*impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so.*

40. The complainant has set out to the Commissioner that he considers that public authorities should not be able to apply regulation 12(4)(b) on the basis of staff time as the EIR provides for an extension of time for voluminous or complex cases.
41. The Commissioner acknowledges that there will be cases where the appropriate route would be to use the extension at regulation 7(1) rather than refuse to comply under regulation 12(4)(b). However, she considers that the extension at regulation 7 cannot provide for an absolute requirement for all requests to be complied with simply because the public authority has the option to extend the time in which it must respond.
42. In the specific circumstances of this case, she considers that it would still not be reasonable to expect the Council to comply with this request within 40 working days.
43. The Council has explained that it estimates that one officer's emails would require between 33 and 84 hours to locate, identify, review and redact. The Commissioner notes that a further six, possibly nine, email accounts would need to be searched and relevant emails reviewed. Therefore it is likely that the Council would require weeks of staff time diverted to handling one request. She has also taken into consideration that the Council's estimates are based solely on the emails located and have not included the time spent reviewing the information previously located and provided to the Commissioner.
44. The Commissioner is, therefore, satisfied that regulation 12(4)(b) is engaged.

### **Public interest test**

45. Regulation 12(4)(b) is a qualified exception and is therefore subject to the public interest test at regulation 12(1)(b) of the EIR which states that information can only be withheld if in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure. Regulation 12(2) states that a presumption in favour of disclosure must be applied.

### **Public interest arguments in favour of disclosure**

46. The Council acknowledged the presumption in favour of disclosing environmental information. It explained that it considered a decision to refuse access to environmental information should not be taken lightly. It also set out that complying with the request would promote



transparency and accountability and would encourage participation in decision making and encourage a free exchange of views.

### **Public interest arguments in favour of maintaining the exception**

47. The Council explained that it considered that it was not in the public interest to divert resources, in particular senior officers' time, from core activities in order to undertake the activities required to comply with this request.
48. The Council set out that public services have a duty to use their resources effectively and it did not consider the time required to comply with this request to be an effective use of its time.
49. The Council also explained that it considered that it is likely that the disclosure of emails located would provide very little, if any, addition information beyond that which is now in the public domain, or likely to be in the future and would place a disproportionate burden on the Council.

### **Balance of the public interest test**

50. In the guidance produced by the Commissioner regarding regulation 12(4)(b)<sup>8</sup>, she explains that the public interest in maintaining the exception lies in protecting public authorities from exposure to disproportionate burden or to an unjustified level of distress, disruption or irritation in handling information requests. The Commissioner continues by acknowledging that dealing with manifestly unreasonable requests can place a strain on resources and get in the way of public authorities delivering mainstream services or answering other requests.
51. A public authority should, however, expect to bear some costs when complying with a request and this expectation must adjust to the importance of the environmental information to the public. For the sake of the public interest test, the key issue is whether in all circumstances of the case the cost that must be borne in complying with the request is disproportionate.
52. The Commissioner considers it is vital not to downplay the significance of the requested information and the importance of ensuring transparency and accountability for the Council's decisions. She does,

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<sup>8</sup> <https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf>



however, accept that to require the Council divert the amount of staff time estimated from its usual functions would be unwarranted bearing in mind the fact that, at the time of the request, the decision making process was not complete and the Council had a clear intention to publish information as part of public consultation in conjunction with Warwickshire County Council. The Commissioner notes that information has subsequently been made available regarding the project<sup>9</sup>.

53. The Commissioner also considers that whilst there is significant public interest in disclosure of information regarding the proposed new road, this public interest does not extend to providing copies of every single piece of information that relates to the project. It is not necessary for the public to review and scrutinise all information ever held by a public authority to obtain transparency and accountability of an authority's decision.
54. In the specific circumstances of this case, the Commissioner considers that the public interest in maintaining the exception outweighs the public interest in disclosure.
55. The Commissioner notes, however, that the Council failed to provide any advice or assistance to aid the complainant in refining his request and has, therefore, breached regulation 9 which states:  
  
*(1) 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.*  
  
*(2) Where a public authority decides that an applicant has formulated a request in too general a manner, it shall*  
  
*(a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and*  
  
*(b) assist the applicant in providing those particulars.*
56. The Commissioner requires the Council to provide the complainant with reasonable advice and assistance regarding refining his request.

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<sup>9</sup> [www.warwickshire.gov.uk/a46linkroad](http://www.warwickshire.gov.uk/a46linkroad)

## Regulation 14 and 11: Statutory timeframes

57. Regulation 14 of the EIR states:

*"(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.*

*(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request."*

84. Regulation 11(4) of the EIR states:

*"A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations. "*

58. The complainant stated that he considers the Council has breached regulation 14 and 11 by not providing its responses *"as soon as possible"*.

59. The Commissioner recognises that although a request may appear to be simple to the applicant, the burden on a public authority may be such that it is not able to respond in a short period of time.

60. The First-Tier Tribunals states in case EA/2013/0226<sup>10</sup>:

*"7. In our judgement, whichever time limit applies, it is necessary to be realistic. Whilst both pieces of legislation contemplate a speedy response, the urgency intended is not such as to require a public authority to "drop everything" in order to reply".*

61. Paragraph 37 of the Upper Tribunal decision *John v Information Commissioner and Ofsted* [2014] UKUT 0444 (AAC)<sup>11</sup> considers the requirement to respond *"promptly"* as required under section 10 of the Freedom of Information Act:

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<sup>10</sup>

<http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i1208/014%20140214%20Decision.pdf>

<sup>11</sup>

<http://administrativeappeals.decisions.tribunals.gov.uk//judgmentfiles/j4320/GIA%202397%202014-00.doc>

*“The context of section 10(1) is concerned with time rather than attitude, although the latter can have an impact on the former. It is too demanding to expect a public authority to respond immediately. That would be unattainable. In the context, promptly is more akin to without delay. There are three factors that control the time that a public authority needs to respond. First, there are the resources available to deal with requests. This requires a balance between FOIA applications and the core business of the authority. Second, it may take time to discover whether the authority holds the information requested and, if it does, to extract it and present it in the appropriate form. Third, it may take time to be sure that the information gathered is complete. Time spent doing so, is not time wasted. FOIA is important legislation that imposes obligations on public authorities; they are entitled to take time not only to find the information requested but to ensure as best they can that there is nothing more to be found. It is then necessary to complete the administrative and bureaucratic tasks of presenting the information and obtaining approval for release.”*

62. Although the Upper Tribunal decision is regarding the statutory timeframe for Freedom of Information, the Commissioner considers the reasoning to apply equally to the EIR.
63. In this case, the Council responded on the twentieth working day following receipt of the request and provided the internal review within the statutory 40 working day timeframe. The Commissioner considers it would be disproportionate to ask the Council for its reasons for the timing of its responses as she has no concerns or evidence that the time taken was a deliberate attempt to delay its response.
64. She considers that the Council has not therefore breached the statutory timeframes set out in the EIR.

#### **Regulation 4: Dissemination of environmental information**

65. Regulation 4 of the EIR states:

- (1) *Subject to paragraph (3), a public authority shall in respect of environmental information that it holds-*
  - (a) *progressively make the information available to the public by electronic means which are easily accessible; and*
  - (b) *take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information.*
- (2) *For the purposes of paragraph (1) the use of electronic means to make information available or to organize information shall not be*

*required in relation to information collected before 1st January 2005 in non-electronic form.*

- (3) *Paragraph (1) shall not extend to making available or disseminating information which a public authority would be entitled to refuse to disclose under regulation 12.*
- (4) *The information under paragraph (1) shall include at least-*
- (a) *the information referred to in Article 7(2) of the Directive; and*
  - (b) *facts and analyses of facts which the public authority considers relevant and important in framing major environmental policy proposals."*
66. The complainant set out that he considered that the Council had not fulfilled its obligation under regulation 4 to proactively publish environmental information.
67. The Commissioner has considered whether she has the jurisdiction to issue a decision requiring a public authority to make available information otherwise than in a response to a request for information.
68. The First-Tier Tribunal considered the Commissioner's jurisdiction to determine this issue in case EA/2016/0310<sup>12</sup>, Dr Thornton v The Information Commissioner. Paragraph 43 states:
69. *"FOIA section 50 (as applied to EIR by regulation 18) provides that a complaint may be made to the Information Commissioner if an information request is thought to have been dealt with in a manner that is inconsistent with the requester's right to have information disclosed on request. Clearly a complaint that voluntary publication has not been effected cannot, by definition, arise from an information request. It is of course open to the Information Commissioner to consider, under FOIA section 52, whether a public authority has complied with any of the requirements of Parts 2 and 3 of the EIR (which will include obligations to publish environmental information under regulation 4). And if that leads to the conclusion that the public authority is in default, an enforcement notice may be issued."*

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2008/Thornton,%20Paul%20EA-2016-0310%20\(22.5.17\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2008/Thornton,%20Paul%20EA-2016-0310%20(22.5.17).pdf)

70. The Tribunal did not come to a conclusion regarding the Commissioner's jurisdiction, however, the above paragraph leads to the logical conclusion that a decision notice cannot be issued for a complaint which does not originate from a request for information.
71. The Commissioner has, however, considered whether it would be proportionate to open a separate investigation with a view to determining whether an enforcement notice is required.
72. The wording of regulation 4 and article 7(2)<sup>13</sup> of the Directive appears to give discretion of when and, to a certain extent, what information should be published to the public authority that holds it.
73. The Commissioner notes that information has been made available by the lead authority for this project (Warwickshire County Council) for the stages of the proposal that it has been decided will progress<sup>14</sup>.
74. In the specific circumstances of this case, the Commissioner has no concerns regarding the Council's proactive publication and will not proceed any further with this complaint.

## Other matters

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75. The Commissioner would like to remind the Council that in circumstances where a request is likely to engage regulation 12(4)(b) or section 12 of the FOIA, in no circumstances should a public authority refine the request without first informing the applicant that the exception is engaged and providing them with the opportunity to refine the request in such a way that is useful and meaningful to them.
76. Following submitting a complaint to the Commissioner, the complainant wrote to the Council to ask it to provide the Commissioner with the withheld information and a submission regarding the Council's decision to withhold the requested information.
77. The Commissioner appreciates that the complainant's intention was to be helpful and assist in resolving the case in a timely manner, however, she asks that complainant to refrain from this in future cases. The Commissioner's officers review each case and request relevant

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<sup>13</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003L0004>

<sup>14</sup> <http://www.warwickshire.gov.uk/a46linkroad>

information upon allocation and the Commissioner does not consider it necessary for a complainant to request submissions from a public authority on her behalf.

## Right of appeal

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78. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

79. 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.
80. 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 .....

**Terna Waya**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**