

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

Decision notice

Date: 27 April 2017

Public Authority: City of York Council (the Council)
Address: West Offices
Station Rise
York
YO1 6GA

Decision (including any steps ordered)

1. The complainant made a request to the Council for all correspondence from officers and Councillors relating to the Groves chapel planning applications. The Council refused to comply with the request under regulation 12(4)(b) EIR.
2. The Commissioner's decision is that the Council has dealt with this request under the correct access regime and that it correctly applied regulation 12(4)(b) EIR to the request. It also complied with regulation 9 in the handling of this request.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 13 November 2016 the complainant made the following request for information under the EIR:

"I would like to see all correspondence, from officers and Councillors, in connection with the Groves chapel planning applications including pre-planning meetings with the developer, the NHS and as well as all other stakeholders and members of the public."
5. On 21 December 2016 the Council responded. It refused to comply with the request under regulation 12(4)(b) EIR and also because it said

that the information contained third party personal data (regulation 13 EIR).

6. The complainant requested an internal review on 10 and 14 January 2017. The Council sent the outcome of its internal review on 14 February 2017. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner 20 December 2016 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the Council dealt with the request under the correct legislation (the Council provided the Commissioner with a sample of information that would fall within the scope of the request to enable her to do this) and whether it has correctly applied regulation 12(4)(b) EIR to the request.

Reasons for decision

Regulation 2(1)

9. Regulation 2(1) defines environmental information in the following terms:

“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;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);
10. Upon viewing the wording of the request and the sample information provided by the Council, the Commissioner considers that information on the planning applications is a measure as defined in regulation 2(1)(c) that is likely to affect the state of the elements of the environment defined in regulation 2(1)(a). The Commissioner is therefore satisfied that the requested information is environmental and that the Council correctly dealt with this request under the EIR.

Regulation 12(4)(b)

11. Regulation 12(4)(b) EIR states that, "For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that...(b) the request for information is manifestly unreasonable;" The Commissioner's guidance on regulation 12(4)(b) states that:

"Under FOIA the cost of considering whether information is exempt cannot be taken into account under section 12 (the appropriate costs limit) but can be taken into account under section 14(1) (vexatious requests). This is because section 12 limits the activities that can be taken into account when deciding if the appropriate limit would be

exceeded. This is not an issue under the EIR. The costs of considering if information is exempt can be taken into account as relevant arguments under regulation 12(4)(b).¹"

12. A public authority may apply section 14(1) FOIA if the amount of time required to review the information to determine whether exemptions would apply to parts of it would impose a grossly oppressive burden on the organisation. However under EIR the cost and time implications of considering whether information is excepted can be taken into account under regulation 12(4)(b) EIR.
13. The Council can therefore take into account the cost of considering whether exceptions apply under regulation 12(4)(b) EIR.
14. The Council has referred to the cost limit set out under the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations) as a starting point to assess the reasonableness of this request. Whilst these Regulations do not apply under EIR, the Commissioner has recognised in her Guidance that "...we take these regulations to give a clear indication of what Parliament considered to be a reasonable charge for staff time."
15. The Regulations stipulate that a cost estimate must be reasonable in the circumstances of the case. The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. Public authorities can charge a maximum of £25 per hour to undertake work to comply with a request - 24 hours work for central government departments; 18 hours work for all other public authorities. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken to:
 - (a) determine whether it holds the information
 - (b) locate the information, or a document which may contain the information
 - (c) retrieve the information, or a document which may contain the information, and
 - (d) extract the information from a document containing it.

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

16. The Commissioner is satisfied that it is reasonable to use the Regulations as a starting point under EIR, but all of the circumstances of the case must be taken into account to determine whether a request can be deemed manifestly unreasonable on the grounds of cost under EIR.
17. The Council acknowledged that there is a general assumption in favour of providing environmental information and therefore considered the assessment of section 12(4)(b) on a calculation of time being in excess of the usual 18 hours allowed under the Freedom of Information Act (FOIA) in the first instance.
18. In this case it was considered that it would take in excess of 54 hours based on 650 emails being recovered and it taking an average of 5 minutes per email to check through each email line by line to identify whether information was contained which would not be appropriate for release and should be withheld under appropriate exceptions under the EIR.
19. The Council provided the Commissioner with a sample of emails, which included not only names of members of the public, but junior officers in the Council and other organisations. This information is not just contained in the contact details at the start and end of emails where it would be easily identified, but is also contained in the body of the text, meaning that the emails would need to be read in full to ensure that information that should not be released was properly identified.
20. It went on that the emails also contain internal communication where officers were considering options in the process of making decisions. This includes the process of making decisions which related to individuals and would be their personal data. It provided evidence of this in one of the samples provided to the Commissioner.
21. It is also considered that in some email conversations, although the decision for that situation may have been concluded, the issues being discussed would also be relevant to current and future cases, where the decision making process could be negatively compromised in a way which would be detrimental to the public interest, if the information was disclosed about how decisions are considered. It is considered that the exception at section 12(4)(e) would apply and the relevant information would have needed to be identified.
22. It is also considered that in these internal communications, the exception at 12(5)(e) would apply and have an aggregating affect when considering the public interest test. Again it provided the Commissioner with an example and explained that disclosure would have a significantly detrimental impact on the Council's ability to protect the public purse when negotiating and collecting contributions towards similar assets.

Information of this nature would need to be identified in the retrieved emails.

23. The Council has confirmed that there are 650 relevant emails to this request. It has provided a sample of these emails to demonstrate that they would have to be assessed, line by line, to determine whether exceptions applied to particular parts of the information. It has provided an example of emails within which it considers redactions would need to be made under 12(4)(e) and 12(5)(e) EIR, but it has also explained that the information contains personal data not just contained in the header and footer of the emails. Based upon this, the Commissioner is satisfied that the Council would be required to review the information line by line in order to determine whether any information would need to be redacted prior to disclosure.
24. The Council argued that it would take approximately 5 minutes per email to review it to determine what redactions would need to be made. It did say that from the sample provided, it can be seen that the size of the emails vary significantly, some being very brief where it would not take 5 minutes to identify any exceptions and others being much longer where it would take significantly longer than this. Upon reviewing the sample information provided, the Commissioner does not consider that it would take 5 minutes to consider the contents of all of the emails. Whilst some contain longer email chains, some are shorter and are unlikely to require significant redaction. The Commissioner does therefore consider that attributing a time of 5 minutes to all emails would appear to be a little excessive. However even if the Commissioner were to reduce the average time to 2.5 minutes per email this would still equate to over 27 hours work which is still well in excess of the 18 hour time limit set under FOIA.
25. The Commissioner is therefore satisfied that in this case, due to the volume of information requested and the fact that it is highly likely that redaction would be required prior to disclosure, regulation 12(4)(b) EIR is engaged in this case. The Commissioner has therefore gone on to consider the public interest test.

Public interest test

Public interest arguments in favour of disclosure

26. The Council argued that there is a strong public interest in the public being able to effectively participate in consultation and democracy, to understand how decisions are made and to ensure accountability. In addition to this the Council is currently working towards finalising the

Local Plan agreement and is conscious that understanding, transparency and accountability regarding planning related matters is a strong argument in favour of releasing relevant information, during this process.

27. However information relevant to the public interest has already been made available. A link to this information was provided to the complainant:

<https://planningaccess.york.gov.uk/online-applications//>

15/02833/FULM 15/02834/LBC 16/01540/FULM
AOD/16/00381 AOD/16/00380

Public interest in favour of maintaining the exception

28. The Council does not consider that it is in the public interest to impose a manifestly unreasonable burden upon it to comply with the request.

Balance of the public interest

29. The Commissioner considers that there is a public interest in transparency relating to information about the planning applications as this will impact individuals within this locality.
30. The Commissioner is aware that the Council has put some information into the public domain which goes some way to meeting the public interest in disclosure.
31. However there is a strong public interest in not placing a manifestly unreasonable burden upon public authorities and in this case due to the number of emails falling within the scope of the request and the likelihood that these will contain numerous pieces of information that will need to be redacted prior to disclosure, including third party personal data, which is not easily isolated without a line by line review, it would be manifestly unreasonable to comply with it.
32. On balance the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exception.

Regulation 9 – advice and assistance

33. Regulation 9(1) states that; “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.”
34. In relation to advice and assistance, the Council explained to the complainant that it would be able to consider a maximum of 216 documents including letters and emails. Therefore if he wanted to submit a new request within specific time periods, for example a 2 month period, or a random sample of 8 – 10 emails taken from each month over a 12 month period, or correspondence to and from a named officer, this may reduce the scope of the request to a level the Council may be able to respond to.
35. The Commissioner does consider that the Council has provided the complainant with advice and assistance as to how his request could potentially be refined so as not to impose a manifestly unreasonable burden upon the Council to comply. It did therefore comply with Regulation 9 in this case.

Right of appeal

36. 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

37. 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.
38. 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

Gemma Garvey
Senior Case Officer

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF