

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 13 March 2018

**Public Authority:** London Borough of Camden  
**Address:** Town Hall  
Judd Street  
London  
WC1H 9JE

#### **Decision (including any steps ordered)**

---

1. The complainant has requested information from the London Borough of Camden ("the Council") relating to the development of a site at West End Lane, West Hampstead, London.
2. The Commissioner's decision is that the Council has correctly refused the request under regulation 12(4)(b) and has provided advice and assistance in accordance with regulation 9. However, the Council breached regulation 7(1) by failing to issue a substantive response within 40 working days of receiving the request.
3. The Commissioner does not require the Council to take any steps.

#### **Request and response**

---

4. On 26 April 2017, the complainant wrote to the Council and requested information in the following terms:

*"(a) Request 1 - Any electronic correspondence to, from or between the persons specified below over the period 23 January 2013 - 30 June 2013 inclusive concerning the Site Allocations Development Plan for 156 West End Lane, West Hampstead.*

*(b) Request 2 - Any electronic correspondence which refer to or relate to [the complainant] and/or 156 West End Lane:*

*(i) to or from [named individual] over the period 19 November 2014 to 3 December 2014 inclusive; and*

*(ii) to, from, or between [two named individuals] over the period 15 September 2015 to 15 March 2016 inclusive.*

*(c) Request 3 - Any memoranda, meeting minutes, records of phone conversations or other documentation (limited to electronic copy documents) held by the persons specified below covering the period 23 January 2013 to 30 June 2013 inclusive concerning the Site Allocations Development Plan for 156 West End Lane, West Hampstead and which make reference to [the complainant] and/or 156 West End Lane.*

*(d) Specified Persons (for the purposes of Requests 1 and 3 above)*

*(i) Planning Department: [four named individuals]*

*(ii) Asset Strategy and Valuation Department: [three named individuals]."*

5. The Council issued a holding response on 25 May 2017 explaining that, due to the complexity of the request and volume of information to be searched, it required more time to respond.
6. A substantive response was issued on 4 August 2017. The Council provided some information falling within the scope of the request, explaining that some redactions had been made under regulation 13 of the EIR – Personal data, and that some information had been withheld or redacted under regulation 12(5)(b) – Adversely affect the course of justice.
7. The complainant had in the meantime contacted the Council on 27 July 2017 to request that an internal review be carried out into the length of time being taken to respond.
8. After the response of 4 August 2017 was received, the complainant confirmed that it was not satisfied. It considered that more information would be held, that some of the information provided was irrelevant, and that some information had been incorrectly redacted or withheld.
9. Following an internal review, the Council wrote to the complainant on 26 October 2017. It stated that its position was now that the request should have been refused, as it was manifestly unreasonable on grounds of cost, under regulation 12(4)(b) of the EIR.

## Scope of the case and background

---

10. The complainant contacted the Commissioner on 31 May 2017 to complain about the way its request for information had been handled. At this stage, it was awaiting a response.
11. The background to this case is that the complainant first made a request to the Council for information relating to the development of the site on 21 December 2015. The request was refused. On 16 March 2016 and 13 June 2016, the complainant made subsequent, narrower requests, which were also refused. These requests were all refused under regulation 12(4)(b) of the EIR – Manifestly unreasonable on grounds of cost.
12. Following an ICO investigation into the handling of the request of 13 June 2016, it was found that the Council had correctly refused the request under regulation 12(4)(b), but that the Council should have offered advice and assistance in narrowing down the scope of the request in accordance with its duty under regulation 9 (ICO decision notice FER0648668, dated 26 January 2017, refers). After some further correspondence between the parties, which is described in more detail later on, this led ultimately to the request under consideration in this notice.
13. The Commissioner considers that the scope of the case has been to investigate:
  - whether the Council has correctly refused the request of 26 April 2017 under regulation 12(4)(b) of the EIR – Manifestly unreasonable on grounds of cost,
  - whether the Council has complied with regulation 9 of the EIR – Advice and assistance in its handling of this specific request, and
  - whether the Council responded within the statutory time for compliance, with consideration to regulation 5(2) of the EIR – statutory time for compliance – and regulation 7(1) of the EIR – extension of time.

## Reasons for decision

---

### Regulation 12(2) – Presumption in favour of disclosure

14. Regulation 12(2) of the EIR states that a public authority shall apply a presumption in favour of disclosure.

## The exceptions

15. The Council has applied the exception under regulation 12(4)(b) to withhold the requested information.

### Regulation 12(4)(b) of the EIR – manifestly unreasonable

16. Regulation 12(4)(b) of the states that:

*'a public authority may refuse to disclose information to the extent that-*  
*(b) the request for information is manifestly unreasonable'*

17. The exception will typically apply in one of two sets of circumstances; either where a request is vexatious or where a compliance with a request means a public authority would incur an unreasonable level of costs, or an unreasonable diversion of resources. In this case, the Council argued the latter, namely that meeting the full terms of the request would place an unjustifiable demand on its resources.
18. The Commissioner considers that the inclusion of 'manifestly' in regulation 12(4)(b) indicates Parliament's intention that, for information to be withheld under the exception, the information request must meet a more stringent test than simply being 'unreasonable'. 'Manifestly' means that there must be an obvious or tangible quality to the unreasonableness of complying with the request.
19. In her guidance<sup>1</sup> on the exception, the Commissioner says at paragraph 19 that in assessing whether the cost or burden of dealing with a request is "too great," public authorities will need to consider the proportionality of the burden or costs involved and decide whether they are clearly or obviously unreasonable. The Commissioner considered this will mean taking into account all the circumstances of the case, including:
  - the nature of the request and any wider value in the requested information being made publicly available;
  - the importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue;

---

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

- the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services; and
  - the context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester.
20. The Commissioner considers that public authorities may be required to accept a greater burden in providing environmental information than other information. Where it is found to be engaged, regulation 12(4)(b) of the EIR is also qualified by the public interest test. Any exercise carried out to determine whether an exception applies must take into account the EIR's express presumption in favour of disclosure under regulation 12(2).
21. In the event that the exception at regulation 12(4)(b) is found to be engaged, the Commissioner will nevertheless go on to consider if the public interest in maintaining the exception outweighs the public interest in disclosure.

**Manifestly unreasonable in terms of costs and diversion of resources**

22. The considerations associated with the application of regulation 12(4)(b) of the EIR on the grounds of cost are broader than its closest relative in FOIA, section 12, which explicitly permits a public authority to refuse a request purely on the basis of the time and cost implications of compliance. However, while recognising the differences between section 12 of the FOIA and regulation 12(4)(b), the Commissioner considers that the "appropriate limit" in section 12 may serve as a useful guide when considering whether a request is manifestly unreasonable on the basis of costs. This is because the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations"), which have the effect of prescribing the "appropriate limit," is taken to give a clear indication of what Parliament considers to be a reasonable charge for staff time.
23. The Fees Regulations state that a public authority's estimate that compliance would exceed the appropriate limit can only take into account the costs it would reasonably expect to incur in: determining whether it holds the requested information; locating the information; retrieving the information; and extracting the information. The Fees Regulations confirm that the costs associated with these activities should be worked out at a standard rate of £25 per hour per person. For local authorities, the appropriate limit is set at £450, which is the equivalent of 18 hours' work.

24. In addition, as noted in the Commissioner's guidance referenced previously, the costs of considering whether information is exempt, and in preparing it for disclosure, may also be taken into account under regulation 12(4)(b) of the EIR, which is not the case under section 12 of the FOIA.
25. In this case, the Council has put forward arguments relating to the amount of time it has already taken in locating and providing information to the complainant when responding to the request on 4 August 2017.
26. It emphasises that it is able, therefore, to explain how much time it has already taken in seeking to comply with the request, and is not simply estimating what time might be taken based on producing a sample.
27. The Council has explained that more than 80 hours has been spent in locating, retrieving and extracting the information and preparing it for disclosure as part of its response of 4 August 2017. Its position therefore is that it has already exceeded the appropriate costs limit and consequently it would be disproportionate for it to have to carry out any further work on the request.
28. By way of explanation the Council states: "*none of the information requested was in a database. It was all in case/property files and emails in individuals' Outlook files.*"
29. It specified that individuals from the following service areas were contacted and/or involved in preparing the response: Development Management, Placeshaping & Economic Development, Asset Strategy and Valuations, Legal, and Information & Records Management.
30. It has also provided the Commissioner with copy emails of updates from officers at the Council, sent to an officer in Information & Records Management, dated May and June 2017, which summarised their progress so far in searching for the relevant correspondence and information.
31. The emails show that one individual named in the request, by way of example, explained that he had spent three hours and 45 minutes locating, retrieving and extracting correspondence from his own mailbox as well as other relevant information from the specified periods.
32. The emails also refer to the difficulty in searching for correspondence to and from individuals who have left the Council, due to the organisation having updated its Microsoft system to Office 365 in the period since the correspondence would have been entered into.

33. Summarising the time spent so far in responding, the Council provided a table of information showing that the estimate of time taken by individuals in the five service areas in complying with the requests exceeds 80 hours.
34. The Council comments that an officer in the Information & Records management team has explained that he had to "*dramatically reduce his workload to deal with this one case and other officers had to take on his cases to free him up.*"
35. As the Council had commented that some of its processes had previously been carried out in providing a response to the request of 13 June 2016, and referred to the same volume of files having to be searched in respect of that earlier request, the Commissioner returned to the Council on 30 January 2018 to check whether the Council's estimate of the time spent on compliance applied to this specific request.
36. The Council confirmed that it had considered the request of 26 April 2017 afresh:

*"I can confirm that the estimate of 80 hours is for the handling of the request which is currently before the ICO. The time estimate was not a continuation or a double counting of time spent on the previous request. The request currently being considered was a separate request to the previous one handled by the council with different questions and different parameters. Therefore the council needed to undergo fresh searches for the information as it was different to that handled previously."*

### **The Commissioner's findings on whether the exception is engaged**

37. The Commissioner is aware that a large bundle of information was sent to the complainant on 4 August 2017. Since the Council, in carrying out an internal review, has now applied regulation 12(4)(b) to the request, she has had to consider whether the Council's estimate of the time taken in locating, retrieving and extracting that information, together with the time taken to prepare it for disclosure, including redactions, is a reasonable one.
38. It is perhaps unusual in a case involving the exception at regulation 12(4)(b) that the information which the public authority considers falls within the scope of the request has already been provided to the complainant.
39. However, the Commissioner's role in considering the handling of this request is, nevertheless, to consider whether the Council is correct to

apply the exception at regulation 12(4)(b) of the EIR to the request, since this was applied at the internal review stage.

40. The Commissioner has considered the arguments put forward by the complainant and by the Council.
41. She is aware that the complainant is frustrated by the application of regulation 12(4)(b), since it had sought to ensure that this request would not be considered manifestly unreasonable by corresponding with the Council prior to making it.
42. She notes that the request was narrowed, in effect, to information held by seven named officers, in an attempt to avoid naming whole departments or service areas within the Council.
43. However, the Commissioner notes the Council's explanation that there was nevertheless a significant burden placed on its resources due to the way in which the information is stored and to some individuals having left the Council. In addition, the Council explained that a significant time was taken up with "*coordinating searches and collation of information, and undertaking redactions.*"
44. The Commissioner is satisfied that the Council, as detailed previously, has accurately represented the time that it spent in complying with the request prior to providing a response on 4 August 2017, and that it has exceeded 80 hours.
45. This exceeds the appropriate costs limit of 18 hours by a significant margin, and, even allowing for the greater burden which public authorities are expected to take on under the EIR, can be said to have placed a considerable burden on the Council.
46. The Commissioner is also aware that the complainant is dissatisfied with some aspects of the information it has received. It considers that some of the information it was provided with – as much as a third, in its view – was irrelevant to its request, and it struggles to accept the application of regulation 12(4)(b) if the Council has spent time providing irrelevant information.
47. However the Commissioner has considered the bundle of information that was provided, and is satisfied that the majority comprises information that appears to fall within the scope of the request.
48. She has therefore determined that the exception at regulation 12(4)(b) of the EIR is engaged, and has gone on to consider the public interest test.

## **The balance of the public interest**

49. Regulation 12(4)(b) is a qualified exemption and is, therefore, subject to the public interest test at regulation 12(1)(b), which states that information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.
50. As explained previously, a similar request by the complainant in this case to the same public authority was considered by the Commissioner in decision notice reference FER0648668<sup>2</sup>.
51. Of particular relevance in considering the balance of the public interest in this case are paragraphs 84 – 92 of that decision notice.
52. To summarise, in that case the Commissioner gave consideration to the clear public interest in a public authority behaving in a transparent manner, particularly with regard to planning decisions where the public authority is both landowner and planning authority, and where a change of use was proposed. She also considered the requester's interest in the case together with the wider interest of the local community, and considered how much weight to apply to these factors.
53. The Commissioner then weighed all of these factors against the burden that would be placed on the Council if it were to comply with the request.
54. She found, in that case, that the public interest in the authority not being diverted from discharging its normal, core functions by the significant time it would take to comply with that request, outweighed the public interest in disclosure.
55. In the Commissioner's view, the public interest arguments remain broadly the same in this case. However, she notes that additional arguments have been put forward by the complainant.
56. The complainant has argued, first, that the request under consideration here is a narrower one than that considered under ICO decision notice FER0648668, referenced previously, and was indeed submitted following a period of correspondence between the complainant and the public authority in February – March 2017 (following that decision notice). The

---

<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/1625836/fer0648668.pdf>

purpose of the correspondence was to consider how the complainant might formulate a request which would not be considered as manifestly unreasonable on grounds of cost, and a request was then submitted in March 2017. This was, nevertheless, refused as being manifestly unreasonable on grounds of cost. Subsequently, the complainant submitted the request under consideration here in a further attempt to be provided with information.

57. The complainant considers, therefore, that there is a public interest concern in the conduct of the public authority in the manner in which it has responded to its request. It considers, indeed, that the conduct of the public authority amounts to evasiveness.
58. The Commissioner accepts that, since a narrowed request has been submitted in this case, the burden placed on the Council in dealing with it is less than in case reference FER0648668.
59. However as previously explained, despite the request having been narrowed in an effort to limit the searches that would need to be carried out, the Commissioner has accepted that the Council has accurately represented the time taken in responding to this request.
60. Having viewed the correspondence between the complainant and the Council, and having considered the volume of evidence that was provided to the complainant, the Commissioner is not persuaded that there has been evasiveness by the Council such to have been of public concern.
61. With regard to the volume of information that was provided, while the Commissioner notes that some has been deemed by the complainant to be irrelevant, she has noted that the bundle comprises over 600 pages of information. Approximately 200 pages comprise reports which arguably can be retrieved quickly; however, the remainder comprises correspondence and other documents.
62. Taking into account the factors above, together with the public interest arguments already referred to in ICO decision notice FER0648668, the Commissioner has determined that the public interest in maintaining the exception outweighs public interest in disclosure.
63. She therefore finds that regulation 12(4)(b) has been correctly applied in this case.

### **Regulation 9(1) – Duty to provide advice and assistance**

64. Regulation 9(1) of the EIR states:

"A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants."

65. Regulation 9 also explains that a public authority will be taken to have complied with paragraph (1) if it has conformed with the relevant code of practice, which in this case is the Code<sup>3</sup> issued under regulation 16 ("the Code of Practice").
66. When refusing a request for environmental information under regulation 12(4)(b) as being manifestly unreasonable because the burden of compliance is too great, the Commissioner views regulation 9(1) as an obligation for public authorities to assist requesters to reduce the scope of the request.
67. By way of background, the Commissioner notes that the Council had corresponded with the complainant in February and March of 2017, providing advice as to how to narrow a previous request. Following the refusal of a request submitted on 10 March 2017, the Council provided further advice and assistance in its letter of 12 April 2017.
68. This advice and assistance was not specific to the refusal of the request under consideration in this notice; that is, the request of 26 April 2017. The Commissioner has been asked to consider the advice and assistance that was provided in the Council's handling of this request.
69. However, the Commissioner is mindful that the Council had provided a number of suggestions as to the way in which a request could be formulated so as not to 'fall foul' of the exception at regulation 12(4)(b). It would be for the complainant to consider acting on these instructions.
70. She also notes that, in response to the request, the Council provided a large amount of information to the complainant and only when asked to carry out an internal review did the Council apply regulation 12(4)(b). No further advice and assistance was offered subsequent to the internal review and the Council has stated that it did not consider it could add to advice previously given.
71. The Commissioner is satisfied that, in this case, the Council has complied with its duty under regulation 9(1).

---

<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1644/environmental\\_information\\_regulations\\_code\\_of\\_practice.pdf](https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf)

**Regulation 5(2) – Time for compliance; Regulation 7(1) – Extension of time**

72. Regulation 5(2) of the EIR states that, where a public authority holds environmental information, the *"information shall be made available... as soon as possible and no later than 20 working days after the date of receipt of the request."*
73. Under regulation 7(1), where a public authority reasonably believes that the volume and complexity of the information requested means that it is impracticable either to comply with a request within 20 working days or to make a decision to refuse to do so, it may extend the time for compliance by a further 20 working days, to a total of 40.
74. In this case, the Council sought to apply regulation 7(1), stating as follows in its email dated 25 May 2017 (20 working days after the date of the request):
- "It is with regret that we have been unable to complete our response within 20 working days. This is because under regulation 7(1) of the EIR 2004 the Council reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request or to make a decision to refuse to do so."*
75. However, after a further 20 working days, on 23 June 2017, the Council stated as follows:
- "It is with regret that we have been unable to complete our response. This is because request will has [sic] already exceeded 30 hours of officer time and can fairly be regarded as falling under regulation 12(4)(b) (Manifestly unreasonable). Despite this the Council will continue to process your request as a matter of urgency and we hope to provide you with a final response (with information release) by 10 July 2017 or earlier if at all possible."*
76. The response was then issued on 4 August 2017.
77. The Commissioner notes that the Council stated that it 'regarded' the request as manifestly unreasonable at this stage. However, it was not, at this stage, refusing the request.
78. Therefore, since the response was provided more than 40 working days from the date of the request, the Commissioner has determined that the Council has breached regulation 7(1) of the EIR.
79. The Commissioner would also note that in general it is poor practice for a public authority to seek to apply an extension on the last day of the statutory period for compliance.

## Right of appeal

---

80. 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)

81. 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.
82. 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 .....**

**Alun Johnson**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**