

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

Date: 28 February 2020

Public Authority: **Fyfield and West Overton Parish Council**
Address: **5 Peacock**
West Overton
Marlborough
Wilts
SN8 4HD

Decision (including any steps ordered)

1. The complainant has requested correspondence from Fyfield and West Overton Parish Council ("the Council") about a specific planning application. The Council refused the request under section 14(1) of the FOIA and also referred to the cost of compliance. After considering whether the request may fall to be considered under the EIR, the Council refused it under regulation 12(4)(b) – a manifestly unreasonable request, on the basis that compliance would place a disproportionate burden on the Council. The Council also suggested that the requested information may be exempt from disclosure under regulation 12(4)(e) – internal communications.
2. The Commissioner's decision is that the request should have been considered under the EIR. However, the Council has failed to demonstrate, to her satisfaction, that the request is manifestly unreasonable. She therefore finds that the Council is not entitled to rely on regulation 12(4)(b) to refuse the request. The Commissioner has also concluded that the Council has failed to demonstrate that regulation 12(4)(e) is engaged.
3. The Commissioner requires the Council to take the following step to ensure compliance with the legislation.

- Issue a fresh response to the complainant under the EIR, which does not rely on regulations 12(4)(b) or 12(4)(e).
4. The Council must take this step 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.

Background to the complaint

5. The complaint concerns a planning application relating to an agricultural contracting business, which may require large vehicles to negotiate the surrounding narrow lanes.
6. The complainant has explained that the application was first registered in March 2019 and the Council held a planning committee meeting, which was open to the public.
7. The complainant's request relates to correspondence, which he thinks would shed light on the Council's position.

Request and response

8. On 17 July 2020, the complainant wrote to the Council and requested information in the following terms:

"Under the Freedom of Information Act I should be grateful if you would provide me with a copy of all the email correspondence sent or received by Parish Council and/or its individual Councillors on the subject of planning application 19/02445/FUL (Rivermead House). Please include all correspondence with any professional officers of Wiltshire Council and any Wiltshire County Councillors. Please also include any correspondence with the applicant and/or his agent. Finally please include any internal correspondence on the subject between Parish Council members including the Parish Clerk."

9. The Council responded on 10 August 2019. It stated that it was refusing to provide the information under section 14(1) of the FOIA – vexatious requests. It also went on to explain that the cost would exceed the appropriate amount.
10. The Council also advised in its response of 10 August 2019, that it did not have a procedure to complete internal reviews if the complainant was dissatisfied.

Scope of the case

11. The complainant contacted the Commissioner on 16 August 2019, to complain about the way his request for information had been handled.
12. The Commissioner accepted the complaint, and asked the Council to consider whether the request for information fell under the Environmental Information Regulations 2004 (EIR).
13. Specifically, the Commissioner contacted the Council and explained that she considered that the request was likely to fall under the EIR, as it relates to planning matters. She asked the Council to reconsider its position and issue an internal review response should it agree that the matter falls under the EIR.
14. The Council responded to the Commissioner, advising that it disputed whether the complainant's request fell under the EIR. However, it confirmed that, if the Commissioner determined the information to be environmental, it wished to refuse the request under regulation 12(4)(b) – manifestly unreasonable, on the basis that responding to it would place a disproportionate burden on the Council and its officers.
15. The Council also advised the Commissioner that it may wish to apply regulation 12(4)(e) – internal communications.
16. Whilst the Council has, in correspondence with the complainant and with the Commissioner, cited a number of different sections of the FOIA and regulations of the EIR, its overriding position is that responding to the request would place a disproportionate burden on the Council and its officers.
17. The Commissioner considers that the scope of the request is to determine if the request falls under the EIR and if the Council has correctly refused it under regulation 12(4)(b) and regulation 12(4)(e).

Reasons for decision

Regulation 2(1) – is the requested information environmental?

18. The Commissioner has first considered whether the information requested is environmental in accordance with the definition given in regulation 2(1) of the EIR. Environmental information is defined within regulation 2(1) as:

"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... emissions... and other releases into the environment, likely to affect the elements referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes... and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...".

19. The Commissioner has not seen the requested information, but she is aware that it relates to a planning application. She has considered the relevant planning application, which relates to the construction of a barn. She has determined that the application is a "measure" which is likely to affect the elements and factors of the environment, as referred to in regulation 2(1)(a) and/or 2(1)(b). She has considered whether the requested correspondence would be information "on" this measure.
20. The Commissioner is mindful of the Council Directive 2003/4/EC which is implemented into UK law through the EIR. A principal intention of the Directive is to allow the participation of the public in environmental matters. The Commissioner therefore considers that the term "any information... on" in the definition of environmental information contained in regulation 2 should be interpreted widely, and would include correspondence relating to a planning application.
21. The Commissioner therefore determines that the requested information, which she understands is held, is environmental under the definition at regulation 2(1)(c) and the request should have been dealt with under the EIR.

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

13. Regulation 12(4)(b) of the EIR provides that:

" a public authority may refuse to disclose information to the extent that –

(b) the request for information is manifestly unreasonable;"

22. The Council's position is that the request is manifestly unreasonable as responding to the request would place a disproportionate burden on it.

23. Regulation 12(4)(b) of the EIR is designed to protect public authorities from exposure to a disproportionate burden or an unjustified level of distress, disruption or irritation in handling information requests. In effect, it works in similar regards to two exemptions within the Freedom of Information Act 2000 ('FOIA'): section 12, where the cost of complying with a request exceeds the appropriate limit and section 14, where a request is vexatious.
24. The Council has suggested that it considers that the request is both vexatious and will exceed the appropriate cost limit.
25. In assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will take the following factors into account:
 - proportionality of the burden on the public authority's workload, taking into consideration 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;
 - 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;
 - 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;
 - the presumption in favour of disclosure under Regulation 12(2);
 - the requirement to interpret the exceptions restrictively.
26. In this case, the Commissioner has considered whether the request may be manifestly unreasonable either due to the cost of compliance, or due to the burden on the Council on more general "vexatious" grounds.

Manifestly unreasonable on grounds of costs

27. The EIR differ from the FOIA in that there is no specific limit set for the amount of work required by an authority to respond to a request, as that provided by section 12 of the FOIA.

28. Specifically, the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') which apply in relation to section 12 of the FOIA are not directly relevant to the EIR - the cost limit and hourly rate set by the Fees Regulations do not apply in relation to environmental information. However, the Commissioner accepts that the Fees Regulations provide a useful starting point where the reason for citing Regulation 12(4)(b) is the time and cost of a request, but she does not consider that they are a determining factor in assessing whether the exception applies.
29. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) of the Fees Regulations states that an authority can only take into account the costs it reasonably expects to incur in:
 - determining whether it holds the information;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
30. 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.

The Council's position

31. The Council has provided the Commissioner with its general reasons for applying the exception to disclosure provided by regulation 12(4)(b), on grounds of costs.
32. It explained that it would take them several working days to obtain the information, which would then bring the day to day operation of the Council to a standstill. It went on to say that the cost to the public purse would be substantial.
33. The Council has explained that to retrieve the information, it would need to access the correspondence of 13 people, some of whom no longer sit on the Council. The Council has stated that more than 500 emails were exchanged on the relevant topic.
34. It advised that it would have to go through material that covers a five month period and estimates that it would take four hours for each of the individuals. This would mean that 52 hours' work would be required.

The Commissioner's decision

35. In considering the Council's position, the Commissioner is satisfied that regulation 12(4)(b) sets a fairly robust test for an authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is "*manifestly*" unreasonable, rather than simply being unreasonable per se. The Commissioner considers that the term "*manifestly*" means that there must be an obvious or clear quality to the identified unreasonableness.
36. It should also be noted that public authorities may be required to accept a greater burden in providing environmental information than other information.
37. In considering cases where the public authority has stated that the costs of compliance would exceed the appropriate limit, the Commissioner also expects, as set out by the Information Tribunal in the case of *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency* (EA/2006/0004, 30 October 2007) that a reasonable estimate is one that is "*...sensible, realistic and supported by cogent evidence*".
38. While the Commissioner acknowledges that the Council says it would take four hours to go through each person's correspondence, which it states would be a burden, the Council has failed to provide any evidence to support this. This is despite being asked by the Commissioner to provide a sampling exercise to support its rationale.
39. The Commissioner notes that the Council stated it would have to look through five months' worth of emails for each person. However, it has not been explained in detail why the Council expects this to place a disproportionate burden on its resources. The Commissioner has no evidence that a large volume of information is held by each of the relevant councillors.
40. The Commissioner cannot find that the Council's compliance with the information request would incur an unreasonable level of costs, since the assertion that it would take in excess of 18 hours is not supported by any evidence or cogent explanations as to why it would take in excess of this time. In the absence of a sampling exercise, the Council's position has not been adequately supported to explain how it had arrived at its estimate.
41. She has determined that the Council has failed to demonstrate that the exception is engaged on grounds of costs alone.
42. The Commissioner has therefore considered the burden on the Council more broadly.

Manifestly unreasonable on grounds of vexatiousness

43. As already stated, regulation 12(4)(b) of the EIR provides an exception from disclosure to the extent that the request is manifestly unreasonable. This may also be applied by public authorities in circumstances where the request is considered to be vexatious in terms of its placing a disproportionate burden on the authority.
44. The term "*manifestly unreasonable*" is not defined in the EIR. However the Commissioner follows the lead of the Upper Tribunal in *Craven v Information Commissioner & DECC*. In this case the Tribunal found that there is, in practice, no difference between a request that is vexatious under the FOIA and one which is manifestly unreasonable under the EIR, save that the public authority must also consider the balance of public interest when refusing a request under the EIR.
45. A differently constituted Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that "*vexatious*" could be defined as the "*manifestly unjustified, inappropriate or improper use of a formal procedure*". The Upper Tribunal's approach in this case was subsequently upheld in the Court of Appeal. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
46. Where this is not clear, the public authority should weigh the impact on the authority of complying with the request and balance this against the purpose and value of the request. In doing this, public authorities will inevitably need to take into account the wider factors such as the background and history of the request.

The complainant's position

47. The complainant has explained that his request relates to a planning application.
48. The complainant explained further that between 11 March and 16 April 2019, a total of 28 letters had been sent to the Council regarding the planning application. Of the 28 letters, he states that 25 were objections to the application.
49. He has explained that the Council released a statement advising it "*...has no objection in principle to the proposal. However, it has several concerns about the traffic implications...*"
50. The complainant says that before the Parish Council meeting on 16 April 2019, regarding the above matter, there were a total of 69 letters

provided to the Council regarding the planning application. He states that 66 out of the 69 letters received by the Council were objections.

51. He stated that the Council never disputed any of the figures or arguments, neither did it adopt them and as such, its official position remained, so far as anyone was aware, as the original statement.
52. Before the date the application was due to be decided, the complainant says that he asked the Council to confirm its position but this was not provided until after the meeting had begun and therefore, it was considered that the Council's position was the same as the original statement.
53. The complainant has explained that the residents are disappointed that the Council did not communicate the views of its residents, even though there had been a large number of objections.
54. Due to the above, the complainant asked the Council several questions. However, he feels that he did not receive a satisfactory response and as such, went on to make an FOIA request, to attempt to discover why things proceeded as they did.

The Council's position

55. In this case, the Council has advised, in a letter to the Commissioner, that the complainant sent it over 50 emails between April and August 2019. It explained that it believed that the request was "... *the culmination of a campaign... to meet his demands would merely prolong the process... the purpose and value of the material sought would be negligible... intended to cause as much inconvenience and irritation as possible to the council, individual councillors and those prepared to deal with him... For the reasons given in the council's response the material sought can be of no practical or other use to [the complainant] or anyone else*".
56. The Council stated in a letter to the complainant, "*In all the circumstances, the information you requested is of no value to [the complainant], the public, or any section of the public.*"
57. It went on to say that there had been an exchange of more than 500 emails between the Council and third parties, mainly residents of the three villages that make up the Council's bailiwick, as well as internal Council emails, which brought the Council's day to day operations to a complete standstill for several weeks.

The Commissioner's decision

58. Whilst the Commissioner accepts that there may have been considerable correspondence at the time of the planning application from the complainant and other residents, she has not been provided with evidence that the Council held a large amount of information at the date of the request. For example, the Council has not provided the Commissioner with the number of emails held by any specific individual at the Council, which may fall within the scope of the request.
59. In considering the burden on a public authority, the Commissioner may consider the amount of work which a Council may have to do in redacting information, such as personal data, from the requested information, in order to disclose it under the legislation. In this case, the Council has suggested that some of the requested information may be exempt from disclosure under regulation 12(4)(e) of the EIR – internal communications.
60. However, again, the Commissioner would return to the fact that the Council has simply not provided any evidence of this, nor carried out any kind of sampling exercise to support its position.
61. Turning to the conduct of the complainant, the Commissioner notes that the Council stated that he sent *"more than fifty emails to the council Clerk or individual council members."*
62. The Commissioner notes that the Council provided her with examples of two emails from the complainant, which it states caused *"a huge amount of distress to the recipients"*. However, while the Commissioner acknowledges the Council's comments, she is not persuaded that the emails are offensive in tone or overtly aggressive. She therefore lacks evidence that his conduct has been obviously vexatious.
63. As previously stated, public authorities may be required to accept a greater burden in providing environmental information than other information.
64. As the Council has failed to provide sufficient evidence to support its arguments, the Commissioner is not persuaded that the request places a disproportionate burden on it.
65. She is therefore not satisfied that the request can be considered manifestly unreasonable on grounds of vexatiousness and therefore, exception 12(4)(b) is not engaged.
66. Since the exception is not engaged, either on grounds of cost or vexatiousness, the Commissioner has not needed to go on to consider the public interest in the disclosure of the information.

Regulation 12(4)(e) – internal communications

67. Regulation 12(4)(e) states:

For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that...

(e) the request involves the disclosure of internal communications.

68. The Commissioner's public guidance on this exception¹ defines a communication as encompassing any information which someone intends to communicate to others, or places on file (including saving it on an electronic filing system) where others may consult it. It also states that an 'internal' communication is a communication within one public authority, and that a communication sent by or to another public authority, a contractor or an external adviser will not generally constitute an internal communication.
69. The Commissioner has considered whether the Council has provided evidence that the requested information would be exempt from disclosure.
70. On 25 November 2019, the Council stated, "[the complainant]... *has asked to see internal documents, to which he is not entitled under EIR (see regulation 12(4)(e)).*"
71. The Commissioner asked the Council for evidence as to why it considered the exception was engaged. On 13 December 2019, the Council stated, "*...as far as I can tell no councillor communicated with a third party at any stage of the planning process, other than to request information from officers of the local planning authority. One councillor requested permission to visit the application site in order to make a report to the council's planning committee. All communications other than these were between councillors and myself, and were plainly internal.*"
72. The Commissioner considers that the Council's response of 13 December 2019 is contradictory and suggests that it may in fact hold copies of correspondence with third parties. The Council has alluded to internal communications within the requested information. However, the

¹ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

Commissioner finds that its explanations fall well short of persuading her that all of the requested information is covered by the exception.

73. As the Commissioner does not have sufficient evidence that any or all of the withheld information would be covered by the exception, she has determined that the exception is not engaged. As the exception is not engaged, the Commissioner does not need to go on to consider the Public Interest Test.

The Commissioner's decision

74. Since the Commissioner has determined that the Council has provided insufficient evidence to engage either the exception at regulation 12(4)(b) or the exception at regulation 12(4)(e), she requires the Council to issue a fresh response to the complainant under the EIR, which does not rely on either of these exceptions.

Other matters

75. Although not forming part of the formal decision notice the Commissioner uses 'Others Matters' to address issues that have become apparent as a result of a complaint or her investigation of that complaint and which are causes for concern.
76. The Commissioner notes that the Council was reluctant to engage with her or to provide details of its position. The Commissioner is aware that the Council may have found dealing with correspondence around the planning issue to be time-consuming. However, she would remind the Council of its obligations to engage fully with her and her officers during an investigation. It is incumbent on a public authority to provide her with comprehensive and detailed submissions to substantiate its position.
77. She would also remind the Council of its obligations to consider requests for information thoroughly, in order to determine whether to respond under the FOIA or the EIR, and to use the guidance which is on offer from the ICO. The Council is obliged to respond to the complainant in accordance with the correct legislation and to provide detailed reasons for its position.
78. The Commissioner also notes that, where information has been requested which falls under the Environmental Information Regulations, an internal review is a statutory requirement and therefore the Council should have a process in place to handle such requests.

Right of appeal

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

80. 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.

81. 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

Andrew White
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