

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 17 May 2022

Public Authority: The London Borough of Waltham Forest
Address: Waltham Forest Town Hall
Forest Road
Walthamstow
E17 4JF

Decision (including any steps ordered)

1. The complainant requested information from the London Borough of Waltham Forest ("the Council") relating to experimental traffic order (ETO) schemes.
2. The Council refused to provide the requested information citing section 12(1) (cost limit) of the FOIA. The Council later accepted the Commissioner's view that the information is environmental and therefore relied on regulation 12(4)(b) (manifestly unreasonable) of the EIR.
3. The Commissioner's decision is that the Council has failed to demonstrate that regulation 12(4)(b) is engaged and therefore, is not entitled to rely on this exception.
4. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the request that does not rely on regulation 12(4)(b) of the EIR.
5. The Council 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 FOIA and may be dealt with as a contempt of court.

Request and response

6. On 31 March 2021, the complainant wrote to the Council and requested information in the following terms:

“Please send me any email and WhatsApp group correspondence between councillors and others involved in ETO schemes installed under the street space scheme.”
7. The Council wrote to the complainant on 7 April 2021 and asked them to clarify the time period of their request. On 11 April 2021, the complainant provided the following clarification:

“Sorry, 15th March 2020 to today’s date.”
8. The Council wrote to the complainant again on 15 April 2021 to ask for further clarification. The Council asked the complainant to confirm what they meant by streetscape and the street space scheme. On 19 April 2021 the complainant provided the following clarification:

“The street space scheme that came into effect when the C19 virus caused lockdown and LTN emergency traffic measures came into force with planters created road blocks.”
9. The Council provided the complainant with a response to their request on 29 April 2021. It refused to provide the requested information citing section 12(1) (cost limit) of the FOIA as its basis for doing.
10. On 10 August 2021, the complainant wrote to the Council to request an internal review.
11. Following an internal review, the Council wrote to the complainant on 9 September 2021. The Council maintained its reliance on section 12(1) of the FOIA.

Scope of the case

12. The complainant contacted the Commissioner on 9 September 2021 to complain about the way their request for information had been handled.
13. During the course of his investigation, the Commissioner wrote to the Council and set out his view that the requested information was likely to constitute environmental information as defined in regulation 2(1) of the EIR. The Council therefore revised its position and relied on regulation 12(4)(b) (manifestly unreasonable) to refuse the request.

14. The scope of this case and the following analysis is to determine if the Council has correctly cited regulation 12(4)(b) of the EIR in response to the request.

Reasons for decision

Is the requested information environmental?

15. Regulation 2(1) of the EIR defines environmental information as being information relating to:

“(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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).”

16. The Commissioner has not seen a copy of the requested information, but he is satisfied that it is environmental. ETOs are “measures” that affect the elements of the environment. The requested information is information on the implementation of that measure and therefore falls under regulation 2(1)(c) as detailed above.

Regulation 12(4)(b) – manifestly unreasonable

17. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
18. The Commissioner considers that a request can be manifestly unreasonable either if the request is vexatious, or where compliance with the request would incur a manifestly unreasonable burden on the public authority both in terms of costs and the diversion of resources.
19. In its submissions to the Commissioner, the Council has relied upon the latter interpretation of regulation 12(4)(b), that it considers the amount of work required to comply with this request in full would bring about a manifestly unreasonable burden.
20. Under FOIA, the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') specify an upper limit for the amount of work required beyond which a public authority is not obliged to comply with a request. This is set at £450 for public authorities such as the Council.
21. The Fees Regulations state that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - 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.
22. The EIR differ from FOIA in that under the EIR there is no upper cost limit set for the amount of work required by a public authority to respond to a request.
23. While the Fees Regulations relate specifically to FOIA, the Commissioner considers that they provide a useful point of reference where the reason for citing regulation 12(4)(b) of the EIR is the time and costs that compliance with a request would expend. However, the Fees Regulations are not the determining factor in assessing whether the exception applies.

24. The Commissioner's guidance on regulation 12(4)(b)¹ states that public authorities may be required to accept a greater burden in providing environmental information than other information.
25. Regulation 12(4)(b) sets a robust test for a public 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". The Commissioner considers that the term "manifestly" means that there must be an obvious or clear quality to the identified unreasonableness.
26. Given the high burden referred to within paragraph 25, the Commissioner expects a public authority to provide both a detailed explanation and quantifiable evidence to justify why complying with a request would impose such an unreasonable burden on it, and therefore why regulation 12(4)(b) is engaged.
27. Where a public authority has shown that Regulation 12(4)(b) is engaged, Regulation 12(1)(b) requires that a public interest test is carried out to determine whether the arguments in favour of maintaining the exception outweigh those in favour of disclosing the requested information. A public authority may still be required to comply with a manifestly unreasonable request if there is a strong public value in doing so.

The Council's position

28. The Commissioner asked the Council to reconsider its handling of the request in accordance with the EIR. In its submissions to the Commissioner, the Council explained that it had reconsidered the request under the EIR. It revised its position citing regulation 12(4)(b) of the EIR as its basis for refusing to comply with the request. The Council provided the Commissioner with an explanation as to why it considered the request to be manifestly unreasonable.
29. The Council estimated that it would take 97.5 hours to locate, retrieve and extract the requested information. Therefore, in total, the Council calculated that it would cost approximately £2,437.50 to comply with the request (97.5 hours x £25 = £2,437.50). The Council did not provide an explanation as to how it had calculated that it would take 97.5 hours to comply with the request.

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

30. The Commissioner contacted the Council again and asked it to explain how it had calculated that it would take 97.5 hours to comply with the request. The Council responded by providing the Commissioner with an extract from its internal review response. It stated that it considers that it has explained why it would take 97.5 hours to comply with the request in its internal review.
31. In its internal review response, the Council explained that the term "Streetspace" is not always used by the Council officers when discussing the Streetspace scheme. In order to provide the requested information the Council explained that it would need to identify all potentially relevant emails. This would include any emails regarding Streetspace projects, even when the if the term Streetspace is not specifically mentioned in the email and Experimental traffic orders.
32. The Council explained that it had conducted a search of one officer's emails using the term "Streetspace and ETOs". This resulted in over 800 emails. Each email would have to be manually reviewed to check that it fell within the scope of the request.
33. The Council explained that once it had determined which emails fell within the scope of the request, each email would need to be assessed to ensure that any personal data was redacted. The emails would then need to be organised chronologically and rendered into a pdf before it could be disclosed.
34. With regards to the public interest, in its submissions to the Commissioner the Council outlined its arguments for maintaining its reliance on regulation 12(4)(b). The Council argued that complying with the request would place a disproportionate burden on the Council and cause an unjustified level distress, disruption and irritation. It considered that complying with the request would place a strain on Council resources and hinder the its ability to deliver mainstream services including answering other requests for information.
35. The Council stated that whilst it recognises that there is a general public interest in disclosing environmental information, it does not consider there to be any specific public interest in disclosing the requested information. The Council also stated that it does not consider the requested information to add to the public's understanding of the subject matter or inform debate. Therefore, the Council concluded that it is in the public interest to maintain its reliance on regulation 12(4)(b) of the EIR.

The Commissioner's position

36. The Commissioner does not consider the Council to have demonstrated that the cost and time it would take to comply with the request would place a manifestly unreasonable burden on the Council.
37. The Commissioner considers that the Council has not provided a sufficiently detailed explanation as to how it determined that it would take 97.5 hours to provide the requested information.
38. Whilst the Council has explained that it has conducted a search of one Council Officer's emails and concluded that would have to manually review over 800 emails in order to provide the requested information, it has not explained why this would take the Council 97.5 hours.
39. The Commissioner's decision is that the Council has failed to demonstrate that the request is manifestly unreasonable. Therefore, his conclusion is that the exception provided by regulation 12(4)(b) is not engaged and at paragraph 4 above the Council is now required to issue a fresh response to the complainant's request.

Right of appeal

40. 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

41. 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.
42. 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

Ben Tomes
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