

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 28 February 2023

Public Authority: Brighton and Hove City Council

Address: Hove Town Hall
Norton Road
Hove
BN3 3BQ

Decision (including any steps ordered)

1. The complainant has requested information relating to the planning department's involvement with a property.
2. The Commissioner's decision is that Brighton and Hove City Council (the Council) has correctly applied Regulation 12(4)(b) when refusing this request for information.
3. The Commissioner also finds that the Council breached:
 - Regulation 9 as it failed to provide any advice and assistance to the complainant when refusing the request.
 - Regulation 14 as the Council failed to provide a refusal notice within 20 working days.
 - Regulation 11 as it failed to conduct an internal review within 40 working days.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with advice and assistance to help them to refine their request to one that does not impose a manifestly unreasonable burden.
5. 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 FOIA and may be dealt with as a contempt of court.

Request and response

6. On 8 May 2019, the complainant wrote to the Council and requested information in the following terms:

"I request that a copy of the following documents be provided to me in electronic form:

- any documents/emails/memos/reports from the Planning Department pertaining to [address redacted] from 1 January 2017 till the date this is process

- any reports relating to Planning Department visits and inspections since 1 November 2018 especially that of [name redacted] around the beginning of April this year (including photographs and all other related documents)

- any internal emails/letters/documents from or to Planning Department staff discussing this planning unit

- any documents/emails/memos/reports/minutes related to Planning Department meetings with representatives of [address redacted]"

7. The Council responded on 18 June 2019. It provided some information within the scope of the request, but redacted the information which was deemed to be personal information.
8. The Complainant contacted the Council on 18 June 2019 and advised that information relevant to the request were missing. The Council provided some additional document on 6 August 2019 to the complainant.
9. The Complainant made an Internal Review request on 6 August 2019 to the Council.
10. Following an internal review, the Council wrote to the complainant on 11 December 2020. It advised that it had breached Section 10 of FOIA by not responding within the statutory deadline and Section 17(1) of FOIA as it did not state the exact exemption.
11. The Council requested further clarification in the following terms:

"please could you provide the following information:

- A timeframe for the information you are requesting and in particular in relation to points three and four of your original request. From example from 1 January 2017 to 08 May 2019.

- To the extent possible, the names of any council officers you believe were party to the meetings.”
12. The complainant provided clarification in the following terms on 7 January 2021:

“A timeframe for the information you are requesting and in particular in relation to points three and four of your original request.

1 January 2017 to 07 August 2019.

To the extent possible, the names of any council officers you believe were party to the meetings.

[names redacted]”

13. The Council provided a further response to the complainant on 30 August 2022, it explained that information within the scope of the request would be exempt under Regulation 12(4)(b).

Scope of the case

14. The complainant contacted the Commissioner 30 August 2022 to complain about the way their request for information had been handled.
15. The Commissioner has considered whether the council is entitled to withhold the information under regulation 12(4)(b).

Reasons for decision

Is the requested information environmental?

16. The Commissioner has first considered whether the information is environmental in accordance with the definition given in regulation 2(1) of the EIR: “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..."

17. In this case the requested information relates to a planning matter. In keeping with regulation 2(1)(c), the Commissioner considers, therefore, that the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment.

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

18. 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. There is no definition of manifestly unreasonable within the EIR, but the Commissioner's opinion is that "manifestly" implies that a request should be obviously or clearly unreasonable for a public authority to respond to in any other way than applying this exception. The Commissioner has published guidance¹ on regulation 12(4)(b).
19. There is no formal cost or time limit beyond which a request becomes manifestly unreasonable. However, the Commissioner considers that the equivalent cost limit in FOIA (which would be £450 or 18 hours for this public authority) is a useful benchmark – though he will take other factors into account.
20. The Council explained to the Commissioner that there are over 900 emails within the requested timeframe, it estimated that it would take around 2 minutes for each email to be reviewed.
21. The Council further explained that if the emails were to be disclosed, it would also have to make relevant redactions to remove all personal data. The Council further estimated it would be able to make redactions on 10 to 20 emails per hour.

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

22. The Council informed the Commissioner that the estimated redaction and retrieval exercise would take no less than 52.5 hours of staff time. At a flat rate of £25 per hour for the cost of staff time, the estimated cost of this request would be at least £1,312 and therefore over the appropriate cost of compliance set out in ICO guidance.
23. The Council concluded that while there is a presumption in favour of disclosure under EIR, responding to this request would place unreasonable demands on its resources and for this reason, the Council consider the request to be manifestly unreasonable under regulation 12(4)(b) of the EIR.
24. The complainant advised that previous case law "shows that providing 917 emails is nowhere near the threshold for invoking Regulation 12(4)(b)."
25. Whilst the Commissioner acknowledges that in some circumstances providing 917 emails may not be manifestly unreasonable. The Commissioner is satisfied in the circumstances of this case, the Council has correctly relied on Regulation 12(4)(b) when withholding the requested information.
26. As the Council explained, due to the nature of this case, there is likely personal data contained in the majority of the emails. With this in mind, the Commissioner also agrees that the retrieval and redaction of the requested information would be manifestly unreasonable.
27. The Commissioner agrees that the Council's estimate of 2 minutes to review each email (on average) would be reasonable and that a redaction of such emails could take between 3/6 minutes.

Public interest test

28. The Commissioner recognises that there is always a strong public interest in disclosure to show the Council is operating in a transparent, open and honest way.
29. The Commissioner also acknowledges that disclosing the requested information would help the public understand how decisions are made by the planning department.
30. The Commissioner however recognises that it would not be in the public interest to take away 52.5 hours of staff time. This would divert attention from staffs' normal roles and tasks, this would not be in the public interest.
31. The Commissioner has concluded that the public interest in the requested information, does not outweigh the burden on the Council.

The Commissioner's decision is that the Council was entitled to rely on Regulation 12(4)(b) when refusing the request.

Procedural Matters

Regulation 11 – Appeal

32. The complainant contacted the Council on 7 August 2019 requesting an Internal Review, the Council did not complete this Internal Review until 11 December 2020.
33. The Commissioner's decision is that the Council has failed to carry out a reconsideration (internal review) of a response it provided under the EIR, within 40 working days. It has therefore breached regulation 11 of the EIR.

Regulation 14(2) – Refusal notice

34. Under regulation 14(2) of a public authority must issue a refusal notice in respect of any excepted information within 20 working days of a request. The complainant provided clarification to their request on 7 January 2021, yet the Council didn't provide a response until 30 August 2022 clearly breaching Regulation 14(2).

Regulation 9 - advice and assistance

35. Regulation 9(1) of the EIR says 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.
36. The Commissioner has not seen any evidence to suggest that the Council has provided any advice or assistance in this case. The Commissioner's decision is that the Council did not provide the complainant with adequate advice and assistance and therefore breached regulation 9 of the EIR.

Other Matters

37. The Commissioner would like to note that the delays in responses for this case are unacceptable and cannot be wholly excused by the Covid-19 pandemic. The Council should work much harder in the future to ensure that such time delays and breaches do not happen again.

38. The Council may wish to take advantage of the Commissioner's resources such as his request calculator² and timeliness self-assessment toolkit³ to help improve its performance.

² <https://ico.org.uk/media/for-organisations/documents/4023849/foi-response-rate-calculator.xlsx>

³ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/assessing-the-level-of-your-compliance-with-foia-and-eir-timescales/>

Right of appeal

39. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

40. 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.
41. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
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SK9 5AF