

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 31 July 2019

Public Authority: Cheshire West and Chester Council
Address: HQ Building
58 Nicholas Street
Chester
CH1 2NP

Decision (including any steps ordered)

1. The complainant has requested information with regards to an independent investigation that was commissioned to look at planning issues connected with a school. Cheshire West and Chester Council (the council) refused the request relying on regulation 12(4)(b) of the EIR as it considered it was manifestly unreasonable. The council also sought to rely on regulation 12(5)(b) of the EIR – Course of justice and legal professional privilege - to refuse this information.
2. The Commissioner's decision is that regulation 12(4)(b) of the EIR is engaged to the requested information and therefore did not go on to consider regulation 12(5)(b) of the EIR.
3. The Commissioner also found that the council breached regulation 14(2) of the EIR as it provided its refusal notice outside the required 20 working days.
4. As the council has responded and found that the information is exempt from disclosure, the Commissioner does not require it to take any steps.

Request and response

5. On 14 September 2018 the complainant wrote an 11 page letter to the council and towards the end of the correspondence made the following information request:

"release to me the specialist planning Counsel's opinion that I know exists and the terms of which I am entitled to know pursuant to the assurances I was given by both [name redacted] and [name redacted] of CWAC."

6. The complainant complained to the Commissioner on the 22 November 2018.
7. Following contact from the Commissioner on the 5 December 2018 asking that the council respond to the complainant, the council provided its response on 18 December 2018.
8. The council interpreted the request to be for 'the Counsel's opinion given to the council as part of the independent investigation that it commissioned to look at planning issues connected with Mill View Primary School'.
9. The council then refused the request under regulation 12(5)(b) of the EIR - the course of justice exception and legal professional privilege. It also applied regulation 12(4)(b) of the EIR as it considered the request was manifestly unreasonable.
10. The complainant requested an internal review on the 21 December 2018 as he was not satisfied with the time it took the council to respond to his request and set out the reasons why he considered the exceptions have been incorrectly applied.
11. The council provided its internal review response on 21 January 2019 upholding its initial response to refuse the request. The council also did not uphold the requestor's complaint about the time delay in responding to his original request.

Scope of the case

12. The complainant contacted the Commissioner to complain about the refusal of his request and time it took the council to respond.
13. The Commissioner considers the scope of the case is to determine whether the request is manifestly unreasonable as per regulation 12(4)(b) of the EIR.
14. The Commissioner will only go on to consider regulation 12(5)(b) of the EIR – Course of justice and Legal professional privilege – if she finds that regulation 12(4)(b) of the EIR is not engaged.
15. The Commissioner will then determine whether the council has breached regulation 5(2) of the EIR in the time it took to respond to the request.

Reasons for decision

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

16. Regulation 12(4)(b) of 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' under 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.
17. The Commissioner recognises that, on occasion, there is no material difference between a request that is vexatious under section 14(1) of the Freedom of Information Act 2000 (the FOIA) and a request that is manifestly unreasonable on vexatious grounds under the EIR. The Commissioner has therefore considered the extent to which the request could be considered vexatious.
18. The term 'vexatious' is not defined in the legislation. In *Information Commissioner vs Devon County Council and Dransfield*¹ the Upper

¹ <https://www.judiciary.uk/judgments/info-commissioner-devon-countycouncil-tribunal-decision-07022013/>

Tribunal took the view that the ordinary dictionary definition of the word is only of limited use, because the question of whether a request is vexatious ultimately depends upon the circumstances surrounding that request. The Tribunal concluded that 'vexatious' could be defined as "...manifestly unjustified, inappropriate or improper use of a formal procedure" (paragraph 27). The decision clearly established that the concepts of 'proportionality' and 'justification' are central to any consideration of whether a request is vexatious.

19. In the Dransfield case, the Upper Tribunal stressed the

"importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not. Emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests" (paragraph 45).

20. In this case the council has told the Commissioner that this request was considered in the context of the complainant's previous contact with the council concerning issues related to the primary school, the completion of the independent reviewer's report and a large number of information requests from him.

21. The council has explained to the Commissioner that the complainant's property is adjacent to this primary school and the letter, in which his information request was made, was the latest approach to the council's Chief Executive in relation to long standing and complex complaints and challenges concerning development and activities at the primary school.

22. The council has told the Commissioner that in 2015, the council's then Chief Executive commissioned an independent review of multiple issues resulting in a detailed report that set out the reviewer's position on each of the issues the complainant had raised.

23. This report was carried out and provided to the complainant in April 2016.

24. A previous decision notice was issued by the Commissioner on 25 October 2016 under reference FER0631144² which supported the

² <https://ico.org.uk/media/action-weve-taken/decision-notice/2016/1625299/fer0631144.pdf>

council's refusal that the complainant's nine requests, at that time, were manifestly unreasonable.

25. The council considers this latest request to be a continuation of a challenge to the council's position on what it considers to be historic matters that have been fully considered.
 26. The council states that the council's current Chief Executive was appointed in July 2018 and the complainant wrote his 11 page letter to him, which contained the request, asking that he revisit these issues.
 27. The council considers this to be unreasonable and persistent and that it is continuing to place an unreasonable burden and cause further burden by asking the council to revisit these matters it considers have been addressed
 28. The council points out that the complainant's letter, which included the request, makes very serious allegations against senior council officers, including 'very serious misfeasance in public office'.
 29. The council has provided the commissioner with a copy of a decision notice by the Local Government and Social Care Ombudsman that was issued on May 2019 which considered whether the council had failed to protect the complainant's amenity and how it has handled the complainant's complaints and concerns.
 30. The Ombudsman did not investigate the complaint further as there was no evidence to show that the complainant was caused significant injustice or that further investigation would achieve a meaningful outcome. The case was recorded as 'not upheld'
 31. Although this ombudsman decision came after this latest request, it does show that the complainant is still pursuing these matters causing the council further burden in having to deal with external bodies enquiring into these matters, which again has not been upheld.
 32. The complainant has told the Commissioner that he should be entitled to this requested information and highlighted an extract sent to him from the person who did the independent report which he considers proves his entitlement. The extract states:
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"Planning Issues – Investigations and information gathering are ongoing. I have requested that CWAC seeks to instruct a planning barrister for a further view on appropriate legal issues. This is an important element as we have agreed. I am unaware of the timescales for engagement and completed advice but have requested CWAC to seek to expedite this urgently to see how far this can be progressed, if not finalised, before the Christmas break."

33. The complainant has also stated that:

"The information requested was obtained by the Council solely for the purpose of performing its obligation (ANNEXEs Ci & Cii refer) to me, as contained in my agreement with its then Chief Executive, that it would conduct a specialist, transparent and independent investigation of:

- "the fairness and correctness of both the Councils conduct and the planning decision that it was not expedient to either a) take enforcement action against the accepted unauthorised development or b) request the submission of a retrospective planning application for the Forest School development" and more generally*
- "all planning and planning enforcement decisions taken to date in respect of Mill View Primary School and the related advice and information given to the school and to Mr Roxburgh".*

34. The council has responded to the Commissioner stating that it did not take legal advice solely to fulfil its obligation to the complainant. It agreed with him to conduct an independent review of the issues raised. The council says it took independent legal advice to inform the independent review and to consider its statutory duties and responsibilities.

35. This independent review was then subsequently provided to the complainant.

36. It also states that disclosure under the EIR is a disclosure to the world at large, not just to an individual party and the council has stated that it does not take legal advice on behalf of private individuals.

37. On review of the above and after carefully considering the previous decision notice FER0631144 (which the Commissioner considers to hold

significant weight in her decision in this case), the Commissioner is satisfied that the complainant is continuing to pursue matters that have been already addressed and is therefore satisfied that this request is continuing to create an unjustified and disproportionate burden on the council in having to respond.

38. The Commissioner is of the view, especially after considering the previous decision notice FER0631144 that even if the council were to respond to this request, this will not satisfy his issue and further requests will continue to be made to the council on the matter.
39. The Commissioner finds that regulation 12(4)(b) of the EIR is engaged.

Public Interest Test

40. Regulation 12(4)(b) of the EIR is subject to the public interest test at regulation 12(1)(b) of the EIR which states that information can only be withheld if in all circumstances of the case, the public interest in maintain the exception outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

41. The council has told the Commissioner that it recognises the general principle of disclosure in that it creates transparency and accountability in public authorities.
42. The complainant is of the view that providing the requested information will help to satisfy the transparent and independent review that he was promised and he considers has not been provided.

Public interest in maintaining the exception

43. The council states that this request is a continued disproportionate use of public resources when taking into account the value and purpose of the request, when the council has already spent significant time and expense, including commissioning an independent review.
44. It considers responding further on this matter is placing a strain on its resources and day to day operations in its employee's ability to deliver its services to the public. The council argues that its focus should be on improving its processes and services for the benefit of all of its customers not revisiting matters that have been concluded.

Conclusion

45. The Commissioner is aware that there is always going to be a public interest on decisions being made by public authorities, even if it is in relation to individual complaints and the Commissioner is always mindful of the impact that regulation 12(4)(b) of the EIR has on a complainant's rights to obtain information from a public authority.
46. It is clear that the complainant does not consider that the review has been carried out as transparently as he expected. However the Commissioner is not convinced that if this requested information were provided, it would satisfy the complainant and the council would still be subjected to further correspondence and requests for information on this matter.
47. The Commissioner, again referring back to the previous decision notice FER0631144, maintains her view that *"it is difficult to identify a wider public interest in the requested information. She is of the view that the requests and interactions with the council are about a personal matter which, despite the efforts of the council, the complainant will not accept as closed."*
48. On consideration of the above, the Commissioner finds the public interest in maintaining the exemption outweighs any public interest in disclosure and therefore upholds the application of regulation 12(4)(b) of the EIR.
49. As the Commissioner has found regulation 12(4)(b) of the EIR to be engaged, she has not gone on to consider regulation 12(5)(b) of the EIR.

Regulation 14(2) of the EIR – Refusal to disclose information

50. If a public authority is refusing a request for environmental information it must do so in accordance with regulation 14 of the EIR.
51. Regulation 14(2) of the EIR requires that the refusal is made as soon as possible and no later than 20 working days and as per section 14(3) the refusal shall specify the reasons not to disclose the information requested including the exception(s) being relied upon along with any factors taken into account in reaching a decision under the public interest test.
52. In this case the council has advised the Commissioner that the complainant's request was embedded in a lengthy complaint letter which

the council's Chief Executive responded to on 9 October 2018 as normal course of business.

53. The council argues that, had the request been formally logged as an EIR request then it would have breached the statutory response deadline, but it considers that this does not apply in this case as the request was dealt with initially as routine business. Then once the Commissioner made the council aware that the complainant wanted this dealing with as an information request - it responded within the 20 working days that the Commissioner asked it to.
54. Also the council has told the Commissioner that it had responded to a councillor's information request, around the same time as this request, for the same information, refusing it under the same exceptions that were eventually applied to this request.
55. The Commissioner has published guidance³ for public authorities on her website *"What should we do when we receive a request for environmental information?"* In this guidance it states that you do not *"...have to treat every enquiry formally as a request under the Regulations. It will often be most sensible and provide better customer service to deal with it as a normal customer enquiry under your usual customer service procedures. For example, if a householder wants to know the refuse collection dates for their property, it could be dealt with as a 'normal course of business' enquiry – you could tell them there and then, or send them a copy of the relevant leaflet. The legal requirements under the Regulations may come into force if:*
 - *you cannot provide the requested information straight away; or*
 - *the requester makes it clear they expect a response under the legislation."*
56. The fact that the council was not going to release the held information means it should have therefore responded under the EIR or at the very least, asked the complainant if he wanted his request to be dealt with formally under the EIR so it could respond in the required timeframes.

³ <https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/receiving-a-request/>

57. As well as this, even though the council refused a separate, but essentially similar, request made by a councillor that the council considered was being made on behalf of the complainant, it does not negate the council's duties to respond in accordance with the EIR to the complainant's request. Every request received needs to be dealt with as a separate request no matter how closely related they appear.
58. On this basis the Commissioner finds that the council has breached regulation 14(2) of the EIR as it did not issue a valid refusal notice within the required 20 working days of the request being received.
59. As the council has now responded, the Commissioner does not require it to take any steps.

Right of appeal

60. 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

61. 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.

62. 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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