

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

Decision notice

Date: 9 February 2015

Public Authority: Kent County Council
Address: County Hall
Maidstone
Kent
ME14 1XQ

Decision (including any steps ordered)

1. The complainant has requested information relating to statutory notices issued under the Highways Act 1980. The Commissioner's decision is that Kent County Council has correctly applied the exception for manifestly unreasonable requests at Regulation 12(4)(b) of the EIR. The Commissioner has also found that Kent County Council has breached Regulation 9(1) by not providing appropriate advice and assistance.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Provide the complainant with appropriate advice and assistance with regard to the requested information that can be provided, to enable her to make an appropriate refined request if necessary.
3. 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 the Act and may be dealt with as a contempt of court.

Request and response

4. On 14 August 2014, the complainant wrote to Kent County Council ('the council') and requested information in the following terms:

"Could you please advise details of any statutory notices issued under the Highways Act 1980 such as those issued under Sections 152, 154, 167 and 230 (and any other sections as appropriate) that remain open i.e. where the matter has not been resolved by the property/land owner.

Please provide the following information for each notice:

Date issued

Legislation and Section issued under

Reason for issue

Postcode of the address the notice relates to

If you need further clarification, please do not hesitate to contact me."

5. The council responded on 3 September 2014 and refused to provide the requested information on the grounds that it is manifestly unreasonable under Regulation 12(4)(b). In addition, it said that the information is also exempt from disclosure under Regulation 12(5)(b) as it would adversely affect the course of justice.
6. The complainant requested an internal review on 8 September 2014. The council provided its internal review response on 7 October 2014. It maintained its reliance on the exceptions at Regulations 12(4)(b) and 12(5)(b) and also applied the exception at Regulation 12(5)(f).

Scope of the case

7. The complainant contacted the Commissioner on 16 October 2014 to complain about the way her request for information had been handled.
8. During the investigation, the council withdrew its reliance on the exception at Regulation 12(5)(b). It said that the refusal on the ground that providing part of the information requested would involve the disclosure of personal information within the meaning of the Data Protection Act 1998 is maintained, but under Regulations 12(3) and 13, rather than 12(5)(f).
9. The Commissioner has considered the council's application of Regulation 12(4)(b).

10. As the Commissioner has found that the exception at Regulation 12(4)(b) applies in this case, he has not found it necessary to consider the exception for the disclosure of personal information.

Reasons for decision

Regulation 12(4)(b) – manifestly unreasonable

11. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
12. In this case, the council cited this exception on the grounds that the cost and burden of dealing with the request is too great.
13. The EIR differ from the FOIA in that no specific limit is set on the amount of work required by an authority to respond to a request as provided by section 12 of the FOIA. 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 they are not a determining factor in assessing whether the exception applies.
14. 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.
15. It should also be noted that public authorities may be required to accept a greater burden in providing environmental information than other information. This was confirmed by the Information Tribunal in the DBERR case¹ where the tribunal considered the relevance of regulation 7(1) and commented as follows (paragraph 39):

¹ Department for Business Enterprise and Regulatory reform v The Information Commissioner and Platform. Appeal no. EA/2008/0097

"We surmise from this that Parliament intended to treat environmental information differently and to require its disclosure in circumstances where information may not have to be disclosed under FOIA. This is evident also in the fact that the EIR contains an express presumption in favour of disclosure, which FOIA does not. It may be that the public policy imperative underpinning the EIR is regarded as justifying a greater deployment of resources. We note that recital 9 of the Directive calls for disclosure of environmental information to be "to the widest extent possible". Whatever the reasons may be, the effect is that public authorities may be required to accept a greater burden in providing environmental information than other information."

16. Therefore, 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.

17. The council said that there is no central database which can be searched for notices to ascertain whether or not a landowner has complied with a notice and that it is not under a statutory duty to record information in the way it has been requested.

18. It said that notices can be issued by the Enforcement team (which was the only team enquiries were made of when the council provided its initial response and internal review) and other teams within Highways, Transport and Waste. It explained that notices are mainly recorded in electronic files, although in a number of different systems suited to the needs of the different teams, and that in order to provide the

information requested it would be necessary to search through the following:

1. "11,889 enquiries received in 2014 in relation to trees shrubs and vegetation on the WAMS system to determine whether notices were issued and what their current status is. Each record would take approximately 6 minutes to search. The total time engaged would be approximately 1,188 hours.
2. 1,600 open enquiries in relation to drainage and flooding. It would take approximately 1 minute to search each enquiry and 3 to 5 minutes to extract the information. The total time engaged would be a minimum 27 hours plus the time taken to extract the information.
3. 652 files on the Customer Services Module recording system. To search each file and retrieve the relevant information would take approximately 90 seconds, or 16 hours 20 minutes in total.
4. 17 notices identified on the Countryside Access and Management System. The initial search takes about 10 minutes. The follow up interrogation of the relevant files takes about 5 minutes per file. Postcodes where recorded may relate to a property, but in some cases may relate just to a road where an obstruction is located. The total time engaged would be approximately 1 hour 35 minutes.
5. 4 excel spreadsheets and 13 digital folders for s154 notices issued in connection with bus routes. The spreadsheets do not record the date of issue of the notice. In order to ascertain the date of issue, it is necessary to open electronic copies of the letters. There are also 6-10 postcard books. The time engaged would be approximately 4-4 ½ hours."

The council confirmed that the above estimates are based upon the quickest method of gathering the requested information.

19. The council also explained that in the case of the majority of files referred to above the postcode would not be recorded because files are usually opened in response to an issue being reported by a member of the public who would not provide a postcode of the property reported. It said that some postcodes that are recorded were provided by the Land Registry, and the quality is poor and that the postcodes that are recorded sometimes refer to the address of the owner of the property or land in question, not to the property or land itself, for example, notices may relate to woodlands or fields.
20. The complainant has said that;

"a member of the public should not be penalised because your information is not organised well. You should maintain a centralised list of this information that is easily accessible. A simple spreadsheet that the relevant teams can update would be sufficient, easy and cost effective method. I believe this information is required for Land Searches. Is it that difficult for them to access the information too? I dispute than an email to several different departments for lists of their ongoing cases would exceed the FOI cost limit. They must keep lists of cases that are being monitored otherwise how do they organise and keep track of their work?

21. As noted earlier, the council has said that it is not under a statutory duty to record information in the way it has been requested. The Commissioner would like to draw attention to the fact that the EIR is concerned with recorded information that is actually held by a public authority, not what a complainant believes should be held.
22. In relation to the burden imposed by this request, the Commissioner has first considered the 11,889 enquiries received in 2014 in relation to trees shrubs and vegetation on the WAMS system. He notes that section 154 of the Highways Act 1980 is concerned with overhanging trees and therefore considers it appropriate that the council would need to search enquiries in relation to trees shrubs and vegetation given its position that there is no central database which can be searched for notices. He also notes that the council's estimate is based upon the quickest method of gathering the requested information. Even if the council's estimate of 6 minutes to search each record was reduced to 1 minute per record, then it would still take 198 hours. The Commissioner considers this to be a significant burden.
23. The council has said that providing the requested information would subject it to a disproportionate burden as it has limited resources and officers would be taken away from their duties in order to respond to the request.
24. The Commissioner asked the council to bear in mind that the complainant has said that the requested information is required to complete Con29 searches (question 3.7(e)) and has asked whether the council refuses to provide this information to complete an Official Land Search. The council explained to the Commissioner that the complainant is requesting information relating to the entire county and in order to complete a Con29 search all that is needed is information relating to a single property and such information, relating to any specific property, is available from the council for a modest fee. It further explained that issues to which notices relate are resolved on an ongoing basis, and new notices are issued on an ongoing basis, and therefore the information would be out of date even before it were provided. The Commissioner

considers that this reduces any wider value in the requested information being made publicly available.

25. The Commissioner has taken into account the presumption in favour of disclosure and the requirement to interpret the exceptions restrictively and accepts that when an exception from the EIR is cited, the arguments in favour of the citing of that exception must be sufficiently compelling to outweigh these factors. However, in the particular circumstances of this case, the Commissioner has found that the time and cost of dealing with the request would impose a disproportionate burden upon the council when weighed against the value of the requested information being made public. He therefore considers that the exception is engaged and has gone on to consider the public interest test inherent in this exception.

Public interest test

26. All exceptions in the EIR are subject to the public interest test. Therefore, in deciding whether the information should be withheld the Commissioner has had to balance the public interest in maintaining the exception against the public interest in disclosure.
27. In relation to the public interest in disclosure, the council said that it accepts that it is in the public interest in general terms for information about its activities to be made available to members of the public. The Commissioner has taken into account the general public interest in transparency and accountability. He is also mindful of the presumption in favour of disclosure and the need to read exceptions restrictively.
28. In relation to the public interest in maintaining the exception, the council said that it has limited resources and the public interest would not be best served by taking officers away from their duties. It said that the officers involved are those whose duties are protecting the environment, and diverting them from those duties would necessarily impact on the quality of the environment.
29. The council also said that if the information requested in respect of the entire county were to be provided and were to be subsequently used to complete Con 29 searches, this would expose the public to the risk of receiving inaccurate information. It explained that;

"This is because issues to which notices relate are resolved on an ongoing basis and new notices are issued on an ongoing basis; accordingly the information would be out of date even before it were provided, and would become more out of date with each passing day: properties would appear to be subject to notices where that was no

longer the case, and other properties would be subject to notices issued after the date the information was provided.”

30. The Commissioner has taken into account the burden and distraction that would be imposed on the council and the wider public interest in protecting the integrity of the EIR and ensuring that they are used responsibly.
31. On balance the Commissioner finds that the public interest favours maintaining the exception as the burden imposed on the council would be significant and, due to the constantly evolving status of the information, any wider value in the request is reduced. The Commissioner's view is that the complainant's request would not fulfil any wider environmental issue.
32. Therefore, in all the circumstances of the case the Commissioner finds that the public interest in maintaining the exception in regulation 12(4)(b) outweighs the public interest in disclosure.

Regulation 9(1) – advice and assistance

33. 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.”
34. This regulation places a duty on a public authority to provide advice and assistance to someone making a request and the Commissioner believes that this includes assisting an applicant to refine a request if it is deemed that answering a request would incur an unreasonable cost.
35. In the initial request for information the complainant specifically said 'If you need further clarification, please do not hesitate to contact me' and in the internal review request said 'I am happy to discuss other ways that this information can be provided'.
36. Despite this, the Commissioner notes that no advice and assistance was given by the council in relation to refining the request. He is mindful of the fact that the council's obligation under regulation 9(1) only extends to what is reasonable. His view is that it would have been reasonable, for example, for the council to suggest that the request could be made in relation to specific properties. The Commissioner therefore finds the council has failed to comply with regulation 9(1) of the EIR.

Right of appeal

37. 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

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

38. 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.
39. 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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