

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

Date: 16 May 2016

Public Authority: Wakefield Council
Address: Wakefield One
PO Box 700
Wakefield
WF1 2EB

Decision (including any steps ordered)

1. The complainant has requested all information about a listed building held by named officials. The Council initially dealt with the request under FOIA and refused the request under section 12 on the basis the cost of compliance would exceed the cost limit. During the course of the Commissioner's investigation the Council recognised that the request should have been handled under the EIR and so refused the request under regulation 12(4)(b) – manifestly unreasonable, again, on the basis would cost too much to comply with.
2. The Commissioner's decision is that Wakefield Council is entitled to rely on the regulation 12(4)(b) to refuse the request. However as it did not apply this exception within the twenty working days the Council has breached regulation 14(2). The Commissioner is also not satisfied that the Council initially provided adequate advice and assistance aimed at enabling the complainant to make a refined request, as required by regulation 9. However during the Commissioner's investigation the Council provided detailed advice and assistance. Although this advice and assistance was provided late, the Commissioner is now satisfied that the Council has fully complied with its obligations under the Regulations.
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. On 24 March 2015 the complainant made a request to inspect all information about the Counting House, a listed building in Pontefract. This was refused on the 29 March 2015 under section 12 of FOIA. Section 12 provides that a public authority can refuse a request where it estimates that the cost of complying with that request would exceed the appropriate limit. The appropriate limit for public authorities such as the Council is £450. If a council estimates that it would cost more than £450 to locate and retrieve the requested information, it is not obliged to comply with the request.
5. On the 30 March 2015 the complainant made another request in the following terms:

“I write further to my 24 March request to inspect documents relating to my above property. And further to your call, advise that having dealt with several WMDC departments and fourteen officials since 2013, need to peruse the following files: -

Planning - to include Messrs. (Named officers A, B and C).

Conservation Planning - to include (Named officers D and E).

Urban Centre Management & Economic Growth - to include (Named officer F).

Economic Growth & Housing - to include (Named officer G).

Councillor (Named Councillor H)'s file.”
6. On 29 April 2015 this request was also refused under section 12. He was simply informed that the cost of dealing with the request would exceed the appropriate limit. In addition he was told that the Council may be able to assist him with his request if he narrowed his request down. However he was not advised how he may be able to do so. The complainant subsequently made a third request on 15 May 2015 for the following:

“I would like to inspect the following files: -

 1. (Named officer D) - Conservation officer.
 2. (Named Officer G) - Corporate Director Regeneration & Economic Growth.
 3. (Named officer A) - Director of Planning, Transportation & Highways.”

7. The Council contacted the complainant on 1 July 2015. Again the request was refused under section 12. The complainant then emailed the Council on 23 September 2015 and asked the Council to review the decision to refuse his latest request.
8. The Council's response was provided on 20 October 2015. It simply informed the complainant that the Council had previously asked him to narrow the scope of his request and unless he did so the Council would be unable to assist him any further. It is not clear from that response whether the Council actually reviewed how it had estimated the costs of complying with the request, or the level of advice and assistance that had been provided. Nevertheless, it is clear that the Council considers it has concluded its handling of this matter and informed him that he was now free to complain directly to the Commissioner.
9. After the Commissioner received the complaint he contacted the Council on 7 January 2016 and advised it that as the information appeared to relate to an historic building which formed an important element of the urban landscape, it was likely to constitute environmental information and therefore the request was should have been dealt with under the EIR.
10. On 4 February 2016 the Council wrote to the complainant and informed him that having formally reconsidered his request of 15 May 2015 it recognised that the request should have been dealt with in accordance with the EIR. It went on to explain that it now considered the request was manifestly unreasonable because the cost of complying with it would be too great. It therefore applied regulation 12(4)(b) to refuse the request. The Council also advised the complainant that he may be able to narrow the request by making a more focussed request, narrowing the time frame of the request, narrowing the specific formats or types of information or narrowing his request to a more limited number of officers.
11. During the course of the Commissioner's investigation the complainant identified the information held by (Named Officer D) as being of most interest to him. Following discussions with the Council the Commissioner was able to inform the complainant that information held by that officer consisted of a very large number of emails together with a number of electronic project files, some of which were duplicated in hard copy files. The Council prepared, what it described as, a file register listing the contents of the various project files. The Commissioner passed the file register on to the complainant on 24 March 2016. Later, on 28 April the complainant was also provided with similar file registers for the other two officers named in his request

Scope of the case

12. The complainant contacted the Commissioner 9 May 2015 to complain about the way his requests were being handled by the Council. This was obviously prior to his request of 15 May 2015. However at that stage it was not clear that the complainant had asked the Council carry out an internal review. It was only after the complainant had made his request of 15 May 2015 and subsequently asked the Council to review its refusal of that request, that the Commissioner was satisfied that the complaint was eligible for investigation.
13. The complainant was concerned about the Council's handling of a dispute about the condition of the listed building and was concerned that he was being denied access to information which he believed was in the public interest to release.
14. The Commissioner considers that the issues to be decided is whether the Council is entitled to refuse the request of the 15 May 2015 under regulation 12(4)(b) and, if it is, whether it followed the correct procedures for refusing the request on that basis, ie whether it issued an appropriate refusal notice in accordance with the provisions of regulation 14. Finally the Commissioner will consider whether, having refused the request under regulation 12(4)(b), the Council provided appropriate advice and assistance to the complainant which would have allowed him to make a refined request which would not cost too much to deal with.

Reasons for decision

Regulation 12(4)(b) – manifestly unreasonable

15. Regulation 12(4)(b) of EIR states that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
16. The purpose of the exception is to protect public authorities from requests which would impose a disproportionate burden on them, and can be used when the cost of complying with a request is too great. To some extent it serves the same purpose as section 12 – the appropriate limit under FOIA, ie the exemption applied by the Council when first dealing the request under FOIA. However there are differences in the way the two provisions work. Section 12 of FOIA provides a definite £450 cut off point above which a public authority, such as a Council, is no longer obliged to deal with the request, however a public authority an only take account of certain activities when estimating whether that cost would be exceeded. Under regulation 12(4)(b) there is not a fixed

amount above which a request can automatically be refused, but neither are there any limitations on the tasks that can be taken into account when considering whether a request would cost too much to deal with.

17. Having said that, the Commissioner considers that the provisions of the FOIA and the Fees Regulations¹ which accompany it provide guidance as to the rate that should be used for staff time when estimating the cost of dealing with a request and the point at which the overall cost would begin to place an unreasonable burden on a public authority.
18. When estimating how much it would cost to comply with a request the Council focussed on the information held by its conservation officer as they were the main person involved in dealing with the Counting House. The Council advised the Commissioner that the information held by this officer consisted of:
 - i) 5 hard copy files – with an estimated 85 documents per file (a total of 425 documents),
 - ii) 26 electronic project files – with an estimated 510 documents per file (a total of 13,260),
 - iii) 2205 emails, and
 - iv) 3307 emails on mail meter (which the Commissioner understands to be archived emails).
19. This means that the officer held a total of 19,197 documents/emails. The Council estimated that it would take an average of 1 minute to retrieve and extract each document/email. This would mean that it would take 320 hours to deal with the request. Using the rate for staff time prescribed under the Fees Regulations of £25 as a guide, this would equate to a cost of £8,000 (£25 x 320 hours). The Commissioner accepts that a request which absorbed 320 hours of staff time would place a disproportionate burden on a public authority. However before accepting the Council's estimate the Commissioner will scrutinise the estimate of the number of documents/emails held, the activities which the Council has taken into consideration and the time it estimates it would take to carry out those activities.
20. The Council has confirmed that the activities it has taken account of when estimating the cost of complying with the request do not include the time taken to consider any that might apply. Although there may be circumstances where it is appropriate to consider the time taken to

¹ Statutory Instrument 2004 No. 3244 The Freedom of Information AND Data Protection (Appropriate Limit and Fees) Regulations 2004.

consider exceptions due to the complexity and volume of the requested information, the Commissioner does not consider it appropriate in this case.

21. Instead the Council has estimated the time it would take to produce hard copies of the requested information. These hard copies would form a working bundle which both the conservation officer and the Council's Information Governance team could use when considering exceptions and which could then be prepared for release, including, if necessary the redaction of any exempt material. The Commissioner considers this to be a necessary part of the request handling process and therefore is satisfied this activity can be included when considering whether a request is manifestly unreasonable.
22. In terms of the number of documents held, upon examining the files held in more detail when producing the file register the Council recognised that the hard copy files were in fact duplicates of some of the information held in the electronic project files and that rather than there being 13,260 (26 x 510) documents held in the electronic project files there were only 3,444. On their own these would take over 57 hours (3,444 x 1 minute = 3,444 minutes, 3,444 / 60 = 57.4 hours) to retrieve and locate based on the Council's assessment of 1 minute per document. When account is taken of the emails, including those on mail meter the cost would be £3,725 (3,444 + 2205 + 3307 = 8,956 total documents, 8,956 x 1 minute = 8,956 minutes / 60 = 149 hours x £25/hr = £3,725)
23. Certainly if account was taken of the emails the request still appears to be manifestly unreasonable. However it is debateable whether the emails are captured by the request. The actual request of 15 May 2015 was to inspect the 'files' of the three named officers. Although you can describe each email as an electronic data file, it is not clear to the Commissioner that it was the intention of the complainant to capture such emails. The Commissioner considers that the most natural reading of the request was that it sought the information held in the project files. During the Commissioner's attempts to informally resolve this case the complainant did agree to focus his request on the 3,444 documents held in the electronic project files but the he did not categorically state that he had no interest in the additional emails and the Commissioner is aware that the complainant is particularly interested in confirming the existence of particular emails which, if they do exist may, or may not be held in the project files.
24. The Commissioner has gone on to consider the actual time that the Council estimates it would take to carry out the activities described in paragraph 21. Although the Council initially claimed that it would take 1 minute to identify each document and to then print that document, it

later recognised that the tasks could be carried out more quickly and that it could process 2.5 documents per minute. This would mean that the Council could produce a working bundle of the documents held in project files in 23 hours (3,444 documents / 2.5 documents per minute = 1,378 minutes, 1,378/60 = 23 hours)

25. If it is assumed that the emails are captured by the request the cost of processing these would have to be included too. The Commissioner understands that the numbers of emails quoted in paragraph 18 relate to all emails held by the conservation officer in their mail box together with all their archived emails; not just those relating to the listed building which is the focus of the request. In light of this, the Commissioner considers it highly likely that even some basic weeding of these emails, using dates, and names of recipients etc, would dramatically reduce the number of emails that had to be considered in more detail to determine their relevance to the request and to then print them off. The Commissioner considers that this could easily reduce the number of emails down to 500. These could be processed in 3 hours 20 minutes (500 / 2.5 documents per minute = 200, 200/60 = 3.33 hours = 3 hours 20 minutes).
26. The Commissioner notes that this would give a total cost of 26 hours and 20 minutes to comply with the request in respect of the information held by the Conversation Officer. Using £25 an hour for staff time this would equate to a cost of just over £658. He notes this is dramatically different than the Council's original estimate.
27. The Council has now produced file registers for the other two officers named in the request of 15 May 2015. These reveal that one officer holds 285 documents and the other 36, a total of 321. These could be processed in just over 2 hours (321 / 2.5 documents per minute = 128 minutes, 128 / 60 = 2 hours)
28. In summary the Commissioner considers a reasonable estimate of the cost of dealing with the request is £708 or 28 hours 20 minutes if the emails held by the Conservation Officer are included (26 hours 20 minutes + 2 hours = 28 hours 20 minutes x £25 per hour = £708) and £625 or 25 hours excluding the emails (23 hours + 2 hours = 25 hours, 23 hours x £25 per hour = £625).
29. The Commissioner will now consider whether the lower estimate of 23 hours or £625 is sufficient to render the request manifestly unreasonable. He notes that it is above the appropriate limit established under section 12 of FOIA which is £450, or 18 hours of staff time. However although this may indicate that the costs involved may have reached a level at which the request could be considered burdensome, the Commissioner is obliged to consider other factors. These include:

- i) the nature of the request and any wider value in the requested information being made publicly available,
 - ii) the importance of any underlying issues and the extent which the requested information would illuminate those issues,
 - iii) the size of the public authority, the resources available to it and the extent to which the public authority would be distracted from delivering other services,
 - iv) 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.
30. The Commissioner will now consider each of these factors in turn. He is aware that the complainant is involved in a dispute with the Council over how it has handled issues relating to the listed building. To some extent the complainant, who owns the listed building, has a private interest in obtaining information in order to pursue that dispute. However the Commissioner understands from the complainant that the listing building is a prominent element of Wakefield's urban landscape. The complainant has hosted a public meeting about his concerns over how the Council is carrying out its conservation functions in respect of the building. This was attended by thirty people. He has also collected a thousand signatures on a petition in support of his concerns. The Commissioner considers this is evidence of a wider value in the information being made public and there being greater transparency over how the Council fulfils its functions in respect of the conservation of this historic building.
31. The Commissioner does not consider it appropriate to go into the detail of the dispute between the Council and complainant over the future of the listed building. It is sufficient to say that the complainant does not believe the Council has acted appropriately when considering what steps are required to ensure the building is maintained in a proper state of repair, he also questions the technical expertise which the Council is relying on. Whilst the Commissioner notes the complainant's own professional expertise in this area the Commissioner is not in a position to adjudicate whether the Council is correct in pursuing its chosen course of action. The Commissioner does not consider the nature of the dispute has a bearing on whether the request is manifestly unreasonable.
32. The Council is a district council serving a population of over 300,000. As such it cannot be considered a small public authority. However the Commissioner understands that the task of producing the working bundle of documents required to process the request would fall to the officers named in the request. In the case of the case of the

conservation officer holding the bulk of the documents producing the bundle this would involve a significant distraction from their core duties. This provides some weight in favour of finding the request is manifestly unreasonable.

33. The Council has not raised any issues around context of the request, in terms of it being one of a series of requests made by the same complainant. The Commissioner is aware that the complainant remains in correspondence with the Council over the listed building which is inevitable given he is its owner. Therefore the Commissioner does not consider this factor has any bearing on whether the request is manifestly unreasonable.
34. Having satisfied himself as to what a reasonable estimate of the cost of complying with this request would be and having considered the other factors listed in paragraph 29 above, the Commissioner finds that the request is manifestly unreasonable. This is even after taking account of the fact that public authorities may be required to accept a greater burden in providing environmental information than other information². This decision is finely balanced, but the Commissioner has given particular weight not only to the amount of time it would take to deal with this request, which is significantly more than that which would be required under FOIA, but also the fact that the main burden of dealing with the request is likely to fall to one member of staff and so prove to be a serious distraction from their ability to carry out their core duties.
35. As with all other exceptions under EIR, regulation 12(4)(b) is subject to the public interest test. Some of the factors already considered above are also relevant to this test.

Public interest test

36. Regulation 12(1)(b) provides that even where an exception to the right of access is engaged, a public authority can only withhold the information if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
37. The Council recognises that there is always some public interest in disclosing information to promote transparency and accountability and to promote greater public awareness and understanding.
38. The Commissioner accepts these general points but considers that there are additional public interest arguments in disclosing this particular information. As discussed in paragraph 30, the listed building referred to

² See Department for Business Enterprise and Regulatory Reform (DEBERR) vs the Information Commissioner and Platform (EA/2008/0097)

in the request is a prominent land mark in Wakefield and the complainant has advised the Commissioner that he collected a thousand signatures on a petition relating to its future. This is evidence of some public concern within the local community over the building and how the Council has carried out its conservation functions in respect of the building. This increases the public interest in disclosing the requested information.

39. The Commissioner also recognises that the complainant is in dispute with Council over building and the work which it considers is necessary to properly maintain it. The Council has relied on the expertise of its own professional officers when considering what measures are required. The Commissioner understands that the complainant has the relevant professional expertise and experience to form his own, informed, views on the measures proposed by the Council. The Commissioner is clearly not in a position to determine which party is correct and therefore the Commissioner does not give any weight to the complainant's argument that it is necessary to disclose the information in order to expose flaws in the Council's handling of this matter.
40. However, the fact that there is a dispute does itself lend additional weight to the public interest in there being greater transparency of the Council's handling of this matter. That additional weight is limited though.
41. The main public interest argument in favour of maintaining the exception in this case lies in protecting the Council from exposure to a disproportionate burden. The majority of the work involved in processing this request would fall to one officer who would be unable to perform their core duties as a result. Given that there is a limited pool of staff capable of carrying out those duties the Commissioner is satisfied that dealing with the request would have an impact on the Council's ability to deliver its mainstream services, albeit a short term one.
42. Having looked at the file registers which the Council has now provided, the Commissioner also considers that it is likely that a refined request could be made which avoided placing such a burden on the Council and still capture much of the more detailed information on the Council's handling of this matter.
43. Therefore the Commissioner finds that the public interest favours maintaining the exception and that the Council is entitled to refuse the request under regulation 12(4)(b).

Regulation 14(2) refusal notice

44. Where a public authority refuses a request it is required under regulation 14 to write to the applicant and explain which exception it is relying on to refuse the request and why it considers the public interest favours maintaining that exception. Under regulation 14(2) the public authority must provide the applicant with this information within twenty working days.
45. In this case the request was originally made on 15 May 2015. The Council originally dealt with the request under FOIA and refused the request under section 12, appropriate limit, on 1 July 2015. This response was provided thirty two working days after the request was received. It was not until the Commissioner had begun his investigation that the Council provided the complainant with an adequate refusal notice citing regulation 12(4)(b) as the basis for refusing the request. This refusal notice was dated 4 February 2016.
46. This is clearly a breach of regulation 14(2). However as the Council has now remedied this failing the Commissioner does not require it to take any further steps.

Regulation 9 – advice and assistance

47. Under regulation 9 a public authority is required to provide a person making a request with advice and assistance so far as it would be reasonable to expect the authority to do so.
48. Where a public authority refuses a request under regulation 12(4)(b) on the basis that it is too voluminous and would therefore cost too much to deal with, the Commissioner finds that it would be reasonable for that public authority to provide the applicant with advice and assistance aimed at enabling them to formulate a refined request which could no longer be considered manifestly unreasonable.
49. The Council originally dealt with this request under FOI and refused it on cost grounds under section 12. There are similar provisions under FOIA as there are under the EIR which require a public authority to assist an applicant to refine their request. However the Council simply advised the complainant to be more specific and narrow the scope of the request down. It did not in the Commissioner's view provide any meaningful advice on how that could be achieved or the extent to which his request was too voluminous. This is despite the fact that the 15 May 2015 request was already a refined version of his earlier 24 and 30 March 2015 requests.

50. There is a code of practice which accompanies the EIR³ which sets out the steps that it may be appropriate for a public authority to consider. These include providing the applicant with access to detailed catalogues and indexes where these are available. The Commissioner considers this is indicative of the type of advice and assistance the Council should have considered providing in this case. He notes that the file registers which the Council ultimately provided to the complainant did not already exist and had to be specifically created. However in the circumstances of this case the Commissioner finds that it was only after these file registers were provided to the complainant that he was placed in a position where he is now able to make a request for the information which he is most interested in obtaining without his requested being deemed manifestly unreasonable.
51. The Commissioner is therefore satisfied that ultimately the Council did provide the complainant with adequate advice and assistance and has therefore complied with its obligations under regulation 9.
52. The Commissioner does not require the Council to take any further action in respect of the request of 15 May 2015. However the complainant is now free to use the file registers to make a fresh request. If he takes advantage of those registers to make a request which is no longer too voluminous the Council will be obliged to deal with it as a new request and to consider whether to disclose the requested information or apply appropriate exceptions.

³ Code of Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004 (SI 2004 No. 3391) – issued under Regulation 16 of the regulations February 2015.

Right of appeal

53. 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

54. 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.
55. 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

Rob Mehan
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF