

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 25 July 2023

**Public Authority:** Bath and North East Somerset Council

**Address:** Guildhall  
High Street  
Bath  
BA1 5AW

#### **Decision (including any steps ordered)**

---

1. The complainant requested information from Bath and North East Somerset Council ('the council') relating to a planning issue. The council refused to comply with the request citing Regulation 12(4)(b) of the EIR (manifestly unreasonable request).
2. The Commissioner's decision is that the council was not correct to apply Regulation 12(4)(b) to refuse to respond to the request further
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
  - To respond to the complainant's request again, without relying upon Regulation 12(4)(b).
4. 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

---

5. On 2 January 2023, the complainant made the following request for information to the council;

*"Access is requested to all forms of media including documents, emails, notes of telephone calls and meetings in connection with Planning and Enforcement, PROW for [address redacted by the ICO] between the dates of 17th August 2021 to current day.*

*Names of persons of interest are [list of names of individuals redacted by the ICO]"*

6. The council responded on 30 January 2023. It withheld the information under section 12 (appropriate limit), and section 30(1)(a) (investigations and proceedings conducted by public authorities) of the Freedom of Information Act 2000. It also applied Regulation 12(4)(b) where the information fell within the definition of environmental information.
7. Following an internal review, on 13 March 2023 the council upheld its decision to apply the above exemptions to refuse the request.

## Scope of the case

---

8. The complainant contacted the Commissioner on 16 May 2023 to complain about the council's response to her request for information. She believes that the council is not correct to withhold the information from disclosure.
9. During the course of the Commissioner's investigation the council amended its decision to apply Regulation 12(4)(b) and Regulation 12(5)(b) to refuse the request. It primarily sought to rely upon Regulation 12(4)(b) as it said to the Commissioner that it could not provide the Commissioner with copies of the withheld information without undermining its application of this exception.
10. In the first instance, therefore, the Commissioner must decide if the council's application of 12(4)(b) was appropriate.

## Reasons for decision

---

### Regulation 12(4)(b) – manifestly unreasonable request

11. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose information if the request for information is manifestly unreasonable. The exception can be applied where it would create a manifestly unreasonable burden upon the authority to respond to the request for information.
12. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the 'fees regulations') sets out an appropriate limit for responding to requests for information under FOIA. The limit for local authorities is £450, calculated at a hypothetical cost of £25 per hour. This applies a time limit of 18 hours. Therefore, where an authority estimates that responding to a request will exceed this limit the authority is not under a duty to respond to the request.
13. Although there is no equivalent limit within the EIR, in considering the application of Regulation 12(4)(b) the Commissioner considers that public authorities may use equivalent figures as an indication of what Parliament considers to be a reasonable burden to respond to EIR requests. However, the public authority must then balance the cost calculated to respond to the request against the public value of the information which would be disclosed before concluding whether the exception is applicable.
14. In estimating the time and burden which it would take to respond to a request, the FOIA fees regulations specify that an authority can consider the time taken to:
  - determine whether it holds the information
  - locate the information, or a document which may contain the information
  - retrieve the information, or a document which may contain the information, and
  - extract the information from a document containing it.
15. Whilst the fees regulations do not apply in relation to requests for environmental information, the above list of activities can still be used as a guide as to what it may be reasonable for a public authority to take account of when considering whether a request may be manifestly unreasonable.

16. However, unlike when citing section 12 of FOIA, the costs of considering if information is covered by an exception can be taken into account as a relevant factor when applying Regulation 12(4)(b).

The complainant's arguments

17. The complainant argues that the council's application of Regulation 12(4)(b) is not correct. She argues that the period of time over which she has asked for relevant information is only relatively short, and she has been told by council officers that due to the current burden upon the council, very little work has been carried out relating to the site. The council disputes that that is the case.
18. She further argues that she had been told by council officers that there is no ongoing enforcement against the landowners. The council countered this by saying that the case was still open, and enforcement could still take place if the circumstances required it. It broadly described what these circumstances might be.

The council's arguments

19. The Commissioner asked the council to provide details of its estimate of the time/cost to respond to the request, noting the tasks outlined above.
20. The council said that it has interpreted the request as being for all information held in respect of the first part of the request, and also to include all information held by, or sent/received from the named individuals in the second part (i.e., where specific officers were named).
21. The council said that the time estimate was based upon the quickest method of gathering the information. The information is not recorded in a database, and locating the information would require staff to search for and locate all of their emails and documents within the scope of the request. It would also need to fully search its document management system and the internal electronic storage systems for files saved by officers who had left the council.
22. It said that the information contained within scope would include:
  - Information held by the enforcement team, such as communications between enforcement officers and communication with the public.
  - Information held by Development Management Team, such as communications with Planning officers.
  - Information held by specialist advice teams, such as heritage and ecology.

- Information held in correspondence between elected members and planning team.
23. It argues that in order to locate all information falling within the scope of the first paragraph, it would need to search the email accounts of all of its officers who were involved. In its internal review it highlighted to the complainant that it understood that three of its officers had hundreds of emails which relate to the issue.
  24. It therefore gave a breakdown of the time it would take for relevant officers to search their outlook accounts. In total this amounted to searches by 12 officers, over 6 departments, taking an estimated total of 14.5 hours in order to locate and disclose the information.
  25. It noted, further, that 3 officers no longer work for the council, and estimated that it would take 4 hours to restore the mailboxes so that they could be searched for relevant information, and a further 4.5 hours to carry out searches.
  26. It said that: "In order to locate all information held within the planning and enforcement teams we would also need to search the Planning Services and Development Control DC folders (and corresponding sub folders) for records for any information held within the scope of the request regarding these matters. This would require an officer to search these folders for all information held. On an initial search of just three sub folders, 100's of documents were located. All appropriate folders would need to be examined in order to locate and provide information within the scope of the request. As a result, we estimate that this would take 4 hours."
  27. Taking into account the figures provided above, therefore, the council has estimated a total time of 27 hours in total in order to locate, review, extract and disclose the requested information. Although the Commissioner questions the time required to search email as there is likely to be a search facility within the email system being used by the council, he notes that the overall numbers of documents estimated to be held is large. He also notes the likelihood that other exceptions will be applicable to some of the information.
  28. For instance, the council stated that the issue involves potential enforcement action, and it argued, therefore, that the information which is located would also be likely to engage the exception in Regulation 12(5)(b) as it relates to an ongoing and open investigation. It highlighted that the investigation is into breaches of planning and listed building control which may amount to a criminal offence if unauthorised works have taken place. It confirmed that it has investigatory powers conferred on it as the Local Planning Authority under both the Town and

Country Planning Act and the Planning (Listed Buildings & Conservation Areas Act) 1990. Having considered its arguments in this respect (but without sight of the relevant information due to the application of Regulation 12(4)(b)), the Commissioner considers that under the circumstances of the case there is very likely to be information falling within the scope of the request to which the exception in 12(5)(b) will be applicable.

29. The Commissioner considers that the council has provided relatively weak arguments to support its case that the searches required make the request manifestly unreasonable. However, given the number of documents it has located in its preliminary searches, and given the likelihood that at least some of that information will relate to enforcement investigations and would therefore require careful scrutiny in order to ensure that exempt material is not disclosed, he is satisfied that responding to the request would create a significant burden on it.
30. The Commissioner's decision is that Regulation 12(4)(b) is therefore engaged by the request.
31. The Commissioner must now consider the public interest test set out in Regulation 12(1) of the EIR. When doing so, he must also take into account the presumption towards disclosure required by Regulation 12(2). The test is whether, in all of the circumstances of the case, the public interest in the exception being maintained outweighs that in the information being disclosed. If it does not, then the information should be disclosed even though the exception is engaged.

### **The public interest test**

#### The public interest in the information being disclosed

32. The central public interest in the information being disclosed relates to creating greater public transparency over the council's actions as regards the site and the PROW. The wider issues are long running and relate to a redevelopment of listed buildings on the site without the relevant planning permission. There have been a number of retrospective planning applications, a number of which were subsequently withdrawn, and investigations which might ultimately lead to enforcement actions being taken if no successful retrospective planning approval is obtained. If retrospective planning application is approved, then the changes become lawful, and no enforcement would be required. However, the subsequent withdrawal of these applications and the submission of new ones by the applicant has extended the length of time which the council has taken to make any substantive decisions over the changes.

33. A number of environmental bodies have expressed concerns about the work and plans relating to the site.
34. The complainant has complained to the council that whilst it is waiting for further planning applications to be submitted, she has noted that work, which she argues is unauthorised, has continued on the site, affecting the environment around the site.
35. The complainant argues that the council has failed to take appropriate action to address the planning issues relating to the site, and that the council's refusal relates, in part, to it seeking to hide its failings in this respect. The Commissioner notes that there is local concern about the issue, however the council argues that it is taking action.
36. There is a public interest in planning matters being dealt with as openly as possible. Planning applications are generally public, and relevant documents are published on the council's planning portal. Information relating to planning enforcement investigations may sometimes be withheld from the public until such time as an enforcement notice is issued.
37. The council acknowledges that there is a public interest in disclosure as it would promote general openness and allow the public to understand how planning issues such as this are dealt with. It would also allow the public a better understanding of the planning process generally.

The public interest in the exception being maintained

38. There is a strong public interest in protecting the ability of the council to carry out its functions without expending significant resources responding to a single information access request. The work required to respond to the request would be significant.
39. The Commissioner notes that the council already proactively publishes documents about planning applications on its website, which goes some way to addressing the public interest in disclosure mentioned above.
40. The Commissioner also notes that there is a strong public interest in allowing the council to carry out its enforcement functions effectively and appropriately, and given the nature of this case, ordering a disclosure of the information on the basis of the public interest may inadvertently affect an ongoing and open planning investigation.

The Commissioner's conclusions on the public interest test

41. There is a general public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and

more effective public participation in environmental decision making, all of which ultimately contribute to a better environment. There is also a public interest in the disclosure of information which demonstrates that a public authority is taking actions to protect the environment where its functions require it to do so.

42. The council argues that it would still take enforcement action should that prove necessary, providing the public with a degree of surety that it is undertaking its functions in this respect appropriately. However, the development has raised concerns in the local community, and there is a public interest in the community being able to reassure itself that the council is taking appropriate action to address the issues with this site.
43. The Commissioner considers the council's arguments to be relatively weak in terms of application of Regulation 12(4)(b). When balanced against the strong public interest in the disclosure of the information, the Commissioner has decided that the public interest in the information being disclosed outweighs that in the exception in Regulation 12(4)(b) being maintained in this instance.
44. However, the Commissioner notes that other exceptions may be applicable to some of the information. He therefore requires the council to respond to the request again, without relying upon Regulation 12(4)(b).



## Right of appeal

---

45. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

46. 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.
47. 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 .....**

**Ian Walley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**