

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 September 2023

Public Authority: Cowfold Parish Council
Address: clerk@cowfold-pc.gov.uk

Decision (including any steps ordered)

1. The complainant requested information in relation to an offshore windfarm consultation. Cowfold Parish Council ("the council") argued that section 12 – cost of compliance, of the Freedom of Information Act (FOIA) applies. At the internal review stage, the council provided the complainant with a timeline document, which set out a summary of all the correspondence held falling within the scope of the request.
2. The Commissioner's has decided that the council should have considered the request under the EIR. Furthermore, the Commissioner considers that the release of the timeline document does not fulfil the terms of the complainant's request.
3. However, the Commissioner considers the council's arguments for refusing to comply with the request under section 12(1) of FOIA to be transferable to Regulation 12(4)(b) of the EIR (manifestly unreasonable request).
4. Whilst the Commissioner has determined that Regulation 12(4)(b) is engaged, he considers the public interest to favour the disclosure (with the exception of personal data) of all of the information which is held that is relevant to the request.
5. The Commissioner also concludes that, on the balance of probabilities, the correspondence and information referred to within the timeline document is all the information that is held by the council that is relevant to the request.

6. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
 - To disclose all the information held relevant to the request to the complainant, subject to any appropriate redactions made under Regulation 13 of the EIR.
7. The council 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

8. On 30 March 2023, the complainant wrote to the council and requested information in the following terms:

"Please can you provide me, under the Freedom of Information Act, details and dates of correspondence, (letters or emails) you or any other member of the parish council received from Rampion or their representatives, the planning inspectorate or our MP Andrew Griffiths concerning the Rampion2 proposals, between January 2020 and the end of July 2022.

To assist you, I have attempted to narrow down dates but they should be seen as guidance only rather than exclusive timings:

-the scoping request from the planning Inspectorate, or possibly Rampion themselves, I can't be certain, was sent out in 2020 with a deadline of response of 4th August 2020

-the non-statutory consultation was held from 14/1/21 to 11/2/21. Rampion say they sent you an email with posters, presumably a short time before this

-in October 2020 Rampion held a project liaison group meeting and say Cowfold attended (probably zoom). Apologies were received by Cowfold for the Feb 2021 meeting but all invitations, presentation and minutes were emailed to Cowfold PC

-in April 2021 Mr Griffiths wrote to all chairs of Parish Councils, including [name redacted by the ICO]. There is no evidence in any minutes of this being discussed either in the correspondence section or as an agenda item at any subsequent Council meeting.

-in June 2021 the newly elected WSCC councillor Mrs Sarah Payne spoke at the PC meeting. There is nothing in the minutes other than the fact that she spoke about Rampion. With just 2 members of the public in attendance, almost nobody in the parish knows what was said. There are no minuted follow ups about this at subsequent meetings. Did any discussions take place?

-Rampion say they sent emails to the Chair and Clerk of Cowfold PC on 14th July and 6th September 2021. Did you receive them, what did they say and what discussion was had by the parish council? Nothing is shown in the council minutes

-during this first consultation, Rampion say '6 Rampion 2 Project Liaison Group meetings were held. Cowfold PC did not attend or send apologies but were emailed all invitations, presentations and minutes. The Clerk confirmed the Chair had received the invitation'. If you did receive these, why did nobody attend?

-Rampion say on 13th July 2022 they emailed you with confirmation that the Oakendene site had been chosen

Please also include any responses from the Parish Council, notes of phone calls or discussions held as a consequence of receiving any information or attending any meetings, and the numbers of any correspondence received from members of the public during the 2021 consultation period."

9. The council responded on 7 April 2023. It refused the request on the basis that section 12 of FOIA applied.
10. Following an internal review, the council wrote to the complainant on 13 June 2023, confirming that "in an attempt to resolve the impasse" it had decided to compile and release a timeline document. This dates when correspondence had taken place, and sets out a brief summary of the purpose or contents of those documents.

Scope of the case

11. The complainant contacted the Commissioner on 8 June 2023, to complain about the way their request for information had been handled.
12. The complainant argues that the council should have provided copies of the correspondence detailed within the timeline document that it issued in response to the request. They also believe that further information must be held by the council in addition to that which is set out within the timeline document.

13. During the course of his investigation, the Commissioner told the council that it should have considered the information under the EIR rather than FOIA. The council accepted that was the case. The equivalent exception to section 12 of FOIA within the EIR is Regulation 12(4)(b).
14. The Commissioner considers that the complaint is that the council has not responded to the request as required by the EIR, and that it has not disclosed all of the information falling within the scope of the request.

Reasons for decision

Regulation 12(4)(b) – manifestly unreasonable requests

15. 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.
16. 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. In the Commissioner's view, the key question for public authorities to consider when determining if a request is manifestly unreasonable is whether the value and purpose of the request justifies the burden that would be placed upon the authority in complying with it.
18. The Freedom of Information and Data Protection (Appropriate Limit and Fees) sets out an appropriate limit for responding to requests for information under FOIA. The limit for local authorities is £450, calculated at £25 per hour. This applies a time limit of 18 hours. Where the authority estimates that responding to a request would exceed this limit, it is not under a duty to respond to the request.
19. 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 the section 12 limits 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.

20. In estimating the time and burden which it would take to respond to a request, the 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.
21. Unlike section 12 of FOIA, the costs of considering if information is covered by an exception can also be taken into account as a relevant factor when applying Regulation 12(4)(b).
22. Where a public authority claims that Regulation 12(4)(b) is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit. This is in line with the duty under Regulation 9(1) of the EIR.
23. The council argues that it has exceeded 18 hours in locating relevant emails and recording the timeline which it disclosed in its internal review. The timeline shows that the council has identified approximately 150 relevant documents which fall within the scope of the request. When it disclosed the timeline it did not include copies of the documents themselves, but it did summarise what information the documents contain.
24. The council said that the correspondence is primarily held in electronic format, and largely on one councillor's PC. However, all councillors carried out searches of their PC's for relevant information. The council also said that the clerk had carried out a review of the physical files it holds. The council then reviewed and collated the information and produced the timeline. The timeline details 8 revisions, which is evidence that the council's processing of the request is in line with the description of the searches it said it had carried out.
25. The Commissioner recognises that the process which would have been undertaken to identify relevant emails would have been a search of relevant email accounts and PC's using relevant keywords. The Commissioner is satisfied that all councillors could search their PC's and ensure that relevant information is located in the same way, and that this would not have taken a significantly long period of time to complete. The councillors would then need to skim read any emails identified in order to check whether they were relevant to the request. If they were, then these would be recorded on the timeline. The council said that it also carried out reviews to ensure that documents were not

duplicated in the timeline and that no documents had been missed.

26. Given the ability for the clerk and all of the councillors to carry out electronic searches using keywords, the Commissioner has not been persuaded that the above process exceeded 18 hours to complete.
27. However, thus far, only the timeline has been disclosed to the complainant. In order to comply with the requirements of Regulation 5(1), the council would now be required to read through the documents to ascertain whether they contain any information which should be exempted (such as personal data). Given the summaries of the documents concerned, the Commissioner is satisfied that there would be personal data of third parties within the information, such as members of the public, and it is likely that a degree of redaction of this personal data would be required.
28. Given that authorities can also take into account the costs of considering whether any exception should be applied to the requested information, and also given the size and resources available to the council, the Commissioner concludes that Regulation 12(4)(b) is engaged; this is because he is satisfied that responding to the request would create a disproportionate burden upon the council.
29. However, under the EIR, if Regulation 12(4)(b) is engaged, the Commissioner must still consider whether the public interest rests in favour of the request being responded to in spite of the fact that the exception is engaged. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
30. When carrying out the test, Regulation 12(2) requires a presumption towards the disclosure of the information.

The public interest test

The public interest in the exception being maintained

31. The central public interest in the exception being maintained relates to preserving the council's resources. It is not in the public interest to require an authority to respond to a disproportionate request which places a significant burden on it, but which would not provide information of significant value to the public.
32. Even where a request would provide information of value to the public, it is not in the public interest to require the authority to fully respond to the request where it would cause such a burden on the authority that this would significantly affect its ability to carry out its other functions.

33. The council argues that the burden of responding to the request would disproportionately divert the clerk away from their normal duties, and that this would have a detrimental impact on ensuring proper administration of the council. It therefore argues that the public interest rests in the council being able to conduct its other functions.

The public interest in the information being disclosed

34. The wider issue in this case relates to whether appropriate levels of public consultation have occurred regarding the Rampion 2 project prior to decisions being taken about it.
35. The complainant argues that neither Rampion, nor the council, provided sufficient information to the public in order to ensure that they were adequately informed about the proposals at a time when the community may have been able to make a difference.
36. The council itself has published information about its view that there was a lack of appropriate consultation provided by Rampion. It has published a letter to Rampion from the council Chairman sent in January 2023, asking for an additional public consultation period in order to consider the proposals.
37. A further explanation for the council's actions as regards the public consultation has been published by the council on its website, including transcripts of some of the letters it has sent.¹

The Commissioner's conclusions

38. The council's letters to Rampion identify that it too considers that the consultation over the proposals was inadequate, although it argues that this was due to Rampion itself. However, the complainant also questions the council's publication of information about the proposals. There is a public interest in the council being transparent about its actions in this respect.
39. A key question here is whether the public interest in complying with the request is substantial enough to justify the impact placed on the council by responding to the request.

¹ <https://www.cowfold-pc.gov.uk/rampion-2/>

40. Given the issues surrounding the public consultations generally, the Commissioner has decided that the public interest in favour of the council responding to the request outweighs that in the exception being maintained in this instance.
41. The Commissioner therefore requires the disclosure of documents falling within the timeline, subject to appropriate redactions under Regulation 13 of the EIR (personal data of third parties).

Regulation 5(1) – duty to make environmental information available upon request

42. Regulation 5(1) of the EIR requires a public authority that holds environmental information to make it available on request.
43. The Commissioner's decision outlined above relates to the information and correspondence held by the council which was identified and summarised within the timeline document; the council has said that this is all the information that it holds that is relevant to the request. However, the complainant has claimed that further information should be held by the council.
44. The council argues that it has carried out sufficient and adequate searches in order to locate any information which it holds, and therefore that it does not hold any further information other than that highlighted in the timeline it disclosed.
45. In scenarios where there is some dispute between the amount of information held which a public authority says it holds, and the amount of information that a complainant believes is held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
46. In other words, in order to determine such complaints, the Commissioner must decide whether, on the balance of probabilities, a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request).
47. The Commissioner has carefully considered the points made by the complainant and the council. The complainant has raised reasonable concerns that further information should be held by the council. However, the council has provided an adequate and appropriate description of the searches which it carried out in order to locate any relevant information held by it. It has described the process it undertook

to locate relevant information, and the Commissioner is satisfied that those searches were appropriate.

48. The Commissioner is therefore satisfied that the council's approach to identifying the information which it holds within the scope of the request was appropriate and proportionate.
49. The Commissioner concludes that, on the balance of probabilities, the council has located all the information which it holds falling within the scope of the request.

Right of appeal

50. 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

51. 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.

52. 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
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