

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 April 2024

Public Authority: Derby City Council
Address: Council House
Corporation Street
Derby
DE1 2FS

Decision (including any steps ordered)

1. The complainant has requested information held by Derby City Council (the council) about the widening and resurfacing of a local pathway.
2. The Commissioner's decision is that the council is entitled to rely on regulation 12(4)(b) - manifestly unreasonable, of the EIR, as its basis for refusing to comply with the request. However, the Commissioner finds that the council breached regulation 9 of the EIR by not providing the complainant with adequate advice and assistance.
3. The Commissioner has also found a breach of regulation 11(4) as the council failed to provide its internal review response within 40 working days.
4. The Commissioner requires the council to take the following step to ensure compliance with the legislation.
 - Provide the complainant with advice and assistance to help them to submit a request that does not create an unreasonable burden.
5. The council must take this step 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

6. On 2 August 2023, the complainant wrote to the council and requested information in the following terms:

“Please provide sight of all records relating to the Derby City Council/ Sustrans partnership project that involves the widening and tarmacking of the open countryside footpath/cycle path/ bridlepath beside the River Derwent at Alvaston for its entire length up to the Borwash Road.

Records should include project management documentation that confirms local consultation sign off, authorisation by council committee, and sign off by [the] all of the claimed partners to the £500,000 project.”

7. On 31 August 2023, the council issued a refusal notice, citing regulation 12(4)(b) of the EIR. The council said that to search and extract information that was relevant to the request would cause an unreasonable and disproportionate burden. It confirmed that it had considered the public interest test and had decided that this favoured upholding the exception in this case.
8. On 1 September 2023, the complainant requested an internal review. On 20 November 2023, the council issued a revised response to the request, and also its internal review response.
9. The council confirmed in its revised response to the request that it still considered that regulation 12(4)(b) to be engaged. However, it now went on to confirm that it had carried out a sample search and that it estimated that it would take 27 hours of one officer's time, which would equate to a cost of £675, to deal with the request.
10. The council's internal review response upheld the decision to refuse the request under regulation 12(4)(b). With regard to advice and assistance, the complainant was advised to contact the council's FOI officer to look at ways of revising the request to make it more manageable.

Reasons for decision

11. This reasoning covers whether the council is entitled to rely on regulation 12(4)(b) of the EIR when refusing to comply with the complainant's request.

Regulation 12(4)(b) – manifestly unreasonable

12. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request is manifestly unreasonable. Where it is found to be engaged, regulation 12(4)(b) is also qualified by the public interest test.
13. Although there is no definition of “manifestly unreasonable” under the EIR, the Commissioner’s opinion is that “manifestly” implies that a request should be obviously or clearly unreasonable.
14. In this case, the council is citing regulation 12(4)(b) on the grounds that to comply with the request would impose a significant and disproportionate burden on its resources, in terms of both time and cost.
15. Under FOIA, the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (‘the Fees Regulations’) specify an upper limit for the amount of work required beyond which a public authority is not obliged to comply with a request. The limit for local authorities, such as the council, is £450, calculated at £25 per hour. This applies a time limit of 18 hours.
16. The Fees Regulations state that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and,
 - extracting the information from a document containing it.
17. There are no appropriate cost limits under the EIR, and the considerations which are associated with the application of regulation 12(4)(b) on the grounds of costs are broader than those relevant to section 12 of FOIA. Under EIR, the public authority must also consider whether the costs and burden are clearly and obviously unreasonable.

The complainant's position

18. The complainant does not accept that compliance with the request would be a burden to the council.
19. In the complainant's request for an internal review, they referred to a previous formal complaint that they had lodged with the council about matters to which the current request relates. The complainant said that a "bundled file" must exist in order to have dealt with that complaint, and that this would hold the information requested, and is therefore easily accessible.

The council's position

20. The council has explained that the information requested relates to a small element of a wider programme of transport improvements dating back several years that have been financed through the Government's "Transforming Cities Fund", which was launched in 2018. The council has said that the programme data and information it holds consist of a "very significant body" of documents, as well as individual officer correspondence between stakeholders and contractors.
21. The council has said that upon receipt of the request, it undertook a sampling exercise which involved a search of its Outlook system. It states it considered it appropriate to use the keywords, "Riverside", "Strategic Cycle Link", "Sustrans", "Notts-Derby cycle route", "National cycle route 6", and "Transforming Cities package files" in order to identify all of the information that might be held that was relevant to the request.
22. The council has said a search of one keyword, "Sustrans", had resulted in 839 returns from one council officer's inbox alone. It says that it randomly selected 10 of the 839 emails identified and that it took 15 minutes (which the Commissioner has calculated would equate to an average of one minute 30 seconds per record) to review these emails in order to determine whether information is held, and to locate, retrieve and extract information.
23. The council then said that it calculated that to complete the activities from this one search result would require 27 hours of one officer's time.
24. The council has confirmed that the same approach was carried out with the other keywords set out in paragraph 20 of this decision notice. It states that each search resulted in similar, and in some cases more, records being identified within Outlook that were potentially relevant to the request.

25. The council states that, following receipt of the Commissioner's letter of investigation, it then carried out further sampling exercises to support its position that compliance with the request would result in a significant burden in terms of costs and resources.
26. The council said that a search of its SharePoint system using three separate keywords had identified 2130 items; "Riverside"(735 items identified), "Cycleway"(1,125 items identified), and "Sustrans" (270 items identified).
27. The council has said that, using the same estimated time of one minute 30 seconds per record that it had applied to the Outlook sampling exercise, it had calculated the following:
$$2130 \text{ records} \times 1 \text{ minute } 30 \text{ seconds} = 53 \text{ hours and } 15 \text{ minutes}$$
28. The council states that a further sample search of its Shared Drive had identified 18 folders, each of which contained subfolders. The council has said that a search of one subfolder (a "Sustrans" folder) found a further nine subfolders, each containing an average of two folders.
29. The council, using the example of the Sustrans folder, provided the Commissioner with the following calculation:
$$18 \text{ (folders)} \times 9 \text{ (subfolders)} \times 2 \text{ (files per subfolder)} = 324 \text{ documents}$$

$$324 \text{ documents} \times 1 \text{ minute } 30 \text{ seconds} = 8 \text{ hours (the Commissioner's calculation was 8 hours and 6 minutes).}$$
30. The council has said, having taken account of the results of the three sampling exercises alone, it has estimated that at least 88 hours and 15 minutes of one officer's time would be required to comply with the request.
31. With regard to the complainant's belief that information relevant to the request would have already been collated in order to respond to their formal complaint about the widening and resurfacing of the pathway, the council has confirmed that it had not been necessary to search or compile a set of information in order to respond to the formal complaint.

The Commissioner's analysis

32. The Commissioner does not agree with all of the calculations provided by the council (he calculated approximately 21 hours of one officer's time in relation to the Outlook sample search, rather than 27 hours).

33. The Commissioner also considers an estimated average time of one minute 30 seconds to review each record identified from the sample searches to be excessive.
34. However, the Commissioner accepts that even if the council were to take one minute to review each of the 3293 items that were identified from the three sample searches conducted, the cost of compliance would still far exceed the appropriate limit (3293 items x one minute = 54 hours and 53 minutes).
35. The Commissioner has also had regard to the fact that the sampling exercises conducted by the council were limited to certain areas of its IT systems (such as one officer's mailbox in Outlook), and that a wider search is likely to be required in order to identify all the information held that may be relevant to the request.
36. The Commissioner is therefore satisfied that the council has sufficiently demonstrated that the costs required to comply with the request would exceed the appropriate limit of 18 hours set out within the Fees Regulations, and that compliance would place a disproportionate burden on the council, both in terms of cost and resources.
37. The Commissioner concludes that the request is manifestly unreasonable and that the exception at regulation 12(4)(b) is engaged. The Commissioner will now go on to consider the public interest test.

Public interest test

The complainant's position

38. The complainant has indicated that they consider that there is a strong public interest in understanding the decisions that have been reached, and why there was no formal public consultation before the relevant pathway was widened and tarmacked. They say that they have concerns that the footpath is now dangerous and could cause harm to those using it. The complainant has also suggested that the council may have been deliberately obstructive when dealing with their request, and is not being sufficiently open and transparent about its actions.

The council's position

39. The council has said that it acknowledges that there is a public interest in accessing information which could lead to more effective public participation in environmental decision making, and ultimately contribute to a better environment.
40. The council says that it also accepts that there is a public interest in transparency and accountability. It states that it considered the public

interest in relation to its partnership with Sustrans, particularly given the impact to users of the pathway relevant to the request. The council has also said that it recognises that records held may allow for a further understanding about the actions and decisions taken in relation to the works, including potential environmental impact points.

41. However, the council has gone on to say that it considers that the time that it would take to comply with the request would have a disproportionate impact on its officers' time. It says it must have regard to the cost to the public purse and considers the cost of compliance to be disproportionate to the benefit gained from compliance and disclosure. The council has said that applying the exception would be in the public interest and justified to protect the more pressing public need, including best use of limited resources and continuity of service delivery.
42. The council also argues that information about the pathway has been released to the complainant in response to their formal complaint. It has also explained that no statutory consultation was necessary as the work carried out on the path was very much part of the normal service delivery. The council says that, given this, any information that might be identified from the searches carried out as being relevant to the request is likely to be of limited value to the public.
43. The council has said that it considers that the public interest would be best served by minimising service disruption and taking a responsible approach to the use of limited council resource against the background of already reduced services and budget deficits.

The Commissioner's analysis

44. The Commissioner considers that there is always a public interest in openness and transparency, allowing for public understanding and accountability in relation to the activities of a public authority.
45. The Commissioner accepts that public interest factors, such as proportionality and the value of the request, have already been considered when deciding whether the exception is engaged in this case.
46. It is the Commissioner's view that there is some public interest in matters to which the request relates; it is about both the widening, and change in the surface material, of a local countryside public footpath. It is important that the public are able to have confidence that the council is carrying out works in the best interests of the local community, and that it has considered the impact that the work will have on the landscape and the general appearance of an area.

47. However, the council has said that it has already explained to the complainant that the work on the footpath was carried out as part of "normal service delivery in the maintenance of a highway" and a statutory consultation (which the complainant raised specific concerns about in separate correspondence to the council) was not required when carrying out the works.
48. The Commissioner must consider the burden of dealing with the request, and the likely value to the public of the disclosure of information relevant to the request, if held, when balancing the public interest in disclosure against maintaining the exception at regulation 12(4)(b).
49. The Commissioner has taken into account the fact that should any individual have concerns about the works carried out on the pathway, then there are appropriate mechanisms in place to pursue such concerns. He has also considered some of the information that is in the public domain about the construction of pathways by Sustrans. He has also taken into account the fact that the council had already considered and responded to concerns raised about the decisions made relating to the widening and resurfacing of the pathway, and the lack of any formal public consultation, in response to the formal complaint that it received.
50. It is the Commissioner's view that the financial and time burden that compliance with the request would cause to the council would be disproportionate, and not in the public interest.
51. The Commissioner has therefore decided that, in the circumstances of this case, the public interest in disclosure of the requested information does not outweigh the public interest in maintaining the exception at regulation 12(4)(b). Therefore, the council was not obliged to comply with the complainant's request.
52. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019):

"If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).
53. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's

decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(b) was applied correctly.

Regulation 9 - advice and assistance

54. Regulation 9(1) of the EIR says that a public authority shall provide advice and assistance to individuals making (or proposing to make) information requests.
55. The advice and assistance which will be reasonable for the public authority to provide will vary according to the circumstances and wording of the request. However, as a general rule, the Commissioner would normally expect a public authority relying on a claim that a request would impose a manifestly unreasonable burden to offer advice and assistance to help the requestor refine their request to one which imposes a more reasonable burden.
56. At the internal review stage, the council said that the complainant might wish to liaise with the council's FOI officer in order to revise the request to make it more manageable. The Commissioner's decision is that this is not an appropriate response, and the council has breached regulation 9 of the EIR.
57. The council has already advised the Commissioner that it would like the opportunity to provide a clearer response to the complainant in respect of the provision of advice and assistance.
58. At paragraph 3, the council is now required to contact the complainant and provide advice and assistance as to how their request can be refined so that it does not create an unreasonable burden.

Procedural matters

59. The complainant has also said to the Commissioner that they are concerned about the time it took the council to provide its responses to the request.
60. Regulation 14(2) of the EIR provides that a refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request. The Commissioner has had regard to the relevant bank holidays in all parts of the United Kingdom, and in doing so, has found that the council issued its initial response to the request within the required 20 working days.

61. However, the council took considerably longer than the required 40 working days to provide its internal review response, and therefore, the Commissioner has found a breach of regulation 11(4) of the EIR.

Right of appeal

62. 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

63. 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.
64. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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