

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 9 April 2024

Public Authority: Oxford City Council
Address: Town Hall
St Aldate's
Oxford
OX1 1BX

Decision (including any steps ordered)

1. The complainant has requested information about air pollution monitoring data. Oxford City Council ("the Council") refused to disclose the information under regulation 12(4)(b) (manifestly unreasonable requests) and regulation 12(4)(d) (material in the course of completion).
2. The Commissioner's decision is that the Council is not entitled to withhold the information under regulation 12(4)(b) or regulation 12(4)(d).
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the information.
4. 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

5. On 7 September 2023, the complainant wrote to the Council and requested information in the following terms:

"Please provide me with monthly raw NO2 pollution data during 2023 to date (ideally, including data from August 2023)."
6. The Council responded on 3 October 2023. It stated that the information was withheld under regulation 12(4)(d).
7. Following an internal review the Council wrote to the complainant on 2 November 2023. It maintained that regulation 12(4)(d) was engaged. It also applied regulation 12(4)(b).

Scope of the case

8. The complainant contacted the Commissioner on 23 November 2023 to complain about the way their request for information had been handled, and specifically that the Council was not entitled to withhold the information under regulation 12(4)(b) or regulation 12(4)(d).

Reasons for decision

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

9. Regulation 12(4)(b) states that information is exempt if the request for information is manifestly unreasonable.
10. The exception is subject to a public interest test under regulation 12(1)(b), and the exception can only be maintained should the public interest test support this.
12. The Commissioner has published guidance on the application of regulation 12(4)(b)¹. This guidance states that possible grounds for a request being manifestly unreasonable are where the cost of compliance

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-4-b-environmental-information-regulations-manifestly-unreasonable-requests/>

with the request would be too great, or where the request is vexatious. If engaged, the exception is subject to a public interest test.

11. In this case the Council has argued that the request, in conjunction with others made by the complainant, has placed burden upon the Council's resources.
12. The Council has explained that it has 'aggregated' the request with eight others made by the complainant in 2023, including six submitted between 25 July and 15 September 2023.
13. The Council has further explained that "There is only one officer in the Council's Environmental Sustainability team who can provide the required information for both aspects above and this has detracted significantly from being able to deliver the daily responsibilities of the role and council priorities in this area."
14. Whilst the Council acknowledges the serious intent behind the request, it argues that compliance with the request would divert its resources.
15. The Council further argues that it is concerned that compliance with the request would cause an adverse impact upon it, as the unverified raw data will likely be misunderstood by the public, which means that the Council will need to spend resources on publicly addressing this.

The Commissioner's analysis

16. The Commissioner has reviewed the Council's arguments.
17. In its submissions, the Council has first referred to the burden created by the request, in conjunction with others made by the complainant, which it 'aggregated' together. However, the Commissioner understands that the Council has issued responses to the other requests – including to one later request made on 15 September - which it has complied with and disclosed the sought information. The Council therefore appears to be seeking to refuse this one request in isolation.
18. However, the Commissioner's view - without further explanation on this point from the Council - is that the request does not appear to seek voluminous, or hard-to-collate information, and the Council has not advanced any arguments that compliance with the request in isolation would place a significant burden upon it.
19. Instead, the Council appears to be relying on the argument that the disclosure of the information, being unverified data, would result in public misunderstanding and concern, and that the Council would need to expend resources in addressing this. This 'adverse impact' appears to

be the Council's main grounds for the burden it considers would be caused by the request.

20. However, the Commissioner's guidance (for the public interest test under the EIR²) states that: "Public authorities often raise the argument that information may be misleading or misunderstood, regardless of the exception claimed. In the Commissioner's view, it is not relevant to the majority of the EIR exceptions. The obvious solution is for you explain the information, rather than withhold it."
21. Having considered the above, the Commissioner considers that the basis on which the Council has applied regulation 12(4)(b) is weak. The Council has not clearly demonstrated that the request in itself would cause significant burden, and the Commissioner is not satisfied that the Council's argument for 'adverse impact' from disclosure is a reasonable basis for the exception to be engaged.
22. Having considered the above, the Commissioner is not satisfied that the Council has demonstrated that the complainant's request was manifestly unreasonable and hence his decision is that regulation 12(4)(b) is not engaged.
23. As regulation 12(4)(b) is not engaged, the Commissioner has not gone on to consider the public interest test.

Regulation 12(4)(d) – Material still in the course of completion, etc.

24. Regulation 12(4)(d) of the EIR states that information is exempt if it relates to material still in the course of completion, to unfinished documents or to incomplete data.
25. Regulation 12(4)(d) is a class-based exception. This means that there is no requirement to consider the sensitivity of the information in order to engage the exception, the only question is whether the withheld information falls within the class described in 12(4)(d). The exception is subject to a public interest test under regulation 12(1)(b), and the exception can only be maintained should the public interest test support this.
26. The Council has applied the regulation 12(4)(d) to raw data relating to air pollution monitoring. The Commissioner understands, from the

² <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/how-exceptions-and-the-public-interest-test-work-in-the-environmental-information-regulations/#a9>

correspondence between the complainant and Council, that this raw data is held by the Council in the form of monthly reports that are received by the Council from a third party.

27. The Commissioner asked the Council to confirm why it believed that the withheld information falls within the class described in regulation 12(4)(d). Having reviewed its response, the Commissioner's understanding is that the Council's key argument is that the raw data is 'unverified', and therefore falls under this exception.
28. The Council has explained to the Commissioner that this is on the following basis:

"DEFRA sets out statutory guidance under the Section 88, part IV of the Environment Act 1995 to which local authorities must have regard when issuing information on air quality. This guidance – PG22 and TG22 – as well as guidance from DEFRA's LAQM support website on the absolute need to conduct data corrections is set out in Appendix 2. In summary, under the DEFRA policy guidance, the Council cannot officially publish its diffusion tube annual data referring to any given year until a number of specified technical steps have been taken to verify a year of monthly data, including analysis by an external laboratory and ratification by DEFRA. Annual results are published in July of the following year, conditional on positive appraisal by DEFRA."

29. The Council has also explained to the Commissioner that it has previously disclosed this information to the complainant on a regular basis outside the terms of FOIA, but that it has since stopped this due to its concern that the dissemination of this unverified data was causing public misunderstanding, and that Council resources were having to be diverted to address this.

The Commissioner's analysis

30. The Commissioner has reviewed the Council's arguments.
31. The Commissioner's guidance on 'What is incomplete data?'³ explains that:

"Data is unlikely to be considered as incomplete if you are already relying on it in your decision-making processes, even if you intend to

³ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-124d-eir/>

add to, check the accuracy of, or modify that data at some point in the future.”

32. In this case, the Council has argued that the information is unverified, and therefore is incomplete. However, as explained by the Commissioner's guidance, that fact that information may be inaccurate is unlikely to be mean that it is 'incomplete'. The Commissioner also considers it relevant to note that this information was previously disclosed by the Council on a regular basis to the complainant; whilst this is not directly relevant to the consideration here - and does not mean the Council is under an obligation to provide the information under the EIR - it does suggest to the Commissioner that the monthly data is sufficiently 'complete' as a standalone document in its own right. As such, the Commissioner does not consider that it falls under this limb of the exception.
33. The Commissioner has further considered whether the raw data relates to information still in the course of completion. The Commissioner understands that the data, once verified, will be issued in July 2024 – as well as the original raw monthly data (that is, the information being requested here).
34. The Commissioner's guidance on 'What does 'relates to' mean?' explains that:

“It is important to recognise that the exception will not automatically apply to all information that can be linked to material that is still in the course of completion. If the information is a separate, independent, and complete piece of work in its own right, the information will not fall within this limb of the exception.”
35. In this case, the Commissioner's view is that the raw data, being in the form of monthly reports provided by third party, will represent complete pieces of work in their own right. As such, the Commissioner does not consider that it falls under this limb of the exception.
36. Having considered the above, the Commissioner is not satisfied that the Council has demonstrated that regulation 12(4)(d) is engaged and so his decision is that it is not.
37. As regulation 12(4)(d) is not engaged, the Commissioner has not gone on to consider the public interest test.

Right of appeal

38. 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

39. 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.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Daniel Perry
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Information Commissioner's Office
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