

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 March 2024

Public Authority: Rushmoor Borough Council
Address: Council Offices
Farnborough Road
Farnborough
GU14 7JU

Decision (including any steps ordered)

1. The complainant requested information from Rushmoor Borough Council ("the Council") relating to a specific development.
2. The Commissioner's decision is that the Council is entitled to rely on regulation 12(4)(b) (manifestly unreasonable) to refuse to provide the requested information. The Commissioner also finds that the Council complied with its obligations under regulation 9 of the EIR to offer advice and assistance.
3. The Commissioner does not require the Council to take any steps

Request and response

4. On 16 October 2023, the complainant wrote to the Council and requested information in the following terms:

"Farnborough – Civic Quarter Development - Plot H, Plot H1, Plot H2, Plot D, Plot I, Plot J and T junction / Highways Works at Pinehurst Roundabout

Copies of all correspondence and e-mails between [name redacted], [name redacted], [name redacted], [name redacted], [name redacted], [name redacted], [name redacted], [name redacted] (Marks & Spencer), [name redacted] (Mayfield / Audley Group), [name redacted] (Mayfield / Audley Group) either

individually or as a group, in relation to the above plots at the proposed Civic Quarter Development and between 11 November 2021 to present day.”

5. The Council responded on 16 November 2023 and refused to provide the requested information citing section 12(1) (cost limit) of FOIA as its basis for doing so.
6. On the same date the complainant requested an internal review. The Council provided the complainant with the outcome of its internal review on 8 December 2023 in which it maintained its original position.

Scope of the case

7. The complainant contacted the Commissioner on 11 December 2023 to complain about the way their request for information had been handled.
8. During the course of his investigation, the Commissioner wrote to the Council and set out his view that the requested information was likely to constitute environmental information as defined in regulation 2(1)(c) of the EIR. The Council therefore revised its position and relied on regulation 12(4)(b) (manifestly unreasonable) to refuse to provide the requested information.
9. The scope of this case and the following analysis is to determine whether the Council is entitled to rely on regulation 12(4)(b) of the EIR to refuse to provide the withheld information.

Reasons for decision

Regulation 12(4)(b) – manifestly unreasonable

10. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. In this case, the Council is citing regulation 12(4)(b) on the grounds that to comply with it would impose a significant and disproportionate burden on its resources, in terms of time and cost.
11. 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.

12. 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.
13. The EIR differ from FOIA in that under the EIR there is no upper cost limit set for the amount of work required by a public authority to respond to a request.
14. While the Fees Regulations relate specifically to FOIA, the Commissioner considers that they provide a useful point of reference where the reason for citing regulation 12(4)(b) of the EIR is the time and costs that compliance with a request would expend, as is the case here. However, the Fees Regulations are not the determining factor in assessing whether the exception applies. The Council 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.

The Council's position

15. In its submissions to the Commissioner, the Council explained that it has conducted initial searches of six mailboxes for information within the scope of the request. These searches took approximately one hour and identified 959 email chains that may fall within the scope of the request. It stated that before it could review each email chain, it would need to convert them to a PST file which would take approximately 15 minutes.
16. The Council explained that in order to provide the requested information, it would need to review each email chain to determine whether it falls within the scope of the request, and whether it contains personal data or commercially sensitive information. The Council stated that it has dealt with a similar request from the complainant and in that case, it took approximately 3 - 4 minutes to review each email chain. Therefore, it estimates that in this case, it would take approximately 3 minutes to review each email chain. In total, it calculated that it would take 47.95 hours to review all 959 email chains (3 minutes x 959 email chains = 47.95 hours).
17. The Council stated that once it had reviewed the email chains a second officer would need to sense check the information. It estimates that it

would take a Council officer approximately 1.5 minutes to sense check each email chain and so it calculated that in total it would take 23.98 hours to sense check all 959 email chains (1.5 minutes x 959 emails = 23.98 minutes). The Council stated that finally, it would need to check for duplicate information which it estimates would take approximately 10 minutes. In total the Council calculated that it would take 73.35 hours to provide the requested information.

The Commissioner's position

18. The Commissioner acknowledges that the Council would need to review 959 email chains including any attachments to those email chains in order to comply with the request. However, he does not accept that a second officer would then need to sense check the email chains. This appears to be a preference of the Council rather than a necessary step.
19. The Commissioner considers the Council's estimate of 3 minutes to review each email chain including any attachments to be reasonable. He notes that the estimate is based on the Council's experience of dealing with a similar request and includes the time it would take to determine whether each email chain falls within the scope of the request and whether it contains personal data or commercially sensitive information.
20. Therefore, the Commissioner considers that complying with the request would place a disproportionate burden on the Council, both in terms of cost and resources. He is satisfied that the request is manifestly unreasonable and so regulation 12(4)(b) is engaged. The Commissioner will now go on to consider the public interest test.

Public interest test

21. With regards to the public interest test, in its submissions to the Commissioner, the Council acknowledged that there is a general public interest in transparency, openness and the promotion of public confidence in its internal processes and procedures. However, the Council also considers that complying with the request would expose the Council to a disproportionate burden. It stated that complying with the request would cause an unjustified level of disruption to its services which would impact its ability to answer other requests. It therefore concluded that the public interest in maintaining the exception outweighs the public interest in disclosure of the withheld information.
22. The Commissioner recognises that there is a public interest in the transparency of the Council. However, he considers that complying with the request would place a significant burden on the Council's limited resources. In the Commissioner's view that burden would be disproportionate and not in the public interest.

23. The Commissioner's conclusion is that the public interest in the maintenance of the exception provided by regulation 12(4)(b) outweighs the public interest in disclosure of the withheld information.
24. 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).
25. As covered above, in this case the Commissioner's view is that the balance of the public interest 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. Therefore, the Council is not required to provide the requested information.

Regulation 9 - advice and assistance

26. Regulation 9(1) of the EIR says that a public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.
27. The Commissioner is aware that the request in this case, is a refined version of an earlier request which the complainant made to the Council. The Commissioner notes that when making the request in this case, the complainant stated that they consider the request to be very specific and that they are unsure how they could narrow the scope of the request further.
28. In its initial response to the request, the Council stated that it is unable to advise the complainant on how to narrow the scope of the request as by the complainant's own admission, the request is very specific. The Commissioner considers that this response was reasonable given that the complainant stated when making the request that it could not be refined further.
29. The Commissioner is therefore satisfied that the Council complied with its obligations under regulation 9 of the EIR to offer advice and assistance.

Right of appeal

30. 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

31. 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.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Joanne Edwards
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