

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 28 March 2024

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

Decision (including any steps ordered)

1. The complainant requested information about a Covered Market Roof Refurbishment. Oxford City Council (the "council") disclosed some information and withheld other information under the FOIA exemption for commercial interests (section 43(2)). The council subsequently reconsidered the request under the EIR and refused to provide the outstanding information under the exception for manifestly unreasonable (regulation 12(4)(b)).
2. The Commissioner's decision is that the council initially wrongly handled the request under the FOIA and breached regulation 5(1) and regulation 14(1) of the EIR but that it correctly applied regulation 12(4)(b) to refuse to provide the information in part 3 of the request.
3. The Commissioner does not require the council to take any steps.

Background

4. Oxford City Council (the "council") is working on a multimillion pound redevelopment of Oxford's historic Covered Market. Separately, the council is investing £3.1m to upgrade the Covered Market, including £1.8m to secure the roof for another 60 to 80 years and £1.3m for internal refurbishment and decorations¹.
5. The complainant has raised concerns that the project has been poorly executed and the money wasted. They explained that they have submitted requests for information to try to establish as to why the project has dragged on for so long and is over budget and who should ultimately be held accountable.

Request and response

6. On 4 August 2023, the complainant wrote to Oxford City Council (the "council") and requested the following information:
 - "1. Please confirm the date work commenced on the Covered Market Roof Refurbishment, detailing different phases of the project.
 2. How frequently are progress reports generated, i.e., weekly, monthly, quarterly? Who is on the distribution list for progress reports?
 3. Please provide copies of all progress reports."
7. The council responded on 4 September 2023 and provided information in relation to parts 1 and 2 of the request. It withheld the information in part 3 of the request under the exemption for commercial interests (section 43(2)) of the FOIA.
8. The council provided an internal review response on 1 November 2023. This confirmed the extent of information held and disclosed some information previously withheld under section 43. In relation to the outstanding information in part 3 of the request, the council maintained its reliance on section 43(2) and additionally suggested that the cost of compliance would exceed the appropriate limit, citing section 12 of the FOIA.

¹ <https://www.oxford.gov.uk/building-projects/covered-market-redevelopment#:~:text=Separately%2C%20the%20City%20Council%20is,The%20Covered%20Market%2C%20Oxford%20website.>

Scope of the case

9. On 17 November 2023 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
10. The complainant confirmed that they were dissatisfied with the council's response to part 3 of their request.
11. During his investigation it occurred to the Commissioner that, due to the nature of the request, it was likely that the information was environmental in nature and that the request fell to be considered under the EIR. He, therefore invited the council to reconsider the request under the EIR.
12. In addition, as the Commissioner was mindful that the complainant had made several requests to the council for information associated with the Covered Market Roof Refurbishment he also invited the council to consider whether these matters could be resolved on an informal basis.
13. The council reconsidered the request under the EIR and issued a new response to the complainant on 19 March 2024, which confirmed that, due to the time it would take to prepare the information for disclosure, it considered that this would place an unreasonable burden on its resources. It confirmed that it was, therefore, relying on the manifestly unreasonable exception to refuse the request.
14. In considering its duty to provide advice and assistance under regulation 9 of the EIR, the council offered to provide the complainant with a selection of the requested reports. The complainant declined the council's offer so the Commissioner has proceeded to a decision on its application of regulation 12(4)(b).

Reasons for decision

Is the requested information environmental?

15. The council initially handled the request under the FOIA. During the Commissioner's investigation and, at his direction, the council reconsidered the request under the EIR.
16. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity

and its components, including genetically modified organisms, and the interaction among these elements;

- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
17. In this case the requested information relates to decisions associated with a covered market roof refurbishment. The Commissioner considers that the requested information is, therefore, likely to be information falling within the definition of environmental information, as set out in regulation 2(1)(c) and regulation 2(1)(f). For procedural reasons, he has therefore assessed this case under the EIR.
18. In view of this, the Commissioner has concluded that the council wrongly (initially) handled the request under the FOIA and breached regulation 5(1) of the EIR. As the council subsequently corrected this the Commissioner does not require it to take any steps in this regard.

Regulation 14 – refusal to disclose information

19. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore, where the procedural requirements of the two pieces of legislation differ, it is inevitable that the council will have failed to comply with the provisions of the EIR.

20. In these circumstances the Commissioner believes that it is appropriate to find that the council breached regulation 14(1) of EIR which requires a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and indeed its internal review) failed to cite any exception contained within the EIR as the council actually dealt with the request under FOIA.

Regulation 12(4)(b) – manifestly unreasonable

21. Regulation 12(4)(b) of the EIR provides 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.
22. 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.
23. 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.
24. The Commissioner's guidance confirms that, under the FOIA, an authority cannot take into account the cost of considering whether information is exempt under section 12 but it can take it into account under section 14(1) (vexatious requests). This is because section 12 limits the activities that can be considered when deciding if the appropriate limit would be exceeded.

25. This is not an issue under the EIR. The costs of considering if information is covered by an exception can be taken into account as relevant arguments under regulation 12(4)(b)².
26. The EIR differ from the 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.
27. While the Fees Regulations relate specifically to the 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. Authorities must 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

28. The council has explained that information relating to progress on the Covered Market Roof Refurbishment (the "Project") was held by a member of staff who left the council in late 2020 and was not saved in shared folders that can now be accessed by the organisation as the email account and personal folders for this officer were disabled and deleted shortly after their departure. It confirmed that, having investigated other potential sources of information relevant to the request it was unable to find any equivalent to the weekly progress reports. In relation to the scope of the request, the council confirmed that it only held information on progress from 2021.
29. The council further advised that the requested reports are operational, internal reports. It explained that, whilst they provide a "snapshot" of the project at the given time and may include issues that caused delays or further cost considerations, they were not designed to provide a strategic overview of the project's performance against targets and budget.

² <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-4-b-environmental-information-regulations-manifestly-unreasonable-requests/>

30. The council confirmed that, to provide all of the weekly progress reports would create an excessive burden on the its resources. It explained that, due to the number of reports, which total 52, and the level of detail they contain, to retrieve all of these reports, and to review and consider and apply relevant exceptions, which is included in calculating the burden of responding to a request under EIR, would take on average at least 90 minutes per report. It confirmed that this was in addition to the time that was spent searching for weekly progress reports or equivalent documents for the duration of the project which took a minimum of 5 hours.
31. The council further advised that, from reviewing a sample of ten and a skim read of other reports, it was evident that all reports would require reviewing for information that would fall under EIR exceptions. It confirmed that these would certainly include regulation 13 (personal data) and 12(5)(e) (confidential commercial information) but potentially other sensitive information. The council confirmed that the reports are detailed and contain complex technical information, ambiguous acronyms and a range of detail that requires close attention to ensure all potentially confidential information has been identified, checked and redacted.
32. In relation to the average estimate of 90 minutes for the review of each report, the council acknowledged that it may be that some reports do not take this long but time taken to consult with associated contractors, to seek clarification and senior officer advice on certain details as well as reviewing and redacting have been factored into this time.
33. In addition to the time and resources the council considers that complying with the request would involve, the council has also raised concerns that, based on the history of requests on this subject submitted by the complainant, even if all the requested information was disclosed, this would only lead to further requests.
34. The council has provided evidence that the complainant submitted 8 requests between 2 August and 9 October 2023 for information relating to the Covered Market roof project (the "Project"), often with requests overlapping/on consecutive days, alongside follow up questions and internal review requests.
35. In order to meet its obligations to provide advice and assistance under regulation 9, the council has confirmed that, in attempts to assist the complainant, it has advised that the FOIA/EIR have limited reach, are confined to providing recorded information held, and do not necessarily result in a clear explanation / overview which may satisfy the requester. The council has suggested that a result of this is that its responses to

the complainant inevitably raises further questions and also increases the burden on council officers searching for, retrieving and reviewing relevant information. In relation to further advice and assistance offered, the council has also stated that the complainant did not take up an offer in September 2023 to discuss their concerns directly with the project team.

The Commissioner's position

36. The Commissioner's guidance sets out a number of factors which authorities should consider when assessing whether the cost or burden of dealing with a request is too great. These include the following considerations:

- the nature of the request and any wider value in the requested information being made publicly available;
- the importance of any underlying issue to which the request relates, and the extent to which responding to the request would shed light on that issue;
- the size of the organisation and the resources available, including the extent to which you would be distracted from delivering other services; and
- the context in which the request is made, which may include the cost of responding to other requests on the same subject from the same requester³.

37. In this case, the subject matter of the request relates to a Project involving public expenditure and which potentially affects a significant number of people, as well as having some impact on the built environment. There are, therefore, grounds for accepting that the Project is a valid subject in the context of transparency and accountability.

38. However, the Commissioner considers that this does not automatically mean that any and all information associated with the Project should be made available. To this end, the Commissioner has considered the complainant's specific request for progress reports and referred to a number of sample reports provided by the council.

³ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-4-b-environmental-information-regulations-manifestly-unreasonable-requests/>

39. As the council has confirmed to the complainant, the reports vary in size and detail and consist of a mixture of granular detail about work undertaken, associated costs and other factors. The Reports were clearly created for the benefit of those involved in the day to day management of the Project and, in the Commissioner's view, do not directly address the complainant's concerns for an explanation as to the timeframe for the project and overall costs.
40. In general terms, whilst the Commissioner is mindful that the fact that information might be technical in nature and/or might appear to be unlikely to be necessarily illuminating, are not in themselves grounds for non-disclosure. Any such information can be contextualised by a public authority in a covering response. However, the Commissioner does consider that the extent to which information might be of value to the broader public is a relevant consideration when deciding whether the additional burden imposed by a request is justified.
41. The Commissioner has also considered the council's evidence regarding the number of requests made by the complainant about the Project and the disposition of the complainant regarding the making of supplementary requests and enquiries. The Commissioner is mindful that, where requests are systematically met with inadequate responses it may be entirely reasonable for a requester to persevere with further requests and enquiries.
42. In this case, though, having concluded that the council's estimates for complying with the request are reasonable and having factored in the relative value of the information and the pattern of requesting displayed by the complainant, the Commissioner considers that regulation 12(4)(b) is engaged; this is because he is satisfied that responding to the request would impose a disproportionate burden upon the council.
43. 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.
44. When carrying out the test, regulation 12(2) requires an authority to apply a presumption in favour of the disclosure of the information.

Public interest in disclosure

45. The council has acknowledged that there is a public interest in information about a high profile building project in Oxford and details of project activity and expenditure, particularly considering the concerns raised about delays and expenditure.
46. The complainant has suggested that the Project has been poorly managed, that it has overrun and that this has resulted in additional public expenditure.
47. The Commissioner recognises that there is a legitimate public interest in transparency around expenditure on developments which have an impact on the environment and the local population. He accepts that this interest would be heightened in cases where there are concerns about mismanagement or misuse of public resources.

Public interest in withholding the information

48. The council has argued that information about the project has previously been released in response to requests made by the complainant and others. It considers that complying with this request would result in council resources being diverted to retrieving and reviewing a significant number of complex documents which may not provide the definitive answers to the concerns which form the focus of the requests, and which has a high likelihood to have an adverse impact on the ability of officers to conduct their work effectively.
49. The council has stated that, in addition to offering to meet with the complainant to discuss their concerns about the Project, it also offered to provide them with a representative sample selection of the requested reports. The council has argued that the complainant's rejection of these offers is indicative of the complainant's disposition towards being unsatisfied with any information disclosed and suggests that such disclosures only prompt further requests/enquiries with the resulting impact on its resources.

Balance of the public interest

50. The Commissioner recognises that there is a general public interest in transparency and accountability in matters relating to public expenditure and to decisions having an effect on the environment and the local community. He accepts that the Project provides a specific instance of this and he has given it due weighting in his consideration of the public interest balance.
51. The Commissioner recognises that the complainant has specific concerns that the Project has been mismanaged. If this were the case, the

Commissioner considers that this would provide an additional weighting in favour of the disclosure of information associated with this.

52. However, the Commissioner has been unable to find any evidence that there are broader concerns about the council's handling of the Project. The available evidence suggests that concerns are largely confined to the complainant and a small number of others who have submitted requests to the council on this matter. The public interest in the context of the EIR relates to the broader interests of the public which can sometimes include the public interest in allowing public authorities to carry out their core functions effectively without this being hindered by burdensome requests.
53. In relation to the council's concerns about the number of requests submitted by the complainant and the likelihood of disclosure resulting in further requests and enquiries, the Commissioner notes the council's concerns but he is not convinced that this argument carries much weight at this point.
54. The Commissioner has accepted that the Project is a legitimate subject for public scrutiny, however, he does accept that a pattern of ongoing enquiries and requests for information, the disclosure of which would not necessarily illuminate the matter for the broader public, might provide evidence of an unreasonable pattern of requesting.
55. In this case, as noted above, the Commissioner has accepted that there is a general public interest in transparency around the Project; however, for the reasons set out above, he does not accept that the specific information requested in this case would necessarily be of great value to the broader public.
56. The Commissioner finds that, when this is considered alongside the burden that making the information available for disclosure would place on the council's resources, combines to create a significant public interest weighting in favour of maintaining the exception.
57. In this case, having considered the above, the Commissioner is satisfied that for the council to respond to the request, the time it would take is significant and disproportionate compared to the public interest in the disclosure of the information. The Commissioner is therefore satisfied that, in this case, the balance of the public interest lies in the exception being maintained.
58. The Commissioner is therefore satisfied that the council was entitled to rely on regulation 12(4)(b) to refuse the request.

Regulation 9 – the duty to provide advice and assistance

59. Regulation 9 of the EIR requires public authorities to provide advice and assistance to requestors, so far as it would be reasonable to expect the authority to do so.
60. In this case the council offered to provide the complainant with a representative sample selection of the requested reports. It also offered to meet with them to discuss their concerns about the Project. The complainant declined both offers.
61. The Commissioner considers this to constitute a reasonable level of advice and assistance in this case and he is, therefore, satisfied that the Council complied with its obligations under regulation 9 of the EIR to offer advice and assistance.

Other matters

62. Although they do not form part of this decision notice the Commissioner would like to raise the following matters of concern.

Records management

63. The code of practice issued under regulation 16 of the EIR (the "EIR Code") contains recommendations for public authorities in relation to the handling of requests for information⁴.

64. The code of practice issued under section 46 of the FOIA (the "section 46 Code") provide specific recommendation for public authorities in relation to the creation of and retention of records⁵.

65. In relation to the reasons for retaining records, part 2.1.1 of the section 46 Code states:

"These include, but are not limited to, the following:

- for accountability and audit;
- to comply with regulatory requirements, including the provisions of FOIA;
- to protect legal and other rights and interests;
- as a historical record."

66. In this case, the council has explained that it has retained a limited scope of information regarding the Project identified in the request. Whilst the Commissioner has not reached any conclusions in relation to this specific matter, he reminds the council of the importance of maintaining adequate records in order to document decision making or for audit purposes. He expects that the council's future practice will conform to the recommendations of the codes of practice.

⁴ https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf

⁵

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1010395/Freedom_Information_Code_Practice_Web_Accessible.pdf

Right of appeal

67. 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

68. 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.
69. 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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