

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

Date: 22 August 2024

Public Authority: Cornwall Council
Address: New County Hall
Truro
Cornwall
TR1 3AY

Decision (including any steps ordered)

1. The complainant made a number of requests for information to Cornwall Council ("the council") relating two planning applications. The council aggregated the three requests and refused to respond further, applying Regulation 12(4)(b) of the EIR. It subsequently confirmed that no information is held as regards one of the requests. The complainant disputes that the information should have been considered under the EIR, and argues that the council is wrong to apply Regulation 12(4)(b) to refuse the requests.
2. The Commissioner's decision is that the council was correct to aggregate the requests and to consider the information under the EIR. He has also decided that it was correct to apply Regulation 12(4)(b) to refuse to respond to the requests further.
3. The Commissioner does not require any steps.

Request and response

4. On 17 November 2023, the complainant wrote to the council making the following request for information:

"I am writing to make a freedom of information request regarding planning applications [planning reference numbers redacted by the ICO]. I seek to see all information, correspondence and communication related to these applications from within the planning department and with any other persons or bodies, including all forms of electronic and written communications, records etc. (notes, meeting notes, Emails, texts, WhatsApps etc.)...

... This request includes all information related to these applications including, but not limited to, the following:

- Any individuals and departments within government that have been involved in or consulted on these applications, including the case officer and management
 - Policy Team (including discussions on the approach and relevant policy during this period, or that has been triggered as a result of these applications)
 - Community Protection
 - Public Protection Noise & Odour
 - Penzance Town Council
 - Historic Environment Planning
 - Delivery Team
 - Environment Agency
 - Any councillors, including Councillor Jim Mckenna
 - Any correspondence with 3rd Parties in relations to or connected with these applications."
5. On 20 November 2023, the complainant also requested further information.
- i. Call records between all involved in the relevant planning applications.
 - ii. Any planning department policy or instruction to officers that prevents them from talking directly to the planning applicant where an agent has been assigned to act on their behalf.
6. The council responded on 15 December 2023. It clarified that the requested information fell to be considered under the EIR rather than FOIA. It said that given the nature of the requests and the short time between them being submitted, it had the aggregated requests, and

that it refused to respond further as Regulation 12(4)(b) applied, (manifestly unreasonable request).

7. On 16 December 2023, the complainant requested that the council carry out a review of its decision. He disputed that all of the information fell to be considered under the EIR, and argued that the council was not correct to refuse the requests under Regulation 12(4)(b).
8. Following an internal review, the council wrote to the complainant on 30 January 2024. It upheld its previous decision, noting that, following a narrowed request made by the complainant in relation to one of the planning applications, it had now located substantially more information falling within the scope of these requests.
9. The council did, however, provide a response to part ii of the request. It said that it holds no written policy but explained why it deals with such requests as it does. The complainant has not made a complaint to the Commissioner about this part of the council's response, and so it is not considered further within this decision notice.

Scope of the case

10. The complainant contacted the Commissioner on 3 March 2024 to complain about the way their request for information had been handled.
11. This decision notice considers whether the council was correct to consider the information under the EIR, and whether it was correct to aggregate the requests and refuse them under Regulation 12(4)(b).

Reasons for decision

12. The Commissioner has not found it necessary to contact the council regarding this complaint as it provided full and clear reasoning for its decisions in its refusal notice and in its internal review response to the complainant.

Is the requested information environmental?

13. 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);
14. The complainant argues that the information is not environmental, or that it is not *all* environmental information. He told the Commissioner that the planning applications revolve around the construction of an internal stud wall within a property and it does not therefore relate to issues which would have an effect upon the environment.
15. The Commissioner has viewed both planning decisions relating to the applications. He notes that both decisions cite, as a reason for refusal, that the proposed changes to the property are overly dominant and disproportionate to the features of the existing building. He notes that one decision adds: *"The proposed development disrupts the simple form and appearance of the building and the modern appearance of the glazed balcony detracts from its historic character and significance. The proposed development harms the architectural and historic significance of the grade II listed building and the character and appearance of the Penzance Conservation Area."*
16. Regulation 2(1)(a) includes 'landscape' as a relevant factor. The outward appearance of a built structure forms part of the landscape of an area and how it is perceived by the public. The above planning refusal indicates, in part, that the applications have been refused due to their

effect upon the building's façade and appearance. This would have had an effect upon the state of the elements of the landscape in the local area.

17. The Commissioner has therefore decided that the requested information is information on a plan (i.e., the planning applications), likely to affect the elements of the environment outlined in Regulation 2(1)(a) above. In particular, the landscape of the area.
18. The Commissioner has therefore decided that the council was correct to consider the information under the EIR rather than under FOIA.

Was the council correct to aggregate the requests for information?

19. The Commissioner has considered the council's arguments for aggregating the requests.
20. The Commissioner's guidance on Regulation 12(4)(b) provides guidance on the aggregation of requests under the EIR:

*"...under the EIR, there is no specific provision for the aggregation 'of substantially similar' requests. Our position, however, is that there may be occasions where it is permissible to consider a number of EIR requests together when deciding if they are manifestly unreasonable because of cost or burden. This is in line with the approach to requests considered manifestly unreasonable on the grounds that they are vexatious in the wider sense, where the context in which they are made can be taken into account."*¹

21. The Commissioner notes that three requests were made by the complainant over a space of two working days. All relate to the same two planning applications, and communications between parties relating to these.
22. He considers that, in the circumstances of this case, the council was able to aggregate the requests for information and consider the effect of responding to them as a whole.

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/#howdowe>

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

23. 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.
24. 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 in order for the exception not to be engaged. One such way a request could be manifestly unreasonable is if a public authority is able to demonstrate that the time and cost of complying with the request is obviously unreasonable.
25. Regulation 12(4)(b) of the EIR exists to protect public authorities from exposure to a disproportionate burden in terms of the amount of time and resources that they have to expend in responding to a request.
26. In the Commissioner's view, the key question for public authorities to consider when determining if a request is manifestly unreasonable is therefore whether the value and purpose of the request justifies the burden that would be placed upon the authority in complying with it.
27. In assessing whether the cost or burden of dealing with a request is too great, the Commissioner will consider the level of the costs involved and decide whether they are clearly or obviously unreasonable. He will take into account factors such as:
 - 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 to it, including the extent to which it would be distracted from delivering its 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 requester.
28. The Freedom of Information and Data Protection (Appropriate Limit and Fees) ("the Fees Regulations") sets out an appropriate limit for responding to requests for information under FOIA. The limit for local authorities, such as the Council, 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.

29. As well as setting out the actual limits, the Fees Regulations explain what activities public authorities can take into account when estimating the cost of compliance. Those activities are limited to:
- determining whether it holds the information;
 - locating that information or a document which may contain the information;
 - retrieving the information or a document containing it; and
 - extracting the information from a document containing it.
30. There is no equivalent limit within the EIR and the Fees Regulations do not apply in relation to the EIR, in considering the application of Regulation 12(4)(b). However, the Commissioner considers that public authorities may use the FOIA section 12 limits and the Fees Regulations as an indication of what Parliament considers to be a reasonable burden to respond to EIR requests.
31. Although it cannot be taken into account under FOIA, under the EIR, the burden of considering whether any exceptions are applicable to the information can also be taken into account in determining whether Regulation 12(4)(b) can be applied.
32. However, as noted above, the public authority must then balance the burden of complying with the request against the public value of the information which would be disclosed before concluding whether the exception is applicable.

The council's arguments

33. The council initially argued that its initial searches identified 168 emails which would need to be read analysed and relevant information extracted.
34. It said that, based on a sampling exercise, it would take an average of 3 minutes per email to determine whether it was in the scope of the request, (8.4 hours in total), and a further 8 hours to extract and redact information (where appropriate) that had already been identified in scope of the request from the council's recording systems.

35. It noted that, in addition to this, third party consultations would be required with information providers external to the council. This was calculated as adding an additional 1 hour and 15 minutes in total.
36. Further to this, additional searches within the relevant services had taken place which it said had taken a further 2 hours.
37. Therefore, it initially estimated that the total time to comply with the request would exceed 19 hours.
38. In its internal review response, however, the council clarified that its initial searches were incomplete as it had initially narrowed the scope of its searches to key words raised by the request. These searches had initially provided an estimate which exceeded 18 hours. However, it noted that the complainant's request was for all communications relating to the relevant planning applications, its following searches for all communications had subsequently found further emails falling within the scope of the request.
39. It clarified that searches carried out in response to a subsequent, narrowed down, request submitted by the complainant for just one of the planning applications involved had identified 601 emails. It therefore said that its prior estimate was incorrect, and that the amount of time required to comply with the combined requests would actually vastly exceed the 18-hour limit set under the FOIA fees regulations.
40. On this basis, it therefore confirmed its view that Regulation 12(4)(b) is engaged.

The Commissioner's conclusions

41. The Commissioner must determine whether this is a reasonable estimate. The estimate must be sensible, realistic and supported by cogent evidence. It should be based on the quickest method of gathering the information requested, considering how the public authority actually holds its records.
42. The Commissioner notes that the request is broad in that it is asking for copies of all correspondence, including emails, texts and any other communications, including call logs, between all parties concerning the planning applications.
43. The council has described how its searches and sampling exercises have uncovered over 600 emails. Given an average of 3 minutes per email, this point alone would exceed 30 hours in order to respond to the request. Even at 1.5 minutes per email this would take the response time close to 15 hours, and this does not include the other processes which it has indicated it would need to carry out, nor the likelihood that

further emails would be found in relation to the other planning application specified by the complainant in their request.

44. The Commissioner is therefore satisfied that responding to the request would clearly exceed the 18-hour limit set by section 12 of FOIA by some degree. His decision is therefore that Regulation 12(4)(b) is engaged by the request. He must therefore carry out the public interest test required by Regulation 12(1) of the EIR.
45. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in the information being disclosed.
46. When doing so, he must also take into account that 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.

Public interest test

The public interest in the information being disclosed

47. The Commissioner notes that there is always a general public interest in public authorities being open and transparent about their actions. This is strengthened by the expectation that planning decisions will be made as openly as possible in order that the public can understand the reasons why a planning decision was decided as it was.
48. The issues involved in this case relate to the two planning applications, which were refused by the council. The complainant is concerned about the actions of a particular councillor in respect of the planning decisions. The complainant therefore argues that there is a public interest in all of the correspondence and communications being disclosed so that the public can properly scrutinise the council's, (and presumably, the councillor's) actions in this respect.
49. Although the complainant has a personal private interest in the information being disclosed, this cannot be taken into account in favour of disclosure in this case. EIR complaints should generally be decided without reference to the identity of the applicant or their motivation in making the request.
50. The Commissioner has, however, taken into account that there is a very strong public interest in ensuring the probity of the planning process.

The public interest in the exception being maintained

51. The council has described how responding to the requests would entail it carrying out a substantial amount of work, creating a significant burden on its resources.
52. There is a strong public interest in protecting the limited resources of public authorities against requests which would create a significant burden upon them and affect their ability to carry out their primary functions.
53. The Commissioner notes that all matters relevant to the decision in planning applications are published on the council's planning portal. Both planning decisions fully explain the reasons for the decision.
54. The complainant has questioned the council's decisions. The council argues that these are matters which can be addressed via the normal planning appeals process, and if necessary, a formal standards complaint to the council. It argues that this is the appropriate means of approaching such concerns rather than via an EIR request.
55. However, there is a wider public interest in allowing access to information in order for the public to consider whether any undue influence has occurred which affected the outcome of the planning application. From that point, a complaint of the nature specified by the council might be made from a more informed position.

The balance of the public interest

56. The Commissioner recognises that 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.
57. 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.
58. The Commissioner notes that the council is a large council and that it would have the necessary resources to respond to the requests should it be required to do so. However, providing a response to an EIR request which greatly exceeds the appropriate limit would require a significant diversion of the council's resources, and affect its ability to carry out its other functions.

59. The Commissioner has taken into account that there is a clear public interest in ensuring transparency in the planning process, and in allowing the public access to information which will allow it to be satisfied about the probity of the decision making process.
60. The Commissioner acknowledges the strong public interest in decisions relating to planning being made as transparently and openly as possible. However, both planning decisions are already published, and the planning portal clearly sets out the documentation pertinent to the decisions, and the reasons behind the decisions.
61. The Commissioner also notes that there are formal means for the applicant to appeal a planning decision, to make complaints about councillors if they have concerns about their actions, or to make complaints about potential maladministration should they believe that this has occurred. Each of these have their own investigation processes which can obtain the relevant information necessary to reach a decision on a complaint or appeal without the council carrying a significant burden in responding to a request under the EIR.
62. The Commissioner notes the public value in allowing access to information which might inform such appeals. However, taking into consideration the significant burden that responding to the request would place on the council, balanced against the information which is already publicly available relating to the decision, the Commissioner has decided that the public interest in the exception being maintained outweighs the public interest in disclosure in this case.
63. 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).
64. As highlighted above, in this case the Commissioner’s view is that the balance of the public interest clearly favours the exception being maintained in this case. Therefore, the Commissioner’s decision, whilst informed by the presumption provided for in Regulation 12(2), is that Regulation 12(4)(b) was applied correctly.

65. The Commissioner's decision is therefore that the council was able to refuse to respond to the complainant's request further under Regulation 12(4)(b) of the EIR.

Right of appeal

66. 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

67. 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.
68. 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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