

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

Date: 17 September 2024

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

Decision (including any steps ordered)

1. The complainant requested environmental assessments and all other information held about a proposed desalination plant. Cornwall Council (the "Council") confirmed that it did not hold environmental assessments and that other information could not be provided on grounds of cost.
2. The Commissioner's decision is that, in relation to the request for environmental assessments, the Council correctly confirmed that the information was not held and regulation 12(4)(a) applies; in relation to other information on the desalination plant, the Commissioner finds that the Council was entitled to rely on regulation 12(4)(b) to refuse the request on cost grounds and that it complied with its duty to provide advice and assistance under regulation 9.
3. The Commissioner does not require further steps.

Background

4. The requests relates to a proposed water desalination plant on the South coast of Cornwall.¹

Request and response

5. On 15 April 2024 the complainant wrote to Cornwall Council (the "Council") and requested the following information ("request 1"):

"Will you under EIR please supply me with the information that Cornwall County Council has towards this desalination project".
6. On 17 April 2024 the complainant asked the Council to provide the following, additional information ("request 2"):

"Under EIR can you please provide all environmental assessments that have been carried out on the project."
7. On 13 May 2024 the Council responded to request 1 and confirmed that it was refusing the request under the "manifestly unreasonable" exception (regulation 12(4)(b)). The Council explained that, due to the volume of information involved, it would be too costly to comply with the request and invited the complainant to resubmit their request with a narrower timeframe.
8. The Council responded to request 2 on 16 May 2024 and confirmed that it did not hold the requested environmental assessments.
9. On 17 May 2024 the complainant asked the Council to review its handling of the requests and on 12 July 2024 the Council provided its internal review response. This confirmed that, in relation to both requests, it was maintaining its position.

¹ <https://www.southwestwater.co.uk/about-us/what-we-do/improving-your-service/projects-and-investment/desalination>

Scope of the case

10. On 27 July 2024 the complainant contacted the Commissioner to complain about the way their requests for information had been handled.
11. The Commissioner has considered whether the Council correctly handled the complainant's requests.

Reasons for decision

Is the requested information environmental?

12. 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);

13. The Commissioner is satisfied that the requested information, which relates to water treatment, falls under the definition of 'environmental information' in accordance with regulation 2(1)(a) and 2(1)(c) of the EIR. For procedural reasons, he has therefore assessed this case under the EIR.

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

14. The Council applied regulation 12(4)(b) to refuse to comply with request 1, namely the following request:

“Will you under EIR please supply me with the information that Cornwall County Council has towards this desalination project”

15. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose information if the request is manifestly unreasonable. It's subject to the public interest test.
16. When determining whether a request for information is manifestly unreasonable, a public authority should consider whether a request is likely to cause a disproportionate cost or burden, or an unjustified level of distress, disruption or irritation. In this case, the Council has relied on regulation 12(4)(b) on the basis that the request would cause a disproportionate cost.
17. Unlike FOIA, the EIR doesn't contain a specific limit at which the burden of complying with a request is considered to be too great. However, the Commissioner's guidance states that public authorities may use the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Fees Regulations") as a starting point for determining what a reasonable burden might be.
18. The Fees Regulations stipulate that a cost estimate must be reasonable in the circumstances of the case. The limit given for central government departments is £600; for local government, and Anglian Water in this case, it is £450. The Fees Regulations also state that public authorities must assess the cost of time spent on responding to a request at £25 per hour. For the £450 limit, this equates to 18 hours of work.
19. When making this estimate, the authority can consider the time taken to:
 - a) determine whether it holds the information
 - b) locate the information, or a document which may contain the information

- c) retrieve the information, or a document which may contain the information; and
- d) extract the information from a document containing it
20. 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 taken into account when deciding if the appropriate limit would be exceeded (see paragraph 20, above). However, 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.
21. For the request to be manifestly unreasonable, the public authority must then balance the public value of the request against the burden of responding.
22. In its submission to the Commissioner the Council has stated that a search for emails was conducted which took 1 hour and identified 3274 emails. It confirmed that, based on a sampling exercise it was determined it would take 3 minutes per email (163 hours in total) to determine whether it was in the scope of the request, extract and then redact information (where appropriate). The Council explained that this figure does not include additional documentation that may be within scope such as documents and notes, as once it was determined this part of the request would be manifestly unreasonable, the entirety of the request became manifestly unreasonable.
23. The Council confirmed that the cost of complying with the request was calculated at £4075. However, it considers that the overall cost is likely to be significantly more, which in the Council's view is excessive. The Council confirmed that the complainant was given the opportunity to narrow their request and was provided with advice and guidance on how to do so; however, the complainant chose not to do this.
24. The Commissioner must determine whether the estimated cost of compliance calculated by the Council 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

² This is confirmed in the Commissioner's guidance here: <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-4-b-environmental-information-regulations-manifestly-unreasonable-requests/>

requested, considering how the public authority actually holds its records.

25. The Commissioner notes that the request is broad in that it is asking for all information, including all correspondence, including emails, texts and any other communications, including call logs, between all parties concerning the desalination project. The Commissioner notes that the request does not specify a timeframe so the chronological scope is open-ended.
26. On the basis of the Council's estimate of 163 hours, the Commissioner is, therefore, satisfied that responding to the request would clearly exceed the 18-hour limit set by section 12 of the 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.
27. 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.
28. When doing so, the Commissioner 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.

The public interest in the information being disclosed

29. The Council acknowledged that the EIR places a presumption in favour of disclosure of environmental information and that there is a public interest in it being open and honest in relation to its involvement with a large project of this nature. The Council also acknowledged that there is a public interest in the environmental impact of the project.
30. The complainant has raised specific concerns about the environmental impact of the desalination process and has argued that this provides significant public interest weighting in favour of disclosure.

The public interest in the exception being maintained

31. The Council has argued that complying with the request would come at a considerable cost to the public purse at a time the Council, like many public authorities, is facing substantial pressures to provide public services with limited resources.
32. The Council considers that complying with the request would have an adverse impact on the handling of other requests for information and the delivery of services generally. It has argued that significant weight

has to be given to the public interest in the Council being able to maintain public services.

33. The Council has further argued that there is a significant amount of information already publicly available, and more information will be made publicly available should a formal planning application be submitted to the Council as part of the planning application process.

The balance of the public interest

34. The Commissioner recognises that the central public interest in the exception being maintained relates to preserving the Council's resources.
35. Even where a request would provide information of value to the public, it is not in the public interest to require an 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.
36. The Commissioner has taken into account that there is a clear public interest in ensuring transparency in relation to the proposed desalination plant and in allowing the public access to information which will allow it to be satisfied about the probity of the decision making process. He is mindful that there are significant local concerns about the plant and he accepts that this provides a weighting in favour of disclosure.
37. However, the Commissioner is also mindful that the proposed plant is subject to a public consultation and will be subject to scrutiny via the planning application process.
38. The Commissioner accepts that, in view of the potential environmental impact of the proposed plant, there is a strong public interest weighting in favour of complete transparency. However, he considers that there is a stronger countervailing public interest in favour of allowing the Council to carry out its functions without these being inhibited by a burdensome request. He considers that this is amplified by the public interest in allowing the planning and consultation processes to run their course.
39. The Commissioner also notes that the Council invited the complainant to refine their request and advised how they might do this in order to reduce the cost of compliance. The Commissioner considers that this demonstrates that the Council has given due consideration to the public interest value of the information.
40. 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 matter and the ongoing decision making process, the Commissioner has decided that the public

interest in the exception being maintained outweighs the public interest in disclosure in this case.

41. 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)”.

42. As highlighted above, in this case the Commissioner’s view is that the balance of the public interest 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
43. 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.

Regulation 9 - advice and assistance

44. Regulation 9(1) requires a public authority to consider what advice and assistance it can reasonably provide to an applicant in cases where it relies on regulation 12(4)(b) of the EIR on the basis of burden, even if this is simply to confirm to the complainant that no reasonable or practicable advice and assistance can be provided.
45. As explained above the Council suggested that the complainant could reduce the scope of the request and explained that they might do this by reducing the time period, providing additional keywords to search and identifying any specific documents or information of particular interest.
46. The Commissioner is therefore satisfied that the Council met its obligation under regulation 9 of the EIR.

Regulation 12(4)(a) – information not held

47. The Council confirmed that it did not hold the information in request 2, namely:

"Under EIR can you please provide all environmental assessments that have been carried out on the project."

48. Under regulation 12(4)(a) of the EIR, a public authority may refuse to disclose information to the extent that it doesn't hold that information when it receives an applicant's request.
49. In its initial response to the request the Council confirmed that it did not hold the requested environmental impact assessments. It reiterated this in its internal review response. The complainant disputes the Council's position.
50. Where there is a dispute over the extent of the information a public authority holds, the Commissioner must decide whether it is more likely than not that the public authority has correctly confirmed that information is not held.
51. The Commissioner asked the Council to provide details of searches it carried out for the information.
52. The Council explained that environmental assessments would be completed as part of a planning process, and that, therefore, the most relevant service to hold the information would be the Council's planning service.
53. It confirmed that multiple officers within the planning service were contacted and asked what environmental assessments were held in relation to the desalination plant. It explained that information holders carried out a robust and thorough search of their electronic files, emails and case recording systems (Uniform) and found no evidence that the Council was in receipt of any environmental assessments relating to the desalination plant. The Council confirmed that environmental assessments of this nature would not be received by or stored by any other service.
54. The Council further confirmed that it did not hold any information that is similar to an environmental assessment at the time of the request.
55. The Council also highlighted that, in their request for an internal review, the complainant referenced news articles and suggested these evidenced that the Council held environmental assessments. The Council considers that the complainant's understanding of the news articles was incorrect and that this was addressed in its internal review response.

The Commissioner's conclusions

56. It is rare that the Commissioner can be 100% certain that information is not held. Nor is he required to prove beyond doubt that the information is not held.
57. In this case the Commissioner appreciates why the complainant might reasonably believe that environmental assessments would be held by the Council.
58. However, the Commissioner notes the searches carried out by the Council and he considers that these appear reasonable and proportionate and, given the subject matter, should have recovered any relevant held information. He has no direct evidence to contradict the Council's position nor any reason to doubt the veracity of its submissions.
59. The Commissioner is therefore satisfied that it is more likely than not that the information is not held. Regulation 12(4)(a) applies.
60. Whilst regulation 12(4)(a) is technically subject to both the public interest test and the presumption in favour of disclosure, the Commissioner can see no public interest argument capable of requiring a public authority to disclose information it does not hold.

Right of appeal

61. 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

62. 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.
63. 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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