

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

Date: 1 June 2018

Public Authority: Bournemouth Borough Council
Address: Town Hall
Bourne Avenue
Bournemouth
BH2 6DY

Decision (including any steps ordered)

1. The complainant has asked Bournemouth Borough Council to provide him with any correspondence where concerns have been raised about the Council's A338-Wessex Fields proposals.
2. The Council refused to comply with the complainant's request in reliance on Regulation 12(4)(b), on the grounds that to do so would be manifestly unreasonable due to the significant burden imposed on the Council by the request in terms of cost.
3. The Commissioner's decision is that Bournemouth Borough Council has correctly applied Regulation 12(4)(b) of the EIR to the complainant's request. She finds that weight of the public interest lies in maintaining the Council's application of this exception.
4. The Commissioner requires no further action in this matter.

Request and response

5. On 16 July 2017, the complainant wrote to Bournemouth Borough Council and asked to be provided with:

"...any correspondence written by Council officers during the last 36 months which raise concerns in relation to the A338-Wessex Fields proposals. [...] Please also provide me with any replies to any concerns raised."

6. The Council responded to the complainant's request on 3 August 2017, by informing him that, under Regulation 12(4)(b), the Council cannot disclose the information he has requested.
7. The Council advised the complainant that the scope of his request is very broad and it does not name any specific officers. The Council identified 2,417 regular officers and 421 casual officers whose email accounts would have to be searched. The Council said that, "Information held within email accounts is considered unstructured information which means that it is not directly indexed within our records management systems using names, addresses, or other unique identifiers", and, "The definition of 'serious concerns' is open to interpretation and it is not possible to search email accounts without an identifiable marker unless every single email received is checked manually".
8. The Council estimated that, "even if we were to restrict the scope of your request to those most likely to have corresponded (7 officers)" the cost of complying with the complainant's request would cost £543.75. The Council therefore determined that the balance of the public interest favoured maintaining the exception.
9. The complainant wrote to the Council on 5 August 2107 to express his dissatisfaction with the Council's response. The complainant disputed the Council's position on the grounds that –
 - The Council could easily narrow the request by using 'A338-Wessex Fields' as an identifier.
 - Because the Council is the decision-maker in this matter, the Council must make strenuous efforts to show that its decision-making processes are fully open and transparent.
 - The Council's argument that its internal emails are 'unstructured information' is tantamount to it being able to block any request for internal email correspondence.
10. On 30 October 2017, having conducted an internal review of its handling of this request, the Council wrote to the complainant to advise him of its final decision. The Council advised the complainant that it had conducted a sampling exercise based on the points made in his email of 5 August, and following its consultation with its IT Department, the Council determined that complying with a refined request would cost in excess of £2,775 and upheld its application of Regulation 12(4)(b) of the EIR.

Scope of the case

11. The complainant initially contacted the Commissioner on 4 October 2017 to complain about the way his requests for information had been handled.
12. In view of the significant opposition to planning application 7-2017-9177-DH, the complainant argues that Bournemouth Borough Council is required to go beyond the disclosure of information required under normal planning arrangements to provide greater openness and transparency. He further argues that a blanket ban on releasing internal communications is unlawful.
13. The Commissioner determined that the focus of her investigation would be to determine whether the Council has handled the complainant's request of 16 July 2017 in accordance with the EIR and specifically whether the Council is entitled to rely on Regulation 12(4)(b) of the EIR to refuse to comply with his request.
14. The Commissioner has been asked to consider a second request submitted to Bournemouth Borough Council by the complainant. The Commissioner's consideration of the second request will be dealt with under a separate decision notice.

Background information – A338 Wessex Fields

15. In September 2016 plans were announced by Dorset Local Enterprise Partnership for the next Bournemouth International Growth (BIG) Programme transport schemes, with over £20 million of investment to help fund a series of highway improvements along the A338 and B3073 corridors.
16. As part of the BIG programme, planning application 7-2017-9177-DH has been submitted which will see the building of a new junction and link road from the A338 to Wessex Fields. This planning application is yet to be determined by Bournemouth Borough Council acting in its capacity as the local planning authority.
17. The planning application is vehemently opposed by the Friends of Riverside campaign group.

Reasons for decision

18. The Council has dealt with the complainant's request under the provisions of the Environmental Information Regulations 2004 ("the EIR") on the grounds that the requested information satisfies the

definition of environmental information provided by Regulation 2 of the EIR.

19. Regulation 2(1)(c) of the EIR defines environmental information as any information on activities affecting or likely to affect the elements of the environment listed in Regulation 2(1)(a). As the requested information is for correspondence about the A338 Wessex Field proposals, the information relates to a matter which will affect at least one of the elements listed in Regulation 2(1)(a) and therefore The Commissioner agrees with the Council that the request is properly dealt with under the EIR.
20. The Council has confirmed that it is relying on Regulation 12(4)(b) of the EIR to refuse to comply with the complainant's request. The Council's position is that the request is manifestly unreasonable on the grounds that to comply with it would impose a significant and detrimental burden on the Council's resources, in terms of its officer time and cost to the Council.
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.
22. The EIR differ from the FOIA in that there is no specific limit set for the amount of work required by an authority to respond to a request, as that provided by section 12 of the FOIA.
23. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the fees regulations) which apply in relation to section 12 of the FOIA are not directly relevant to the EIR - the cost limit and hourly rate set by the fees regulations do not apply in relation to environmental information. However, the Commissioner accepts that the fees regulations provide a useful starting point where the reason for citing regulation 12(4)(b) is the time and cost of a request but they are not a determining factor in assessing whether the exception applies.
24. The Commissioner is satisfied that Regulation 12(4)(b) sets a fairly robust test for an authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is 'manifestly' unreasonable, rather than simply being 'unreasonable' per se. The Commissioner considers that the term 'manifestly' means that there must be an obvious or clear quality to the identified unreasonableness.
25. It should also be noted that public authorities may be required to accept a greater burden in providing environmental information than other information. This was confirmed by the Information Tribunal in the

DBERR case¹ where the tribunal considered the relevance of regulation 7(1) and commented as follows (paragraph 39):

"We surmise from this that Parliament intended to treat environmental information differently and to require its disclosure in circumstances where information may not have to be disclosed under FOIA. This is evident also in the fact that the EIR contains an express presumption in favour of disclosure, which FOIA does not. It may be that the public policy imperative underpinning the EIR is regarded as justifying a greater deployment of resources. We note that recital 9 of the Directive calls for disclosure of environmental information to be "to the widest extent possible". Whatever the reasons may be, the effect is that public authorities may be required to accept a greater burden in providing environmental information than other information."

26. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will take the following factors into account:

- Proportionality of the burden on the public authority's workload, taking into consideration the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services.
- 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 illuminate that issue.
- The context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester.
- The presumption in favour of disclosure under regulation 12(2);
- The requirement to interpret the exceptions restrictively.

27. The Council has provided the Commissioner with its rationale for applying the exception to disclosure provided by Regulation 12(4)(b):

¹ Department for Business Enterprise and Regulatory reform v The Information Commissioner and Platform. Appeal no. EA/2008/0097

the Council has advised the Commissioner that it considers the complainant's request to be a 'blanket request' because it requires the Council to locate emails which raise concerns about the A338-Wessex Fields proposals from any officer employed by the Council over a 36 month period.

28. This was explained to the complainant in the Council's refusal notice of 3 August 2017, which advised the complainant that his request is too broad in scope and would place a disproportionate burden on the authority to locate, retrieve and extrapolate the information.
29. To illustrate its position, the Council provided the complainant with the number of officers within the two relevant service units within the Council, together with the number of officers within the authority as a whole. The Council explained that even a refined request would require it to locate, retrieve and extrapolate the information from the emails of 7 of its officers who would most likely to have received correspondence for the specified period and this would also be considered as being manifestly unreasonable.
30. The Council provided the complainant with the following estimate of the time and cost that would be needed for it to search the emails of 7 officers for the 36 month period was:

$261 \text{ working days per year} \times 3 \text{ years (36 months)} = 783 \text{ days}$

$20 \text{ emails per day} \times 783 \text{ days} = 15,660 \text{ emails per officer}$

$15,660 \text{ emails} \times 7 \text{ officers} = 109,620 \text{ emails}$

Based on an assumption that it would take a minimum of 5 seconds to determine whether an email 'raised concerns in relation to the A338-Wessex Fields proposals', it would take more than 152 hours of work to respond to the suggested refined request, at a projected cost of £3,806.

31. At internal review, and following the complainant's suggestion that a search could be made using 'A338 – Wessex Fields' as an identifier, the Council made an internal enquiry to ask whether it would be possible to undertake a search of all Council officers' incoming and outgoing emails over the last 3 years using the complainant's search term within the subject field.
32. The Council's IT Department confirmed that the Council only holds three months of data on site. To search for emails older than 3 months would require the IT department to recall tapes from its off-site storage and then to build systems relevant to those tapes in order to restore the data.

33. The Council advised the Commissioner that it has gone through three different iterations of its email systems over the past three years. The IT Department estimated that the resource time to restore the three years' worth of data would be around three weeks, equating to £2,775, solely to restore the data. This estimate does not include the time needed to locate, retrieve and extrapolate any emails containing the search parameter of 'A338-Wessex Fields' within the subject field.
34. If the Council was to locate any emails, each would need to be assessed to determine whether they are within scope of the request or exempt from disclosure.
35. In view of the estimates outlined above, the Council argues that the task of locating the information requested by the complainant, or a document which may contain that information, is manifestly unreasonable. The Council maintains the position that it is unable to locate the information needed to comply with the request without placing a disproportionate burden or an unjustified level of disruption on the authority.
36. The Council has considered two different ways of locating, retrieving and extrapolating the information and has provided estimates based on both options. The first option looked at a search of the officers most likely to have received correspondence (7 officers) and the second option looked at a search of all Council officers incoming and outgoing emails for the search parameter 'A338-Wessex Fields'.
37. In the Council's opinion, both options are manifestly unreasonable and are the only options available for the Council to locate the requested information. The Council assures the Commissioner that there is no quicker method that could be used to locate the requested information.
38. Under Regulation 9 of the EIR a public authority is required to provide advice and assistance to applicants or prospective applicants, so far as it would be reasonable to expect the authority to do so.
39. In this case, The Council explained to the complainant that the scope of his request was very broad. The Council did not provide any advice and assistance to the complainant in terms of modifying the request, as its response included an estimate of a proposed refined request which was also considered to be manifestly unreasonable.
40. Given that the complainant disputed the Council's position that his request was too broad and also that he had suggested how the search could be undertaken by using the search parameter 'A338-Wessex Fields'. The Council's internal review response included an estimate for this approach.

41. The Council noted that the complainant stated in his request that he is aware that a number of officers have raised serious concerns about the Wessex Fields road building projects. The Council took the complainant's comment to indicate that he would be able to refine his request as he is implying that he knows that the Council holds information and what it relates to. In view of this, the Council believes that the complainant's purpose in submitting his request in the terms specified is not to locate relevant information but to cause disruption to the authority.

The Commissioner's conclusions

42. The Commissioner has considered the terms used by the complainant in his request: She considers that the complainant's request is objectively clear and she agrees with the Council that it is 'blanket' in scope due to the wide net it casts for correspondence where concern has been raised about the A338-Wessex Fields proposals. Nevertheless, on its face, the complainant's request is not manifestly unreasonable. To determine whether the request is manifestly unreasonable the Commissioner is obliged to consider the terms of the complainant's request alongside how the requested information is likely held by the Council – if the information is in fact held.
43. The Commissioner considers that the Council is justified in using email correspondence as a starting point for considering the complainant's request. She understands why the Council first considered the complainant's request in terms of the 7 officers most likely to have sent or received correspondence of the type required by the complainant. The Commissioner considers this approach to be wholly justified.
44. The Council's estimate of the time needed to locate information of the type requested by the complainant is informative and understandable: It provides a breakdown of the time and cost required to be spent by the Council to locate the information specified in the request. The estimated cost is well in excess of the cost limit which is described by the Fees Regulations for requests under the FOIA: Even if each of the 7 officers sent/received only 5 emails per day, based on the notional 5 seconds required to determine the contents of those emails, the Council would still be required to undertake 38 hours of work which would equate to a cost of £950.
45. The alternative approach considered by the Council, i.e. to use the complainant's suggested search term, is again informative and understandable: The Commissioner accepts that the Council would need to reconstruct the required information from tapes located at its off-site storage and she accepts the Council's assurance that the time and cost of doing this would be in the region of £2,775.

46. Both of the Council's estimates of the cost of complying with the complainant's request are well in excess of the cost limit provided by the Fees Regulations. So much so, that the Commissioner is drawn to conclude that the Council is justified in considering the complainant's request to be manifestly unreasonable. The Commissioner considers that the burden imposed on the Council by this request is markedly greater than that normally required to provide environmental information that the Commissioner considers that Regulation 12(4)(b) is correctly engaged.
47. It now falls to the Commissioner to consider whether the public interest favours the maintenance of this exception to disclosure.

The public interest test

48. The public interest test in this case concerns whether the Council should be required to carry out activities to locate and retrieve the information described by the complainant's request where to do so would be time consuming and costly.
49. The Council acknowledges that there is a general public interest in accountability and transparency in respect of planning applications and development matters, and particularly in relation to developments of the size and impact of the A338 Wessex Fields link. It accepts that there is a public interest inherent in providing the public with information which will assist it to understand the basis on which the Council's decisions are made.
50. The Council also accepts that there is a public interest in providing information which will increase the public's understanding of its approach to handling issues raised by these proposals. Such information would enable communities affected by developments to better engage and improve participation in the decision-making processes.
51. Weighed against these factors is the burden imposed on the Council by this particular request, particularly in terms of officer time and cost to the Council. The burden imposed on the Council by this request constitutes a significant diversion of resources away from the Council's core business which would have a proportionally detrimental impact on its provision of services to the public.
52. The Council acknowledges its obligation to provide accurate information. It asserts that any information held within its email accounts is not indexed within its records management system and it is considered unstructured data. As such, the Council argues that it cannot ensure that all the information requested by the complainant would be captured.

53. At the time of the complainant's request, planning application 7-2017-9177-DH had not been submitted. It was submitted on the 15th December 2017. The Council argues that the planning process is open and transparent which provides the public with opportunity to comment on planning applications once they have been submitted.
54. The Council points out that planning applications are uploaded to its website to make members of the public aware of applications so that they can view the details and submit comments if they wish. Once a planning application has been submitted to a Local Planning Authority, any comments submitted, for or against the application, are published on the website as an associated document.
55. The Council has drawn the Commissioner's attention to the 350 general comments uploaded to its website in respect of planning application 7-2017-9177-DH. The Council argues that these comments are accessible to the complainant and it asserts that their availability and that of other information sufficiently serves the public interest.
56. To illustrate its point, the Council has advised the Commissioner of the significant amount of information already made available through public information events, corporate communications and information accessible via the planning application register. Again, the Council considers that this availability of information serves the public interest.
57. The Commissioner has considered the public interest factors for and against disclosure which are identified above. She recognises that planning applications involving greenbelt land will, by their very nature, be of great interest to the public and are likely to attract opposition.
58. In this case the Council is both the land owner and decision maker: The Commissioner must therefore acknowledge the need for openness and transparency required in respect of planning application 7-2017-9177-DH.
59. The Commissioner believes that there is merit to the public interest arguments which favour compliance with this request but she must also give weight to the effect that this would have on the Council in terms of causing a disproportionate and unjustified level of disruption.
60. The Commissioner is obliged to recognise the fact that the Council would be required to locate relevant emails from *any* of its officers over a 36 month period. It appears to the Commissioner that the complainant is using the provisions of the EIR in an attempt to uncover any information which may or may not be informative, over and above the information normally made available in respect of planning applications. In the

Commissioner's opinion the complainant's request is insufficiently targeted to serve a defined public interest.

61. The Commissioner cannot ignore the significant impact that complying with this request would have on the Council. This impact, when considered alongside the availability of information associated with planning application 7-2017-9177-DH is, in the Commissioner's opinion, provides greater weight to the public interest which favours maintaining the Council's application of Regulation 12(4)(b).
62. The Commissioner's decision is that Bournemouth Borough Council has correctly applied Regulation 12(4)(b) to the complainant's request.
63. The Commissioner also finds that the Bournemouth Borough Council has considered the advice and assistance provision of Regulation 9 of the EIR. For the reasons given at paragraphs 39 – 41, the Commissioner has decided that the Council has complied with Regulation 9.

Right of appeal

64. 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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

65. 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.
66. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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