

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

Date: 28 June 2021

Public Authority: **Caerphilly County Borough Council**
Address: **Penalta House**
Tredomen Park
Hengoed
CF82 7PG

Decision (including any steps ordered)

1. The complainant has requested from Caerphilly County Borough Council (the Council) information about work it has carried out on, and outside, her property over the last 30 years. The Council initially disclosed a schedule of works extracted from computerised records, but the complainant believed that it held more information. The Council subsequently located extensive manual files on works conducted by it between 1995 and 1999. It revised its position and said that under section 12 of the FOIA it was not obliged to comply with the request, due to the costs of doing so.
2. The Commissioner's decision is that while the Council should have dealt with the request under the EIR, it was not obliged to comply with the request on the grounds that it was manifestly unreasonable within the meaning of regulation 12(4)(b) of the EIR, due to the burden that complying would impose on it.
3. However, the Commissioner found that the Council breached regulation 11(4) (Representations and reconsiderations) of the EIR as it did not carry out the internal review and notify the complainant of the outcome within the required timescale.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 21 January 2020, the complainant wrote to the Council and requested information in the following terms:

"I would like to use my freedom of rights and request information on what works have been carried out by the council outside my property or to it, at [address redacted] for the past 30 years".
6. The Council responded on 7 February 2020. It disclosed a list of jobs and repairs dating back to 1999, which it said was when its maintenance records began.
7. The complainant wrote to the Council on 15 February 2020, saying that the information was incomplete, and asking to receive all the information it held.
8. Following an internal review, the Council wrote to the complainant on 16 July 2020. It stated that it had disclosed all the information it held and clarified that information about works conducted prior to 1999 would have been held in paper records and destroyed in accordance with its retention and disposal policy.

Scope of the case

9. The complainant contacted the Commissioner on 16 July 2020 to complain about the way her request for information had been handled. She forwarded the information she had received from it on 7 February 2020 in response to her request. The complainant told the Commissioner that the Council must hold more information than it had disclosed to her. She also complained about the time it had taken to complete the internal review.
10. During the Commissioner's investigation the Council located extensive manual files, pre-dating 1999, which it said may contain further information falling within the scope of the request. It said the information was voluminous and that it was therefore revising its position on the request as a whole. It said that under section 12 of the FOIA it was not obliged to comply with the request, due to the excessive costs searching the records would incur.
11. The analysis below considers the Council's revised position in respect of the request. In doing so, the Commissioner has considered whether the request falls to be dealt with under the FOIA or the EIR.

Reasons for decision

Is the information environmental information?

12. Environmental information must be considered for disclosure under the terms of the EIR rather than the FOIA. Regulation 2(1)(c) of the EIR defines environmental information as any information on:

"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 [regulation 2(1)](a) and (b) as well as measures or activities designed to protect those elements."

13. The request in this case is for information relating to the condition of highways, footways and gullies which can be understood to affect the state of soil and land (regulation 2(1)(a)) and factors including noise and emissions (regulation 2(1)(b)). The Commissioner therefore considers that the request should be dealt with under the EIR and the Council now agrees.
14. The Council had cited section 12 of the FOIA as its grounds for not complying with the request. There is no direct equivalent of section 12 in the EIR. However, the EIR do allow a public authority to refuse a request that is 'manifestly unreasonable'.

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

15. 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. A request can be refused as manifestly unreasonable either because it is considered to be vexatious, or on the basis of the burden that it would cause to the public authority.
16. In this case, the Council argued that the request was manifestly unreasonable on the grounds that to comply with it would impose a significant burden on the Council, in terms of the cost and consumption of resources that would be required to locate and extract any relevant information in the manual files.
17. 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 a public authority has to expend in responding to a request. In effect, it is similar to section 12(1) of the FOIA, where the cost of complying with a request exceeds the appropriate limit.
18. Under the 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 Fees Regulations provide that the costs associated with dealing with a request (determining whether the requested information is held; finding the information, or records containing the information; retrieving the information or records; and extracting the requested information from records) should be worked out at a standard rate of £25 per hour per person. For local authorities, the appropriate limit is set at £450, which is the equivalent of 18 staff hours of work.

19. 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.
20. 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 costs of compliance. However, the Fees Regulations do not determine whether or not the exception applies.
21. Regulation 12(4)(b) sets a robust test for a public 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.
22. The Commissioner's guidance on regulation 12(4)(b)¹ states that public authorities may be required to accept a greater burden in providing environmental information than other information.
23. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will consider the following factors:
 - the 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;

¹ <https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf>

- 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) of the EIR; and
- the requirement to interpret the exception restrictively.

The complainant's position

24. The Commissioner asked the complainant whether she had any particular reason for requesting the information, or what value she considered it had. In response, the complainant said she wanted to have a record of what works had been done around her house or on the pavement, highway or gullies nearby, as she felt the Council was 'covering something up'. She asserted that it was her right to have this information. The Commissioner understands that on at least one occasion the complainant has contacted the Council about flooding to her property as a result of external blocked gullies.

The Council's position

25. The Council's position was that complying with the request would place an unreasonable burden on it which could not be justified by the purpose and value of the request, and therefore that it was not obliged to comply with it because of the exception provided by regulation 12(4)(b) of the EIR.
26. The Council said that all relevant information for the period 1999 to January 2020 had been provided to the complainant, as this could readily be accessed from its electronic maintenance recording systems. However, the time period specified in the request spanned thirty years, establishing an effective start date of January 1990. It had initially thought that any information about works prior to 1999, which would have been held in manual files, had been disposed of in accordance with the Council's Record Retention and Disposal Policy. It subsequently found that it did in fact hold paper inspection records prior to 1999. Without reviewing them, it was not possible to confirm whether any records relating to works carried out prior to 1999 in the areas specified in the request, were held.

27. The Council said it has used electronic records management systems to manage its highways, street lighting and street works since 1999. However, during the Commissioner's investigation, it located 19 large archive boxes holding inspection records for the period 1995 – 1999 in its archive. It said it was possible that information covered by the request could be stored in one or more of these boxes. It said that it was not possible to confirm this without reviewing each document held in each box.

28. The Council provided the following information about how it manages its programme of works:

"Caerphilly County Borough Council undertake regular inspections of its entire adopted highway network which is split into areas i.e. inspection areas, and each area is patrolled by a Highway Inspector. The frequency of inspections will depend on the level of use and importance of the road or footway and information obtained from the highway safety inspection, including nil returns, are recorded as is information relating to ad-hoc service requests. Streets are inspected as part of a planned route and not as individual locations and any defects identified at a specific location would be recorded along with any other defects identified at locations included on that route."

29. Turning to the work that would be necessary in order to locate and extract any relevant information that might be held in the boxes, the Council said that it had been unable to carry out a sampling exercise to see how quickly this could be done, due to restrictions placed on staff accessing its offices during the COVID-19 pandemic. However, it said that it had calculated a costs estimate based upon what it believed to be the quickest method of gathering the requested information:

"In order to determine if the information requested is held, every document in each of the boxes would have to be reviewed and searched to identify those relating to the location in question...each box contains inspection records spanning a number of years for many different locations across the borough. We are unable to identify if any of the boxes hold information relating to [address redacted] as we do not have a list of the individual records held in each box. An example of the description recorded for the boxes would be: Old Inspection Records – SIP Beat Maps 1995/6."

30. Explaining that it had based its calculation on each of the 19 boxes holding, on average, 1700 records, as per the supplier specification, it provided the following costs estimate:

Retrieving	Hard copy	19 transfer cases	2 people to travel to archive and return: 15 mins per person each way	1 hour
Retrieving	Hard copy	19 transfer cases	2 people to locate and retrieve transfer cases from archive: 15 mins per person	30 mins
Extracting	Hard copy	approx. 1700 records per box	3 seconds to review each record	5,100 seconds per box = 1hr 25mins per box 19 boxes x 1hr 25mins = 26hrs 55 mins
			Total:	28hrs 25mins

31. The Council said that searching for and providing any information held in the archive boxes would impose a significant and detrimental burden on the Council's resources in terms of officer time and cost. Complying with the request would result in a "significant burden" and unreasonable pressure on its resources, both during the current COVID-19 pandemic and under normal circumstances.
32. The Council accepted that, in terms of size and resources, it is a large organisation, however, it believed that complying with the request would place a substantial and unreasonable burden on its resources. It had been unable to identify any value in the information being requested beyond the complainant's own interest in it. It said that compliance with the request would divert Council officers from undertaking other normal responsibilities and disrupt and interfere with the services it provides to the wider public. It would also require officers to go into the office

environment at a time when Council staff were being asked to work from home where possible due the current COVID-19 pandemic.

The Commissioner's conclusion

33. When considering this matter, the Commissioner has disregarded the previous disclosure the Council made for the period 1999 - 2019. This is because the Council's position has altered since it made that disclosure and it now considers that it was under no obligation to respond to the request as a whole, because of the exception at regulation 12(4)(b) of the EIR.
34. The Commissioner has considered the Council's cost estimate and she regards it as clear, logical and convincing. She accepts that to comply with the request it would be necessary to consult each paper record in the 19 boxes to identify whether it contains relevant information. While it cannot be guaranteed that each box contains 1700 records, she notes that this figure comes from the supplier's recommendation.
35. The Council has estimated the activities involved in extracting information to be just three seconds, a figure the Commissioner considers to be conservative – she notes, for example, that it has not allotted any time for copying any relevant information it finds, which would increase, perhaps significantly, the time needed. However, based on the Council's calculation, this leads to an overall estimate of approximately 28.5 hours, and this is greater than the 18 hour upper limit for FOIA requests, set out in the Fees Regulations.
36. She is satisfied that the allocation of the resources necessary to process the request would have a significant and disruptive impact on the Council's services. It considered the request between January 2020 and July 2020, a time when its resources were already under considerable pressure. In the COVID-19 pandemic climate, many public authorities are facing severe front line pressures and are re-deploying resources to meet those demands. The Commissioner recognises the additional burden that the pandemic is placing on the Council. She accepts that it does not have resources on hand such that it could absorb 28.5 hours work without this adversely impacting other service areas.
37. Turning to the value and purpose of the request, the complainant told the Commissioner that she does not care how much complying with the request would cost the Council, she believes she is entitled to receive the requested information.
38. The Commissioner acknowledges that the EIR do contain a presumption in favour of disclosure. However, it is also necessary to consider whether any burden which would be suffered by the Council (and its consequences) is proportionate to any benefit that would flow from disclosure. The Commissioner is aware that the complainant is unhappy

with the Council's maintenance and repairs on, or near, her property. The Commissioner invited her to explain what bearing the requested information would have on those concerns, or why there might be a wider public interest in its disclosure. In response she spoke of the Council 'covering things up', but did not explain what she meant by that or how the information might assist her. In the absence of such arguments the Commissioner can only assume that the value of the request lies mainly in the complainant learning information about her property and how it may have been affected by work the Council has, or has not, conducted. While the Commissioner accepts that this, of itself, is a reasonable thing to ask, ultimately, she considers that if the Council was to comply, the detrimental impact on its provision of services would be disproportionate to the request's value.

39. Taking all the above into account, the Commissioner is satisfied that the Council has shown that compliance with the request would involve at least 28 hours work, which broadly equates to around four days' work. This is an expense which the Council could not be expected to absorb without adversely affecting its service provision in other areas. Furthermore, the Commissioner finds that the burden would be so disproportionately excessive as to outweigh the other factors identified in paragraph 23, above.
40. The Commissioner's decision is therefore that it would be manifestly unreasonable, on the grounds of cost and the burden that would be placed on its resources, for the Council to comply with the request.

Public interest

41. Regulation 12(4)(b) of the EIR is subject to a public interest test, as required by regulation 12(1)(b), and so the Commissioner must decide whether the public interest in maintaining the exception is stronger than that in complying with the request.

Public interest in favour of disclosure

42. The Council argued the following:

"When determining whether it would be unreasonable to expend resources searching for information, we recognised that there is a strong public interest argument in favour of disclosing the information as it would provide greater openness and accountability. These factors would always weigh heavily in favour of disclosure of the information requested and greater openness may enhance the quality of public debate on any issues and accountability of the spending of public money."

43. The complainant did not specify any particular public interest that would be served, however, the Commissioner notes her stated concerns.

Public interest in favour of maintaining the exception

44. The Commissioner's published guidance on regulation 12(4)(b)² says that many of the issues relevant to the public interest test will have already been considered when deciding if this exception is engaged. This is because engaging the exception includes some consideration of the proportionality and value of the request.
45. The Council reiterated that the burden of complying with the request was disproportionate to the value of the request. It said that the request related to personal concerns the complainant had about her property and that the requested information would be of no significant value to anyone other than the complainant.
46. It said:

"It is the Council's view that the burden of complying with this request is too great and the balance of the public interest weighs in favour of withholding the information. We believe that information relating to works completed outside a specific property is not information that is regularly sought after by members of the public and therefore, there would not be any value in putting that information into the public domain. The Council have not received any other requests for information relating to this specific location and this request is therefore personal to the applicant. We have not been able to establish what benefit complying with this part of the request would bring to the wider public. We appreciate that the request relates to an issue that is of concern for the applicant and the disclosure of the information could possibly help them with an issue that they may have, but beyond the transparency aspect, the Council have been unable to identify a wider value in making the information publicly available, if it is held in our archives. In this case, it would appear that the primary motivation behind the request is to further the applicant's own private interests and while this does not necessarily mean that there is no wider public interest in the information that has been requested, in this particular case, we have been unable to establish what benefit to the public would be derived from the release of the requested information for the period prior to 1999."

² <https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf>

Balance of the public interest

47. Since the Commissioner is satisfied that the Council is entitled to rely on the exception at regulation 12(4)(b), the Commissioner accepts that the request is manifestly unreasonable. The question is whether the public interest in maintaining the exception is strong enough to outweigh the public interest in disclosure.
48. The Commissioner has carefully considered the public interest arguments on both sides. The Commissioner accepts that compliance with the request would cause the Council an unjustified burden for the reasons set out above. There is a considerable public interest in protecting public authorities from burdensome requests, where the value of the requested information does not justify the work required to comply with the request. In this case the Commissioner was unable to clearly establish what purpose and value the request served and thus what wider benefit would flow to the public from the disclosure of the requested information.
49. The Commissioner acknowledges the complainant's clear personal sense of grievance regarding the Council's actions, but has found that this is not a strong public interest argument in favour of requiring a public authority to comply with a manifestly unreasonable request. The Commissioner is not convinced that compliance with the request would impart any particularly meaningful information into the public domain about street repairs, particularly given the age of the information involved (pre 1999).
50. The Commissioner is also sympathetic to the significant pressures faced by the Council in terms of competing priorities and the consequences of dealing with the COVID-19 pandemic. The Commissioner considers that obliging the Council to comply with the request would be likely to have an adverse impact on the handling of other requests for information, and the delivery of important public services generally. The Commissioner remains of the view that there is a substantial public interest in protecting the ability of public authorities to deploy their limited resources in the most reasonable and proportionate manner. In this case the Council would have to divert resources to deal with the complainant's request that might otherwise have been spent on requests that benefit the wider public or on the Council's core services themselves.
51. For the reasons set out above the Commissioner finds that the public interest in maintaining the exception in this case outweighs the public interest in disclosure.

Presumption in favour of disclosure

52. 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).

53. As covered above, in this case the Commissioner's view is that the balance of the public interest favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(b) applies.

Regulation 11 - representations and reconsideration

54. Regulation 11(1) of the EIR provides the right for requesters to request a review of the handling of their request.
55. Regulation 11(4) states that once a public authority has received a request for a review it must respond as soon as possible, and no later than 40 working days after it receives the internal review request.
56. In this case, the complainant wrote to the Council on 15 February 2020 and asked for an internal review. The Council did not notify the complainant of the outcome of the review until 16 July 2020, 105 working days later.
57. The Council therefore did not comply with the requirements of regulation 11(4) of the EIR, in that it did not provide the outcome of its review within 40 working days.
58. The Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function. This aligns with the goal in her draft "Openness by design"³ strategy to improve standards of accountability, openness and transparency in a digital age. The

³ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

Commissioner aims to increase the impact of FOIA enforcement activity through targeting systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"⁴.

Other matters

59. The Commissioner has upheld the Council's position that the request, as it stands, engages regulation 12(4)(b) of the EIR. The Commissioner is aware that the Council initially disclosed information it says it holds in respect of the period 1999 – 2019, and that the complainant considered it incomplete. As the Commissioner's decision is that the Council was not obliged to comply with the request as a whole, she has not examined that disclosure.

⁴ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

60. 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

61. 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.
62. 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

Samantha Bracegirdle
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