Reference: FER0722965

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **6 September 2018**

Public Authority: **Staffordshire County Council**
Address: **1 Staffordshire Place, Tipping Street, Stafford, ST16 2DH**

Decision (including any steps ordered)

1. The complainant has requested information relating to 3 definitive map modification applications. Staffordshire County Council withheld the requested information, citing regulation 12(4)(b) (manifestly unreasonable) of the EIR, on the grounds that the cost of compliance would be too great.

2. The Commissioner's decision is that Staffordshire County Council has applied regulation 12(4)(b) of the EIR appropriately. However, the Commissioner considers that Staffordshire County Council has breached regulations 5(2) (time for compliance) and 14(3) (refusal to disclose information) of the EIR.

3. The Commissioner does not require Staffordshire County Council to take any steps following this decision.

Background

4. Staffordshire County Council (the council) explained that the present request was related to applications made by a third party (now deceased) to modify public rights of way under section 53 of the Wildlife and Countryside Act 1981. These applications (section 53 applications) are managed by its Legal Service Unit.

5. If an applicant who has submitted a section 53 application dies, there is no power under the Wildlife and Countryside Act 1981 for someone else to act on their behalf; however the local authority must still pursue the application.

6. If a local authority fails to determine a section 53 application within 12 months, the applicant can apply to the Secretary of State for Environment, Food and Rural Affairs, who can direct the authority in question to determine the application within a prescribed period of time.

Request and response

7. On 19 October 2017, the complainant wrote to the council and requested information in the following terms:

> "I am writing to request information from the Council concerning the following applications, made under section 53 of the Wildlife and Countryside Act, to modify the definitive map pf public rights of way:
>
> LE601G
> LC604G
> LC616G
>
> … Accordingly, please can Staffordshire County Council provide me with the following information related to the three listed claim numbers above for which basic edited information is contained in the attached pdf files taken from the Councils [sic] statutory 53b register:
>
> Copies of the three original unedited applications submitted, together with all and every piece of information submitted with them and in support of the applications concerned.
>
> All and any further information in the Councils [sic] possession related to these claims, to include any internal communications, notes or other related material."

8. The council responded on 17 November 2017 and provided links to the 3 applications in question. It also confirmed that it was investigating these applications under the Wildlife and Countryside Act 1981 but as the investigations had not been completed, the remaining unpublished information was being withheld under regulation 12(4)(d) (material in the course of completion, unfinished documents and incomplete data). The council also confirmed that it would be carrying out a public interest test in due course.

9. There was further communications between the complainant and the council from 22 November to 15 December 2017.

10. On 18 December 2017 the council sent the complainant its full response. It confirmed that it was relying on regulation 12(4)(b) and also added the following exemptions:

    Regulation 12(3) and 13 (3rd party personal data).
    Regulation 12(4)(d) (unfinished documents).
    Regulation 12(5)(b) (legal professional privilege).

11. The council also confirmed that it had carried out the public interest test. It considered that it was not in the public interest to disclose the requested information.

12. Following an internal review the council wrote to the complainant on 8 January 2018, upholding its original decision.

Scope of the case

13. The complainant contacted the Commissioner on 27 January 2018 to complain about the way his request for information had been handled. He explained that the council had made no attempt to qualify why it concluded that the public interest in withholding the information outweighed the public interest in releasing it. He also explained that in the application of exemption 12(4)(b), the Commissioner expects authorities to support their decisions with evidence to justify those decisions.

14. Additionally, the complainant explained that it has taken the council approximately 23-25 years to deal with the section 53 applications in question and that it had failed to determine them. He also provided the Commissioner with examples of directions issued by the Secretary of State in relation to separate section 53 applications.

15. The complainant also explained that the council was clearly frustrated that it was being called to account for its breaches of duty (and breaches of the Human Rights Act as outlined by the Minister in a direction) but that this was no reason to try and obstruct access to information that enables the public to take action to protect the public rights of way network that might otherwise be lost forever.

16. The complainant also explained that he wanted the information submitted with the maps in order to examine the evidence and documents related to the section 53 applications referred to in his request.

17. During the Commissioner's investigation, the council confirmed that it was relying on regulation 12(4)(b) (manifestly unreasonable) and clarified that the cost of compliance would be too great.

18. The Commissioner will consider the council's application of regulation 12(4)(b) and the length of time taken to deal with the request.

Reasons for decision

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

19. Regulation 12(4)(b) states that:

> "For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –
> (b) the request for information is manifestly unreasonable;"

20. The Commissioner has issued guidance on the application of regulation 12(4)(b).[1] This guidance contains the Commissioner's definition of the regulation, which is taken to apply in circumstances where the request is either:

- vexatious, or
- the cost of complying with the request would be too great.

21. The guidance also explains that the purpose of this exception is to protect public authorities from exposure to a disproportionate burden or an unjustified level of distress, disruption or irritation in handling information requests.

22. Additionally, the guidance explains that this exception is concerned with the nature of the request and the impact of dealing with it, not any adverse effect that might arise from disclosure of the content of the information requested. If a public authority is concerned about the content of the requested information being disclosed then it should consider whether another exception applies.

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

23. In the present case, the council considers that the cost of complying with the request would be too great.

24. The EIR does not contain a limit at which the cost of complying with a request is considered to be too great. However, the guidance suggests that public authorities may use the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations) as an indication of what Parliament considers to be a reasonable charge for staff time.

25. The Regulations stipulate that a cost estimate must be reasonable in the circumstances of the case. The limit given for local government is £450 or 18 hours work. Included within the limit 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.

26. For the purposes of the EIR, a public authority may use this hourly charge in determining the cost of compliance. However, the public authority is also expected to consider the proportionality of the cost against the public value of the request before concluding whether the request is manifestly unreasonable. Additionally the Commissioner's guidance on regulation 12(4)(b) states that the cost of considering exempt information can be taken into account:

    "Under FOIA the cost of considering whether information is exempt cannot be taken into account under section 12 (the appropriate costs limit) but can be taken 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. This is not an issue under the EIR. The costs of considering if information is exempt can be taken into account as relevant arguments under regulation 12(4)(b)."

27. The Commissioner considers that the Regulations can be used as a starting point. In addition, she also considers that all of the circumstances of the case must also be taken into account when determining whether a request can be deemed manifestly unreasonable on the grounds of cost under EIR, including:

    - 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 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.

Evidence from both parties

The council's view

28. During the Commissioner's investigation, the council explained that the withheld information consists of three cases, each case having a file reference in its filing system, which has both manual and electronic files. It also explained that the files were considered for disclosure at the time of the request. In addition, the council explained that the files contain both personal and legal information. The council also explained that under section 53B of the Wildlife and Countryside Act 1981, a county council must keep a register, both in paper and electronic format, of all applications which have not been determined by it. It also confirmed that the register is available on its the website.

29. Additionally, the council explained that some of the remaining information relates to the legal process to determine whether a right of way should be modified and it should be handled according to that process, which is governed by the Wildlife and Countryside Act 1981.

30. The council also explained that initially it would have to search its filing system which has both paper files for older cases and an electronic filing system known as Iken, to locate each file. It confirmed that most of its paper files were stored off site and therefore it could take a few days for a file to be located. Additionally, with regard to a lot of older files, if they have been worked on since 2011, documents would also be stored in Iken. The council confirmed that it had checked the files requested and two of them had documents on Iken which would also need to be examined.

31. Furthermore, the council explained that all of the paper files are around 100-200 pages each which does not include the documents stored also in Iken, which would be approximately an extra 50-100 documents to search through. The council also explained that this information consists of application data, third party data, case specific data and potentially legally privileged information, due to the status of the application.

32. The council argued that this made the location of information very time consuming. It explained that each sheet would have to be checked for any sensitive information before it could be photocopied. Additionally,

the council explained that with all section 53 applications, the personal information of people who have filled in evidence forms was in its files. This would have to be redacted before copying which would be very time consuming, especially as some files have 30-40 evidence forms. It also explained that all the legally privileged correspondence between colleagues and councillors would also have to be redacted. In addition, the council explained that each document would need to be accessed to see if it was acceptable to share information and this would be an additional cost.

33. The council also explained that, due to the amount of paperwork stored in each file and on the electronic system, going through each file properly ie: checking document, redacting information, photocopying/scanning and preparing the document for disclosure, would take at least a day per file, approximately 7 hours for each file; therefore three files would take at least 21 hours. Additionally, the council explained that under section 53 of the Wildlife and Countryside Act 1981 it was required to publish information related to section 53 applications not yet determined. It argued that given this, the extra work that would be needed to comply with the request would be manifestly unreasonable under the EIR.

34. The council also explained that it would have to carry out a search within its filing team to ensure that no other information was held. It also explained that a detailed assessment would have to be made of each file by a legal practitioner, as disclosure could harm the legal process in relation to regarding a request for a right of way to be modified.

35. Additionally, the council explained that it charges approximately 10p per sheet for photocopying and given that there are approximately 200 sheets per file the cost of photocopying ie 200 sheets per file x 10p = £20.00 per file approximately.

36. The council also explained that there was no quicker way to gather all of this information. It also confirmed that anything it had a statutory duty to publish was published but all other information was kept in its manual and electronic files. The council also provided the Commissioner with a link to an example of some of the information which must be published. This included: the application file number, the name of the applicant and the route under consideration.

37. Additionally, the council explained that there had been a technical issue which had added to the delay in its consideration of the section 53 applications in question, which had only been resolved recently, due to a lack of funding.

The complainant's view

38. The complainant explained that:

- The council had failed to deal with his information request within the statutory maximum time limit set out in the EIR.
- The council has been entirely unhelpful in the way it has dealt with his information request.
- Decisions and assumptions have been made about both the content and quantity of information he requested, without the council even having inspected the documents requested to inform itself of what they do or do not contain.
- The council has deliberately evaded and not answered key questions he has asked related to the exemptions it has applied.

39. The complainant also explained that he had specifically asked:

- How much time the council had assessed would be required to retrieve and copy the information he has requested?
- What cost to the council has been estimated for this?

40. The complainant explained that he did not receive an answer despite this being a fundamental consideration as to whether his request could be refused as being too burdensome for the council to deal with.

41. The Commissioner notes that the applications in question are already being dealt with under the Wildlife and Countryside Act 1981 and that this statute governs what information must be published. She also notes the council's explanation regarding the work that would be involved in preparing the relevant information and the fact that information is already published in line with the requirements under section 53 of the Wildlife and Countryside Act 1981.

42. Although the council did not provide an estimate of the breakdown of the cost of compliance with the request, it has explained how the time taken to deal with the request would exceed the 18 hour time limit set out in the Regulations. The Commissioner notes the time it would take to consider and prepare the requested information would be at the very least 21 hours.

43. The Commissioner considers that it is reasonable to consider that compliance with the request would mean using significant public resources and place a substantial burden on the council, particularly as it is already dealing with the section 53 applications in question under the Wildlife and Countryside Act 1981.

44. The Commissioner therefore considers that regulation 12(4)(b) is engaged. She will go on to consider the public interest.

The public interest test

45. As with all of the exceptions under the EIR, regulation 12(4)(b) is subject to the public interest test as set out in regulation 12(1)(b): in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Public interest arguments in favour of maintaining the exception

46. The Commissioner considers that the public interest in maintaining this exception lies in protecting public authorities from exposure to disproportionate burden or to an unjustified level of distress, disruption or irritation in handling information requests.

47. In addition, the Commissioner considers that dealing with manifestly unreasonable requests can place a strain on resources and get in the way of public authorities delivering mainstream services or answering other requests.

48. The council explained that it always considers that information should be released unless there is a valid reason not to. It accepted that it was in the public interest to view information relevant to an application. However, it also explained that anything deemed relevant in relation to section 53 applications, was published under the statutory requirements of the Wildlife and Countryside Act 1981.

49. The council also explained that in order to publish the requested data, work would need to be completed. It argued that the remaining information which it is not required to publish under the Wildlife and Countryside Act 1981, would involve considerable staff time with regards to assessing it. It also pointed out that the time it would take to review a file would be time taken away from dealing with the section 53 applications themselves and it would be a cost to the public purse. In terms of the public interest, the council explained that it was worth noting that only an applicant could request changes to their section 53 application, no other member of the public could do this.

Public arguments in favour of disclosing the information

50. The Commissioner considers that there will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective

public participation in environmental decision making, all of which ultimately contribute to a better environment.

51. The complainant argued that there was substantial public interest in the totally unacceptable and manifestly unreasonable backlog of undetermined section 53 applications to modify the definitive map of public rights of way in Staffordshire and initiating actions to determine these. The complainant provided the Commissioner with a copy of another recent direction issued to the council and explained that the total now stood at more than 50 direction decisions issued by the Secretary of State with a further considerable number submitted and under consideration by the Minister.

52. The complainant explained that in every case the council had argued that it should not be directed to take action. He also alleged that in many cases the council had attempted to delay or protract the release of information legally necessary to progress applications made.

53. Furthermore, the complainant argued that disclosure would enable the public to review the evidence regarding public rights and whether there is a robust defence for anyone continuing to assert and exercise those rights. He also argued that without this information there remained a long standing and on-going caution by the public to exercise and enjoy the claimed public rights.

54. The complainant pointed out that the use of a route which is not formally recorded on the statutory records as a public right of way, exposes users to potential criminal prosecution. He argued that if section 53 applications were not decided within a reasonable period of time, retrospective verification or clarification of evidence provided in support of the public rights asserted was jeopardised. He explained that long and manifestly unreasonable delays in meeting the duty to determine claims resulted in an inability to clarify or elaborate on evidence, if necessary; this is because applicants and those who provided evidence of use, or those who had specific information that could have been provided to support the claim, gradually die, move away from the area or otherwise cannot be contacted. This resulted in a totally avoidable loss of public rights and was unacceptable.

55. The complainant also argued that disclosure was in the public interest, as confrontations and disputes between landowners and users have occurred as well as obstruction of public user rights. He argued that this would continue until these rights were assessed and recorded in law.

56. Furthermore, the complainant explained that disclosure would allow evaluation regarding whether other methods of recognising these rights might be possible to ensure they were not lost. He argued that this

57. would overcome a further unspecified number of years or decades of delays before the council dealt with them in addition to the more than two decades of delays so far.

Balance of the public interest arguments

58. The Commissioner has considered the public interest arguments from both parties. She also notes that in the EIR there is a presumption in favour of disclosure (regulation 12(2)(b)).

59. The Commissioner notes the complainant's argument regarding the public being able to see the requested information and being able to take action to protect the public rights of way that might be otherwise lost forever.

60. The Commissioner recognises the inherent importance of accountability and transparency within public authorities and the necessity of a public authority bearing some costs when complying with a request for information. Additionally, the Commissioner must assess whether the cost of compliance is proportionate to the public value of the request.

61. The Commissioner has also considered whether there is a serious purpose behind the request. She acknowledges that the complainant has an interest in the information being disclosed and his arguments regarding disclosure being in the wider public interest. The Commissioner accepts that there is a serious purpose behind the request.

62. Although the Regulations do not apply to the EIR, as explained above, the Commissioner considers they can be used as a guide. The council has not provided a breakdown of the costs involved in gathering and considering the requested information, but the Commissioner notes that the EIR does not require this. However, she notes that the council has explained that it would take at least 21 hours to consider the files in question and that it may be longer as further searches would have to be conducted in order to ensure that relevant information was not held elsewhere. She notes that the Regulations provide that the time limit for local authorities is 18 hours work.

63. The Commissioner also notes that the section 53 applications in question are being considered under the Wildlife and Country Act 1981 and that the council is under a legal obligation to publish certain information regarding these applications. The council confirmed to the Commissioner that it does this and as explained above, provided her with examples of the type of information it must publish.

Conclusion

64. The Commissioner has considered all of the arguments presented. She notes the complainant's understandable frustration that the section 53 applications in question appear not to have been dealt with speedily. She also notes that the Secretary of State has issued directions in relation to other section 53 applications, although not in relation to the three section 53 applications referred to in the request, as the applicant died before he could submit any appeals. However, the Commissioner cannot comment on issues relating to the process of the council's consideration the section 53 applications, as it is outside her remit to do so.

65. Having considered the relevant arguments in relation to the application of regulation 12(4)(b) and the fact that the section 53 applications in question are being considered by the council under the Wildlife and Countryside Act 1981, the Commissioner has concluded that the cost of compliance with the request, in this case exceeding the 18 hours set out in the Regulations, is disproportionate to the public value of the request and the public interest favours the maintenance of the exception.

66. The Commissioner is therefore satisfied that the council has applied regulation 12(4)(b) appropriately in this case and that the public interest in maintaining the exception outweighs the public interest in disclosure.

Procedural issues

67. The complainant submitted his request on 19 October 2017. The council provided its full response on 18 December 2017.

Regulation 5 – time for compliance

68. Regulation 5(2) provides that a public authority must respond to a request promptly and in any event no later than 20 working days after the date of receipt.

69. The Commissioner considers that the council has breached regulation 5(2) as it took longer than 20 working days to provide the requester with a full response.

Regulation 14 – refusal to disclose information

70. Regulation 14(3) states that if a public authority wishes to refuse any part of a request it must issue a refusal notice within the 20 working day time for compliance, citing the relevant exemptions and the matters it has considered when reaching a decision regarding the public interest.

71. The Commissioner considers that the council has breached regulation 14(3) as, although it cited which exception it was relying on, it took longer than 20 working days to provide its considerations regarding the public interest test.

72. The Commissioner notes that when the council initially responded to the request on 17 November 2017, it confirmed that it would be carrying out a public interest test in due course. However, unlike the Freedom of Information Act 2000, the EIR does not allow a public authority to extend the time to respond to a request, in order to consider the public interest test.

Other matters

73. The Commissioner notes that in its response to the complainant of 17 November 2017, the council confirmed that it would be carrying out a public interest test in due course. However, as explained above, the EIR does not allow a public authority to extend the time to respond to a request, in order to consider the public interest test.

74. Under regulation 7(1) of the EIR, a public authority may extend the 20 working day limit to 40 working days if it reasonably believes that the complexity and volume of the requested information means that it is impracticable to comply with the request or to make a decision not to.

75. Furthermore, the Commissioner notes the complainant's complaint about the way in which the council handled the public interest test. She has published guidance on this[2] which explains that when carrying out the public interest test, the public authority should consider the arguments in favour of disclosing the information and those in favour of maintaining the exception.

Right of appeal

[2] https://ico.org.uk/media/for-organisations/documents/1629/eir_effect_of_exceptions_and_the_public_interest_test.pdf

76. 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

77. 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.

78. 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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