

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

Date: 12 February 2020

Public Authority: Tunbridge Wells Borough Council
Address: Town Hall
Royal Tunbridge Wells
Kent
TN1 1RS

Decision (including any steps ordered)

1. The complainant has requested information about a local building development. Tunbridge Wells Borough Council ('TWBC') disclosed some information, but said that it was not required to comply with the request on the grounds that it was manifestly unreasonable within the meaning of regulation 12(4)(b) of the EIR.
2. The Commissioner's decision is that TWBC was entitled to refuse the request under regulation 12(4)(b) of the EIR. She also decided that the level of advice and assistance provided by TWBC complied with the requirements of regulation 9(1) of the EIR.
3. However, she found that because TWBC failed to specify to the complainant the EIR exception under which it was refusing the request, or to explain to him its consideration of the public interest, TWBC breached regulations 14(3)(a) and (b) of the EIR.
4. The Commissioner requires no steps as a result of this decision notice.

Background

5. The Calverley Square project was a proposal to build a new theatre, town hall and underground car park in a town park in Tunbridge Wells.
6. TWBC said that the development could have generated up to £2 billion for the town's economy, although the project proved controversial with local residents.
7. In October 2019 (some months after the date of the request) planning permission for the development was refused¹.

Request and response

8. On 8 May 2019, the complainant wrote to TWBC and requested information in the following terms:

"I'm seeking all internal communications regarding the Calverley Square development, in particular those relating to communicating the perceived benefits of the scheme.

I am interested in any information held by the council regarding my request, and note that I do not have to specify particular files or documents".

9. TWBC responded on 31 May 2019. It disclosed:
 - a 41 page strategic assessment of the wider economic benefits of the scheme;
 - a 20 page critique of the wider economic benefits of the scheme;
 - a weblink to the Planning Committee report of 9 May 2018, where the benefits were considered in public as part of the application; and
 - a weblink to the Civic Development Delivery report considered by TWBC at the full council meeting of 6 December 2017.
10. However, TWBC said that it had identified more than 26,000 emails potentially falling within scope of the request. It said that it was not

¹ <https://www.bbc.co.uk/news/uk-england-kent-49983712>

obliged to comply with the request because the work involved in establishing whether each email did contain information falling within the scope of the request would exceed the appropriate cost limit, established under section 12 of the FOIA.

11. The complainant submitted a refined request on 12 June 2019, asking that the same request be processed using 14 specific search terms, mostly comprising the surnames of particular individuals.
12. TWBC responded on 2 July 2019, informing the complainant that compliance with the revised request would still exceed the appropriate limit, and that section 12 of the FOIA continued to apply.
13. The complainant submitted a further, refined request, on 9 July 2019, asking for it to be processed using just four search terms (individuals' names have been redacted by the Commissioner):

“[Person A] + [Person B] + *plan B*

[Person A] + [Person B] + *CS + cost + over-run/overrun/over run*

[Person B] + [Person A] + *theatre + subsidy*

[Person C] + *Grove Hill House*”

14. TWBC responded on 25 July 2019, saying:

“I confirm that a search of our systems has identified emails that contain the search terms you requested, however, that does not confirm or guarantee that the information contained within the emails relates to the specific information with regard to your request”.

15. It said that a manual search of each email would be required to establish whether it contained information falling within scope of the request and that compliance with the refined request would therefore still exceed the FOIA appropriate limit. In addition to section 12, it said it was also applying section 14 (vexatious and repeated requests) of the FOIA to refuse to comply with the request, in view of the unreasonable burden that doing so would place on it.
16. The complainant requested an internal review of this decision on 29 July 2019. TWBC provided the outcome of the internal review on 6 September 2019. It disclosed some information which it said it had been able to locate within the cost limit. It upheld its application of sections 12 and 14 of the FOIA in respect of the remainder of the request.

Scope of the case

17. The complainant contacted the Commissioner on 8 September 2019 to complain about the way his request for information had been handled. His submission explained that the request related to a £108 million development, and that the information which had so far been disclosed to him was largely irrelevant to the request.
18. During the Commissioner's investigation, and having acknowledged that the complainant had requested environmental information, TWBC withdrew reliance on sections 12 and 14 of the FOIA, and instead it applied regulation 12(4)(b) (request is manifestly unreasonable) of the EIR. This late revision has not been put to the complainant, to forego any further delay in the investigation.
19. Following the combined cases of the *Home Office v Information Commissioner* (GIA/2098/2010) and *DEFRA v Information Commissioner* (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new exemption or exception either before the Commissioner or the First-tier Tribunal and both must consider any such new claims.
20. The analysis below therefore considers whether the request of 9 July 2019 fell to be dealt with under the EIR, and whether TWBC was entitled to refuse the request under regulation 12(4)(b) of the EIR.

Reasons for decision

Is the information environmental information?

21. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR rather than the FOIA if it meets the definition set out in regulations 2(1)(a) to 2(1)(f) of the EIR.
22. The Commissioner considers that the information in this case can be classed as environmental information, as defined in regulation 2(1)(c) of the EIR. This says that any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors of the environment listed in regulation 2(1)(a) and 2(1)(b) will be environmental information. One of the elements listed under 2(1)(a) is land.
23. The request in this case is for information to do with the redevelopment of a piece of land. The Commissioner considers that the request therefore relates to a measure as defined in regulation 2(1)(c) of the

EIR which would, or would be likely to, affect the elements described in 2(1)(a), namely, land.

24. The Commissioner is therefore satisfied that the request was for environmental information, and that the request fell to be dealt with under the EIR.

Regulation 12(4)(b) - Request is manifestly unreasonable

25. 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. In this case, TWBC argued that the request was manifestly unreasonable on the grounds that to comply with it would impose a significant burden on TWBC, in terms of cost and consumption of resources.
26. 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 of the FOIA, where the cost of complying with a request exceeds the appropriate limit.
27. 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 hours work.
28. The EIR differ from the FOIA in that under the EIR there is no specific cost limit set for the amount of work required by a public authority to respond to a request.
29. 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 time and costs that compliance with a request would expend. However, the Fees Regulations are not the determining factor in assessing whether the exception applies.
30. 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.

31. The Commissioner’s guidance on regulation 12(4)(b)² states that public authorities may be required to accept a greater burden in providing environmental information than other information.
32. 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;
 - 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

33. The complainant emphasised the importance of TWBC responding to the request. He argued that:
 - there was a public interest in the information being disclosed;

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

- overall, TWBC had not been sufficiently transparent with regard to the development, which he said had led to complaints from councillors and residents;
- his request was focussed; and
- that TWBC had allowed bias against him to inform its decision to refuse the request, as it knew he opposed the scheme.

TWBC's position

34. TWBC said that the request was manifestly unreasonable on the grounds of excessive cost and because of the diversion of resources which would be necessary to comply with it, neither of which could be justified by the purpose and value of the request.
35. TWBC had carried out a sampling exercise and explained that the information described in the request is not held in an easily retrievable format. In order to collate the information, members of staff would be required to manually review individual records. It said:

"The Council ... identified 2395 emails which also contain additional attachments as part of the search terms requested by the complainant. The Council's Legal Team have reviewed 52 of these emails (which were identified from the search terms which produced the smallest number of results) as part of the review carried out. The Council's review response to the complainant advised that with regard to these documents this resulted in a considerable amount of time to:

- *Review the documents*
- *Make checks as to which documents to which statutory exemptions may have applied had been placed in the public domain*
- *Make appropriate redactions*
- *Process redacted documents into a transmittable form*

This work could not be undertaken without reallocating resources in consequence of which other work was disrupted and delayed.

There are approximately 2343 records remaining that would each need to be evaluated in order to identify, extract and review this information. We have estimated that at the very minimum on a basis of two minutes per record, this equates to a member of staff working for 4686 minutes or 78.1 hours on this request. The two minute per record is a conservative estimate as based upon the emails reviewed by the Council's Legal Team as part of the review, this took a

considerably longer period of time given the number of attachments included with some of the emails. The Council's Legal Team have advised that to date they have spent a total of 54.92 hours on the review of this request of which approximately 40.5 hours involved reviewing and collating the information held and checking for and redacting exempt information. Given the significant amount of time spent to date, this has diverted resources from responding to other service requests and service areas. The Council's IT Team have also spent approximately six hours to date on locating the requested information. Under the Fees Regulations, the appropriate limit is set at £450, which is the equivalent of 18 hours work at the cost of £25 per hour. We consider that this exceeds the appropriate costs limit of 18 hours (even allowing for the additional expectation of time under the EIR) and this would significantly impact on the Council's resources.

The Head of Economic Development has advised that he spent approximately four hours reviewing documents prior to them being supplied to the Complainant. He has confirmed that he would need to review each further individual email and associated correspondence that may be supplied and comment on the information included or dismiss as not relevant. The Council's Performance and Governance Team would also be assisting with the review of documents, carrying out checks to identify which documents or information where a statutory exemption may or may have been applied, making the appropriate redactions if required and preparing this into an accessible format. This team delivers a number of public facing services which require responses within statutory timescales and as a result this may require this work to be delayed in order to fulfil the request."

36. In response to the Commissioner's questions about the estimated time taken to gather the requested information, TWBC explained that information potentially falling within the scope of the request was identified using the search terms specified by the complainant. It said that the broad nature of the request was problematic, particularly the specification that it was for, "*all internal communications regarding the Calverley Square development, in particular those relating to communicating the perceived benefits of the scheme.*" It would be necessary to spend considerable time reviewing each record to ascertain the extent to which it fell within the scope of the request. TWBC said:

"The Council is aware from reviewing the 52 emails identified from the results of the search terms that produced the smaller amount of emails that the time taken to review, check and redact far exceeded the estimated time of two minutes per email which would increase the estimated time significantly."

37. TWBC provided the following information about staffing levels:

"Within the Performance and Governance Team there are two full time and one part time member of staff – one of which would be required to carry out the requested work. These team members are also responsible for investigating complaints at Stage 2 of the Council's complaints procedure on behalf of the Chief Executive, responding to FOI requests, responding to Data Protection enquiries and Equalities. The diversion of one member of staff on a task such as this would impact heavily on the rest of the team as the remaining full time officer would be required to carry out the work of the other officer and any additional urgent work requiring attention."

38. Finally, TWBC refuted that it had allowed bias against the complainant to influence its decision to refuse the request, saying that the decision to apply the exception was solely based on the excessive time required to fulfil the request and on the cost of compliance. It pointed out that some information about the Calverley Square development had been disclosed to the complainant and was available to other members of the public.

The Commissioner's conclusion

39. The Commissioner has considered TWBC's estimates. She notes that the search terms specified by the complainant returned 2395 emails (plus attachments) which would need to be manually reviewed to establish the extent to which they are on the overall subject of the request. Depending on the individual content of each email, it may be necessary to redact irrelevant content and information which is exempt. TWBC has estimated the activities involved in locating and reviewing to be on average, two minutes per record, leading to an overall estimate of 78 hours. The Commissioner has also had regard for TWBC's assertion that two minutes is a conservative estimate, and that a sampling exercise of 52 records took in excess of 64 hours to complete. Finally, she has noted that compliance with the request would require the diversion of resources from other areas.

40. The Commissioner considers the cost estimate provided to her by TWBC to be cogent. She notes that even if the estimated time taken to consider the information potentially falling within the scope of the request was reduced by two thirds, the time required would still be significantly greater than the 18 hour upper limit for FOIA requests, set out in the Fees Regulations. Compliance with the request would have a significant and disruptive impact on TWBC's FOIA service provision, requiring a significant allocation of staff time, and the diversion of resources away from other service areas.

41. Even though the scope of the original request was twice reduced by the complainant, the request remains relatively wide ranging in its scope. The Commissioner has published guidance on making requests for information³ which cautions requesters against making catch-all requests for "*all information on*" a matter, because of the risk that such requests may incur significant costs which engage the costs provisions under the FOIA and which are taken into account when considering the EIR.
42. Turning to the value and purpose of the request, the Commissioner acknowledges the complainant's point about the significant amount of public money involved in the project. However, TWBC says that a significant amount of information about the project has been placed in the public domain at every stage of the planning process (as illustrated by the information which it provided in response to the initial request). On that point, the Commissioner notes that there are documents in the public domain about the development, including information about a public inquiry on the compulsory purchase of property to make way for the development. She further notes that the complainant has had disclosed to him a 41 page strategic assessment of the wider economic benefits of the scheme and a 20 page critique of the wider economic benefits of the scheme.
43. Having considered the volume of information in scope and the resultant time estimate, the Commissioner finds that significant resources would have to be diverted from core services for TWBC to comply with the request. Assuming an average working day of seven hours, 30 minutes, 78 hours of work would take one person in excess of 10 working days to complete. This is an expense which TWBC could not be expected to absorb without it affecting service provision in some way and it would therefore be manifestly unreasonable.
44. Furthermore, the Commissioner finds that the burden would be so disproportionately excessive as to outweigh the other factors identified in the bullet points of paragraph 32.
45. Her decision is therefore that it would be manifestly unreasonable, on the grounds of cost and the burden that would be placed on its staff resources, for TWBC to comply with the request.

³ <https://ico.org.uk/your-data-matters/official-information/>

Public interest

46. 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.

The public interest in the information being disclosed

47. In correspondence with TWBC, the complainant argued that the project was of huge concern to local residents and that the strength of feeling may have contributed to the outcome of recent council elections. He said it was in the public interest for the requested information to be disclosed.
48. TWBC has acknowledged the public interest and need for both transparency and accountability in relation to public spending, particularly in planned developments of this size. It also said that public participation in decision making would be enhanced by disclosure.

The public interest in the exception being maintained

49. TWBC referred the Commissioner to the considerable burden that would be imposed on it, which it said would result in the diversion of resources away from TWBC's core business, and would have a proportionally detrimental impact on its provision of services to the public.
50. TWBC referred the Commissioner to the information it had already placed in the public domain, as noted in paragraph 42, above.

Balance of the public interest

51. The Commissioner recognises the importance of accountability and transparency with regard to decision-making by public authorities (particularly involving the spending of public money), and the necessity of a public authority bearing some costs when complying with requests for information. However, in considering the public interest test for this case, the Commissioner must assess whether the cost of compliance to, and impact on, TWBC is proportionate to the value of the request.
52. The Commissioner appreciates that there has been considerable local interest in the Calverley Square development, particularly in view of the costs involved and of the fact that part of the redevelopment was earmarked for a local park. It is therefore reasonable to conclude that there will be some public discussion about the development and that the disclosure of relevant information may therefore increase public understanding of TWBC's decision making process.

53. However, the Commissioner notes that the project has been subject to significant scrutiny: a public inquiry was held about the compulsory purchase of property for the development, and it was subject to a formal planning application process (which eventually resulted in the refusal of planning permission for the development). She considers the public interest in the independent scrutiny and oversight of the proposed development at the time of the information request to have been served to a significant degree by these events. While the general public interest in openness and transparency would be served if disclosure of the requested information could have been achieved readily and at proportionate cost, TWBC has demonstrated that it would instead be a disproportionate, costly and time consuming action, which would divert available resources away from other services. It has also shown that a substantial amount of general information about the proposed development is in the public domain.
54. Whilst the Commissioner accepts that the request had a serious purpose and value, she nevertheless considers the burden that would be imposed by compliance with the request to be manifestly excessive to the extent that it would impact on other services. It is, therefore, the Commissioner's decision that the public interest lies in maintaining the exception.

Presumption in favour of disclosure

55. 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).
56. 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) was applied correctly.

Regulation 9 – Advice and assistance

57. Regulation 9(1) of the EIR provides that:

"A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants."

58. This regulation places a duty on a public authority to provide advice and assistance to someone making a request. The Commissioner considers that this includes assisting an applicant to refine a request if it is deemed that answering a request would otherwise incur an unreasonable cost.
59. TWBC pointed out that it had provided the complainant with some information which was relevant to his request. It had also explained to him why it could not comply with the request as a whole and had invited him to narrow or refine his search terms in order to bring the request within acceptable parameters.
60. The Commissioner considers that it would be difficult for TWBC to have offered any more meaningful advice about refining or narrowing the request in order to provide the complainant with further information.
61. Taking the above into account, the Commissioner considers that TWBC has complied with the requirements of regulation 9(1) of the EIR.

Regulation 14 – Refusal to disclose information

62. Regulation 14(1) of the EIR sets out the provisions that must be complied with when refusing a request for environmental information.
63. Regulation 14(3) of the EIR states:

“The refusal shall specify the reasons not to disclose the information requested, including –

 - (a) any exception relied on under regulations 12(4), 12(5) or 13; and*
 - (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).”*
64. Since TWBC’s final position with regard to the request was that it was entitled to refuse it under regulation 12(4)(b) of the EIR, in failing to specify to the complainant the exception under which it was refusing the request, and in failing to explain to him its consideration of the public interest, TWBC breached regulations 14(3)(a) and (b) of the EIR.

Right of appeal

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

66. 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.

67. 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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