

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 10 May 2023

Public Authority: Sheffield City Council

Address: Town Hall
Pinstone Street
Sheffield
S1 2HH

Decision (including any steps ordered)

1. The complainant requested information relating to the felling of trees in 2018 from Sheffield City Council ("the council"). The council refused the request on the basis that Regulation 12(4)(b) of the EIR applies (manifestly unreasonable request).
2. The Commissioner's decision is that the council was correct to apply Regulation 12(4)(b) to refuse the request, and that the public interest rests in the exception being maintained. However, the Commissioner has also decided that the council did not comply with the requirements of Regulation 11(4) in that it did not respond to the request for review within 40 working days.
3. The Commissioner does not require further steps.

Request and response

4. On 8 April 2021, the complainant wrote to council and requested information in the following terms:

"I wish to request information related to the decision in December 2017 taken by cabinet to fell memorial trees on Western Road and to plant new trees to replace all those lost prior to the streets ahead contract:

Please provide any communications, plans or other documents related to:

The decision to save the trees announced by then cabinet member Lewis Dagnall in November.

This overturned the decision to fell trees taken by cabinet - so please include in your response:

The details of the change as communicated to cabinet;

The governance process followed in this case to overturn a cabinet decision;

(This decision is reported here:
<https://www.thestar.co.uk/news/memorial-...>)

In December 2017 Cabinet also decided "practical and affordable options be considered to replant trees that were lost and not replaced in previous years prior to the current Streets Ahead contract; "

Please provide details of any communications, plans, surveys or other documents related to these options, including the public consultation on this tree planting that was promised by the then cabinet member Brian Lodge at the time.

If a formal decision has been made on the option to replant these trees, please provide full details of the decision and the governance process followed to make it.."

5. The council provided its response on 14 April 2021. It highlighted the intention to create a public archive of Sheffield tree related material, and applied Regulation 12(4)(b) to refuse the request for information.
6. The complainant wrote back to the council on 15 April 2021 requesting that the council carry out an internal review of its decision to apply Regulation 12(4)(b).

7. Following an internal review council wrote to the complainant on 21 October 2022. It upheld its position that, as the requested information is substantial, and as it was to be included within the council's tree archive, Regulation 12(4)(b) is applicable.

Scope of the case

8. The complainant contacted the Commissioner on 18 December 2022 to complain about the way their request for information had been handled.

9. The complainant argued that:

"The archive itself, and other publicly available council documents demonstrates that SCC hold other information that they have not published, and have not provided as a response to my request. Further, the criteria used for publishing documents in the archive fall short of the authority's legal obligations under the FOIA and EIR:

1. The Archive was established on the basis that documents containing personal information would be redacted and published, in line with legal obligations under GDPR and FOIA, however the council has instead decided not to publish whole documents because the document contains personal information. (see note 1).

2. The archive is limited to information from 2013-2018. There is publicly available information that demonstrates my request covers information held by the council after 2018. (see note 2).

3. The council has omitted completely a number documents that have been referred to publicly (and even published) from the archive, but it is reasonable to assume they hold these documents.

In addition I am aware of other documents that have come into the public domain from the period in scope of the archive, and which have not been provided. (See note 3) I ask that the ICO look at this case and require the authority to make available the full information they hold."

10. The complainant therefore argues that the council has not disclosed all of the information which it holds falling within the scope of the request of 8 April 2021; that it has not all been made available via the archive.

11. However, the Commissioner must make his decision based upon the circumstances at the time that the council responded to the request; on 14 April 2021. At that time, the council indicated that it was intending to

include documents within the archive, and that it was beginning the process of doing so. It applied Regulation 12(4)(b) based upon the manifestly unreasonable burden which would be placed on it if it was required to respond to the request at that time.

12. If the council was correct to apply Regulation 12(4)(b) in its response of 14 April 2021, then it was not under a duty to respond to the request further.
13. The complainant's subsequent argument, that not all of the information has been published, cannot be considered by the Commissioner as part of this complaint. The relevant request is the request of 8 April 2021, and the Commissioner must therefore consider the application of the exception as at the time of the council's response of 14 April 2021. However, the complainant's grounds of complaint to the Commissioner relate to issues which occurred after 14 April 2021, once the archive was published.
14. If the complainant believes that further information is held by the council he will therefore need to make a new request for information. The publication of the archive will also offer the scope for him to significantly narrow the scope of his new request.
15. This decision notice therefore analyses whether the council was correct to apply Regulation 12(4)(b) to the request of 8 April 2021 as at the time of the councils response, on 14 April 2021.
16. The Commissioner will also address the significant delays which occurred in the council providing its responses to the complainant's request for review.

Reasons for decision

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

17. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request is manifestly unreasonable.
18. The information relates to the council's management of trees within the city. The council's actions in this respect have had an effect on the environment. The Commissioner therefore agrees that the requested information is environmental, and therefore, the council was right to handle the request under the EIR.

The council's arguments

19. The council argues that the request encompassed 'any' or 'all' information falling within the scope of the wording of the request. The council cited Regulation 12(4)(b) on the grounds that complying with the request would impose a manifestly unreasonable burden on its resources in terms of time and cost.
20. The council argued that the work involved in responding to the request would be significant and cause it a manifestly unreasonable burden, particularly as work was ongoing to create an archive of documents which would hold the same information which the complainant was requesting.
21. It noted that an indication of the volume of the material which would need to be located is indicated in an article in 'The Star'¹, which refers to the involvement of campaigners, the Independent Tree Panel, Economic and Environmental Wellbeing Scrutiny and Policy Development Committee and the Western Road First World War Memorial Trees Task and Finish Cross Party Working Group.
22. The council argued that just one component of a search it would need to undertake indicates that in the generic Inbox of the Service Assurance Team, there are 6,293 emails dating back to 2012 which may contain information relevant to this request. It argued that, taking one minute per email, only considering half of the emails from this would take approximately 52 hours to extract information.
23. It further argued that, in addition to this, it would need to consider the inboxes of Technical Team officers, senior officers in the Highways service, Democratic Services (which provides the support to council committees), the former chief executive and council leader, still serving councillors who were cabinet members at the time, other councillors whom they may have consulted, and legal services, at a minimum.
24. The council also noted that the complainants request asked for records prior to 2012, which would require it to look at its parks and countryside service, whose responsibility street trees fell to before the Streets Ahead contract with Amey.

¹ <https://www.thestar.co.uk/news/memorial-trees-first-step-plans-save-treesa-222740>

25. It considered that this would require months of work which it could not justify that because of the disruption to the delivery of other services caused by staff having to spend time dealing with the request.

The complainant's arguments

26. The complainant argued that if the council was already carrying out work to analyse and publish the information, then it could not argue that responding to his request would cause the council an unreasonable burden; it would need to, and was, carrying out that work already.

The Commissioner's conclusion on the engagement of Regulation 12(4)(b)

27. The Commissioner has considered the arguments submitted by the council. He has noted, specifically, the nature of the task which the council estimated would need to be undertaken in order to fully respond to the request for information, and the volume of work which would be required in order to fully respond to the request.
28. The Freedom of Information and Data Protection (Appropriate Limit and Fees) sets out an appropriate limit for responding to requests for information under FOIA. The limit for local authorities is £450, calculated at £25 per hour. This applies a time limit of 18 hours. Where the authority estimates that responding to a request will exceed this limit the authority is not under a duty to respond to the request.
29. Although there is no equivalent limit within the EIR, in considering the application of Regulation 12(4)(b) the Commissioner considers that public authorities may use equivalent figures as an indication of what Parliament considers to be a reasonable burden to respond to EIR requests. However, the public authority must then balance the cost calculated to respond to the request against the public value of the information which would be disclosed before concluding whether the exception is applicable.
30. The Commissioner notes that there is a public value in the information being disclosed in this case. However, the Commissioner considers that the burden outlined above is so extensive that the public value in the disclosure of the information would not make the request reasonable in this case. Particularly as work was already being undertaken by the council to produce a public archive of information relating to the councils tree management. In this context, the application of the exception, essentially requiring the complainant to await the publication of the archive, was a reasonable approach given the amount of information falling within the scope of his request. The Commissioner has addressed the council's response to the request for review further, below.

31. Having considered the council's position the Commissioner is therefore satisfied that the exception in Regulation 12(4)(b) was engaged by the request. The Commissioner has therefore gone on to consider the public interest test required by Regulation 12(1)(b). When doing so, he has taken into account the presumption in favour of disclosure required by Regulation 12(2).

Regulation 12(1)(b) - public interest test

32. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

33. 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, all of which ultimately contribute to a better environment.

34. The issue of the council's management of its trees, and its memorial trees has been highly controversial over the last few years. There have been a number of public clashes regarding the plans to cut down a large number of trees, and the article in the Star, noted above, highlights some of the issues involved. The Commissioner notes this, and has taken into account a very strong public interest in the council being transparent about its actions, particularly given the large number of trees which were under threat from the plans as initially stipulated.

35. The Commissioner has also taken into the account the heritage and the history behind some of the trees concerned, planted as memorial trees in honour of fallen World War One soldiers. The issue of the trees is therefore a highly emotive subject, which increases the public interest in the council being transparent about its plans and decisions.

36. On the counter side, the council has highlighted the significant burden responding to the request would create. The Commissioner accepts that the council's description of the work would entail a level of work significantly above that expected by the appropriate limit under FOIA.

37. The Commissioner also notes the intention of the council to create a tree archive, containing all of the relevant information which the public will be able to view. This significantly reduces the public interest arguments for the council carrying out the work in response to an EIR request, as the information would be available as soon as the archive was completed.

38. Although a public interest in the council fully responding to the request remains, given the level of work involved, and the level of disruption that this would entail, and also the stated intention to create a tree archive, the Commissioner is satisfied that the public interest in the exception being maintained outweighed the council responding to the request further at the time that it responded to the complainant's request for information.
39. 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.
40. As set out above, in this case the Commissioner's view is that the balance of the public interests 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.

Procedural matters

Regulation 11(4) - Representations and reconsideration

41. The complainant made his request for review on 15 April 2021. The council did not notify the complainant of its review decision until 21 October 2022.
42. Regulation 11(4) of the EIR requires that a public authority notifies the applicant of the outcome of its internal review as soon as possible, and no later than 40 working days after the date of receipt of the applicants representations and by a significant amount of time.
43. The council therefore failed to comply with the requirements of Regulation 11(4) by a significant degree of time.
44. The Commissioner has therefore retained a record of this for his monitoring and enforcement work.

Right of appeal

45. 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

46. 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.
47. 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

Ian Walley
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