

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 13 June 2023

Public Authority: East Riding of Yorkshire Council
Address: County Hall
Beverley
East Yorkshire
HU17 9BA

Decision (including any steps ordered)

1. The complainant has requested information relating to odour complaints arising from a particular business facility. East Riding of Yorkshire Council ("the Council") disclosed some information in response to the request.
2. The Commissioner's decision is that the Council was entitled to rely on regulation 12(4)(b) (manifestly unreasonable) of the EIR to refuse to comply with the rest of the request. However, he finds that the Council breached regulations 5(2), 14(2) and 11(4) of the EIR as it failed to provide its initial response and its internal review outcome within the statutory timeframes of 20 working days and 40 working days respectively.
3. The Commissioner does not require the Council to take any further steps on this matter.

Request and response

4. On 21 October 2022, in response to the Council sharing the outcome of its findings from an investigation into odour complaints linked to a particular business facility, the complainant wrote to the Council and requested information in the following terms:

"I'm somewhat perplexed by this response and how this opinion has been formed on the back of a reporting system that is clearly flawed. Please advise:

1. What is this reporting system that is mentioned and where and how was it advertised to residents?
2. How does the system differ to that operated by the EA?
3. Were reports to the EA shared and included within both systems? It is clearly unfair to expect residents to report to multiple bodies.
4. What scores for persistence, intensity, and unpleasantness the officers would consider sufficient to amount to a statutory nuisance.
5. Details of the scoring system used and how it is quantified.

Also, under the Freedom of Information Act, please provide:

- [6] All data obtained by this system (personal data redacted).
- [7] Details of the officers undertaking surveys.
- [8] The number, results and reports of the surveys.
- [9] What visits were undertaken to the site, when, by who and the associated reports and findings.
- [10] All internal communications relating to the matter.
- [11] All internal communications relating to the Biowise/Wastewise facility."

5. The Council responded on 25 November 2022. It provided information in response to parts 1-9 of the request. However, it refused to provide information in response to parts 10 and 11 of the request. It cited regulation 12(4)(e) (internal communications) of the EIR as its basis for doing so.
6. Following an internal review the Council wrote to the complainant on 28 February 2023. It maintained its original position.

Scope of the case

7. The complainant contacted the Commissioner on 28 February 2023 to complain about the way their request for information had been handled.
8. During the course of the Commissioner's investigation, the Council accepted that it had been unable to review all information within the scope of parts 10 and 11 of the request in order to fully consider the public interest in disclosure of any or all of it. This was due to the large volume of information relating to this matter, meaning the work required to review all of it would be too great of a burden on the Council's resources. The Council therefore amended its position in

respect of parts 10 and 11 of the request, instead relying on regulation 12(4)(b) (manifestly unreasonable) of the EIR.

9. The Commissioner considers that the scope of his investigation is to determine whether the Council was entitled to rely on regulation 12(4)(b) to refuse to comply with parts 10 and 11 of the request.

Reasons for decision

Regulation 12(4)(b) – manifestly unreasonable

10. 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.
11. The Commissioner considers that a request can be manifestly unreasonable either if the request is vexatious, or where compliance with the request would incur a manifestly unreasonable burden on the public authority both in terms of costs and the diversion of resources.
12. In its submissions to the Commissioner, the Council has relied upon the latter interpretation of regulation 12(4)(b), that it considers the amount of work required to comply with parts 10 and 11 of the request would bring about a manifestly unreasonable burden.
13. Under 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 using a notional rate of £25 per hour per person. For local authorities, the appropriate limit is set at £450, which is the equivalent of 18 hours of work.
14. The EIR differ from 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.
15. Whilst the Fees Regulations relate specifically to 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.

16. 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.
17. 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.
18. The Commissioner considers it to be the responsibility of the public authority to demonstrate why an exception under the EIR has been properly engaged. This means that, in cases where the public authority is relying on regulation 12(4)(b), it should provide him with both a detailed explanation and quantifiable evidence to justify why complying with a request would impose such an unreasonable burden on it.
19. Where a public authority has demonstrated that regulation 12(4)(b) is engaged, regulation 12(1)(b) requires that a public interest test is carried out to determine whether the arguments in favour of maintaining the exception outweigh those in favour of disclosing the requested information. A public authority may still be required to comply with a manifestly unreasonable request if there is a strong public value in doing so.

The Council's position

20. The Council explained that it holds correspondence regarding the business facility to which the odour complaints relates from as far back as 2014. It considers that extracting the internal communications regarding the facility would impose a significant burden as it would take considerable time and disproportionate costs, and would take officers away from day-to-day operations resulting in a detriment to the service.
21. At the time of writing to the Commissioner to explain its position further, the Council had received a total of 390 reports or complaints about the facility. Due to the way the reports are stored, the Council would be

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/manifestly-unreasonable-requests-regulation-12-4-b-environmental-information-regulations/>

required to open and examine each record individually to determine if it contained any information within the scope of the request, and to extract any relevant internal communications and prepare them for disclosure. The Council estimates that this would take a minimum of 10 minutes per record.

22. The Council considered if the service area could assess only the most current case records relating to the facility, of which there were 302 since February 2020. However, at 10 minutes per record, this would still amount to over 50 hours of staff time, or roughly £1257 when guided by the notional rate of £25 per hour per person set out in the Fees Regulations.
23. The Council further explained that on top of the 50+ hours set out above, it would also need to conduct searches into work group email accounts, as well as the email accounts of individual officers who have had any involvement with matters relating to the business facility. Whilst the most pertinent emails would have been saved on the case files and reporting system, there may have been other emails or informal discussions which weren't necessary to add to the case files but may still fall within the scope of 'all internal communications' relating to the facility. Therefore, the Council would still be obliged to review each email fully.
24. Whilst the Council did not put forward any estimates of time or cost in relation to the additional work of searching email accounts, the Commissioner is satisfied that the total work required across the complaint/report files and email accounts would cause a disproportionate effect on the service area's resources. He therefore finds that regulation 12(4)(b) of the EIR is engaged, and has gone on to consider the public interest test in accordance with regulation 12(1)(b).

Public interest test

25. The Council explained that it seeks to ensure that it is open and transparent in its business dealings. However, it considers that it has already met its obligations regarding transparency relating to the odour concerns arising from the business facility, as it has ensured that residents, and complainants, receive appropriate updates in order that they are kept informed of ongoing issues. After the recent residents survey was undertaken, an email response was sent to all residents involved, giving a full update on the matter and further website links as to where the consultation documents and permit information could be found, as well as a summary of the investigation and the Council's conclusions.

26. The Council further considers it has met its obligation to be transparent and accountable, as it provided a considerable amount of information in response to the first nine parts of the request. This included a full (suitably redacted) list of all the odour reports made by residents, as well as those made by the officers investigating the odour complaints. It also provided an explanation of the odour assessment system and what the Council considers for a potential statutory nuisance.
27. The Commissioner is satisfied that the Council gave relevant consideration to most of its arguments for maintaining the exception during its explanation for engaging the exception, however the Council reiterated that the work which it would have to undertake to comply with parts 10 and 11 of the request would have a detrimental and disproportionate impact on the day to day ongoing business of a small but busy service area, when it has already made a lot of relevant information available to the public.
28. In addition, the Commissioner would note that there is always a strong inherent public interest in allowing a public authority to protect itself from manifestly unreasonable requests.
29. Whilst the Commissioner recognises that there is a public interest in how the Council handles such complaints, and any resulting decisions or actions which it may take, he finds that the public interest is satisfied by the considerable amount of information relating to the odour complaints which the Council has placed into the public domain. This includes the information which the Council voluntarily disclosed to residents following its investigation into the concerns, as well as that information which the Council disclosed in response to the earlier parts of this request.
30. 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 & Government Legal Department* [2019] UKUT 247 (AAC), "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).
31. The Commissioner's view is that the balance of the public interest favours the maintenance of the exception, rather than being equally balanced. Therefore the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the Council was entitled to rely on regulation 12(4)(b) to refuse to comply with parts 10 and 11 of the request.

Procedural matters

32. Regulation 5(2) of the EIR provides that information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
33. Regulation 14(2) of the EIR provides that a refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.
34. The Council provided its initial response to parts 1-9, and refusal of parts 10 and 11, of the request 24 working days after the date of receipt. The Commissioner therefore finds that it breached both regulation 5(2) and 14(2).
35. Regulation 11(4) of the EIR provides that a public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.
36. The Council provide its internal review outcome 63 working days after the date of receipt of the complainant's representations. The Commissioner therefore finds that it breached regulation 11(4).

Right of appeal

37. 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

38. 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.
39. 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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