

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 9 February 2024

Public Authority: Derbyshire County Council
Address: County Hall
Matlock
Derbyshire
DE4 3AG

Decision (including any steps ordered)

1. The complainant requested information from Derbyshire County Council ("the Council") about the closure of a footpath. The Council refused the request under regulation 12(4)(b) of the EIR (manifestly unreasonable) on the grounds that to comply with the request would incur unreasonable costs.
2. The Commissioner's decision is that the Council is entitled to refuse the request under regulation 12(4)(b). The Commissioner also finds that the Council complied with its obligations under regulation 9 of the EIR to offer advice and assistance.
3. The Commissioner does not require further steps.

Request and response

4. On 19 June 2023, the complainant wrote to the Council and requested information in the following terms:

"Your reply provides no details despite my asking specifically "exactly what has been done to assess the situation and the

likelihood of collapse — the exact level of danger posed” . I note the similarity in the text of your response to that of the "Appendix 1 — Summary for Public Consultation" dated March 2023 produced by the Peak District National Park which I have received.

In his undated reply to my MP, Mr Greatorex states that the PDNPA commissioned the services of an external consultancy to investigate and publish a report. So as a minimum I was expecting to be sent that report. He states "The matter will be discussed again with the National Park Authority to establish if any progress has been made in this area. As and when a response is received I will pass this on to you" So I was anticipating being sent this request and the response as a minimum.

I state my request again. I want to know exactly which individuals decided to close FP9 and when. I want to see this information for both the initial decision to close it as well as all subsequent decisions taken to keep it closed. And I want to see all the data and information that was used in making the decision to close FP9.

For the avoidance of doubt and in the absence of knowing what you did I will now attempt to specify exactly what I am asking you to provide (and what I was expecting to receive).

1. I request the report referred to in My Greatorex's response as well as his request to the PDNPA and their response.

2. I request the "the geotechnical investigations" in full. I want see all documentation relevant to these investigations — both all documentation connected with the council requesting these investigations (for example briefs given to the organisation or individuals conducting the investigations) and all reports that were produced. I want the original documentation NOT quotes from it or summaries of it.

3. I request any and all internal reports produced about the closure of FP9 since 2016.

4. I request the full records of any and all meetings where the closure of FP9 was discussed from 2016 onwards. Please send the minutes from these meetings together with the record of who attended and their qualifications to pass judgment on the danger posed.

5. I request any and all other internal and external correspondence concerning the closure of FP9 whether email, letter, reports, social media communication etc.
 6. I request full records and reports of ALL visits to the site since 2016 (I assume this will include a) who went b) exactly what was done during the visit and who did it, c) the qualifications and experiences of any and all who were involved in passing judgement on the level of danger during these visits, and d) how such visits were used in the decision to close the path).
 7. I request copies of all notices issued to close the path which were displayed at the ends of the path — the first notice and all subsequent notices extending the closure.
 8. I request any and all other information not covered in the above but relevant to the closure of FP9
 9. I request full details of my initial contact with the council about this — FS Case 424177983 submitted on the 23 May 2022 — my emails, your responses and any records taken of phone conversations of any phone conversations we have had.”
5. The Council responded on 14 August 2023 and refused the request under regulation 12(4)(b) of the EIR (manifestly unreasonable), specifically on the grounds that to comply with the request would incur unreasonable costs. It upheld this position at internal review on 15 August 2023.

Scope of the case

6. During the course of the Commissioner’s investigation the Council informed the Commissioner, that although its previous responses to the complainant did not acknowledge that it holds the geotechnical report commissioned by the Peak District National Park Authority (PDNPA), it does in fact hold a copy of this report. The Council stated that it considers this report is exempt from disclosure under regulation 12(4)(f) of the EIR (interests of the information provider).
7. This decision notice will first consider whether the Council is entitled to refuse the request under regulation 12(4)(b) (manifestly unreasonable). The Commissioner will only go on to consider whether the Council is entitled to withhold the geotechnical report under regulation 12(5)(f) if he has found that the Council is not entitled to refuse the request under regulation 12(4)(b).

Reasons for decision

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

8. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose environmental information to the extent that the request for information is manifestly unreasonable.
9. There is no definition of 'manifestly unreasonable' under the EIR, but the Commissioner's opinion is that 'manifestly' implies that a request should be obviously or clearly unreasonable for a public authority to respond to in any other way than applying this exception.
10. In the Commissioner's view, the key question for public authorities to consider when determining if a request is manifestly unreasonable is whether the value and purpose of the request justifies the burden that would be placed upon the authority in complying with it.
11. The Freedom of Information and Data Protection (Appropriate Limit and Fees) ("the Fees Regulations") sets out an appropriate limit for responding to requests for information under FOIA. The limit for local authorities, such as the Council, is £450, calculated at £25 per hour. This applies a time limit of 18 hours. Where the authority estimates that responding to a request would exceed this limit, it is not under a duty to respond to the request.
12. As well as setting out the actual limits, the Fees Regulations explain what activities public authorities can take into account when estimating the cost of compliance. Those activities are limited to:
 - determining whether it holds the information;
 - locating that information or a document which may contain the information;
 - retrieving the information or a document containing it; and
 - extracting the information from a document containing it.
13. 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 the section 12 limits 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.

14. The Council provided the following background information regarding the closure of the footpath in its submissions to the Commissioner:

"It may be helpful to you to explain the context to the closure of the subject footpath, which is known as Footpath Number 9 at Follow [sic], which is within the Peak District National Park. Derbyshire County Council are the Local Highway Authority. Three footpaths are currently closed (known as Footpath Numbers 6, 9 and 10) within the area of the land slips around Foolow and Grindlow, Derbyshire, until the surrounding land is stabilised. These closures are as a result of continued uncertainty surrounding the stability of the land in the area and the risk to public safety of continuing to allow access along/into these designated routes and area of public access. The temporary closures are pending the outcome of investigations being co-ordinated by Peak District National Park Authority in their capacity as the Minerals Planning Authority for the Peak District National Park. It is envisaged that after such investigations have taken place that an informed decision can be taken as to whether the risk to public safety is at a level whereby the temporary closures can be lifted.

Foolow Public Footpath Number 9 has been temporarily closed by order made under s14(1)(b) Road Traffic Act 1984 due to catastrophic failure of a hillside crossed by public rights of way. It has been further extended under s15(5) Road traffic Act 1984, by approval by the Department of Transport, until the 6th May 2025, to allow for remediation of and monitoring of land over which the Foolow Public Footpath Number 9 and other footpaths cross."

15. At internal review the Council informed the complainant that it was estimated that the Council holds 300 documents which may contain information within the scope of the request. It estimated that would take a minimum of 10 minutes per document to search for whether it contained information within scope, whether it was a duplicate email and for the existence of personal information. This estimate did not include the time it would take to redact and save the emails to prepare for disclosure. The Council also stated that this estimate does not include the guidance that would be needed from the Public Rights of Way Officer in relation to whether the subject matter of the document relates to Footpath Number 9.
16. At 10 minutes per record this estimate from the Council would amount to 50 hours of staff time, or £1250. This is more than two and a half times the appropriate limit of 18 hours / £450.

17. In its submissions to the Commissioner the Council stated that it had carried out additional searches to verify the estimate it gave at internal review and was therefore now able to give a more detailed estimate of the number of documents held that may contain information within the scope of the request.
18. It has now identified the following documents/items that may contain information within the scope of the request:
 - 121 documents which may contain relevant information from one involved officer
 - 108 other emails
 - 47 items (of which 10 are subfolders) in a folder relating to Footpath Number 9
 - It considers that the folders for Footpaths Number 6 and 10 which, as explained above, are nearby and also closed for the same reasons, are also likely to hold information within the scope of the request. It explained that the temporary closures folder for Footpath Number 6 contained 7 subfolders. It did not provide a corresponding figure for Footpath Number 10.
19. It therefore appears that the Council's original estimate was fairly accurate, if we take the number of items it has specified would need to be searched in their submissions to the Commissioner, this gives a total of 283 items.
20. Regarding the figure of 10 minutes per item given by the Council, the Commissioner notes that the Council's estimate appears to be incomplete as it states this does not include all of the staff time required to check whether the information is within the scope of the request.
21. Regarding the Council's inclusion of time to check the information for personal data, although not permitted under FOIA, the Commissioner's guidance¹ is clear that the costs of considering if information is covered by an exception can be taken into account as relevant arguments under regulation 12(4)(b) of the EIR.

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/regulation-12-4-b-environmental-information-regulations-manifestly-unreasonable-requests/#differences>

22. No further information was provided to the Commissioner about how the estimate of 10 minutes per item had been arrived at.
23. In the absence of further arguments from the Council or details of a sampling exercise having been carried out the Commissioner is not satisfied that 10 minutes per item is a reasonable estimate.
24. Nevertheless, the Commissioner notes that if it were to take 3 minutes 49 seconds per item or longer, the time taken to comply with the request would be in excess of 18 hours. The commissioner is satisfied that a reasonable estimate for the average time to carry out the required activities for each item would be greater than the figure of 3 minutes 49 seconds.
25. The Commissioner is therefore satisfied that the Council has demonstrated that the time it would take to comply with the request is likely to exceed the time limit of 18 hours which serves as an indication of a reasonable burden to respond to an EIR request.
26. The Commissioner therefore concludes that regulation 12(4)(b) is engaged; this is because he is satisfied that responding to the request would create a disproportionate burden upon the Council.
27. However, under the EIR, if regulation 12(4)(b) is engaged, the Commissioner must still consider whether the public interest rests in favour of the request being responded to in spite of the fact that the exception is engaged. 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.
28. When carrying out the test, regulation 12(2) requires a presumption towards the disclosure of the information.

Public interest test

29. The Council acknowledged the inherent public interest in disclosure of environmental information to promote transparency and accountability of Council activities and decision making, recognising the paramount importance of promoting greater public awareness and understanding of environmental matters, encouraging free exchange of views, informed debate and effective public participation, all of which contribute to a better environment.
30. However, the Council argues that impact that responding to the request would have on the Council's ability to carry out its duties would not be in the public interest as it would not be a proportionate use of its limited resources. It also added that as the footpath has been closed

temporarily by Order of the Secretary of State for Transport it considered the public interest in disclosure to be limited.

31. In this case, having considered the above, the Commissioner is satisfied that the public interest lies in the exception being maintained.
32. The Commissioner recognises the importance of the right of access to public rights of way and therefore the public interest in the disclosure of information pertaining to the temporary suspension of this right. Although he notes that this appears to be due to legitimate concerns about public safety in this case.
33. However, the central public interest in the exception being maintained relates to preserving the Council's resources. It is not in the public interest to require an authority to respond to a disproportionate request which places a significant burden on it, but which would not provide information of significant value to the public.
34. Even where a request would provide information of value to the public, it is not in the public interest to require the authority to fully respond to the request where it would cause such a burden on the authority that this would significantly affect its ability to carry out its other functions.
35. The Commissioner is therefore satisfied that the Council was entitled to rely on regulation 12(4)(b) to refuse the request. He has therefore not gone on to consider whether the Council would be entitled to withhold the geotechnical report under regulation 12(5)(f).

Regulation 9 – the duty to provide advice and assistance

36. Regulation 9 of the EIR requires public authorities to provide advice and assistance to requestors, so far as it would be reasonable to expect the authority to do so.
37. In this case, the Council has advised the complainant that they may wish to request the geotechnical report from the PDNPA and provided them with a weblink to do so. Having received the request and being aware that a large amount of information was held, the Council's Public Rights of Way Officer telephoned the complainant on 29 June 2023. The Council states that this call lasted between 60 and 90 minutes. The Council has not stated whether it made a specific suggestion to the complainant as to how the request could be refined to fall within the appropriate cost limit. However, it has stated that during the call the Officer provided detailed information about the basis for the footpath closure and how the Council was complying with its legal duties, in doing so they also described information held that falls within the scope of the request. The Commissioner considers this to constitute a reasonable level of advice and assistance in this case.

38. The Commissioner is therefore satisfied that the Council complied with its obligations under regulation 9 of the EIR to offer advice and assistance.

Right of appeal

39. 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

40. 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.
41. 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

Victoria James
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