

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 30 September 2019

Public Authority: City of York Council

Address: Station Rise

York

YO1 6GA

Decision (including any steps ordered)

1. The complainant requested from City of York Council ("the Council") a copy of the advice offered to councillors who sit on the planning committee regarding meeting members of the public. The Council considered the request to be manifestly unreasonable under regulation 12(4)(b) of the EIR.
2. The Commissioner's decision is that the Council was correct to refuse the request as manifestly unreasonable under regulation 12(4)(b), and that the balance of the public interest favours the exception being maintained. However, the Council breached the requirement, under regulation 14(2) of the EIR, to provide its refusal within 20 working days.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 18 February 2019, the complainant wrote to the Council and requested information in the following terms:

"Can you send me the advice given to [named councillor] referenced in the email below please. Can you also provide me with all formal and informal advice offered to councillors who sit on the planning committee with regard to meeting members of the public".

5. The complainant provided a copy of the email he was referring to, as detailed further on in this notice.
6. The Council responded on 9 May 2019. It refused the request, citing the exception at regulation 12(4)(b) – manifestly unreasonable requests.
7. Following an internal review, the Council wrote to the complainant on a date in June 2019. It upheld its position.

Scope of the case

8. The complainant contacted the Commissioner on 27 March 2019 to complain about the way his request for information had been handled. At this stage, he had not received an initial response to his request.
9. The scope of the case has been to consider whether the Council correctly refused the request as being manifestly unreasonable under regulation 12(4)(b) of the EIR, and the time taken by the Council for compliance with the legislation. The Commissioner has first considered whether the Council was correct to handle the request under the EIR.

Background to the request

10. The request followed an email which was sent from the named councillor to the complainant on 14 February 2019. It stated:

"Thank you for your email with your concerns and your invitation to meet you. Having taken advice I am afraid that I won't take up that invitation. It is not usually appropriate for members of the Planning Committee to meet either applicants or objectors to avoid any charges of bias. It is also important that every member receives the same information before coming to a decision and that clearly would not be the case if we met applicants or objectors separately."

11. The Commissioner understands that the complainant queried this response informally and then received the following email from the councillor on 15 February 2019:

"I have been a member of the Planning Committee for 30 years and Chairman for the last 4. Over the years the advice has always been that meeting developers or objectors outside the formal committee process should be treated with great caution. In this case I spoke to the Ass Director... I have always declined to attend private meetings in order that I am not seen to be biased."

12. This led to the complainant making the request under consideration in this notice.

Reasons for decision

Regulation 2(1) of the EIR – environmental information

13. Regulation 2(1) of the EIR provides the following definition of environmental information:

"...any information in written, visual, aural, electronic or any other material form on-

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements..."

14. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
15. The Commissioner has produced guidance¹ to assist public authorities and applicants in identifying environmental information. The

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https://ico.org.uk/media/fororganisations/documents/1146/eir_what_is_environmental_information.pdf

Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.

16. The Commissioner notes that the request relates to the considerations of councillors who sit on the planning committee, in relation to representations which may be made by members of the public about planning proposals.
17. The Commissioner has considered the request in light of the definition at regulation 2(1). She is satisfied that information relating to whether councillors should meet individual members of the public about planning applications may affect the outcome of those applications, and therefore would be likely to affect the elements and factors of the environment. The Commissioner is therefore satisfied that the information falls within the definition of environmental information at regulation 2(1)(c) of the EIR, and the Commissioner is satisfied that the Council considered the request under the correct access regime.

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

18. Regulation 12(4)(b) states that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
19. The Commissioner considers that the inclusion of "manifestly" in regulation 12(4)(b) indicates Parliament's intention that, for information to be withheld under the exception, the information request must meet a more stringent test than simply being unreasonable. "Manifestly" means that there must be an obvious or tangible quality to the unreasonableness of complying with the request.
20. As the Commissioner explains in her guidance² on whether the exception may be engaged, regulation 12(4)(b) can be engaged where responding to a request would place a disproportionate burden on the public authority. This may apply either where the request is vexatious, or where the cost of compliance with the request would be too great.

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

21. In this case, the Council's position is that responding to the request would require an unreasonable diversion of resources away from its core activities, for the reasons set out below.
22. It considers that the request is part of a long-running dispute between the complainant and the Council, which relates to a local planning matter. The Council has explained that the complainant, who had concerns over a specific planning proposal, considered that the Council did not follow its published *Code of Good Practice for Councillors involved in the Planning Process* regarding whether or not councillors should meet with individual members of the public.
23. The Council has explained, and indeed the Commissioner is aware, that this is not the first time that the complainant has asked for information about how councillors on the planning committee should conduct themselves with regard to discussing planning applications with local residents.
24. A previous ICO decision notice, reference FER0759178³, considered whether the Council was correct to refuse, under regulation 12(4)(b), a request from the complainant for "*what rules members of the planning committee adhere to specifically with regard to discussing applications with local residents / affected members of the public*". In that case, the Commissioner's decision was that the exception was engaged and that the balance of the public interest favoured the exception being maintained; that is, that the Council had refused the request correctly.
25. The Council also explained, as it had done in the previous case, that the complainant made a complaint to the Local Government and Social Care Ombudsman (the LGO) that the Council wrongly advised councillors who sat on planning committees that they could not discuss planning applications with residents. He considered that the relevant guidance encouraged dialogue with residents. The LGO, however, found that, while the Council did have a written policy encouraging councillors to be approachable, the Council left the ultimate decision on whether to speak on a particular matter to the councillors themselves. The LGO, in its revised final decision dated 4 September 2018, did not find that the Council was at fault.
26. The Council considers that the request under consideration in this notice relates to the same issue that the complainant raised before, and, for

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614711/fer0759178.pdf>

that reason, considers it to be manifestly unreasonable, on the grounds that it would place a disproportionate burden on its resources to respond.

27. The Commissioner has considered whether the exception is engaged. In line with her guidance, referenced previously, when considering whether compliance with a request would place a disproportionate burden on a public authority, she will take into account all the circumstances of the case 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; and
 - 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.
28. She notes that the request under consideration in ICO case reference FER0759178, set out in paragraph 24 above, related to a similar issue. In that case, a different councillor had sent an email to the complainant stating that *"I make a rule not to offer any opinion either for or against any recommendation prior to the planning application being heard"*. This email led to the complainant making the request for the *"rules members of the planning committee adhere to"*.
29. The Commissioner considers that the circumstances of that request are very similar to this case. In both cases, the complainant reacted to an email from a councillor declining a personal meeting, by making a freedom of information request: in the earlier case, for the specific *"rules"*, and in this case, for the specific *"advice"* that was being referred to.
30. The Commissioner is aware that the complainant considers his request to have value and merit for two reasons.
31. First, he considers it to be a matter of importance if councillors are misleading the public about whether or not they are allowed to meet with them. He considers that if the councillors are inventing having received advice, this should be declared publicly.

32. With regard to this, however, the Commissioner notes that the complainant will seize on an ordinary turn of phrase such as those written in the councillors' emails ("*I make a rule*", "*Having taken advice*") and use it as a basis for an information request, when, in fact, he is likely to be aware that these phrases do not necessarily imply that recorded information is held. This issue was explored in the earlier decision notice.
33. In this case, the relevant councillor had explained in her email of 15 February 2019, set out in paragraph 11 of this notice, that she had "*spoken to*" the Assistant Director about whether or not she should meet him. This was before the date of the request.
34. In addition, in the Commissioner's view, in stating "*over the years the advice has always been that meeting developers or objectors outside the formal committee process should be treated with great caution*" the councillor is likely to be describing general practice rather than referring to any specific, recorded guidance.
35. This strongly suggests to the Commissioner that the complainant could have anticipated that no recorded information was likely to be held, which has similarities with case reference FER0759178, where the Council suggested that the complainant would already know that there were no written "*rules*".
36. In considering whether regulation 12(4)(b) is engaged, the Commissioner is not, as such, required to determine whether or not any relevant recorded information is held. However, in this case it is relevant that the Council considers that it is disproportionate for it to respond to the request when the complainant is likely to be aware that there is no recorded information that it could provide.
37. The complainant's second area of concern is that he considers it to be a matter of importance if the Council is issuing advice, or rules, to its councillors which are not in line with its published guidance and/or codes of practice.
38. However, the Commissioner notes that the Council's position on this matter was clarified, prior to the date of the request, by the LGO in its decision, which established that the Council leaves the final decision on this matter to the individual councillors.
39. The Commissioner considers that the complainant is using freedom of information legislation as a means to try to expose failings in at the Council, due to his own personal dissatisfaction with the handling of objections to the planning application.

40. The Commissioner acknowledges that the complainant has concerns that the Council is not following its own policies with regard to councillors being approachable. However, the role of the Information Commissioner is not to adjudicate in matters regarding the Council's general conduct or approach. She is concerned only with its adherence to the provisions of the relevant legislation; in this case, whether it correctly considered the request to be manifestly unreasonable.
41. The Commissioner is satisfied that, due to the nature of the request, the underlying issues to which the request relates and the extent to which responding to the request would illuminate that issue, and the context in which the request was made, the request is manifestly unreasonable. The exception at regulation 12(4)(b) is therefore engaged.
42. The EIR explicitly require a public authority to apply a public interest test (in accordance with regulation 12(1)(b)) before deciding whether to maintain the exception. The Commissioner has therefore gone on to consider the balance of the public interest in this case.

The balance of the public interest

43. Since the request has been found to be manifestly unreasonable, the Commissioner has considered whether the balance of the public interest favours the request being responded to, or not. Responding to the request would mean that that the Council would have to consider whether it held information falling within its scope in order to comply with its obligations under regulation 5(1) of the EIR, which states that "*a public authority that holds environmental information shall make it available on request*" subject to any further exception which may apply.
44. The complainant has stated that his request is "*pivotal and vital to acceptable planning policy*". He considers that there is "*strong evidence*" that the Council is advising councillors not to meet with members of the public, in which case the advice should be made public; or, if the councillors are inventing having received advice, this should be declared publicly.
45. He himself has drawn a comparison with the case he brought separately to the ICO, referenced previously in this notice (reference FER0759178). He stated that he fears that the reference to "*advice*" in this case is invented, as indeed he states the reference to "*rules*" had been in the previous case. He considers that if there is no advice, the councillors must be misleading the public about their reasons for refusing to meet with individuals. Alternately, if the advice exists, he considers that "*such advice would appear to be contradictory to all local and national guidelines*" and moreover "*would suggest that the Council may not have been entirely honest in their previous reply*".

46. There is always an inherent public interest in public authorities being open and transparent in the way in which they conduct public business. However, the Commissioner does not consider in this case that there is evidence of the Council not being transparent. Considering the planning process as a whole, it was possible for members of the public to attend meetings about the planning application, and to make representations via the usual consultation process.
47. With regard to the specific issues in this case, the Council presented its case to the LGO about its approach to councillors meeting with individual members of the public, before the date of the request. In addition, councillors acknowledged to the complainant that their usual position is not to meet privately with individuals; they were evidently happy to state this openly in correspondence. The LGO addressed these issues and, in its publicly-available decision, did not find fault.
48. In the Commissioner's view, responding to the request would not shed further light on these issues which have already been addressed by the LGO and responded to by the councillors themselves in their emails.
49. The Commissioner agrees with the Council that the complainant has "*exercised appropriate routes for the provision of comprehensive independent scrutiny related to the Council's actions*" and therefore she does not consider that there is sufficient purpose and value in the request to justify the diversion of Council resources away from its everyday tasks.
50. She considers that responding would place a burden on the Council which was disproportionate to the value of the request.
51. She therefore considers that the balance of public interest lies in the Council not being diverted away from its core responsibilities and has determined that the exception should be maintained.

Regulation 14(2) – refusal to disclose information

52. Regulation 14(2) of the EIR states that if a request for environmental information is refused by a public authority, the refusal shall be made "*as soon as possible and no later than 20 working days after the date of receipt of the request*".
53. From the evidence available in this case, it is clear that the Council failed to provide its refusal within 20 working days and has therefore breached regulation 14(2). The Commissioner does not require any remedial steps to be taken in respect of this.

Right of appeal

54. 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

55. 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.
56. 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

Andrew White
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