

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

Decision notice

Date: 4 December 2017

Public Authority: London Borough of Lambeth
Address: Olive Morris House
Brixton Hill
London
SW2 1RL

Decision (including any steps ordered)

1. The complainant has requested correspondence and information relating to the Carnegie Community Trust and the Carnegie Library, Herne Hill from the London Borough of Lambeth ("the Council"). The Council refused to provide any information and applied the exception at regulation 12(4)(b) of the EIR – manifestly unreasonable on grounds of cost.
2. The Commissioner's decision is that the Council has failed to demonstrate that complying with the request would be manifestly unreasonable in all the circumstances of the case. In addition, the Council has breached regulation 14(2) of the EIR since it did not provide a refusal notice to the complainant within the statutory timeframe of 20 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - With regard to requests 1 and 2, issue a fresh response to the complainant which does not rely on regulation 12(4)(b) of the EIR.
 - With regard to request 3, issue a fresh response in accordance with the EIR.

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 22 May 2017, the complainant made the following request for information from the Council:

"I am revising my request to ask for:

[1] Any emails dated November 2012 and December 2012 to or from Lambeth council to the organisation now known as Carnegie Community Trust relating to the Carnegie library, Herne Hill.

[2] I would also ask for copies of any email dated November 2012 and December 2012 between the organisation now known as Carnegie Community Trust and [named individual] (former Lambeth council officer).

[3] I also wish to request a spreadsheet showing the dates of emails between the organisation now known as Carnegie Community Trust and [named individual] from 2012 - 2016."

6. The Council responded on 4 July 2017 and refused to provide the information he had requested. It stated that the request was manifestly unreasonable under regulation 12(4)(b) of the EIR, due to the amount of time it would take to provide the information. It also stated that it did not hold a spreadsheet in respect of the last part of the request, and was not obliged to create one.
7. Following an internal review, the Council wrote to the complainant on 2 August 2017. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 19 June 2017 to complain about the way his request for information had been handled. At this stage, no response had been provided by the Council. Following the outcome of the internal review, the complainant confirmed on 11 August 2017 that he wished the Commissioner to investigate.

9. The Commissioner considers that the scope of the investigation is to consider whether the Council was correct to refuse the request under regulation 12(4)(b) of the EIR, and she will also consider whether the Council responded within the statutory time-frame.

Reasons for decision

Background to the case

10. The complainant first requested correspondence relating to the Carnegie Library, Lambeth in October 2016. His request was refused under the exception at regulation 12(4)(b) of the EIR on grounds of cost and the Commissioner carried out an investigation into the Council's handling of the request.
11. The outcome of the investigation was set out in ICO decision notice ref. FS50655040¹ on 27 April 2017. The Commissioner found that the exception at regulation 12(4)(b) had been engaged in that case, and that the balance of the public interest test favoured maintaining the exception. However, the Commissioner found that the Council had breached regulation 9(1) of the EIR since it had not provided the complainant with sufficient advice and assistance to enable him to consider narrowing the scope of his request. The Commissioner ordered the Council to provide this to him.
12. The Council provided the complainant with the following advice and assistance on 10 May 2017:

"We suggest you request a significantly reduced timeframe of one or two months and/or specific emails from/to a particular officer. If you are aware of any particular issue arising within these emails then you may wish to alter the search terms accordingly and we may be able to provide specific information."
13. The complainant submitted the request which is the subject of this investigation, on 22 May 2017.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2017/2014001/fs50655040.pdf>

Regulation 12(2) – Presumption in favour of disclosure

14. Regulation 12(2) of the EIR states that a public authority shall apply a presumption in favour of disclosure.

The exceptions

15. The Council has applied the exception under regulation 12(4)(b) to withhold the requested information.

Regulation 12(4)(b) – manifestly unreasonable

14. Regulation 12(4)(b) of the EIR states that:

‘a public authority may refuse to disclose information to the extent that...

(b) the request for information is manifestly unreasonable’

15. 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.
16. The exception will typically apply in one of two sets of circumstances; either where a request is vexatious, or where compliance with a request means a public authority would incur an unreasonable level of costs, or an unreasonable diversion of resources. In this case, the Council argued the latter, namely that meeting the full terms of the request would place an unjustifiable demand on its resources.
17. In her guidance² on the exception, the Commissioner says at paragraph 19 that in assessing whether the cost or burden of dealing with a request is “too great,” public authorities will need to consider the proportionality of the burden or costs involved and decide whether they are clearly or obviously unreasonable. The Commissioner considered this will mean taking into account all the circumstances of the case, including:

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

- 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.
18. The Commissioner considers that public authorities may be required to accept a greater burden in providing environmental information than other information. Where it is found to be engaged, regulation 12(4)(b) of the EIR is also qualified by the public interest test. Any exercise carried out to determine whether an exception applies must take into account the EIR's express presumption in favour of disclosure under regulation 12(2).

Manifestly unreasonable in terms of costs and diversion of resources

19. The considerations associated with the application of regulation 12(4)(b) of the EIR on the grounds of cost are broader than its closest relative in FOIA, section 12, which explicitly permits a public authority to refuse a request purely on the basis of the time and cost implications of compliance. However, while recognising the differences between section 12 of the FOIA and regulation 12(4)(b), the Commissioner considers that the "appropriate limit" in section 12 may serve as a useful guide when considering whether a request is manifestly unreasonable on the basis of costs. This is because the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations"), which have the effect of prescribing the "appropriate limit," is taken to give a clear indication of what Parliament considers to be a reasonable charge for staff time.
20. The Fees Regulations state that a public authority's estimate that compliance would exceed the appropriate limit can only take into account the costs it would reasonably expect to incur in:
- determining whether it holds the requested information;
 - locating the information;

- retrieving the information; and
 - extracting the information.
21. The Fees Regulations confirm that the costs associated with these activities 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.
22. In addition, as noted in the Commissioner's guidance referenced previously, the costs of considering whether information is exempt, and in preparing it for disclosure, may also be taken into account under regulation 12(4)(b), which is not the case under section 12 of the FOIA.

The Council's position

23. In this case, initially, the Council explained to the complainant that: *"there would be approximately 5 officers within the relevant team who may have had correspondence about this issue although we cannot guarantee that these are the only relevant individuals. Some of these or other officers may also have since left the Council.... We have checked one individual's email address and found approximately 500 emails in November & December 2012. We consider that we would need to ask other officers to review a similar amount of emails and email chains which may have included the Carnegie Community Trust."*
24. The Council explained that it was the Council officer named in the second and third parts of the request whose electronic mailbox it had checked. It had ascertained that there were over 500 emails in his mailbox for the period of November and December 2012.
25. The Council explained that it had applied the search term "Carnegie" to these emails but this had not returned any results.
26. No further searches or investigations had been carried out.
27. The Commissioner, in her initial letter of investigation, asked the Council to carry out a search of the mailboxes belonging to the five officers referred to in its response to the complainant for the relevant period, using relevant search terms. However the Council explained that due to restructuring it would be *"extremely difficult to ascertain which individuals may have held relevant information. We advised previously that there would be approximately 5 officers as this was the size of the relevant team but we cannot guarantee that these would be the only officers holding this correspondence."*
28. Furthermore, the Council stated that it considered it was *"not feasible"* to request any individual officer within the department to review their

emails for information collated five years ago, specifically commenting:
"We consider it likely that relevant emails may have been deleted or that officers have since left the organisation, making it more difficult for us to review whether any information is still held."

29. The Commissioner returned to the Council on 10 October 2017 and asked it to clarify whether it was the Council's position that it would take too long to determine whether any information falling within the scope of the request was held, or whether, as explained in the Council's response to the complainant, it would be collating the information which would exceed the time for compliance.
30. The Council explained that it considered it was not likely that information was held; however in its view it could not *"explicitly and comprehensively state that no information whatsoever [was] held by the Council without reviewing each individual email held by [named officer] (and potentially other officers)."*

Is the exception engaged?

31. For the exception to be engaged, the Council should be able to demonstrate that complying with the request would be manifestly unreasonable: in this case, manifestly unreasonable in terms of the cost and diversion of resources. The Commissioner's guidance, referenced earlier, makes it clear that a public authority should be able to demonstrate that an unreasonable burden would be placed on it.
32. The Commissioner has examined the arguments provided by the Council as to how long it would take either to determine whether information is held, and/or to provide the information to the complainant.
33. The Council has not explained how long it has taken to conduct the search of the named officer's mailbox, which retrieved 500 emails for the relevant period, and then to apply the search term "Carnegie" to those emails. In the absence of further detail or explanations, the Commissioner considers that this "sifting" exercise would take only a short time and certainly less than an hour.
34. The Commissioner asked the Council in her initial letter of investigation to conduct a sampling exercise; that is, to retrieve a representative sample of emails and prepare them for disclosure. The Council has not done this. The Commissioner understands that, once no emails were retrieved by using the search term "Carnegie", from the named officer's mailbox for the relevant period, the Council conducted no further investigations.
35. Rather, the Council's arguments have focused on the difficulty in checking what information may be held. The Council has estimated that

it would need to check all 500 emails received by the named officer during the relevant period in order to determine whether or not they are relevant to the request. It has estimated that it would take 5 minutes per email chain to do this, which equates to approximately 41 hours of work. It also stated that to carry out redactions could bring the total to around 50 hours of work.

36. The Commissioner does not agree that it would take five minutes per email chain to check whether or not it falls within the scope of the request. Returning to the wording of the request, the complainant asked for correspondence from certain individuals – members of *“the organisation now known as the Carnegie Community Trust.”* If the Council identified these individuals, it should be relatively straightforward to filter the emails by the name of the correspondent.
37. The Commissioner is concerned in this case at the adequacy of the searches that have been carried out for information for the purposes of determining whether compliance would be manifestly unreasonable. The Council appears to have looked only at one named officer's electronic mailbox to find information, as requested in the second part of the request. Returning again to the wording of the request, the complainant also asked for correspondence from *“the organisation now known as the Carnegie Community Trust”* with *“Lambeth Council”* for the specified period. The Council has not, however, asked other Council officers whether they hold information.
38. In her letter of 10 October 2017, the Commissioner asked the Council to conduct further searches. The Commissioner suggested further relevant search terms that could be employed in addition to *“Carnegie.”* The Commissioner also stated to the Council that, in her view, it is not unduly onerous for other Council officers to be contacted and asked to conduct searches of their mailboxes for a specific two-month period.
39. However, the Council has not done this. Rather, it responded as explained in paragraph 30, above, also stating in that response: *“We note your comments regarding the search terms but consider using other more generic terms would be likely to result in a significant amount of emails to review; and would not necessarily be specific to the request or useful to the applicant.”*
40. In the Commissioner's view, the Council does not appear to have targeted its searches appropriately. It is not clear, for instance, whether the Council has sought to identify those individuals who would have been members of the Carnegie Community Trust at the relevant period. This organisation is still active and, in the absence of evidence to the contrary, it would appear to be relatively straightforward to identify the individuals, and then ask Council officers to conduct a search of their

electronic mailboxes for correspondence from those individuals over the relevant two-month period. These emails could then have been copied to a folder and a sampling exercise carried out.

41. The Commissioner notes the Council's concern that it may never be able to be absolutely certain that it has located all the information it holds falling within the scope of the request. However, as the Commissioner explained to the Council in a letter dated 2 November 2017, this is true of any FOI request, and it is for this reason that the Commissioner makes her determinations based on adequate and reasonable searches having been carried out, and on the balance of probabilities. In this case, the searches have been neither appropriately targeted nor adequate.
42. The Commissioner is also concerned at the lack of detailed evidence provided by the Council as to why it would exceed the appropriate costs limit either to determine whether information is held, and/or to provide the information to the complainant. The Council has argued only that it would take five minutes to review any specific email chain. This has not adequately demonstrated that an unreasonable burden would be placed on the Council's resources to determine whether information is held, or to provide information to the complainant.
43. In her letter of 2 November 2017, the Commissioner explained to the Council that, in her view, the exception was not engaged, and invited the Council to make further submissions and/or provide further evidence that it would place an unreasonable burden on the Council to fulfil the request. She has not received any further submissions or evidence.
44. The Commissioner has determined in this case that the exception at regulation 12(4)(b) has not been engaged. She therefore has not gone on to consider the public interest test.
45. The Commissioner's decision is that the Council has failed to demonstrate that complying with requests 1 and 2 would be manifestly unreasonable in all the circumstances of the case. The Commissioner therefore requires the public authority to issue a fresh response that does not rely on regulation 12(4)(b).
46. With regard to request 3, the Commissioner observes that the complainant asked for a spreadsheet of *"emails between the organisation now known as Carnegie Community Trust and [named individual] from 2012 - 2016."* The Council initially argued that a spreadsheet was not held and that it should not have to create information. It also considered that fulfilling the second part of the request alone would exceed the suggested costs limit. In view of the fact that the Council has not yet conducted adequate searches to determine

whether any such emails exist, the Commissioner has not considered the Council's position on this part of the request on this decision notice other than to note the following.

47. While the Council has explained that it does not hold a spreadsheet containing the information specified in the request, this is not necessarily the end of the story. In her guidance on 'Determining whether information is held'³, the Commissioner addresses in paragraphs 12 the issue of extracting or compiling information to meet a request:

"the public authority... [may] hold the correspondence referred to in the request and the information required to produce the schedule will be contained in that correspondence. It is simply a case of extracting the relevant information (the individual building blocks) from the correspondence and organising them into a schedule. The extraction of existing information and presenting it as a schedule is not the creation of new information."

48. In this case, the Commissioner considers that the Council should have considered whether it is able to compile a spreadsheet (or schedule) and therefore requires it to provide a new response to this request.

Regulation 14(2) – Refusal to disclose information

49. Regulation 14(2) of the EIR states that a public authority wishing to withhold information in response to a request is required to provide the requester with a refusal notice stating that fact within 20 working days after the date of receipt of the request.
50. In this case, the complainant emailed his request to the Council on 22 May 2017. The Council responded on 4 July 2017, 29 working days after the request was received.
51. The Commissioner has therefore determined that the Council has breached regulation 14(2).

³ https://ico.org.uk/media/for-organisations/documents/1169/determining_whether_information_is_held_foi_eir.pdf

Right of appeal

52. 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@hmcts.gsi.gov.uk

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

53. 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.
54. 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

Alun Johnson
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