

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 20 February 2023

Public Authority: Luton Borough Council
Address: Town Hall
Luton
LU1 2BQ

Decision

1. The complainant's representative requested information from Luton Borough Council ('the council') regarding its decision to enforce planning laws against his client (the complainant) relating to a property. The council applied Regulation 12(4)(b) to refuse the request.
2. The Commissioner's decision is that the council is entitled to rely upon Regulation 12(4)(b) to refuse to respond to the request further, and that the public interest rests in the exception being maintained.
3. The Commissioner does not require the council to take any steps.

Request and response

4. Following a pre-action protocol letter issued by the complainant's representative to the council on 11 March 2022, correspondence occurred between the parties during which a number of requests were made under the EIR.
5. The parties resolved the majority of the issues between them. However, two issues remain. These relate to the complainant's requests for:
 - “(b) Copies of any record of the decision-taking process relating to the decision (of 20 January 2022 or before) and of the material considerations the decision-taker had regard to in their decision; and
 - (c) To provide all information held by LBC concerning LBC's decision on expediency of enforcement action taken on or before 20 January 2022;”
6. On 30 January 2023 the council confirmed to both the complainant's representative and the Commissioner that it is relying upon Regulation 12(4)(b) of the EIR to refuse to respond further to these parts of the request.

Reasons for decision

7. The following decision notice analyses whether the council was correct to refuse the above request for information by applying Regulation 12(4)(b).
8. The complainant's representative is acting on behalf of his client, who received an enforcement notice from the council. As he is acting on behalf of his client, the request is therefore treated as if it has been requested by the client.
9. 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.
10. The information relates to a decision by the council to issue a planning enforcement notice. The complainant's actions have had an effect on the environment surrounding the property, and the enforcement notice requires the rectification of these changes. The Commissioner therefore agrees that the requested information is environmental, and therefore, the council was right to handle the request under the EIR.

11. The council cited Regulation 12(4)(b) on the grounds that complying with the request would impose a manifestly unreasonable burden on the council's resources in terms of time and cost.
12. The council has previously disclosed some information in relation to its decision to enforce against the complainant. The request seeks all information that fed into the decision-making process leading to the enforcement notice being issued. The council argues, however, that all information which is a material consideration to its decision to enforce has already been disclosed.
13. It also argues that the request is a 'fishing exercise,' aiming to find flaws in the council's arguments in order to support the complainant's case if a judicial review was taken forward.
14. The council noted that responding to the request would require it to undertake significant searches which would be likely to exceed the appropriate limit when taken into account with the searches which it has already carried out when responding to the other parts of the request. It suggested that carrying out such searches would be likely to exceed 25 hours in officer time.
15. It submitted the following arguments in support of this position:
 - a) The council said that the start of the process, feeding into the expediency of taking the decision, began in August 2017.
 - b) It argued that searching for relevant information would require an examination of at least 13 separate officer files from various council departments including Planning, Housing, Building Control and Environmental Protection.
 - c) It said that two of the files belong to officer's who no longer work for the council, and another two belong to external consultants. It said that it would therefore take more time to 1) facilitate the process of extraction and 2) as far as previous officer's files are concerned - would take far longer for someone to extract based on their inexperience and lack of familiarity with the file(s).
 - d) It considered that the processes required in points b) and c) alone would exceed 18 hours.

- e) It said that it would be likely that it would wish to rely on other exceptions for the requested information, and so further time would need to be taken in order to review the information and redact it as necessary. Under EIR, unlike under FOIA, public authorities are entitled to include the time taken to consider the application of exceptions when calculating the cost of compliance with an EIR request.
- f) It considered that dealing with the request up to this point had already taken it approximately 10 working hours.
- g) It estimated that responding to the remainder of the requests would require approximately another 15 hours of work, thereby making a total time of 25 hours. It noted, however, that this was an estimate, and that it did not know exactly how long it would take. It considered that a study of the relevant files could identify a requirement for it to carry out further searches, and therefore additional time would be required in order to respond.

The Commissioner's analysis

- 16. Based upon the council's arguments, above, the Commissioner accepts that the council's estimate is reasonable, although he notes that the estimate of 18 hours, when added to the 10 already expended by the council, would provide an estimate of 28 hours rather than 25.
- 17. 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.
- 18. 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.
- 19. Having considered the council's position the Commissioner is satisfied that the exception in Regulation 12(4)(b) has been correctly engaged by the council. The Commissioner has therefore gone on to consider the public interest test required by Regulation 12(1)(b).

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

20. 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.
21. The Commissioner recognises that 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.
22. The request primarily relates to the complainant's own private interests. It relates to his interest in obtaining information relevant to his potential judicial review proceedings against the council regarding the enforcement notice. However, the Commissioner recognises that there is a wider public interest given that there are large number of people now living within the property concerned, and these will also be affected by the council's decision.
23. The council has explained that the resources which would be required in order to respond to the request would be disproportionate compared to the public interest in the disclosure of the requested information. It has confirmed that all information which is material to its decision to enforce has already been disclosed.
24. It considered that there is no public interest in disclosing 'essentially draft information' which fed into a final decision when the final decision itself is publicly available, and fully explains its reasons for issuing the enforcement notice.
25. It highlighted that "All considerations and the balancing exercise and weighing up of factors are set out in the final decision of February 2022. Indeed, if a material consideration exists in a draft email for instance but does not make it to the final decision, then the Council cannot rely upon it. Consequently a decision could be quashed by the Courts if the matter should have made it to the final decision but was absent and similarly is unlikely to be given air time at a planning appeal if the Council tried to rely on a reason for issuing the enforcement notice which is not part of the final decision."
26. The Commissioner notes that the initial requests were made within a pre-action protocol letter, relating to the potential for a judicial review to be taken forward. Judicial review proceedings would resolve whether the

council's actions were correct in law. The Civil Procedures Rules¹ would require both parties to disclose any information which they were seeking to rely upon in order to defend their respective positions before the court as part of those proceedings. This process is managed by the court to ensure that the parties can represent their interests on an equal footing.² A disclosure of the requested information outside of this process therefore risks undermining the ability of the council to provide its arguments against the appeal on an equal footing.

27. The council also highlighted that the complainant has the ability to launch a planning appeal against the notice.

The Commissioner's conclusions

28. The Commissioner notes the wider issues regarding the people currently living within the property, however the ability of the complainant to launch appeals to overturn the notice is the appropriate, and legally definitive way to address the issues involved.
29. He is also satisfied that the council has already disclosed the information necessary for the complainant's representative to understand the council's reasons for issuing the enforcement notice, and to take forward appeals against the decision should the complainant choose to do so. Although it is not relevant to the decision in this case, the Commissioner notes that, subsequent to the request being responded to, the complainant's representative has taken forward a judicial review case, and appealed the enforcement notice under the planning process.
30. The Commissioner therefore accepts the council's argument that responding to the complainant's request would create a disproportionate burden upon it for the following reasons:
- The complainant has already been provided with a full explanation of the council's reasons for issuing the enforcement notice for the purposes of appealing the council's decision.
 - There is little wider public value in the requested information being disclosed given that the matters relevant to the appeal have already been provided to the complainant.
 - There are other, more appropriate, alternative legal options open to the complainant to appeal against its decision, and relevant

¹ <https://www.legislation.gov.uk/uksi/1998/3132/contents>

² Regulation 1.1(2)(a) - <https://www.legislation.gov.uk/uksi/1998/3132/rule/1.1>

information will be disclosed to the complainant's representative during the course of those proceedings, overseen and managed by the Court to ensure the parties can represent their cases on an equal footing.

- An appeal would need to be launched in order to formally overturn the notice even if the request were responded to in full.
31. Given the above, the Commissioner is therefore satisfied that, in this case, the public interest in the exception being maintained outweighs that in the information being disclosed. The Commissioner is therefore satisfied that the council is entitled to rely on Regulation 12(4)(b) as its basis for not responding to the request.
 32. Regulation 12(2) of the EIR states that a public authority shall apply a presumption in favour of disclosure, and the Commissioner has borne this in mind when reaching his decision. However, the above demonstrates that the Commissioner's view is that the public interest in the exception being maintained clearly outweighs that in the information being disclosed at the time that the request was initially responded to.
 33. Therefore, the Commissioner's decision is that the presumption in favour of disclosure required by Regulation 12(2) does not change the outcome of his decision that the exception was correctly applied by the council in this case.
 34. Regulation 9 of the EIR requires a public authority to provide advice and assistance to requesters in order to provide them with as much information as they are able to obtain, or to reframe their request in order that it can be responded to. The Commissioner accepts that the council has sufficiently met its obligations under Regulation 9 in this case. The council has taken steps to seek to resolve the complainant's request on an informal basis insofar as it was able to. It has further clarified why it is not able to carry out searches for the remaining information.

Right of appeal

35. 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

36. 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.
37. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF