

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

Date: 15 April 2024

Public Authority: Oldham Council
Address: Civic Centre
West Street
Oldham
OL1 1UL

Decision (including any steps ordered)

1. The complainant requested information from Oldham Council (“the Council”) relating to Oldham Coliseum and the proposed construction of a new theatre.
2. The Commissioner’s decision is that the Council is entitled to rely on section 12(1) (cost limit) to refuse to comply with the request in its entirety. He also finds that the Council is entitled to rely on regulation 12(4)(b) (manifestly unreasonable) to refuse to comply with parts 2 and 3 of the request.
3. The Commissioner finds that the Council met its obligations under section 16(1) of FOIA and regulation 9 of the EIR to offer advice and assistance. The Commissioner does not require the Council to take any steps.

Request and response

4. On 1 September 2023, the complainant wrote to the Council and requested information in the following terms (numbering added by the Commissioner):

“Please provide copies of correspondence (written, email, text and any other media communication) and minutes of meetings

(including informal contemporaneous notes) between Oldham Council, Arts Council England, The Trustees of Oldham Coliseum Theatre Limited and any other party in respect of [1] governance issues, [2] building repairs for the existing theatre and [3] the design of the proposed new theatre under planning applications FUL/351543/23 and LBC/351546/23.”

5. The Council responded on 27 September 2023 and provided the complainant with two links to where information relating to the planning applications referred to in the request could be located on its website. On the same date, the complainant requested an internal review.
6. The Council provided the complainant with the outcome of its internal review on 12 January 2024 in which it amended its position. It stated that it was relying on section 12 (cost limit) of FOIA to refuse to provide the requested information.

Scope of the case

7. The complainant contacted the Commissioner on 12 November 2023 to complain about the way their request for information had been handled.
8. During the course of his investigation, the Council informed the Commissioner that it considered some of the requested information to be environmental and so it had reconsidered the request under the EIR. The Council revised its position stating that it was now relying on regulation 12(4)(b) (manifestly unreasonable) of the EIR to refuse to comply with the request.
9. The Commissioner considers that in this case, the complainant has requested both non-environmental and environmental information and so the Council should have handled the request under both FOIA and the EIR. He considers the information requested in parts 2 and 3 of the request to be environmental information as defined in regulation 2(1)(c) “activities affecting or likely to affect the elements and factors referred to in (a) and (b)” of the EIR as the information relates to the repair of a theatre and a planning application for the construction of a new theatre. However, the Commissioner does not consider the information requested in part 1 of the request to be environmental as it relates to governance issues and so that information falls under FOIA.

10. The Commissioner has issued guidance¹ which explains how the cost of complying with such requests should be calculated. This guidance explains that where any single request is for information which spans more than one access regime, then the costs of collating all the information can be taken into account under FOIA, but only the costs of collating the environmental information can be taken into account under the EIR. The only exception which allows public authorities to take into account the costs of collating all the information falling within the scope of the request under the EIR is where this is a necessary first step because they cannot otherwise isolate the environmental information.
11. Therefore, in this case, when considering the cost of complying with the request under FOIA, the Council can consider the cost of collating the information requested in all three parts of the request. However, when considering the cost of complying with the request under the EIR, the Council can only consider the cost of collating the information requested in parts 2 and 3 of the request.
12. The Commissioner will consider whether the Council is entitled to rely on section 12(1) (cost limit) of FOIA to refuse to comply with the whole of the request. He will then go on to consider whether the Council is entitled to rely on regulation 12(4)(b) (manifestly unreasonable) of the EIR to refuse to comply with parts 2 and 3 of the request.

Reasons for decision

Section 12(1) – cost of compliance

13. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate cost limit. The appropriate limit for public authorities such as the Council is £450. As the cost of complying with a request must be calculated at the rate of £25 per hour, section 12(1) effectively imposes a time limit of 18 hours for the Council.

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/calculating-costs-where-a-request-spans-different-access-regimes/>

14. A public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:

- determining whether the information is held
- locating the information, or a document containing it
- retrieving the information, or a document containing it
- and extracting the information from a document containing it

The Council's position

15. In its submissions to the Commissioner, the Council explained that it has conducted a search of its email system using a variety of different search terms, for information falling within the scope of the request. This search located 11,057 emails between Oldham Council and Arts Council England and 22,488 emails between Oldham Council and Oldham Coliseum Theatre that may fall within the scope of the request.

16. The Council explained that it also conducted a search of its email system using the search terms 'Oldham Coliseum', 'Coliseum', 'FUL/351543/23', 'LBC/351546/23' and 'performance space'. This search located 353,080 emails that may fall within the scope of the request. The Council explained that when conducting its searches of its email system it limited its search to only emails dating from between 1 June 2020 and 1 September 2023 as from June 2020, Council advisors were working on the plan for a new performance venue in Oldham town centre.

17. The Council explained that in order to determine whether the emails it had identified by its searches fell within the scope of the request, it would need to review each email. It stated that if it were to take approximately one minute to review each email, it would take over 5000 hours to comply with the request.

The Commissioner's position

18. The Commissioner has calculated that if the Council were to take one minute to review each email and determine whether it falls within the scope of the request, in total, it would take the Council approximately 6,444 hours to comply with the request (386,625 emails x 1 minute = 6,444 hours). He considers the Council's estimate of one minute to review each email to be reasonable. Even if the Council were to take 1 second to review each email the cost of complying with the request would significantly exceed the appropriate limit.

19. Furthermore, the Commissioner notes when providing its estimate of the time it would take to comply with the request, the Council only considered the amount of time it would take to search its emails for information falling within the scope of the request. However, as the request also asks for meeting minutes and correspondence held in other forms such as written communications, it is likely that in order to comply with the request, the Council would need to conduct further searches.
20. Therefore, the Commissioner's decision is that the Council has estimated reasonably that the cost of complying with the request would exceed the appropriate limit and so the Council is entitled to rely on section 12(1) to refuse to comply with the request.

Regulation 12(4)(b) – manifestly unreasonable

21. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. In this case, the Council is citing regulation 12(4)(b) on the grounds that to comply with it would impose a significant and disproportionate burden on its resources, in terms of time and cost.
22. 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.
23. Whilst the Fees Regulations, outlined above, 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, as is the case here. However, the Fees Regulations are not the determining factor in assessing whether the exception applies. The Council 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.

The Commissioner's position

24. The Commissioner notes that the Council has located 353,080 emails by conducting a search of its email system for emails dating between 1 June 2020 and 1 September 2023 using the search terms 'Oldham Coliseum', 'Coliseum', 'FUL/351543/23', 'LBC/351546/23' and 'performance space'. He considers that due to the search terms used by the Council, it is likely that at least some of those emails will fall within the scope of parts 2 and 3 of the request. Therefore, the Commissioner accepts that it would be necessary for the Council to review all 353,080

emails to determine which of those emails fall within the scope of parts 2 and 3 of the request.

25. As stated above, the Commissioner considers the Council's estimate of 1 minute to review each email to be reasonable. Based on this estimate, the Commissioner has calculated that it would 5885 hours to review all 353,080 emails (353,080 emails x 1 minute = 5885 hours). Even if the Council were to take 1 second to review each email, the cost of complying with parts 2 and 3 of the request would still significantly exceed the appropriate limit.
26. Therefore, using the Fees Regulations as a point of reference as described above the Commissioner is satisfied that parts 2 and 3 of the request are manifestly unreasonable and so regulation 12(4)(b) is engaged. The Commissioner will now go on to consider the public interest test.

Public interest test

27. The Commissioner recognises that there is a public interest in the transparency of the Council particularly in relation to the repair of Oldham Coliseum and the construction of a new theatre. However, he considers that complying with parts 2 and 3 of the request would place a significant burden on the Council's limited resources. In the Commissioner's view that burden would be disproportionate and not in the public interest.
28. The Commissioner's conclusion is that the public interest in the maintenance of the exception provided by regulation 12(4)(b) outweighs the public interest in disclosure of the withheld information.
29. 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* (SGIA/44/2019):

"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).
30. As covered above, in this case the Commissioner's view is that the balance of the public interest favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation

12(2), is that the exception provided by regulation 12(4)(b) was applied correctly. Therefore, the Council is not required to provide the information requested in parts 2 and 3 of the request.

Section 16 – advice and assistance

31. Section 16(1) of FOIA provides that a public authority should give advice and assistance to any person making an information request. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice² in providing advice and assistance, it will have complied with section 16(1).
32. In its internal review response, the Council informed the complainant that they could refine the scope of their request by being more specific about the information they would like to receive or by limiting their request to a particular time period.
33. The Commissioner considers that this was an appropriate response in the circumstances. He is therefore satisfied that the Council met its obligations under section 16(1) of FOIA.

Regulation 9 - advice and assistance

34. Regulation 9(1) of the EIR says that a public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.
35. As explained above, in its internal review response, the Council informed the complainant that they could refine the scope of their request by being more specific about the information they would like to receive or by limiting their request to a particular time period.
36. The Commissioner is therefore satisfied that the Council complied with its obligations under regulation 9 of the EIR to offer advice and assistance.

² <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

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

Ben Tomes
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