

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

Date: 4 October 2017

Public Authority: Sheffield City Council
Address: Town Hall
Pinstone Street
Sheffield
S1 2HH

Decision (including any steps ordered)

1. The complainant requested information from Sheffield City Council (the Council) relating to the location of trees that had been selected by a Council contractor for the implementation of flexible paving. The Council denied holding any relevant information. The Commissioner investigated the complainant's appeal and found that the information was held on behalf of the Council by one of its contractors.
2. The Council confirmed that its revised response was that the request was manifestly unreasonable as per regulation 12(4)(b) of the EIR, and that the balance of the public interest favoured maintaining the exception. The complainant confirmed he wished to appeal against this refusal of his request.
3. The Commissioner's decision is that the Council incorrectly refused the request as manifestly unreasonable.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the requested information.
5. 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.

Background to case

6. The Council has outsourced the maintenance of all of its roads, pavements, street lights and trees to Amey Hallam Highways Ltd (Amey). After Amey won the contract it proposed to remove a sizeable number of trees. There is local opposition to this and a number of individuals that are interested in learning more about any plans to remove local trees.¹

Request and response

7. On 4 January 2016, the complainant wrote to the Council and requested information in the following terms:

"I wish to register a FOI request. On Monday, December 28th, 2015, in the Sheffield Star, Councillor Terry Fox was stated as saying "solutions put forward by campaigners were already used including flexi paving which has on 143 occasions retained trees."

I would be grateful if you would let me know the location of these 143 occasions, the date these were used, the actual product that was used on each occasion and the contractors that carried out the work."

8. The Council responded on 18 January 2016 and denied holding any relevant information. The Council's response stated:

"The only direct quote from Cllr Fox used by the Sheffield Star was that solutions being put forward by campaigners were "already used". We have no information relating to flexi-paving being used to retain trees on 143 occasions"

9. Following this the complainant requested an internal review (neither party supplied the Commissioner with the date of this correspondence). In this he submitted two further requests (Commissioner's emphasis):

*"Firstly, I would like to know **the locations of the 143 occasions referred to by Councillor Fox where flexible paving has been or will be used** (as stated in the response to [Person A]) and which of these is to retain existing, mature highway trees.*

¹ See <http://www.savesheffieldtrees.org.uk> & <https://www.economist.com/news/britain/21726090-rearguard-battle-protect-old-trees-excessively-zealous-infrastructure-company-tree>

Secondly, I would like to know the same details for the 142 occasions in 2015 referred to by David Caulfield [then acting as Council Director of Regeneration and Development Services]. Assuming the work has indeed been carried out, someone surely will have some idea of where these are."

10. The Council issued its internal review on 29 June 2016. It responded as follows:
 - Request of 4 January 2016 – upheld its original response and denied holding any information.
 - Request for an internal review
 - First request – denied holding relevant information.
 - Second request – stated that the figure of 142 was incorrect, and that the figure was 143 as per the other requests.
11. The Council's response also confirmed that flexible paving had "been prescribed" for 143 trees but that this work had not taken place. It stated that its initial response was still correct as the request asked for completed work, and not that which had been selected as a potential solution.

Scope of the case

12. The complainant contacted the Commissioner on 11 July 2016 to complain about the way his request for information had been handled. The Commissioner carried out her initial investigation on whether the Council held information for the complainant's request of 4 January 2016 and the first request of his internal review.
13. During the course of this investigation, it became evident that the Council did hold information, by virtue of it being held on its behalf by its contractor Amey as per regulation 3(2)(b) of the EIR. Amey has a contract with the Council to carry out maintenance work for roads, street lights, and roadside trees. Whilst this maintenance work has been outsourced to Amey it remains the Council's responsibility, and therefore for the purposes of the EIR information about the location of the 143 trees is held by the Council.
14. However, the Council also strongly indicated that should the Commissioner find the information is held by Amey on its behalf, its revised response would be to refuse the request under regulation 12(4)(b) of the EIR as manifestly unreasonable. The Commissioner

asked both parties whether they would be willing to accept that the information is held by Amey on the Council's behalf, and instead change the scope of the case to be whether the complainant's request of 4 January 2016 and the first request of his internal review could be refused as manifestly unreasonable.

15. Both parties agreed to this. Therefore, the scope of the Commissioner's case is whether the complainant's request of 4 January 2016 and the first request of his internal review are manifestly unreasonable as per regulation 12(4)(b) of the EIR and whether the balance of the public interest favours maintaining the exception.

Reasons for decision

Is the information environmental?

16. Environmental information is defined at regulation 2(1) of the EIR:

"2.—(1) In these Regulations –

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely 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;

...

(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;"

17. The complainant requested the location of trees which had been identified by Amey as suitable for flexi-paving. The Commissioner sees this as a request for information about a programme likely to affect an environmental element. The Commissioner considers that the request asks for environmental information as per regulation 2(1)(c) and so the EIR is the correct statutory instrument to apply to the request.

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

18. Regulation 12(4)(b) states:

"(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(b) the request for information is manifestly unreasonable;"

19. Regulation 12(4)(b) of the EIR is designed to protect public authorities from exposure to a disproportionate burden or an unjustified level of distress, disruption or irritation, in handling information requests. In effect, it works in the similar regards to two exemptions within the Freedom of Information Act 2000: section 12, where the cost of complying with a request exceeds the appropriate limit; and section 14, where a request is vexatious.

20. This view was confirmed in the in the Upper Tribunal case of *Craven v The Information Commissioner and the Department of Energy and Climate Change*:

"Taking the position under the EIR first, it must be right that a public authority is entitled to refuse a single extremely burdensome request under regulation 12(4)(b) as "manifestly unreasonable", purely on the basis that the cost of compliance would be too great (assuming, of course, it is also satisfied that the public interest test favours maintaining the exception). The absence of any provision in the EIR equivalent to section 12 of FOIA makes such a conclusion inescapable"².

21. The Council confirmed that it was relying on the exception in relation to the cost of complying with the request, similar to a refusal under section 12(1) of the Freedom of Information Act 2000. For refusals under section 12(1) of the Freedom of Information Act 2000 there is an established 'appropriate limit' which sets an upper limit on how much time a public authority can spend complying with a request. This estimate must be tied to four specific activities. No such limit exists under the EIR, and the estimate does not need to be tied specifically to the four activities. Instead, the Council is permitted to suggest any activities it considers relevant. The task for the Commissioner is to determine not only whether the request is unreasonable, but manifestly so.

² [Craven v The Information Commissioner and the Department of Energy and Climate Change \[2012\] UKUT442 \(AAC\)](#) see paragraph 25

22. Regulation 12(2) of the EIR states that all exceptions within regulation 12(4) of the EIR are subject to a public interest test. Should the Commissioner find that the request is manifestly unreasonable she will go on to consider the balance of the public interest in maintaining this exception.

Council's estimate

23. Whilst the Council is not required to tie its estimate to the four activities that are permitted under section 12 of the Freedom of Information Act 2000, it chose to do so for structure. The Commissioner will present the estimate in this format.
24. Determining whether information is held – the Council considered this to be negligible. Amey had already determined that there were 143 trees from its inspectors' notes, so the Council is aware that the information will be held in its records. Where the request differed from the information provided to Cllr Fox is that he only knew the total number of trees that had been identified; the request required the location for each of those trees.
25. Locating and retrieving the information – the Council considered that these two activities made up the bulk of the time required to comply with the request. It explained that the information was held in the form of notebooks from inspectors working for Amey, and that there was no central record containing the requested information.
26. The Council stated that it would need time to review the initial inspection record for the 143 trees and check that at the time of the request the consideration for the use of flexi-paving was still pending or had been used.
27. The Council explained further that there were approximately 32 members of staff involved in making the inspection reports, and that the notebooks containing the reports for the 143 trees would not be held in a structured manner. It would not know for certain which employees identified the specific trees, and there was no way to know how many trees were identified by each employee. A thorough search would have to conduct a wide search of the records that were held at the time of the request.
28. The Council provided the Commissioner with evidence on the amount of records it would need to search through in order to retrieve the relevant information. Since 2012, Amey had completed around 72,000 sets of tree survey reports and site notes. The Commissioner did query whether all of the 72,000 records would be relevant; the Council replied that they were, although due to the passage of time was unable to provide a more exact figure.

29. The Council also stated that as a good amount of the surveys and notes were completed in the elements there was some damage from exposure to rain and dirt etc. The Council concluded that this means two minutes would be required for each record.
30. Extracting the information – the Council stated that once the information had been retrieved it would require two minutes for the location from each relevant record to be compiled into a suitable reporting format.

Commissioner's view of estimate

31. The Commissioner acknowledges that the information is not stored in a central record, and that the nature of the work means that the records are unlikely to be stored in a way that aids retrieval of the requested information. This will inevitably make the task more difficult and require careful manual inspection. The Commissioner also accepts the Council's argument that some of the records will be in a state of disrepair due to their exposure to the elements.
32. However, the Commissioner is not convinced that it would take two minutes to check an individual record for the location of a tree. She cannot see how an individual who is familiar with the records would not be able to determine in a much shorter time period whether a report or site note relates to one of the 143 trees. In her view, anyone with such experience could work through four records in a minute to locate the relevant information.
33. Further, she is not convinced that it would take two minutes for someone to extract the address from a site report and type or write it into a format that can be provided to the complainant. Given that the addresses will all be in Sheffield it is conceivable that the first line of the address and post code would be sufficient to show the complainant where the tree is located. The Commissioner would expect an office worker to be able to do at least five of these in a minute. Using these figures the Commissioner's estimate comes to a total of 300 hours of work as opposed to the Council's estimate of 2,404.
34. The Commissioner considers it highly significant in this instance that Councillor Fox had already made a statement confirming that 143 trees had been selected as potential locations for flexi-paving. This means that at some point before the statement was made Amey had carried out the work to determine the 143 tree total. The Council confirmed as much in its submissions to the Commissioner by stating:

"Amey originally established the 143 number by manually reviewing and collating information held on employee work books and individual records from tree surveys".

35. The Commissioner enquired how long this process took, to which the Council denied having any knowledge. The Commissioner asked the Council how it knew that the 72,000 records it cited would all be relevant, and the Council stated that it believed this figure was correct but could not explain how it knew this and that the total figure was changing all the time. The Commissioner does not consider this explanation to be sufficient to justify needing to search through such a high volume of information.
36. The complainant's request asks for the locations of the 143 trees mentioned in Councillor Fox's statement where flexi-paving had been selected as a potential solution. This means not only identifying the trees selected but also extracting the location of the trees. This does require more work than was carried out previously by Amey, but for reasons explained earlier the Commissioner considers this could be done at a quick rate once the right form had been identified. The Commissioner acknowledges the practicalities of Amey having to work with an ever growing list of reports, but given that the end date of the relevant information is the date of Councillor Fox's statement it should be straightforward to establish the date of later forms and disregard them.
37. The Commissioner's view is that whilst the task might present a substantial amount of work for Amey on behalf of the Council, it is not an unreasonable amount, and certainly not manifestly so. The Commissioner remains unconvinced by some of the Council's arguments regarding the amount of work required, and she notes that the Council was unable to provide justification for why such a large number of records was necessary.
38. The Commissioner's decision is that the request is not manifestly unreasonable as per regulation 12(4)(b) of the EIR. The Council must disclose the requested information to the complainant.

Other matters

39. It is evident that there is a concerted effort in Sheffield to preserve trees, such as the 143 identified within the request. There are a number of environmental reasons for the preservation of trees and it is clear that there is an organised and well-supported campaign to support those reasons. This is clear from the national news coverage surrounding the campaign, as well as the High Court action.
40. The section 46 code of practice provides guidance on effective record management policies and why this is of benefit for both public

authorities and requesters alike. The following extract comes from paragraph 9.3 and deals with what record systems should be held:

"9.3 *Records systems should be designed to meet the authority's operational needs and using them should be an integral part of business operations and processes. Records systems should have the following characteristics:*

a) *They should be easy to understand and use so as to reduce the effort required of those who create and use the records within them. Ease of use is an important consideration when developing or selecting a system;*

b) *They should enable quick and easy retrieval of information. With digital systems this should include the capacity to search for information requested under the Act;*

...

h) *They should enable an audit trail to be produced of occasions on which selected records have been seen, used, amended and deleted.¹³*

41. The Commissioner considers that this guidance would be appropriate in this instance. The Council (via Amey) holds information about its maintenance programme in a weather-stained manual form with little recognisable capability for extracting details. This shows the records are not easy to use, do not allow for quick retrieval, and – from what the Council said about ongoing changes to the records – do not allow for it go back and determine what information would have been held.

42. The Commissioner recommends that the Council looks at creating a central record for the work that is due to be carried out for its maintenance programme. It is remarkable that the Council would need 2,404 hours in order to comply with this request and verify the location of the 143 trees, all of which to confirm the accuracy of a statement made by a local councillor. From the Council's submissions it is clear that its records do not afford much transparency for the work that is being carried out, and this does not serve the campaign groups in their

attempts to gain information about the work of the maintenance programme.

43. Lastly, in the Council's last submissions it stated that it had a concern that the 143 trees were still a focus to the request, and that the passage of time from when the request was made diminished the importance of the information. The Commissioner certainly understands the point that events are moving onwards, and that her investigation has taken some time to reach a final decision. However, she would also note that the delay could have been greatly reduced had the Council not failed to confirm that the information was held on its behalf. Added to this is the fact that the Commissioner needed to interrogate the idea that Amey had complied with a request which took 2,404 hours of its staff's time at Councillor Fox's behest. It should be obvious why such a statement raises questions and why the Commissioner had to investigate this further; the delay that resulted from this is undesirable but necessary.

Right of appeal

44. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

45. 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.
46. 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

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