Manifestly unreasonable requests - regulation 12(4)(b)

Environmental Information Regulations

Contents

Introduction

1. The Environmental Information Regulations 2004 (EIR) give rights of public access to information held by public authorities.

2. An overview of the main provisions of the EIR can be found in The Guide to the Environmental Information Regulations.

3. This is part of a series of guidance, which goes into more detail than the Guide, to help public authorities to fully understand their obligations and promote good practice.

4. This guidance explains to public authorities how to deal with requests for information which are manifestly unreasonable.

Overview

- The EIR allow public authorities to refuse a request for information which is manifestly unreasonable. The inclusion of the word "manifestly" means that there must be an obvious or clear quality to the unreasonableness.
- This exception can be used:
  - when the request is vexatious; or
  - when the cost of compliance with the request would be too great.
- In practice there is no material difference between a request that is vexatious under section 14(1) of FOIA and a request that is manifestly unreasonable on vexatious grounds under the EIR.
- There may, however, be material differences between a request that can be refused under section 12 of FOIA (the costs limit) and a request that can be refused as manifestly unreasonable under the EIR on the grounds of costs or diversion of resources.
- This exception is subject to a public interest test. In practice however, many of the issues relevant to the public interest test will have already been considered when deciding if the exception is engaged.

What the EIR say

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

> 12(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

General principles of the exception

6. The EIR allow public authorities to refuse a request for information that is manifestly unreasonable. The inclusion of the word "manifestly" means that there must be an obvious or clear quality to the unreasonableness.

7. The purpose of the exception is to protect public authorities from exposure to a disproportionate burden or an unjustified level of distress, disruption or irritation, in handling information requests.

8. The exception can be used:

- when the request is vexatious; or
- when the cost of compliance with the request is too great.

9. In theory there could be other circumstances in which a request might be manifestly unreasonable and public authorities are free to make arguments on other grounds they consider to be relevant. However, in reality, we would expect the bullet points above to cover the vast majority of manifestly unreasonable requests.

10. Public authorities should also note that we consider this exception to be concerned with the nature of the request and the impact of dealing with it and not any adverse effect that might arise from disclosure of the content of the information requested. If a public authority is concerned about the content of the requested information being disclosed then it should consider whether another exception applies. Guidance on the all the EIR exceptions can be found via our guidance index.

11. In practice there is no material difference between a request that is vexatious under section 14(1) of FOIA and a request that is manifestly unreasonable on vexatious grounds under the EIR.

12. There may, however, be material differences between a request that can be refused under section 12 of FOIA (the appropriate costs limit) and a request that can be refused as manifestly unreasonable under the EIR on the grounds of costs or diversion of resources.

Manifestly unreasonable on the grounds that the request is vexatious

13. Detailed guidance on when a request can be considered to be vexatious under section 14(1) of FOIA can be found via our guidance index. Public authorities should use this guidance when considering whether a request for environmental information is manifestly unreasonable on the grounds that it is vexatious.

14. Although there are some differences between the structure of the relevant provisions in FOIA and the EIR, these should make no difference in practice.

> **Example**
>
> This issue was considered in the Upper Tribunal case of *Craven v The Information Commissioner and the Department of Energy and Climate Change [2012] UKUT442 (AAC)*.
>
> Judge Wikeley's conclusion was as follows:
>
> *"I do not believe that the existence of the of the explicit public interest test in the EIR and the statutory presumption of a restrictive interpretation of regulation 12(4)(b) should mean that, even at the margins, it is in some way "easier" to get a request accepted under the EIR than under FOIA."* (paragraph 22)

15. Public authorities will still need to go through the process of applying a public interest test under the EIR (which is not

required under FOIA). For more guidance on how this works please refer to the section below on the public interest test.

16. We would not expect a public authority that refuses a request as manifestly unreasonable on the grounds that it is vexatious to provide the requester with advice and assistance, although it is free to do so if it wishes.

Manifestly unreasonable on the grounds of costs or diversion of resources

General approach

17. Under the EIR, unlike under FOIA, there is no appropriate costs limit above which public authorities are not required to deal with requests for information. The main provision for dealing with burdensome requests under the EIR is regulation 7(1).

> 7(1) Where a request is made under regulation 5, the public authority may extend the period of 20 working days referred to in paragraph (2) to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so.

18. However, the exception at regulation 12(4)(b) of the EIR can apply if the cost or burden of dealing with a request is too great.

Example

This position was confirmed, again in the Upper Tribunal case of *Craven v The Information Commissioner and the Department of Energy and Climate Change [2012] UKUT442 (AAC).*

"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." (paragraph 25)

19. 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.

20. This will mean taking 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.

21. It should be noted that public authorities may be required to accept a greater burden in providing environmental information than other information.

Example

This was confirmed in a preliminary decision of the Information Tribunal in the case of *Department for Business Enterprise and Regulatory reform (DBERR) vs the Information Commissioner and Platform (EA/2008/0097).*

In this case the tribunal considered the relevance of regulation 7(1) and commented as follows (paragraph 39):

"We surmise from this that Parliament intended to treat environmental information differently and to require its disclosure in circumstances where information may not have to be disclosed under FOIA. This is evident also in the fact that the EIR contains an express presumption in favour of

disclosure, which FOIA does not. It may be that the public policy imperative underpinning the EIR is regarded as justifying a greater deployment of resources. We note that recital 9 of the Directive calls for disclosure of environmental information to be "to the widest extent possible". Whatever the reasons may be, the effect is that public authorities may be required to accept a greater burden in providing environmental information than other information."

Differences and similarities to FOIA

22. In assessing the level of costs that might be incurred in responding to a request, we suggest that public authorities use a rate of £25 per hour for any staff time involved. This is in line with the rate applicable under FOIA by virtue of The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. This does not mean that the FOIA fees regulations apply to requests that fall to be considered under the EIR. However, we take these regulations to give a clear indication of what Parliament considered to be a reasonable charge for staff time.

23. In assessing whether the cost, or the amount of staff time involved in responding to a request, is sufficient to render a request manifestly unreasonable the FOIA fees regulations may be a useful starting point. They are not, however, determinative in any way.

Example

In ICO decision notice FS50121519, the public authority, DBERR, had originally refused the request under section 12 of FOIA. When the Commissioner alerted the public authority to the fact that some of the information requested was environmental information, the public authority suggested that if this were the case, the request should still be refused under regulation 12(4)(b) as manifestly unreasonable.

The public authority suggested that, in effect, regulation 12(4)(b) was the equivalent of section 12 of FOIA and therefore, as responding to the request would have exceeded the appropriate limit detailed in the fees regulations, it could be refused under regulation 12(4)(b).

The Commissioner rejected this argument, clarifying that the fact that responding to a request for environmental information would exceed the appropriate limit if it were dealt with under FOIA, is not straightforward grounds for classing a request as manifestly unreasonable.

In this case, the public authority did not present satisfactory evidence for its calculations of cost estimates for complying with the request; this therefore gave the Commissioner good grounds to doubt the public authority's claim that the request was manifestly unreasonable.

In addition to this, the Commissioner considered how proportionate the burden created by the request would be, and whether complying with the request would involve an unreasonable diversion of resources from the provision of public services.

As DBERR was a large central government department, the Commissioner made the judgement that dealing with this request would not interrupt its normal activities and responsibilities in any significant way.

The Commissioner was satisfied that in these circumstances the request was not manifestly unreasonable, despite the fact that the costs of responding would have exceeded the appropriate limit under FOIA fees regulations.

24. As the FOIA fees regulations do not apply under the EIR, there is no specific provision for the aggregation of substantially similar requests for environmental information. Our position, however, is that there may be occasions where it permissible to consider a number of EIR requests together when deciding if they are manifestly unreasonable on the grounds of cost. This is in line with the approach to requests considered manifestly unreasonable on the grounds that they are vexatious, where the context in which they are made can be taken into account.

Example

In ICO decision notice FS50464000 several requests were made on the same day by the same requester. The requests were for information about meetings and correspondence with

David Cameron and various third parties on matters relating to climate change.

The Commissioner carefully considered the wording of each individual request and found that in the circumstances of this case they were similar enough to be considered together for the purposes of applying regulation 12(4)(b). This was on the basis that they all covered the same broad information; the combination of David Cameron and climate change, and that they had all been made by the same requester, at the same time.

25. Public authorities need to take care, however, not to apply this principle indiscriminately or too widely. In the above case it was the combination of all those factors that informed the Commissioner's decision and he was clear that this shouldn't be taken to mean that all future requests on climate change and meetings with David Cameron could necessarily be considered together. We would encourage public authorities to be sensible about this issue and to only use this approach when dealing with multiple requests would cause a real problem. Remember, the test is "manifestly unreasonable" and this means that there must be an obvious or clear quality to the unreasonableness.

26. Under FOIA the cost of considering whether information is exempt cannot be taken into account under section 12 (the appropriate costs limit) but can be taken into account under section 14(1) (vexatious requests). This is because section 12 limits the activities that can be taken into account when deciding if the appropriate limit would be exceeded. This is not an issue under the EIR. The costs of considering if information is exempt can be taken into account as relevant arguments under regulation 12(4)(b).

Advice and assistance

27. When refusing a request for environmental information under regulation 12(4)(b) on the grounds of cost, public authorities should provide the requester with appropriate advice and assistance.

28. This will usually involve setting out the costs involved in answering the request and explaining how it might be refined to make it more manageable and therefore, not manifestly unreasonable. The aim of advice and assistance should be to

help the requester to submit a new, more manageable, request.

The public interest test

29. Many of the issues relevant to the public interest test will have already been considered when deciding if this exception is engaged. This is because engaging the exception includes some consideration of the proportionality and value of the request.

30. Nevertheless, public authorities must go on to apply the public interest test set out in regulation 12(1)(b). A public authority can only withhold information if the public interest in maintaining the exception outweighs the public interest in disclosing the information.

31. Regulation 12(2) specifically states that a public authority shall apply a presumption in favour of disclosure.

32. In practice public authorities will usually be able to just 'carry through' the relevant considerations from engaging the exception into the public interest test.

Public interest in maintaining the exception

33. The public interest in maintaining this exception lies in protecting public authorities from exposure to disproportionate burden or to an unjustified level of distress, disruption or irritation in handling information requests.

34. Dealing with manifestly unreasonable requests can place a strain on resources and get in the way of public authorities delivering mainstream services or answering other requests.

Public interest in disclosure

35. 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 in environmental decision making, all of which ultimately contribute to a better environment.

36. The weight of this interest will vary from case to case, depending on the profile and importance of the issue and the extent to which the content of the information will actually

inform public debate. As the information will often not have been collated for 12(4)(b) cases, this may have to be determined from considering the nature of the request, the type of information likely to be covered or from collating a small representative sample.

37. There may of course be other factors in favour of disclosure, depending on the particular circumstances of the case. For example, these could include accountability for spending public money, the number of people affected by a proposal or any reasonable suspicion of wrongdoing.

Requests for mixed (both FOI and EIR) information

38. Sometimes requests are made which cover both environmental information and other, non-environmental, information. In most circumstances we would expect a public authority to collate all the information and then, for any information it is considering refusing, to split it into information to be considered under FOIA and information to be considered under the EIR.

39. However, part of the purpose of refusing requests for environmental information under regulation 12(4)(b) of the EIR (and under sections 12 and 14(1) of FOIA) is to avoid incurring the burden of collating the information. For this reason practical problems would arise if we insisted on the approach set out above for such cases.

Example

This was confirmed in the context of vexatious requests in the Upper Tribunal decision in *Craven v The Information Commissioner and the Department of Energy and Climate Change [2012] UKUT442 (AAC).*

"*Furthermore, as Mr Cornwell argued, the whole purpose of both section 14(1) and regulation 12(4)(b) was to protect public authorities from exposure to disproportionate burden in handling information requests. That goal would be defeated if, as part of the very process of applying the relevant criteria the public authority had to identify which was environmental information and which was non-environmental information. I*

agree that this would be both an empty duty and a counter-productive enterprise. It follows in my view, that public authorities, the Commissioner and tribunals are perfectly entitled, where appropriate to address such issues on an "either /or basis."

40. If a public authority wishes to refuse a "mixed" request as vexatious under FOIA and manifestly unreasonable under the EIR, then it can do so without first collating the information and splitting it into environmental and non-environmental information. It should simply issue a refusal notice that:

    - states that to the extent that the request is for non-environmental information it is vexatious under section 14(1) of FOIA;
    - states that to the extent that the request is for environmental information it is manifestly unreasonable under regulation 12(4)(b) of the EIR; and
    - provides an explanation of the public interest carried out under regulation 12(4)(b).

41. If a public authority wishes to refuse a "mixed" request on the ground of cost then, because there are material differences between section 12 of FOIA and regulation 12(4)(b) of the EIR the situation is a little more complex. For further information please refer to our separate guidance entitled "Calculating costs where a request spans different access regimes", which is available via our guidance index.

Neither confirm nor deny

42. The EIR provide that a public authority can only refuse to confirm or deny whether it holds information if to do so would adversely affect the interests in regulation 12(5)(a) (international relations, defence, national security of public safety) and would not be in the public interest. The EIR differ in this respect from FOIA, where most exemptions include NCND provisions.

43. This means that if a public authority refuses a request under regulation 12(4)(b) it should still let the requester know whether or not it holds information falling within the scope of the request. We do, however, recognise that there will be a

small proportion of cases where this simply isn't practicable. If the public authority isn't sure whether information is held, and the costs of establishing this are in themselves clearly and obviously unreasonable, then we would not expect the public authority to put itself to this expense. To do so would be counter to the purpose of the exception.

What the ICO will expect from an authority

44. If a complaint is made to the ICO, then we will expect public authorities to be able to support the application of regulation 12(4)(b) with evidence. This could include detailed costs estimates, sample correspondence, correspondence logs or other documentary evidence.

45. We will not expect a public authority to collate all the requested information before refusing a request under regulation 12(4)(b); to do so would defeat the object of this exception being claimed in the first place. We will, however, expect the public authority to be able to support their application of the exception and the public interest test by reference to the subject matter and likely content of the information. On some occasions and particularly in borderline cases, we may ask a public authority to provide a representative sample of information, so that we can properly assess the public interest in its disclosure.

Other considerations

46. Our webpages for the public include some advice for requesters on how to word their requests to get the best result. They are aimed at the general public and provide guidance on how to use EIR rights responsibility. An authority which is concerned that an individual's requests may become manifestly unreasonable could try referring them to these webpages, and advising them that future requests are less likely to be refused if framed in accordance with these guidelines.

47. This guidance relates only to the EIR. If the information is not environmental information, the EIR are not relevant and public authorities will instead need to consider exemptions under FOIA. The most relevant FOIA exemptions are likely to be section 14 (1) (vexatious requests) and section 12 (the appropriate costs limit).

48. Additional guidance is available on our guidance pages if you need further information on the public interest test, other EIR exceptions or FOIA exemptions.

More information

49. This guidance has been developed drawing on ICO experience. Because of this, it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.

50. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.

51. If you need any more information about this or any other aspect of freedom of information, please contact us: see our website www.ico.org.uk.