

Your ref:  
My ref: SH/sa/ME39328



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Legal Services**  
Shire Hall, Warwick, CV34 4RL  
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Dr Thornton

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17 November 2017

**Samantha Amphlett**  
Solicitor

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Dear Dr Thornton

**ENVIRONMENTAL INFORMATION REGULATIONS 2004 ("EIR")  
INTERNAL REVIEW REFERENCE 2620230**

Purpose of Report

I have been asked to undertake an internal review in respect of the Council's response to a request for information you made dated 7 July 2017.

In undertaking this review I have considered the EIR, the *Manifestly unreasonable requests regulation 12(4)(b)* guidance, the *Charging for environmental information (regulation 8)* and *Internal reviews under EIR* guidance issued by the ICO, communications between you and the Council and the ICO's decision ref. FER0637124.

I have also made enquiries to ascertain how your request was handled and carried out a sampling exercise, to determine whether or not the Council were correct in applying the exception to your request.

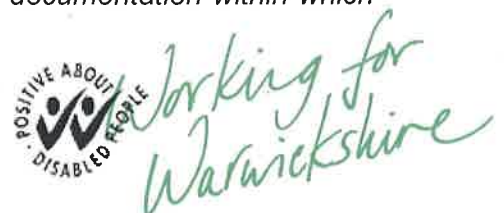
Information Requested

On 7 July 2017 you made a request under the EIR regime for the following:

*It was revealed in February 2016 that it is intended that the A46 Stoneleigh junction will be enlarged to create an interchange roundabout with two bridges over the A46. It is intended that a new major road will continue from there to Warwick University and from there continue to join the A452 Balsall Common road passing along the route of HS2 to form a road link to the NEC and Birmingham Airport. Clarification of the detailed route options under consideration has not been provided.*

*Summary information that records no more than that previously placed in the public domain about the road proposal has recently been placed on the Warwickshire County Council website at their URL: <http://www.warwickshire.gov.uk/a46linkroad> Please provide all information that you hold relating to such a potential new road development. This would include any reports, plans, cost-benefit analysis and possible route option information. This will include the documentation within which*

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*the claimed merits of such a road have been 'identified', and any evidence claimed to substantiate such merits. The information may be held independently by the authority or will be included in communications to or from other public agencies.*

The Council acknowledged your request that same day, confirming that they would aim to respond to it by 4 August 2017. On 27 July 2017 the Council contacted you again to request clarification of your request. The Council noted that it had received a similar request from you in the past (reference 1389328), which at that time was with the ICO for consideration.

The Council's understanding was that your request was for the same information you had requested previously (ref. 1389328), as follows:

*Please provide all information that you hold relating to such a potential new road development. This would include any reports, plans, cost-benefit analysis and possible route option information. This will include the documentation within which the claimed merits of such a road have been "identified", and any evidence claimed to substantiate such merits. The information may be held independently by the authority or will be included in communications to or from other public agencies.*

Your request, which forms the subject of this internal review, sought this information for two sets of dates:

1. The dates of your previous request (reference 1389328) ("Request 1"); and
2. 28 April 2016 to 7 July 2017 ("Request 2").

The Council refused to provide the information you sought noting that Request 2 remained unclear and the exemption under regulation 12(4)(b) applied. On 29 August you emailed the Council to confirm that whilst they appeared to have documented your request correctly, you felt they were making compliance with your request more onerous than necessary. In that email you also listed 4 points (a-d) that you wanted clarification on and suggested that the Council provide you with '*clarification of the various documents that you hold that fall within the terms of [your] request along with ... clarification of the workload involved in publication of each component*'. There was a slight delay between this letter and you confirming on 24 September 2017 that you required an internal review. In the interim communications passed between you and the Council. In these emails the Council offered you an opportunity to refine your request, in order to try and address your concerns before proceeding to an internal review.

Your email of 24 September 2017 addressed to Emily Wells at the Council makes reference to information released by Warwick District Council, in response to an EIR request you submitted to them in tandem with your request to the Council. The release of this information by the District Council reduces the public interest argument in favour of the Council releasing the information, as it is already in the public domain. This is the benefit of the District Council having a smaller sample of documents to consider and therefore being able to provide the information. In any event, in accordance with the ICO's guidance, I have considered the circumstances that applied at the time that the Council responded to your request.

### **Request 1**

I do not intend to consider Request 1 as part of this internal review, as it has already been referred to and considered by the ICO (ref. FER0637124). However, I have read that ICO decision and taken it into account when considering how Request 2 was handled.

## Request 2

On 25 August 2017 the Council wrote to you to advise that the information you sought under Request 2 would not be made available, as it was exempt under regulation 12(4)(b) EIR.

### Manifestly unreasonable

In order for this exemption to apply the Council needed to show that your request for information was manifestly unreasonable. The term 'manifestly unreasonable' is not defined by the legislation. However the ICO offers helpful guidance, which confirms that in order to be manifestly unreasonable, there must be a clear and obvious unreasonable element to the request.

A request will be manifestly unreasonable where:

1. it is vexatious; or
2. it would result in the Council incurring unreasonable costs or an unreasonable diversion of resources.

The Council deemed that answering Request 2 would result in excessive costs, as officer time calculated at £25 per hour would exceed £450.00. The Council also found it would result in an unreasonable diversion of resources, as an officer in the Transport Planning Team would need to divert their attention from their day-to-day functions to review the information.

It is accepted that staff time charged at £25.00 an hour, taken from the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, relates to Freedom of Information Act 2000 ("FOIA") requests rather than EIR. However as the ICO confirmed in its decision on the related request, this does provide a '*clear indication of what Parliament considered to be a reasonable charge for staff time*'. Accordingly, I consider that the Council was reasonable in using the limit of £450 or 18 hours of officer time as a guide to what would amount to unreasonable costs and use of resources.

In addition to this useful calculation, the Council ought also to have considered the proportionality of the cost of releasing the information, against the value in it being made available. I consider this was picked up in the Council's application of the public interest test. The Council balanced the burden on office time to respond to Request 2 against the benefit of making the information available. This is considered in more detail under the heading 'Public interest'.

In the recent decision on Request 1, the ICO confirmed that, the appropriate limit not being determinative in EIR cases, meant the Commissioner must make her decision '*based on whether the cost of complying with the request is 'clearly' or 'obviously' disproportionate to the public interest in disclosure*'. It was reasonably concluded by the Council that the cost of compliance with Request 2 would be clearly and obviously disproportionate due to the significant amount of time that would be required to respond to it.

In its response to you, the Council stated that it had reviewed the information it held and estimated that it would take approximately 150 hours of officer time to comply with your request. This the Council considered to be far in excess of the guide appropriate limit of 18 hours. It was also well in excess of the 30 hours considered excessive in the decision of Trafford Borough Council (FER0659916), and was a sufficiently disproportionate time to be manifestly unreasonable.

Furthermore the ICO's guidance confirms that:

*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.*

It is for these purposes that the Council has applied the exception.

### **Sampling exercise**

I have undertaken a sampling exercise to determine whether the Council was correct to assert that responding to Request 2 would incur in the region of 150 hours of officer time. I have found that using the search term 'A46 Link Road' returns 3,000 emails that would need to be considered in response to Request 2.

The sampling exercise consisted of reviewing a random sample of 10 emails from the 3,000 returned from the search. The process of reviewing and redacting each of the 10 emails was then timed. The emails ranged from taking between 1 to 9 minutes to review and redact, providing an average time of 4 minutes and 12 seconds per email. The sample included emails of varying lengths, needing varying amounts of redaction; a couple of the emails included attachments but the rest did not. I am satisfied that the sample was a fair representation of the 3,000 emails returned by the search and accordingly I find 4 minutes 12 seconds a reasonable time estimate to deal with each email.

As well as the emails, I found that Request 2 would also require the review and possible redaction of 16 sets of meeting notes with associated reports and a presentation. In accordance with your request this is all of the information held '*independently by the authority or*' '*included in communications to or from other public agencies*'.

I am satisfied that responding to Request 2 would take an officer in excess of 210 hours to review and redact the information for release, before taking into account the further 16 sets of meeting notes and paperwork. This appears to me to be a reasonable estimate being based on a sound sample, which is '*sensible, realistic and supported by cogent evidence*' as set out in the Information Tribunal case of *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency* (EA/2006/0004, 30 October 2007) referred to in the recent ICO decision on Request 1.

Therefore I am satisfied that release of the information you seek under Request 2 would put a disproportionate burden on the Council's resources, such that the request can be considered manifestly unreasonable.

### **40 working days**

The ICO's decision (ref. FER0637124) noted that in responding to Request 1, the Council had not considered whether the request would have been manifestly unreasonable had the Council exercised its ability to respond within 40 working days rather than 20.

I note that the Council similarly did not consider whether an extension would make a difference in responding to Request 2. That said, given the volume of work required (at least 210 hours of officer time, equating to a cost of £5,250.00), I do not believe an extension to respond in 40 working days would have made a difference to the outcome. Given the volume of work required to respond to Request 2, I find that, on balance, the Council would still have viewed Request 2 as creating an unreasonable diversion on the Council's resources.

### **Public interest**

The Council could only withhold the information under Regulation 12(4)(b) if the public interest in withholding the information outweighed the public interest in releasing it. The starting point for the Council was to apply a presumption in favour of disclosure, which was recognised in the response issued to you. The Council set out the arguments in favour of disclosure that it had considered as follows:

- Disclosure of all of the information would promote transparency and accountability of the Council
- It would allow members of the public the ability to have a free exchange of views with the Council
- It would promote public participation in decision making
- Help inform public understanding and participation in a debate
- Enables more scrutiny of actions of public officials

However it also considered arguments in favour of maintaining the exemption and on balance found those arguments more persuasive. The Council considered that the exemption should be maintained on the following grounds:

- To fully comply with this request would be an excessive cost to the Council in terms of officer time spent dealing with the request
- It would have a severe impact on the capacity of the transport planning team, as the officer required to review the information would need to review all of the information which would impact on their day to day functions.

In addition, the Council explained that they reached this conclusion as:

*there is a stronger public interest in the Council being able to undertake its core functions without spending a disproportionate amount of resource on complying with a significantly burdensome request, and instead allow the Council to fulfil its obligations to the residents of Warwickshire.*

I am satisfied that the Council has considered the public interest test. The public interest in maintaining the exemption has been carefully weighed against the public interest in not maintaining it.

This also demonstrates that the Council did consider the proportionality of the costs of complying with Request 2 against the value of providing the information. The amount of officer time that would be engaged in reviewing the information is considered against the value in releasing information over and above that already available on the website dedicated to the A46 project. It is my view that the Council has reasonably concluded that the greater public interest is in maintaining the exemption. Given the extent of the officer time I have found to be required to comply with Request 2, I find this position entirely justified.

Furthermore, I note that in the decision letter of 25 August 2017, the Council confirmed that it would continue to provide as much information as possible on the website dedicated to the scheme. It was also confirmed that it is anticipated that further consultation on options for phase 2 of the project will be carried out in Spring 2018.

### **Advice and assistance**

The ICO's guidance does set out that authorities should, when considering the regulation 12(4)(b) exemption, provide appropriate advice and assistance to enable requestors to refine a request in such a way as to make it more manageable.

I note that, in accordance with the guidance, the Council did set out the likely costs of complying with your request, which it calculated in the sum of £3,750.00. The Council also contacted you on 27 July 2017 and you were given an opportunity to clarify the requests you had made to the Council before they attempted to respond. This enabled you to clarify the documents you sought and the dates for which they were required. This reduced the number of relevant documents to those generated between 28 April 2016 and 7 July 2017. That was the extent of the request that the Council considered as Request 2 however the

volume of documents relating to this project is such that this refinement was not sufficient to prevent Request 2 from being manifestly unreasonable.

### Conclusion

Following a detailed review, I conclude that the Council has acted in accordance with legislation and ICO guidance and correctly applied the exemption under section 12(4)(b). The public interest has been carefully considered and I uphold the Council's decision to withhold the information sought by Request 2.

It may, with the information provided in this report, be possible for you to refine your request such that the exception under regulation 12(4)(b) would not apply. A refined request would need to be submitted to the Council as a new request. If you wish to refine your request please submit it in the usual way and the Council will be happy to consider it.

I hope that this internal review fully addresses your concerns and the information provided assists you in considering how your request might be refined. If you are not satisfied with the outcome of the review you may appeal to the Information Commissioner's Office at the following address:

FOI Compliance Team (complaints)  
Wycliffe House  
Wilmslow  
Cheshire  
SK9 5AF

Tel: 0303 123 1113

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. Amphlett', with a long horizontal flourish extending to the right.

Samantha Amphlett