

Decision Notice 104/2021

Spaces for People project

Applicant: The Applicant

Public authority: Aberdeen City Council

Case Ref: 202001173



Scottish Information
Commissioner

Summary

The Council was asked for information on the Spaces for People project.

The Council considered that responding to the request would be manifestly unreasonable.

The Applicant disagreed with the Council's decision that providing the information would be too costly and time-consuming, and that it was too voluminous. She believed it should be relatively easy for the Council to provide the information for the short timescale stated.

The Commissioner investigated and found that the Council had complied with the EIRs in responding to the request (which he accepted was manifestly unreasonable).

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (c) and (f) of definition of "environmental information") (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 9(1) and (3) (Duty to provide advice and assistance); 10(1), (2) and (4)(b) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 11 August 2020, the Applicant made a request for information to Aberdeen City Council (the Council). The information requested was:
... all correspondence (to include but not be limited to: internal and external, email, memo, letter, file notes, reports, meeting minutes, phone call records), invoices, bills, statements, that mention Sustrans by name or implication and/or "Spaces for People" from 1 March 2020 through today's date. Parties mentioned in such documents may include one, some or all of these: Aberdeen, Aberdeen City Council and its officers, staff, Scottish government personnel, Sustrans and its personnel; any outside contractor who supplied materials used in Spaces for People to include whomever is building the wooden benches called "parklets". This should be very clear and require no further clarification from me, but do ask you are somehow unsure of the request. It is my goal to seek any and all documents, records, financials in this short time period that involve Sustrans and the Spaces for People initiative - and explain how the £1.76 million pounds Sustrans and ACC have to spend is being used. I expect this will also include the means by which ACC applied for this fund i.e. its application, subsequent meeting information, etc.
2. The Council responded that same date, expressing concerns that the scope of the request was too broad and, in terms of regulation 10(4)(b) of the EIRs, it would likely be manifestly unreasonable for the Council to respond to it. The Council believed it would likely cost in excess of £600 to provide a response, and asked the Applicant to consider narrowing the scope of the request by reducing the timescale or the parties involved.

3. On 17 August 2020, the Applicant wrote to the Council, questioning why it would be unable to electronically search for, locate and provide the information requested, held on its electronic storage systems, covering a period of roughly six months. She argued that correct record storage would allow easy identification of those involved in the project, and that it would be easy to search electronically for correspondence held for the short timescale stated. She did not believe it would cost nearly £600 to provide a response, and asked the Council to provide the calculations that led to this conclusion.
4. The Council responded that same date, informing her that it believed there was potential for refusing the request under regulation 10(4)(b), at the time it considered the scope of the request initially, but it was unable to confirm this at this point. The Council stated that, should it conclude the exception applied, it would provide reasoning.
5. On 24 August 2020, the Applicant wrote to the Council, commenting that she would share any decision by the Council to rely on “manifestly unreasonable” criteria with the media and the Commissioner. In her view, the Council could electronically search for, identify and provide the information relating to the project, requiring little time or cost.
6. The Council wrote to the Applicant on 8 September 2020. It apologised for not responding to her request within the statutory timescale and stated it hoped to respond within the next five working days. The Council informed the Applicant of her right to request a review of its failure to respond on time.
7. On 11 September 2020, the Council issued its response to the Applicant. It applied section 39(2) (Health, safety and the environment) of FOISA and responded under the EIRs, as it considered the information to be environmental information.
8. The Council provided some financial information, along with a link to its website where information on the Spaces for People project was published. It informed the Applicant it was unable to provide all the information requested as it considered the request to be manifestly unreasonable, in terms of regulation 10(4)(b) of the EIRs.
9. The Council provided details of the number of files and items of correspondence involved, spread across multiple officers’ email and teams accounts, along with the time and costs required to extract and prepare the information for disclosure. In the Council’s view, collating and providing all the information captured by the request was not only costly, but would seriously impede officers’ other duties (and require those duties to be backfilled), which would place a considerable burden on time and resources.
10. The Council offered to discuss with the Applicant ways in which to refine the request to reduce the costs involved.
11. On 11 September 2020, the Applicant wrote to the Council, requesting a review of its decision as she disagreed that it was too expensive and time-consuming to provide the information requested. She argued that disclosure of this information was in the public interest as both public money and public health were at stake. Noting that the project had been in existence for barely six months, she asked the Council to explain how it was able to readily scan and store correspondence but was incapable of responding to her request for six months’ worth of correspondence on the project. She also asked the Council to explain why it was necessary to collate the documents involved, offering to do so herself. The Applicant acknowledged the Council’s response was late, but confirmed she was not asking it to review its failure to respond on time.

12. The Council notified the Applicant of the outcome of its review on 30 September 2020, fully upholding its original decision. It maintained that responding to the request, as submitted, would involve a considerable amount of electronic and paper searches and checks across the organisation, due to the number of people involved with the project. The Council again offered to discuss with the Applicant ways in which to refine the request to reduce the costs involved.
13. On 6 October 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated she was dissatisfied with the outcome of the Council's review because she did not accept the Council's position on the cost of compliance or the volume of information.
14. On 15 December 2020, the Council wrote to the Applicant, providing her with links to Committee papers published on its website which, it believed, set out more detail in relation to her request for information on how the funding for the Spaces for People project was spent.

Investigation

15. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
16. On 9 October 2020, the Council was notified in writing that the Applicant had made a valid application and the case was subsequently allocated to an investigating officer.
17. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions, with particular reference to its claim that responding to the request would be manifestly unreasonable.
18. The Applicant was also invited to comment on why she believed it was in the public interest for the information to be disclosed.
19. Both parties provided submissions to the Commissioner.

Commissioner's analysis and findings

20. In coming to a decision on this matter, the Commissioner has considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Handling in terms of the EIRs

21. The Council considered the Applicant's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
22. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.

23. The Council submitted that the information requested by the Applicant related to the Spaces for People project, which was a government-funded programme managed by Sustrans Scotland to enable statutory bodies to implement measures focussed on protecting public health, support physical distancing and prevent a second wave of the COVID-19 outbreak. In the Council's view, the information was environmental as it affected air and landscape, by making Aberdeen City a safer place to walk and cycle.
24. The Commissioner accepts this as a reasonable description and, in the circumstances, is satisfied that the information requested by the Applicant falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a), (c) and (f) of that definition.

Section 39(2) of FOISA – Environmental information

25. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Council was entitled to apply this exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
26. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
27. The Commissioner therefore concludes that the Council was correct to apply section 39(2) of FOISA, and consider the Applicant's information request under the EIRs.

Regulation 5(1) of the EIRs - Duty to make environmental information available

28. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to information that is held by the authority when it receives a request.
29. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
30. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

Regulation 10(4)(b) of the EIRs – Manifestly unreasonable

31. Regulation 10(4)(b) provides that a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable. In considering whether the exception applies, the authority must interpret it in a restrictive way and apply a presumption in favour of disclosure. Even if it finds that the request is manifestly unreasonable, it is still required to make the information available

unless, in all the circumstances, the public interest in doing so is outweighed by that in maintaining the exception.

32. The Commissioner's general approach is that the following factors are relevant when considering whether a request is manifestly unreasonable. These are that the request:
- (i) would impose a significant burden on the public body;
 - (ii) does not have a serious purpose or value;
 - (iii) is designed to cause disruption or annoyance to the public authority;
 - (iv) has the effect of harassing the public authority; or
 - (v) would otherwise, in the opinion of a reasonable person, be considered manifestly unreasonable or disproportionate.
33. This is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account.

The Applicant's submissions

34. In her application to the Commissioner, the Applicant did not accept that the Council could not share correspondence for the time period stated, or that it was too voluminous, given the project was, by that time, only about seven months old and involved the building of wooden structures and a (by then abandoned) £100,000 art project. She believed the real reason for non-disclosure was to cover up a waste of taxpayers' money on the project, the aim of which was to prevent the spread of COVID-19. In the Applicant's view, the Council had chosen to do this by creating wooden structures which did not seem value for money, and had failed to prevent a COVID-19 outbreak spike.
35. In her submissions to the Commissioner, the Applicant stated that there should be nothing "manifestly unreasonable" about supplying correspondence for a project less than six months old, which required building of wooden platforms and taking other measures. In her view, the measures taken proved wholly ineffective against COVID-19, evidenced by infection hotspots while penalising motorists with strange traffic changes.
36. The Applicant argued that, in this electronic age, it should not be difficult to find project documentation, as invoices, emails, word documents and spreadsheets are stored electronically. She provided examples of previous requests made to the Council where, in her experience, it had been shown to misrepresent how difficult and time-consuming such tasks were.

The Council's submissions

37. In its initial submissions to the Commissioner, the Council maintained that responding to the request would be manifestly unreasonable. While it appreciated the Applicant believed the information should be easily retrievable, the Council explained that the scope of the Spaces for People project was not limited to traffic flow changes and the creation of "parklets" (outdoor benches with seating), but was a city-wide project involving a high level of assessment by the Planning Team and consultation with stakeholders.

Significant burden

38. In its initial response (which it fully upheld at review and referred to in its submissions to the Commissioner), the Council determined there were in excess of 100 files directly associated

with the Spaces for People programme, plus over 3,000 items of correspondence spread across the email accounts of multiple officers and teams. This had been determined as a result of the Team Leader (Roads Project) searching the initial Spaces for People programme folder. No further searches involving Sustrans were undertaken at that time as, based on the Spaces for People project alone, the amount of information requested was already deemed to be a considerable piece of work.

39. The Council considered this to be a burden on time and resources as it would involve removing an officer from normal duties for two weeks to concentrate on this request alone, in addition to what it described as “a great deal in extra hours” to backfill unattended duties, impacting on the Access to Information Team’s ability to answer information requests timeously, and the Planning and Transport Teams’ ability to introduce social distancing measures.
40. The Council explained that this initial estimate had only covered the Spaces for People programme since 1 March 2020, and did not capture every piece of correspondence mentioning Sustrans. Consequently, it believed the total number of files requiring to be interrogated and redacted would exceed the estimate originally stated.
41. In its initial submissions to the Commissioner, the Council explained that it had looked further into the actual number of files held. It submitted that, for the period between 1 March 2020 and 11 August 2020 (the date of the request), it held 784 files associated with the Spaces for People project, plus approximately 2,521 emails from personal and generic email accounts for the relevant teams. The Council noted that, at this point, this did not include other senior managers, the Media Team or the Customer Feedback Team.
42. The Council was asked to provide further details of the searches carried out to support its position on this, together with any supporting evidence.
43. In response, the Council submitted that searches of documents stored in its Sharepoint location “C19 Urban Realm” had been carried out using a “document created” search period of 1 March 2020 to 11 August 2020, and this had now identified 982 documents.
44. The Council further submitted that email searches had been widened to include relevant staff with a role within the Spaces for People project who would have corresponded on it internally or externally (these individuals having been identified through consultation with senior managers). Searches of these email accounts were conducted by staff using, variously, the keywords “parklets”, “Spaces for People”, “SFP” and “Sustrans” for the period 1 March 2020 to 11 August 2020.
45. The Council provided a list of the personal and team email accounts searched (including individuals’ job titles for the personal accounts), together with a breakdown of the number of emails identified for each of the 53 accounts listed. This totalled 34,421 emails now identified as a result of these searches. The Council also provided a sample of screenshots to evidence the results of these searches.
46. The Council explained that all emails and attachments identified would require to be checked by an appropriate officer, submitting it would take a minimum of two minutes per item to locate, extract and review the information in order to determine whether it fell within scope.
47. The Council stated that the email search results did not include items which *may relate to* “parklets”, “Spaces for People” or “Sustrans” by implication, as this would require a search of every document or email held by an individual with a link to the subject matter, to be able to determine this.

48. While the Council believed it had undertaken a thorough and robust search, it explained this was not complete due to the following:
- Further search parameters might identify additional relevant information (for example, “parklets” were previously referred to as “decking and staging”, and Spaces for People projects might have been named by the corresponding area, e.g. “Queen Street”).
 - Some staff had been on leave and were unable to provide search results.

Costs

49. For the original cost projections, upheld at review, the Council stated this covered in excess of 100 files and 3,000 items of correspondence. At two minutes per item and staff costs of £15 per hour, the Council projected, at that time, that this would take 100 hours and cost at least £1,500.
50. In its initial submissions to the Commissioner, the Council provided revised cost calculations for the 784 files and 2,521 emails it stated it actually held. Using the same rates as before, the Council now estimated this would take 110.16 hours and cost £1,652.50 (but these costs did not cover searches by other senior managers, the Media Team or the Customer Service Team).
51. The Council provided details of the hourly rates and the tasks which would require to be carried out by the staff involved, explaining it used a standard rate of £15 per hour to calculate staff costs:
- Access to Information Officer (£13.27 - £15.12 per hour) – redacting and preparing information for disclosure.
 - Transport Strategy and Programmes staff (directly involved in delivering social distancing measures) (£17.25 - £19.71 to £25.81 - £29.46 per hour) – locating and retrieving information.
 - Roads Project Team staff (directly involved in delivering social distancing measures) (£13.27 - £15.12 to £25.81 - £29.46 per hour) - locating and retrieving information.
52. The Council confirmed the charges involved related to the costs of locating, retrieving and providing the information, which would involve staff downloading and saving each email separately. Access to Information Officers would then collate the information, review content, remove any personal information and prepare documents for disclosure.
53. In its later submissions, the Council provided revised cost calculations for the 982 documents and 34,421 emails it had now identified as being held (which included the searches for information held by individuals and teams not previously captured). Using the same rates as for previous calculations, the Council now estimated that this would cost £17,701.50.
54. The Council provided the Commissioner with a sample of the information identified. It submitted that, taking the request as it stood, all documents, emails and attachments would require to be opened and reviewed to determine whether they related to “parklets”, “Spaces for People” or “Sustrans” by implication.
55. The Council was then asked to carry out a sample costing exercise in evidence of its position on the costs involved in complying with the request.
56. In response, the Council provided details of a sample exercise carried out by the Senior Access to Information Officer (£15.58 - £17.76 per hour) to identify how many documents

could be located and retrieved from the Planning Team's "C19 Urban Realm" Sharepoint location within 30 minutes. The Council explained this Sharepoint site held much of the planning, tender and risk assessment documents for the Spaces for People project. Given this, no specific keyword search terms were used in this particular search, as many of these files would relate directly to the Spaces for People project.

57. The Council explained that the date filter used (covering the timeframe set out in the request) had to be re-applied each time a sub-level was accessed, taking additional time not previously anticipated. Manual checking (reading) of files was then undertaken to establish whether they fell within scope, and those that were relevant to the request were saved into a folder held by the Access to Information Team (which, the Council explained, would be standard practice and so the time involved in so doing had been included).
58. This sample exercise identified 13 files within 30 minutes.
59. The Council submitted that, while this should have been a straightforward copy exercise, a number of documents also included information on other topics outwith the scope of the request which required checking. There would be "hidden" costs in the time required to determine whether to disclose these documents as a whole or extract the relevant information, and in converting documents to pdf format and extracting relevant pages/sections where necessary.
60. The Council further highlighted that duplicate correspondence would likely be present across email searches by different staff members, and the costs of removing these had not been addressed in any cost calculations, given that the extent of this was unknown.
61. Based on the sample costing exercise, and taking into account the difficulties in calculating any "hidden" costs this exercise had shed light on, the Council confirmed that the cost of compliance was estimated to be a minimum of £17,701.50, as previously submitted.

Manifestly unreasonable or disproportionate

62. The Council believed that any reasonable person would consider this request to be manifestly unreasonable or disproportionate, based on what the Applicant was trying to establish, namely how the £1.76 million was being spent and the means by which the Council had applied for the funding. It maintained that providing the amount of information requested was excessive.
63. The Council confirmed that the Applicant's identity, occupation or history of previous requests had no bearing on its decision, and the same outcome would have been reached regardless.

The Commissioner's views

64. There is no definition of "manifestly unreasonable" in the EIRs, or in Directive 2003/4/EC¹ from which they are derived. The Commissioner's view is that "manifestly" implies that a request should be obviously or clearly unreasonable and she notes the opinion of the Information Tribunal in *Dr Kaye Little v Information Commissioner and Welsh Assembly Government (EA/2010/0072)*², which considers the equivalent regulation to 10(4)(b) of the (UK) Environmental Information Regulations 2004, and states:

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0004:EN:HTML>

² [\[2010\]UKFTT EA20100072 \(GRC\) 20101230.pdf \(tribunals.gov.uk\)](#)

From the ordinary meaning of the words "manifestly unreasonable", it is clear that the expression means something more than just "unreasonable". The word "manifestly" imports a quality of obviousness. What is in issue, therefore, is a request that is plainly or clearly unreasonable. It is a more stringent test than simply "unreasonable".

65. This view was confirmed in the Appeal Court decision *Dransfield & Anor v The Information Commissioner & Anor* [2015] EWCA Civ 454³ (Dransfield) which comments:
- The word "manifestly"...means of course the unreasonableness must be clearly shown. This saves the authority from having to make any detailed investigation into matters which it does not know or are not in the public domain.*
66. Whether a request is manifestly unreasonable will depend on the facts of each case. It may apply where it can be demonstrated that a request is vexatious, or where compliance would incur unreasonable costs for the public authority or an unreasonable diversion of public resources.
67. *Decision 024/2010*⁴ established that the Commissioner was likely to take into account the same kinds of considerations in deciding whether a request was manifestly unreasonable under the EIRs as in reaching a decision as to whether a request was vexatious in terms of section 14(1) of FOISA. In *Dransfield*, Lady Justice Arden commented that while "manifestly unreasonable" differs on its face from "vexatious" (section 14(1) of FOISA), the difference between the two phrases is "vanishingly small".
68. In this case, the Council's submissions focussed on the significant burden of compliance and the impact of so doing on its resources, including the cost of compliance in terms of staff time. The Commissioner notes that in *Dransfield*, Lady Justice Arden commented that, while there was no provision in the (UK) Environmental Information Regulations 2004 which would prevent an authority from taking the costs of compliance into account in considering whether the request was manifestly unreasonable, those costs would have to be balanced against the benefits of disclosure in terms of the public interest test (equivalent to the public interest test in regulation 10(1)(b) of the EIRs).
69. The Commissioner therefore acknowledges that there may be circumstances where the burden of responding (in terms of its impact on the public authority's core functions) is sufficient justification for deeming a request to be manifestly unreasonable.
70. There is no cost limit for determining what is deemed to be an excessive cost of compliance under the EIRs, as there is in FOISA. Under FOISA, public authorities do not have to comply with a request if the cost of compliance exceeds £600. Even so, the Commissioner recognises that there may be cases where the time and expense involved in complying with a request for environmental information means that any reasonable person would regard them as excessive. The Council has argued that such a case can be made in relation to the Applicant's request.
71. In this case, the Council has argued that the burden of responding to the Applicant's request would not only directly involve a number of Council staff and incur significant costs and staff time, but would also have a resultant impact on the work of others through having to "backfill" duties, which the Council considers disproportionate.

³ <http://www.bailii.org/ew/cases/EWCA/Civ/2015/454.html>

⁴ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2010/200900461.asp>

72. Responding to information requests is a statutory duty for the Council, and one which must be properly resourced. The Commissioner acknowledges that, in common with all other Scottish public authorities, in addition to complying with requests for information under FOISA and the EIRs, the Council has many other demands on its time and resources. Compliance with information requests should, however, be considered as an element of the authority's core business, being a statutory requirement. Therefore, the Commissioner will not accept lightly arguments that compliance with an information request, in any given case, represents an unreasonable diversion from compliance with other statutory responsibilities.
73. The Commissioner accepts, however, that the information captured by certain information requests (such as the one under consideration here) may be held in a variety of locations across an authority. He recognises that such cases may require numerous staff members to be involved in searching for relevant information, given their involvement in the subject matter and the manner and locations in which the information is held. He also acknowledges that it may be the case that only certain staff will have the specialist knowledge or expertise to determine what information is relevant to the request, and recognises that this in itself will impose a time factor, particularly where large volumes of information are identified through searches. In such situations, the burden of responding to the request must be assessed by considering the impact across the Council as a whole.
74. While, on the face of it, the request appears to be quite focussed, it is clear to the Commissioner, from the Council's submissions and the sample of information provided to him during the investigation, that it is in fact more wide-ranging than the Applicant appears to believe, due not only to the nature and scope of the project itself but also the way in which the information is held across the Council. It is clear that the range of measures covered by the project have generated a significant volume of files and correspondence, as identified by the Council's searches.
75. The Commissioner notes that the Council's final costings have increased more than ten-fold since its initial estimate, and also that there may still be further information held, not captured by the keyword searches carried out by the Council, and which may be held "by implication" (as set out in the request).
76. The Council has explained what would be involved in responding to this request. The Commissioner accepts that this explanation is based on a reasonable assessment of the process, together with the volume of information held and the staff time involved. On the basis of the detailed submissions provided by the Council, he accepts that the information is held across a variety of locations within the Council, and that each document and email identified through the searches conducted would require to be examined to determine whether the information therein fell within the scope of the request. The Council has provided a reasonable estimate of the time it would take to complete the searches, examine and prepare the relevant information for disclosure, after carrying out a sample costing exercise. On this evidence, the Commissioner accepts that the cost of complying with the request would be significant, incurring staff time costs well above the £600 limit at which a request considered under FOISA could be refused.
77. The Commissioner also accepts that complying with the request would involve certain staff being diverted from their normal duties and considers the potential disruption caused by this diversion would be likely to have a significant impact on the Council's ability to carry out its other statutory functions.

78. As it currently stands, the Commissioner cannot see any other way in which the Council could satisfy the request, and accepts that responding would be disproportionate and would impose a significant burden on both the Council's financial and human resources.
79. In all of the circumstances, therefore, the Commissioner accepts that the Applicant's request was manifestly unreasonable. As such, he finds that the Council correctly applied the exception in regulation 10(4)(b) in this case.

Consideration of the public interest

The Applicant's submissions on the public interest

80. In the Applicant's view, the correspondence requested would show that this project, funded by Sustrans money from the taxpayer, had been wasteful, ineffective and unscientific, as thought by many. She did not understand how, or believe that, a project of such a comparatively small scope and budget (i.e. to build wooden benches and bus stops with wood from only one source, and using grant money from only one source) was capable of having amassed such a quantity of correspondence in less than six months. She questioned how the Council managed such matters, should this be the case.
81. The Applicant argued that disclosure of the information was wholly in the public interest. In her view, the Council had spent £1.7 million on an ineffective, unscientific scheme to reduce the spread of COVID-19 by creating more spaces for the virus to live on. She submitted the Council planned to spend at least £100,000 of the grant on artwork which was to "inspire confidence" that the scheme was a good one, and this had been objected to by Aberdeen citizens, many of whom then had serious money worries. In her view, it was in the public interest to know how and why this money was deployed and whether it was value for money.

The Council's submissions on the public interest

82. The Council acknowledged the public interest in the social distancing measures it had put in place, and in ensuring public money was spent appropriately (in particular the amount it had spent on social distancing measures, following a news article on this specific matter). The Council recognised the public had to feel confident that the Council was spending money in a cost-effective manner.
83. Notwithstanding these public interest arguments, the Council considered the amount and type of information requested to be excessive. In the Council's view, the public interest lay in ensuring its services used their time and resources efficiently to deliver the social distancing measures during the pandemic.
84. On balance, the Council concluded that the public interest favoured non-disclosure, as providing the information requested would divert staff from managing the implementation of the planned social distancing measures required during the pandemic.

The Commissioner's conclusions

85. The Commissioner notes the Applicant's arguments in support of her view that it is in the public interest to know how the Council accounts for its decisions on expenditure across the Spaces for People project, particularly given the amount of funding involved and the clear and direct impact of the project on the citizens of Aberdeen.
86. In the Commissioner's view, there is an inherent public interest in disclosure of information to ensure an authority is transparent and accountable for its expenditure of grant funding of this

magnitude, which would enable public scrutiny of the authority's decisions and actions in so doing.

87. Against this, the Commissioner has considered the strong public interest in ensuring an authority can carry out its statutory functions without unreasonable or disproportionate disruption.
88. As stated above, the Commissioner has already accepted that providing the information requested in this case would incur significant costs to the Council in staff time and resources and, to a certain extent, divert resources away from core functions.
89. The Commissioner considers there is a public interest in ensuring the EIRs are used responsibly. While public authorities are encouraged to act in a transparent and accountable way, which benefits the public as a whole, the Commissioner also recognises that responding to requests which require them to devote excessive or disproportionate amounts of time can only be at the expense of other areas of work. While the Commissioner acknowledges the Council's duty to respond to this request, he notes it has a similar responsibility to respond to other requests it receives, as well as carrying out its other statutory functions, and there is a public interest in ensuring resources are not diverted away from this disproportionately.
90. On balance, therefore, the Commissioner accepts that, in all the circumstances of this case, the public interest arguments in favour of making the information captured by this request available are outweighed by the public interest in maintaining the exception in regulation 10(4)(b) of the EIRs. The Commissioner finds that the Council was entitled to withhold the requested information under this exception.

Regulation 9 of the EIRs – Duty to provide advice and assistance

91. Regulation 9(1) of the EIRs provides that a Scottish public authority must, so far as it would be reasonable to expect it to do so, provide advice and assistance to applicants and potential applicants. Regulation 9(3) provides that a Scottish public authority shall be taken to have complied with this duty if it conforms with the relevant Code of Practice (in relation to the provision of advice and assistance).
92. The Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs (the Section 60 code⁵) states (at paragraph 9.2 in Part 2):

Duty to advise and assist when responding to a request

The obligation to provide advice and assistance continues at the point of issuing a response. For example, if directing the applicant to a website, the authority should take all reasonable steps to direct the applicant to the relevant section.

93. It further states, at paragraph 9.4.3:

Where excessive costs apply

When refusing a request on cost grounds, it is good practice for the authority's response to provide clear advice on how the applicant could submit a new, narrower request within the cost limit. In giving advice you may wish to take account of how much the cost limit

⁵ <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

has been exceeded. Any narrowed request would be a separate new request and should be responded to accordingly.

94. The Council was asked to explain what advice and assistance it gave to the Applicant to help her refine her request, so that it was not considered manifestly unreasonable and could be managed without the claimed impact on the Council's resources.
95. In its submissions to the Commissioner, the Council stated it had offered the Applicant the opportunity to discuss and refine her request on a number of occasions, none of which she took up. The Council commented that, had she done so, it would have suggested restricting the scope to capture minutes of meetings and financial information referencing the Spaces for People project, or a similar refinement depending on her needs. The Council confirmed it had not provided the Applicant with these specific suggestions, believing it was better customer service to speak with her in person in order to fully understand the scope of her request and advise on the best way to provide the information she was looking for in a way that required less officer time.
96. The Council believed that, in offering the Applicant these opportunities to discuss her request, it had met the duty to provide advice and guidance as set out in Regulation 9 of the EIRs. It confirmed it was still happy to do so.
97. In her submissions to the Commissioner, the Applicant suggested that the Commissioner's office might want to make any recommendations to her about narrowing the scope of her request. In response, she was advised to engage with the Council on this matter, given that the Council would be best placed to offer advice on how it would be able to respond to a narrowed request without invoking regulation 10(4)(b).

The Commissioner's views

98. The Commissioner notes that the Council made a number of offers to the Applicant to discuss her request with her, with a view to refining it so that it was not considered to be manifestly unreasonable – offers which the Applicant does not appear to have taken up with the Council, while asking the Commissioner for recommendations on narrowing the scope.
99. In this case, and taking into account the Council's offers to discuss the request with the Applicant, the Commissioner does not accept that the Council failed to comply with regulation 9(1) of the EIRs in responding to the Applicant's request. In fact, it attempted engagement of a kind the Commissioner would encourage: it is not the role of the Commissioner to recommend to the Applicant how she could or should narrow the scope of her request. This should be achieved through direct discussions between the Applicant and the Council.

Decision

The Commissioner finds that Aberdeen City Council (the Council) the Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Margaret Keyse
Head of Enforcement

30 June 2021

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

- (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 paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

- (2) The duty under paragraph (1)-

...

- (b) is subject to regulations 6 to 12.

...

9 Duty to provide advice and assistance

- (1) A Scottish 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.

...

- (3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.

10 Exceptions from duty to make environmental information available–

- (1) A Scottish public authority may refuse a request to make environmental information available if-

- (a) there is an exception to disclosure under paragraphs (4) or (5); and
- (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-

- (a) interpret those paragraphs in a restrictive way; and
- (b) apply a presumption in favour of disclosure.

...

(4) A Scottish public authority may refuse to make environmental information available to the extent that

...

(b) the request for information is manifestly unreasonable;

...

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