

Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

Decision Notice

Date: 25 January 2010

Public Authority: Surrey County Council
Address: County Hall
Penrhyn Road
Kingston upon Thames
Surrey
KT1 2DN

Summary

The complainant requested information about the widening of a crossover from the council, together with other information associated with a change of use of business premises. The council relied upon section 14 of the Act and regulation 12(4)(b). The Commissioner's decision is that the information in question is environmental information. The Commissioner's decision is that the authority was able to rely upon regulation 12(4)(b). The complainant's request was vexatious and therefore manifestly unreasonable for the purposes of the regulation 12(4)(b). The Commissioner has not therefore considered the application of section 14 further in this instance.

The Commissioner's Role

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

Background

2. The complainant's request follows on from numerous other requests and correspondence with the council relating to a planning matter involving Tandridge District County Council, Surrey County Council and a third party. The councils approved a change of use to a premises and the County Council approved a cross over widening to facilitate parking at the site. The complainant considers

that the planning approvals have resulted in reduced access to her property as the business often parks its vans on the forecourt to the premises, blocking access to her parking area. As a result changes were made to the layout of the area to facilitate her access abilities however she remains unhappy with this new layout stating that it is dangerous to pedestrians.

3. An Ombudsman's investigation into the planning decisions found maladministration on a minor point, and the councils were ordered to pay compensation and issue apologies to the complainant. However she remains dissatisfied at this and has continued to seek information from the council. She is also involved in private litigation with the third party in this case, seeking to reassert her right of way over the parking area.

The Request

4. On 19 June 2008 the complainant requested from the council:

"Please forward all information relating to the various highways considerations regarding the three planning applications made by or on behalf of Mr A at (private address given). That includes information from any and all parties and includes negotiations regarding the sizes of the parking spaces, bollards, parking in front of garages, number of vehicles parked on the forecourt etc.

I note the conditions on Mr A's first planning permission refer to "parking and turning", while the conditions on his second specifically refers to "parking of two vehicles". Please send all information related to this change of wording, from all parties.

Please confirm whether any of the documentation relating to the crossover widening at (address provided) includes reference to the bollards (and/or their) removal. If so please supply the documentation or explain on what basis it is withheld.

In addition, SCC included a list of enclosures in its response to the local Government Ombudsman, dated 7 December 2007. This includes No. 4: "The County Councils response to Tandridge District Council asking for amendments to the planning application. The County Council never made a formal response to this application."

Please send a copy of the county council's response (i.e. No 4 in the list of enclosures). In addition, please send the district councils request for amendments, also referred to in No 4."

5. The council responded on 27 June 2008. It stated that it was refusing the information on the grounds that the information was exempt under section 14, and to the extent that the information is environmental information under regulation 12(4)(b) (that the request is manifestly unreasonable). The

Commissioner has considered the information. It is information about the widening of a crossover on the highway. As such the Commissioner considers that the information is environmental information for the purposes of regulation 2(1)(c), which is provided in the legal annex to this notice.

6. On 29 June 2008 the complainant's parents also wrote to the council asking for further information relating to the same issue.
7. On 11 July 2008 the complainant asked the council to review its decision.
8. The council responded to the complainant's parent's on 16 July 2008. It stated that it believed that they were acting in conjunction with the complainant in making the request and that it had therefore also deemed this request to be manifestly unreasonable.
9. The council responded to the complainants request for a review on the 12 August 2008. The review confirmed that the council considered the request to be manifestly unreasonable.

The Investigation

Scope of the case

10. On 27 August 2008 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider whether the information she requested should have been provided to her and whether the council was right to apply regulation 12(4)(b) to the information.

Chronology

11. The Commissioner wrote to the complainant on 25 September 2008. He asked her to confirm whether she was acting on behalf of her parents as regards the request they had made highlighted at paragraph 6 above. He stated she would need to provide a letter from her parents specifically authorising her to do so if that is what she wished to do, and the Commissioner would then open a new complaint. The complainant did not respond to this. The Commissioner has not therefore considered her parents' request further in this Decision Notice, other than to add that no evidence of an internal review was provided by the complainant to the office relating to this request, and it would not therefore be eligible for investigation until such time as the complainant or her parents had asked the council to do so.
12. On 21 October 2008 the Commissioner wrote again to the complainant stating that her request would be dealt with in due course. On the same day he wrote to the council informing it that a complaint had been received. The council acknowledged receipt of that letter on 17 November 2008.

13. On 30 July 2009 the Commissioner wrote to the council indicating that the complaint had now been allocated for investigation. That letter also addressed a different matter, which relates to a further complaint from the complainant.
14. On 20 August 2009 the Commissioner spoke with the council on the telephone regarding the complaint. The council confirmed its wish to continue to rely upon regulation 12(4)(b), and agreed to provide further information to the Commissioner in response to the complaint. The further information included a log of the previous requests and correspondence which the council had received from the complainant, together with a copy of the Ombudsman's report.
15. On 9 September 2009 the Commissioner wrote to the council asking for the information which it had stated would be provided to him. The information was provided to him shortly afterwards.
16. On 3 December 2009, following the disclosure of information by the council on a related case, the Commissioner wrote to the complainant. He asked her if she was prepared to withdraw her other complaint given the disclosure of the information to her, and stated that in this case his preliminary view was that the council was able to claim that the request was manifestly unreasonable. He provided reasons for this and asked the complainant if she was willing to withdraw this complaint on that basis.
17. The complainant telephoned the Commissioner on 14 December 2009 and confirmed her wish for both cases to be continued and Decision Notices issued.

Analysis

Exception

Regulation 12(4)(b)

18. The council claims that the information is exempt under regulation 12(4)(b). Regulation 12(4)(b) is provided in the legal annex to this Decision Notice. It provides an exception to an authority's duty to respond to a request where the request is manifestly unreasonable.
19. The term "manifestly unreasonable" is not defined in the regulations. The Commissioner is clear however that the inclusion of "manifestly" in regulation 12(4)(b) indicates Parliament's intention that, for information to be withheld under this exception, the request must meet a more stringent test than being simply "unreasonable". "Manifestly" means that there must be an obvious, clear or self-evident quality to the unreasonableness referred to.
20. There is also no single test for what sorts of requests may be manifestly unreasonable. Rather, it is to be judged on each individual request bearing in mind all of the circumstances of the case. The Commissioner is of the view however that regulation 12(4)(b) will provide an exception to the duty to comply

with a request where that request is vexatious, where it would incur unreasonable costs for the public authority or where responding would be an unreasonable diversion of resources.

21. In his Awareness Guidance no. 22 'Vexatious and repeated requests' published 3 December 2008 - the Commissioner finds that the following questions can aid a decision as to whether a request is vexatious or not:
 - Could the request fairly be seen as obsessive?
 - Is the request harassing the authority or distressing to staff?
 - Would complying with the request impose a significant burden in terms of expense and distraction?
 - Is the request designed to cause disruption or annoyance?
 - Does the request lack any serious purpose or value?
22. The Commissioner has taken into account these criteria when considering the application of the exception to the information. It is important to note however that the ultimate decision on this case is based upon all of the circumstances of the case rather than simply a bald application of the criteria considered herein. He also points out that many of the arguments which are considered within the different criteria below are also equally applicable and relevant to the other criteria.
23. When determining whether a request should be deemed vexatious, the Commissioner is mindful that the history and context of the issue will be considered, along with one or more of the above factors. In certain cases, a request may not be vexatious in isolation but when considered in context it may form a wider pattern of behaviour that makes it vexatious. Nevertheless, the Commissioner recognises that it is the request and not the requestor that must be vexatious in order for the exception to apply.

Is the request obsessive?

24. In his Awareness Guidance on the subject of vexatious requests, the Commissioner acknowledges that obsessive requests are usually a very strong indicator that a request is vexatious. When trying to establish whether a request may be considered obsessive, the Commissioner's guidance states that:

"Relevant factors could include the volume and frequency of correspondence, requests for information the requester has already seen, or a clear intention to use the request to reopen issues that have already been opened and debated."
25. The Commissioner firstly considers the language used by the complainant in her written complaint to the Commissioner dated 27 August 2008:

"The requested information regarding the highway considerations at (address provided) go to the very heart of the formal complaints made to the council more than three years ago which were not upheld, but I

contend should have been. I believe the withheld documentation (which should be in the public domain) would show my original complaints to be justified and that this is the council's prime motivation for not supplying it."

26. The Commissioner considers that this clearly demonstrates the complainant's aim to reopen her old complaints which have already been fully considered.
27. Also of primary relevance in this case is the fact that the Ombudsman has already carried out an investigation of the councils' involvement in this matter. The council can therefore establish a case for saying that the request sought to reopen a complaint which has already been satisfactorily adjudicated upon by the appropriate regulator. The Commissioner considers this to be a significant factor in determining whether the request is obsessive. The council cooperated with the Ombudsman and aided him to carry out his investigation with the intention that a fair and amicable solution should be found between the complainant and the authorities involved. The Ombudsman's report required an apology and compensation to be paid and the council subsequently did this.
28. The Commissioner is aware that there is also private litigation ongoing on this matter. There are therefore also private reasons for the complainant to request the information. However in pursuing further information in order to facilitate this claim the complainant has sought to reopen matters which have already been fully considered with the council.
29. The Commissioner is also aware of a significant number of further requests and correspondence relating to the same issue which have been made to both councils. He has previously issued a Decision Notice on a complaint against Surrey County Council which upheld the council's decision that all information which it held had been provided to the complainant. This was considered in the Decision Notice FER160254. He also issued a Decision Notice, again on a related issue, against Tandridge District Council recently in case FS50198525. This upheld the complainant's complaint and further information was provided to her. The Council in that instance did not claim that the request was manifestly unreasonable or vexatious and so this issue was not raised in that Decision Notice. Other requests and complaints have also been received and dealt with relating to the same issue. Taking into account all of the above, the Commissioner concludes that the request could be fairly seen as obsessive.

Did the request have the effect of harassing the authority?

30. The Commissioner reiterates that, in many cases, there will be an element of overlap between the various vexatious criteria. For instance, where a request is considered obsessive, it will often be the case that it will have the effect of harassing a public authority.
31. The Commissioner must primarily consider the effect which the complainant's actions have had on the council. He can however bear in mind the history of the case and the manner of the council's previous dealings with the complainant when making his decision.

32. Significantly, whilst the complainant may not have intended to cause distress, the Commissioner must consider whether that was in fact the effect which it did have. In his guidance on this issue, the Commissioner states that the “focus should be on the likely effect of the request (seen in context), not on the requester’s intention. It is an objective test - a reasonable person must be likely to regard the request as harassing or distressing.” Although a complainant’s reasons for making the request may in themselves be reasonable, a request may therefore still be manifestly unreasonable to the authority because of the effect it has on that authority.
33. The Commissioner notes that the number, frequency and tone of the complainant’s requests and correspondence with the council provide evidence that the requests are obsessive. He notes that the manner in which the complainant engages with the council is often confrontational and marked by sarcastic, aggressive or manipulative language. Her manner would also have had the effect of harassing and distressing council officers dealing with her correspondence.
34. The Commissioner notes that the correspondence contained some serious allegations which the complainant made against the Council. Whilst the Commissioner is unable to elaborate upon the content of these allegations further in this Decision Notice, having considered the content of these allegations he considers that they would have the effect of harassing or distressing council staff.
35. The Commissioner has also taken into account the number of requests which the complainant has made, and in particular the manner in which these have been made. The log shows that the complainant had made 12 previous requests for information relating to the crossover widening, with correspondence following the council’s responses to those requests. For example, when the council has previously provided information this has resulted in further requests for information following that disclosure, or explanations being demanded from the council relating to the information which has been disclosed to her. The Commissioner considers that it may have been harassing to council officers to receive immediate responses of this nature.

Would responding to the request have imposed a significant burden in terms of the expense and distraction on the authority?

36. The Commissioner has borne in mind the decision of the Information Tribunal in the case of *DBERR v The Information Commissioner (EA/2008/0096)* when coming to his decision regarding this part of his considerations. In that case the Tribunal clearly indicated that “*public authorities may be required to accept a greater burden in providing environmental information than other information*” (see paragraph 39). Its decision was based upon the clear presumption in favour of disclosure provided in the regulations and because of the nature of the obligations laid on the UK via the Aarhus Directive.
37. The council has provided the Commissioner with a log of the complainant’s requests to support its reliance on regulation 12(4)(b). Although on an individual basis responding to this request would not have imposed a significant burden, the

Commissioner has considered the overall effect of all of the requests, together with the resultant correspondence which has passed between the parties. He has taken into account the following factors in this consideration.

- The number of requests and correspondence which the complainant has had with the council on this issue over a number of years.
- As noted above, the council was investigated by the Ombudsman regarding this issue. The council subsequently issued an apology and provided compensation in response to that investigation.
- The Commissioner further notes that in case FER160254 he investigated and issued a Decision Notice on a similar issue to the request in this instance, again from the same complainant. In that case information was supplied to the complainant in response to her request, however the complainant complained to him regarding information which the council stated was not held. The Commissioner upheld the council's refusal notice in that case, although he did criticise the council's inadequate records management practices as regards the loss or destruction of information.

38. The request considered in that Decision Notice was for

1. details of the constraints requested by the complainant's neighbour in relation to the widening of the vehicle crossover;
2. a statement from the council regarding the constraints/conditions applied to the approved widening of the vehicle crossover, both at the time it was passed and any changes that have occurred since;
3. for copies of all application documents relating to this widening;
4. copies of correspondence between the complainants neighbour, the Council and Tandridge District Council relating to this widening and to the earlier refused widening proposal; and
5. to know the reasons why her neighbour contested the council's decision to refuse the first application that was submitted for the widening of the vehicular crossover.

39. Although most of the information in question was supplied the complainant complained to the Commissioner regarding points 3 and 5.

40. When considered together with this request this suggests a degree of obsessive behaviour which was likely to have harassed officers of the council who were assigned to deal with those requests. The Commissioner also considers that replying to this request, taken in the context of all of the other requests and correspondence issued by the complainant, is likely to have imposed a significant burden on the council in terms of the expense and distraction.

Was the request intended to cause disruption of annoyance?

41. The Commissioner understands that the intention behind the complainant's request was to seek information in order to fight ongoing private litigation. She was not seeking to antagonise or disrupt the council by making her request.

However he also notes that the frequency, tone and effect of the requests would have had that effect when considered altogether. He further notes the intention to reopen her complaint with the council as highlighted above. Overall however he finds that the complainants request was not intended to cause disruption or annoyance.

Did the request have no value or purpose?

42. For the same reasons, the Commissioner also does not consider that the request has no value or purpose. The complainant's access rights to her property were allegedly affected by an approved change to the highway and the request seeks to establish how that might have happened, and whether anything can be done to reassert those rights. The complainant is entitled to seek to protect her rights through private litigation against the third party and she believes that information held by the council would help her do this.
43. However the Commissioner has also taken into account the complainant's statement that she believes that the council was wrong in its previous decisions and that she is seeking to prove this through her further requests. In this sense, her complaint has been fully investigated by the Ombudsman and it serves no value or purpose because the issues have already been fully considered and adjudicated upon.

Conclusion

44. The Commissioner is therefore satisfied that regulation 12(4)(b) is engaged for the reasons provided above.

The public interest test

45. Regulation 12(1)(b) requires that a public interest test is carried out in cases where regulation 12(4)(b) is engaged. The test is whether in all the circumstances of the case the public interest in maintaining the exception overrides the public interest in disclosing the information. When considering his decision the Commissioner must also bear in mind the presumption in favour of disclosure provided by regulation 12 (2).

The public interest in disclosing the information

46. The public interesting in disclosing the information in this case relates to the transparency and accountability of the actions which the council took in dealing with the crossover widening.
47. There is little wider public interest in requiring the disclosure of this information specifically because the crossover widening affects relatively few people beyond those living directly on the site. The complainant's central complaint relates to the fact that she is now unable to easily have access to or park her car on her property on all occasions. She therefore argues that the council's agreements have failed to take into account her right of way and/or her rights to part of the land. The central issue is therefore personal to her and her direct neighbours

alone. On a wider nature however, there is an onus on public authorities to act transparently in the planning decisions they take, and disclosure of this information may shed further light on the council's actions in agreeing a controversial planning application in this instance. The Commissioner notes however that this is not a case where the planning approval affects a large number of the public.

48. The Commissioner notes that the complainant has also argued that there are health and safety issues relating to the new layout, and if that is the case there would be a wider public interest in allowing the disclosure of any concerns which the council had considered when agreeing this. The complainant understands that the crossover widening application was initially refused by the council but that it subsequently agreed to the application. The council denies that the road layout is unsafe however it is not clear whether any changes were made which allowed the application to go ahead. Whilst the Commissioner makes no judgement upon whether or not there are health and safety issues with the new layout, he accepts that there is a public interest in disclosure of the information in order to inform the public whether any such issues were considered.

The public interest in maintaining the exception.

49. The Commissioner recognises compelling arguments in favour of maintaining the exception in this case because of the public interest in protecting the integrity of the EIR and ensuring that they are used responsibly. While public authorities are being encouraged towards goals of transparency and accountability which benefit the public as a whole, it is not the intention of the legislation to require that public authorities tolerate the harassment of their officials by individuals who demonstrate obsessive behaviour when seeking information. If the Commissioner were to find that such behaviour is appropriate, he considers that the legislation would be seriously undermined. The Commissioner is strongly of the opinion that public authorities should be able to concentrate their resources on dealing with legitimate requests rather than being distracted by requests that have little or no merit and where the wider public interest would not be served by the disclosure of information.
50. Whilst in this case the Commissioner believes that the merit behind the initial requests, correspondence and complaints which were made was understandable he recognises that as time as gone on the complainant has continued to press issues which have already been considered and responded to. He further considers that allowing the continuation of this approach via the EIR would not be in the public interest.
51. In weighing these considerations in the balance, the Commissioner has had regard to the fact that the volume of requests and correspondence which has been submitted over a long period of time has placed a significant burden on Council resources. Taken in context with this other correspondence, he considers that requiring the council to continue to respond to this request would disrupt the everyday work of the Council, diverting a disproportionate amount of resources from its core business.

52. The council has also worked with the Ombudsman and responded positively in response to her findings. The Commissioner considers that it does not seem likely that responding to the request will satisfy the complainant as regardless of the information it provides in response to her requests the complainant continues to question the council's motives, allege various wrongdoings and maintains that it is not open honest and transparent. It is the Commissioner's view that these factors lessen the public interest in requiring the council to respond further to her request.

53. The Information Tribunal is concerned that the Act should not be brought into disrepute by setting the threshold for vexatiousness too high. In *Mr J Welsh v The Information Commissioner (EA/2007/0088)* the Information Tribunal found that:

"...there is a danger that setting the standard of vexatiousness too high will diminish public respect for the principles of free access to information held by public authorities enshrined in FOIA. There must be a limit to the number of times public authorities can be required to revisit issues that have already been authoritatively determined simply because some piece of as yet undisclosed information can be identified and requested...." (para 26).

54. In view of the above, the Commissioner considers that in all the circumstances of this case, the public interest in maintaining the exception under regulation 12(4)(b) outweighs the public interest in disclosing the information and therefore finds that the request is manifestly unreasonable.

The Decision

55. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the regulations.

Steps Required

56. The Commissioner requires no steps to be taken.

Right of Appeal

57. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 25th day of January 2010

Signed

**Lisa Adshead
Senior FOI Policy Manager**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Regulation 12

(2) A public authority shall apply a presumption in favour of disclosure.

(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;

Duty to make available environmental information on request

5. –

(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Interpretation

2. –

(1) In these Regulations -

"the Act" means the Freedom of Information Act 2000[3];

"applicant", in relation to a request for environmental information, means the person who made the request;

"appropriate records authority", in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

"the Commissioner" means the Information Commissioner;

"the Directive" means Council Directive 2003/4/EC[4] on public access to environmental information and repealing Council Directive 90/313/EEC;

"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;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(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;