

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

Date: 26 March 2014

Public Authority: North East Derbyshire District Council
Address: The Council House
Saltergate
Chesterfield
S40 1LF

Decision (including any steps ordered)

1. The complainant has requested the details of an external consultant to the council who he believes provided advice on the marketing of land which the council wished to sell for development purposes. The council applied Regulation 12(4)(b) to the information.
2. The Commissioner's decision is that Regulation 12(4)(b) applies to the complainant's request.
3. However the Commissioner has also decided that the council did not deal with the request for information in accordance with the Regulations because it did not apply the correct legislation when handling the request. The council responded to the request claiming section 14 of FOIA. The Commissioner's decision is that the information is environmental information as defined in Regulation 2 of the EIR. The council should therefore have applied section 12(4)(b) which is the roughly equivalent exception to section 14 of FOIA.
4. The Commissioner does not require the council to take any steps.

Request and response

5. On 2 June 2013, the complainant wrote to the council and requested information in the following terms:

"In a recent letter to [name redacted], I referred to [name redacted]'s minutes dated 23.6.2011, ref: DCI/09/11/BM, specifically to MINUTE 8.2; this was concerning "recent advice from and external agent" who recommended the use of the "For Sale signage on the site together with two newspaper advertisements".

Please will you ask [name redacted] to IDENTIFY this "external agent" in order to clarify this individual's recommendations. A response is required which I will provide to the police."

6. The council responded on 19 June 2013. It stated that the request was vexatious and applied section 14 of the FOI Act to the request.
7. Following an internal review the council wrote to the complainant on 30 August 2013. It stated that it retained its reliance upon section 14 to refuse the request. However it said that under the circumstances it was also worth clarifying that no information is held in respect of the request as the advice was actually provided on a different land sale to the issue raised by the complainant.

Scope of the case

8. The complainant contacted the Commissioner on 19 December 2013 to complain about the way his request for information had been handled. He considers that the council should disclose the information to him on the basis that the public interest in discovering exactly what had occurred which resulted in the land being sold at the price that it was.
9. The Commissioner considers that the complaint relates to the application of section 14 by the council, and the refusal to provide him with the information which he has asked for.

Reasons for decision

Is the information environmental information

10. The Commissioner has considered the information under the EIR. Both in his previous decision notices on this issue outlined in FS50436741, FS50436742, FS50436888, FS50440374 and in the First-tier Tribunal decisions EA/2013/0064 0065, 0066, 0067 complaints over this issue have been dealt with under the EIR.
11. The complainant has concerns that the council, or officers of it acted inappropriately over the sale of a piece of land in Mickley. The requested information relates to the details of an external consultant who provided

advice on the council's marketing of a different piece of land. This, it was suggested was evidence that the council's actions as regards the land sale at Mickley were appropriate. The land at Mickley was being sold for the purposes of development.

12. The Commissioner considers that the request is for information on a plan to sell land at Mickley with the purpose of developing it. The requested advice was relied upon by the council as an example of best practice in the sale of the land. It therefore falls within Regulation definition of information provided in Regulation 2(1)(c) as information on an activity likely to affect the elements of the landscape outlined in Regulation 2(1)(a).
13. The Commissioner therefore considers that the requested information is environmental information falling within the scope of the EIR.
14. The council applied section 14 of FOIA to the request for information the equivalent section under the EIR is Regulation 12(4)(b). The Commissioner is aware of the history behind this case. The elements necessary for these exemptions to apply are extremely similar. Given the complaints past history and the Commissioners understanding of this the Commissioner has transferred the councils arguments for the application of section 14 of FOIA and applied it to the application of Regulation 12(4)(b) rather than simply issuing a decision notice requiring the council to issue a response under the Regulations in this instance.

Regulation 12(4)(b)

15. Regulation 12(4)(b) provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. The Commissioner is clear that the inclusion of "manifestly" in regulation 12(4)(b) indicates Parliament's intention that, for information to be withheld under this exception, the information request must meet a more stringent test than being simply "unreasonable". "Manifestly" means that there must be an obvious or clear quality to the unreasonableness referred to.
16. The Commissioner is of the view that this regulation provides an exception to the duty to comply with a request for environmental information in two circumstances: 1) where it is vexatious, and 2) where it would incur unreasonable costs for the public authority or an unreasonable diversion of resources. However, that is not to say that the exception is limited to these two circumstances only, as the Tribunal in the case of DBERR v ICO and Platform (EA/2008/0096) emphasised:

"It is clearly not possible to identify all situations in which a request will be manifestly unreasonable" (paragraph 37); there may well be other situations where regulation 12(4)(b) can apply."

17. In this case the council suggest that Regulation 12(4)(b) should apply because the requests are vexatious. It has previously dealt with a large number of requests from the complainant over the issue of the Mickley Land sale over a number of years. Although the information itself relates to another land sale the advice was relied upon as evidence that the council had followed good practice in the Mickley Land sale and it was in this respect, and with the intention of further investigating the sale, that the complainant is requesting the information.
18. The complainant has said to the council that he wishes details of the external consultant in order that he can be contacted and in order to provide the information to the police. He also alleges that he has found discrepancies in the council's statements over the issue of the consultant.
19. The Commissioner and the Tribunal have considered complaints from the complainant regarding the application of Regulation 12(4)(b) to requests about the sale of this land by the council. Both found in favour of the councils application of the exception. The Commissioner's decision notice regarding the previous complaints can be found in his decision FS50436741 FS50436742, FS50436888, FS50440374 at http://www.ico.org.uk/~media/documents/decisionnotices/2013/fs_50436741.ashx and the Tribunals decision can be found in its decision in EA/2013/0064, 0065, 0066, 0067 which is available at [http://www.informationtribunal.gov.uk/DBFiles/Decision/i1098/Sturmer,%20Robert%20EA.2013.0064,%20065,%20066%20&%20067%20\(11.10.2013\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1098/Sturmer,%20Robert%20EA.2013.0064,%20065,%20066%20&%20067%20(11.10.2013).pdf).
20. The Commissioner issued a further decision notice upholding the application of Regulation 12(4)(b) in case FS50520772 . The decision notice is available at http://www.ico.org.uk/~media/documents/decisionnotices/2014/fs_50520772.ashx.
21. A further Tribunal decision upholding an earlier complaint from the complainant is available at <http://www.informationtribunal.gov.uk/DBFiles/Decision/i890/20121123%20Decision%20EA20120052.pdf> however in that decision the Tribunal itself recognised that all available information had been provided to the complainant regarding the sale.
22. It is important to note that Regulation 12(4)(b) can only be applied to the request itself, and not the individual who submits it. An authority

cannot, therefore, refuse a request on the grounds that the requester himself is vexatious. Similarly, an authority cannot simply refuse a new request solely on the basis that it has classified previous requests from the same individual as vexatious.

23. In *Information Commissioner v Devon County Council & Dransfield* [2012] UKUT 440 (AAC), (28 January 2013) the Upper Tribunal took the view that the ordinary dictionary definition of the word vexatious is only of limited use, because the question of whether a request is vexatious ultimately depends upon the circumstances surrounding that request.
24. In further exploring the role played by circumstances, the Tribunal placed particular emphasis on the issue of whether the request has adequate or proper justification. They also cited two previous section decisions where the lack of proportionality in the requester's previous dealings with the authority was deemed to be a relevant consideration by the First Tier Tribunal.
25. After taking these factors into account, the Tribunal concluded that 'vexatious' could be defined as the "*...manifestly unjustified, inappropriate or improper use of a formal procedure.*" (paragraph 27).
26. The Tribunal's decision clearly establishes that the concepts of 'proportionality' and 'justification' are central to any consideration of whether a request is vexatious.
27. This being the case, the key question a public authority (and the Commissioner) must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
28. The Commissioner has considered the nature, the frequency and the disproportionate burden created by the complainant's previous requests over the sale of the land at Mickley in the decisions outlined above. He does not therefore intend to re-cover those same issues in this decision notice but has nevertheless taken these into account in this decision. Further details of the history leading to the application of the exception are outlined in FS50436741 FS50436742, FS50436888, FS50440374.
29. The current request relates to the same issue of the land sale, albeit potentially with a different angle or sub-issue to previous requests to some degree. In all however they relate to the same issue of the land sale and the complainant's stated intention is to pursue the issue of the sale further with the council.
30. In the tribunal decisions EA/2013/0064, 0065, 0066, 0067 the tribunal considered the previous requests from the complainant and said:

"There is no evidence of wrong-doing and requests to the Council cannot bring forward information which the Council does not hold. Taking a broad view of these requests in their context it is clear that they can serve no proper purpose and are manifestly unreasonable."

31. The Tribunal concluded:

"It is clear that there is no serious purpose behind these requests. The processes of FOIA and EIR have gone as far as they can and they have disclosed nothing. There is no evidence to sustain [the complainant's] suspicions. The burden on the Council and its staff has been considerable, his attempts to get disciplinary action against officers is evidence of his unreasonable approach. No public interest is served by his requests. The Tribunal is satisfied that the ICO's decision notice is correct, the requests are manifestly unreasonable and dismisses the appeal."

32. The Commissioner notes that in spite of applying Regulation 12(4)(b) the council did write to the complainant and explain that the external consultant's advice did not actually relate to the sale of the land at Mickley and related a completely different sale. The advice was mentioned in respect of the land at Mickley as it supported the council's actions in the way that it had advertised the sale of the land but it did not in fact relate to the sale at Mickley. It is noted however that the complainant alleges that there are discrepancies in the council's statements as regards this.
33. Nevertheless the issues regarding this request follow the same issues as were involved in those cases. The request is for information relating to the same land sale and follows a pattern wherein the complainant does not trust the responses (and the information) he has received from the council previously and seeks to demonstrate that the information he has received is incorrect by making further requests, allegations and complaints. In this, his intention behind all of his requests is to prove that the council's sale of the land was improper and potentially fraudulent. His stated intention with the information requested in this case is to provide it to the police, presumably so that the external agent can be questioned about the advice he provided and whether the council's reliance upon this is correct. Clearly if the police considered this important to any inquiries they were carrying out then they could obtain this information themselves.
34. The Commissioner's decision is therefore that the council's decision to apply Regulation 12(4)(b) was correct in this case. He has therefore gone on to consider the public interest test required by Regulation 12. The test is whether the public interest in maintaining the exception outweighs the public interest in the information being disclosed. The

Commissioner has taken into account the presumption of disclosure provided by Regulation 12(2).

The public interest test

35. The Commissioner has referred to the factors and consideration outlined in the previous public interest test which he carried out in case FS50436741. He has also taken into account the consideration of the Tribunal in its decision in EA/2013/0064, 0065, 0066, 0067. The factors considered in those cases remain relevant to this complaint.
36. Following the above the Commissioner's decision is that the public interest rests in the exception being maintained in this case.

Other matters

37. Although they do not form part of this decision notice the Commissioner wishes to highlight the following matters.
38. Section 50(1) of the Act requires the Commissioner to make a decision in relation to complaints he receives about public authorities' compliance with the Act when dealing with requests for information. However, under section 50(2)(c) the Commissioner has the right to refuse to make a decision if it appears to him that a particular application is frivolous or vexatious.
39. In case FS50520772 the Commissioner issued a decision notice to the complainant which found in favour of the councils application of Regulation 12(4)(b). In the 'Other Matters' section of the notice he outlined that if similar complaints were received from the complainant in the future he would consider using his powers under section 50(2)(c) to refuse to make a decision on the complaint. He also outlined his reasons for that decision in the decision notice.
40. In this case the Commissioner notes that the complainant made his complaint to the Commissioner prior to decision notice FS50520772 being issued. The complainant would not therefore have been aware of the Commissioner's intention to consider whether any further complaints are vexatious or frivolous when making his complaint to the Commissioner. The decision notice containing the notification was issued on 6 January 2014. The complainant's last correspondence to the Commissioner over this case was received on 19 December 2013.
41. The Commissioner therefore considers it would not be fair and appropriate to apply section 50(2)(c) to this particular complaint given

that the complainant would not have received the notification issued by the Commissioner at the time of making his complaint.

Right of appeal

42. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

43. 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.
44. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
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