

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

Decision Notice

Date: 19 September 2011

Public Authority: East Riding of Yorkshire Council
Address: County Hall
Cross Street
Beverley
East Riding of Yorkshire
HU17 9BA

Summary

The complainant is in a dispute with the council over the actions it took relating to planning matters on his neighbours property. He asked the council to explain how *"the council can allow residential development to take place without a change of use being granted"*. The council initially refused to respond to the request as it argued that a question did not constitute a valid request under the Act. The Commissioner therefore provided guidance on the issue of questions being regarded as requests under the Act. The council then wrote to the complainant and refused the request under Regulation 12(4)(b) (manifestly unreasonable). The Commissioner's decision is that the council was correct to apply Regulation 12(4)(b) to the request and that the public interest favours maintaining the exception in this instance. However the council breached Regulation 14(3)(a) and (b) and 14(5)(a) and (b) in that it did not initially provide a valid refusal notice which provided all of the details which are required within refusal notices under the Regulations.

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 almost 20 years of correspondence and meetings with the council relating to a bungalow which neighbours his property. The Commissioner understands that the complainant believes that part of the property extends on to his own land, and has sought information from the council as to how this situation was allowed to occur.

The Request

3. On 5 January 2011 the complainant requested from the council
*"The council have conceded that no residential use exists for the property in planning application *****. Could you explain to me how the council can allow residential development to take place without a change of use being granted. All I require from you is an explanation please."*
4. Although the intention behind the question relates to the concerns which the complainant has had with the council over his neighbour's property it was also formulated in a general manner. It can also be read to be asking for details about how planning law would allow this more widely.
5. The Commissioner also notes that on 10 January 2011 the complainant made another request for information. He asked the council to *"give me the date the four year rule became law."* The Four Year Rule is a planning law which prevents authorities from taking action against property owners for changing the use of the property where the property has been used in that way unchallenged for four years,
6. On 11 January 2011 the council responded to the complainant's initial request. It said that it was no longer prepared to correspond further

with him on this matter. On the same date the council's Chief Executive wrote to the complainant outlining that council officers had responded extensively to his questions previously and that there was nothing further that he could add to the information which he had already been given regarding the planning status of his neighbour's property.

7. On 31 January 2011 the complainant wrote to the Commissioner to complain that he had not received a response to his request.

The Investigation

Scope of the case

8. On 31 January 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the council should have responded to his request, and whether the information should be provided to him.

Chronology

9. On 14 March 2011 the Commissioner wrote to the council informing it that it needed to issue a formal refusal notice to the complainant in response to his request. Although the council's response had informed the complainant that it would not correspond further on this issue, it had not provided a refusal notice which met with the requirements of the Regulations. Its letter had not stipulated the Regulation it was relying upon to refuse the request nor specified the reasons why it was refusing to respond.
10. The council responded on 29 March 2011. It asked the Commissioner to reconsider whether the request was an eligible complaint under the Regulations as it considered that the request was in fact a question rather than a request for recorded information.
11. The Commissioner wrote back to the council on 30 March 2011 explaining that the First Tier Tribunal had provided guidance that questions should also be considered as requests under the Act or the Regulations where an authority holds recorded information which would respond to the question asked.
12. On 31 March 2011 the council wrote to the complainant stating that it would not respond further on this matter.

13. On 5 April 2011 the council again wrote to the Commissioner asking him to reconsider his decision that the complaint was eligible. It argued that the complainant had asked a question which would require some analysis to respond rather than being a request which could simply be answered by disclosing recorded information.
14. On 14 July 2011 the Commissioner telephoned the council to explain his position on this case. He followed this with a letter on the same day clarifying the same. He explained to the council why he considered the request to be eligible and informed it that it would need to issue a formal refusal notice under the Regulations.
15. On the same date the council issued a formal refusal notice to the complainant stating that it refused to respond to the request under Regulation 12(4)(b) as it considered it to be manifestly unreasonable.

Analysis

Substantive Procedural Matters

Exceptions

Regulation 12(4)(b)

16. The council relied on the exception in Regulation 12(4)(b). This exception applies where a request is either vexatious, or would be imposing on the authority to such an extent that it would neither be reasonable, nor in the public interest for it to comply with the request. The council confirmed that it considered that the complainant's request was vexatious.
17. When considering whether a request is vexatious or not the Commissioner will look to the all of the circumstances of the case, but will bear in mind a number of guidelines which might aid him to make his decision. These are:
 - a) whether compliance would create a significant burden in terms of expense and distraction
 - b) whether the request is designed to cause disruption or annoyance
 - c) whether the request has the effect of harassing the public authority or its staff

d) whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable

e) whether the request has any serious purpose or value

18. Not all of these factors need to be present in order for the Commissioner to find that the request is vexatious. The Commissioner has considered these in the order provided above.

19. a). The council did not provide specific arguments to the effect that responding to the request would cause it a significant burden. It did however describe the work it had carried out responding to the complainant's previous questions and complaints on this issue. Since 1991 numerous council officers had corresponded with the complainant, met with him and spoken to him regarding the residential use of the property.

- The council provided the complainant with access to the planning history files.
- The complainant referred the matter to the Ombudsman on two or more occasions;
- The complainant had made a previous complaint to the Commissioner about whether records were held, and the Commissioner's decision at that time was that on a balance of probability, relevant records were not held.
- The council had carried out a review of the decision in 1999 and confirmed that the information it holds could not answer the complainant's complaint. In 2010 after a further question from the complainant the council carried out a further review of the records held in relation to the matter and wrote to the complainant outlining its conclusions. The officer who carried out the review stated that the council could not help him further in respect of the issue and that it would not correspond with him further over the matter. It said that this was because there had now been correspondence between the complainant and the council over a period of nearly 20 years on the same issue and it could not help him further.
- The complainant then wrote a further 3 emails to the officer concerned over the matter and then wrote to the council's Chief Executive. He then responded to the complainant as stated above, indicating that the council would not respond further on the issue.
- The council also took further action which is outlined in paragraph 30 below.

The council has therefore demonstrated that it has spent a significant amount of time and resources answering previous questions from the complainant on the same issue.

20. The Commissioner is therefore satisfied that responding to the complainant's questions would not create a significant burden for this particular request but that it would add to the significant amount of work which the council has already carried out responding to the complainant's complaints.
21. The Commissioner also notes that it is clearly the intention of the complainant to continue making complaints or requests until he has proven his case. The Commissioner has therefore taken into account the full context of all the complaints and the requests so far, and the fact that the complainant would be more than likely to continue to make requests on this issue when making his decision. The answers which the council could provide in this instance would not specifically resolve the issues he has with the council and so the Commissioner considers that the complainant would continue with further requests until he achieved his goal.
22. b). The Commissioner is satisfied that the request is not designed to cause disruption or annoyance. The complainant is seeking further information in respect of a matter which he remains unhappy about, and his view is that the council holds evidence which would help him resolve his complaint.
23. c) The Commissioner must consider whether the request would have had the effect of harassing the authority or its staff rather than whether the requestor had the intention of harassing the authority per se. If the authority or its staff would have felt harassed by the request then the council can take this into consideration as a factor in favour of the exception being applicable.
24. The Commissioner notes that the issues involved are nearly 20 years old, albeit those circumstances may have changed and been compounded by more recent planning applications etc for extensions on the property in questions during that time.
25. The council has outlined some of the steps which has taken to resolve the complainant's complaints previously. These are outlined above and in point d) below. After considering the history of this case the Commissioner is satisfied that the request continues a line of complaints and questions about the council's decisions on the property which the council has already sought to respond to on a number of occasions in the past. The council has previously explained the circumstances which have led to the situation however as the

- complainant remains unhappy with the current circumstances he continues to make requests in order to try to prove his point.
26. The Commissioner is therefore satisfied that the receipt of a further question after the prior work which the council has done to explain the issues to the complainant would lead the council and council staff to feel that they were being harassed on this issue.
 27. d). The Commissioner accepts that at times there is a thin line between obsession and persistence. Although each case is determined on its own facts, the Commissioner considers that an obsessive request can be most easily identified where a complainant continues with the request(s) despite being in possession of other independent evidence on the same issue.
 28. The council indicated in its letter to the complainant that the issue has been continuing since 1991 and that an Ombudsman has already considered a number of complaints on this issue. The complainant however denies that the issue has been properly considered by an Ombudsman. He says that due to the council's delays in responding to his original questions he was denied an ombudsman's investigation as the Ombudsman then judged his complaint to have been submitted out of time. The Commissioner cannot consider whether that was the case nor not however he accepts that where the Ombudsman refused to consider a complaint then this would not constitute a consideration of the complaint being made by an independent third party. The substance of the complaint would not have been investigated in detail nor a decision made based on all the facts of the case.
 29. The council has provided further arguments to demonstrate that the complainant's continued requests and correspondence are obsessive and seek to justify his arguments even though these issues have been ongoing for nearly 20 years and have been considered on many occasions in the past.
 30. The Commissioner notes the council's arguments in the former case he investigated involving this complainant. The council wrote to the Commissioner in that case in 2008 explaining:

"since the matter has been investigated [the complainant] has contacted the council on a regular basis at approximately 6 month intervals. Each time the council has attempted, using its records, to answer the complainant's questions, even though these have involved the re-wording of earlier questions and are essentially asking for the same information. [The complainant] has been shown the files and had them explained to him and has been given every opportunity to view the files subsequently. The

council has taken its own legal advice on the matter and [the complainant] has met one of the legal team and the council's former Chief Executive.... [also a solicitor] and has been advised on numerous occasions that the planning files cannot help him to establish, as he claims, that part of "White Bungalow" is built on his property. He has been advised throughout that the matter is a civil issue and he should take his own legal advice. [Name of officer] has asked [the complainant] on numerous occasions, whether he has taken the matter to court and [the complainant] has replied in the negative

31. It added:

"What [the complainant] has done consistently is try to seek the same information, often by trying to bypass [the officer responsible for the review in question] and seek information from other Council Officers within the Planning Service, often leading to considerable amounts of work before the officers, in trying to obtain the files, find them booked out to [the officer responsible for the review].

32. The Commissioner also notes and takes account of the arguments outlined in paragraph 35 below. In conclusion he is satisfied that the council has provided evidence to demonstrate that the request is obsessive and is otherwise manifestly unreasonable.
33. e). The final test is whether there is any serious purpose or value to the request. The Commissioner is satisfied that the complainant does have a serious purpose in making the request in that he is seeking to justify his position as regards the property. However the request itself essentially asks for an explanation of planning law. He has asked the council to explain "*how the council can allow residential development to take place without a change of use being granted*". Such general information would be widely available from a planning law adviser or through researching on the internet which explains the circumstances under which this might occur. In that sense the Commissioner is satisfied that the information would be available to the complainant through other means, albeit that this would take research or cost the complainant money to obtain.
34. However, specifically relating to the property in question, the council also previously provided a justification for its actions relating to his complaint and demonstrated why it had made the decisions it did in planning law for this property. The council explained to the complainant that this occurred due to "The Four Year Rule" in planning law – essentially that a use of property in a particular way for a

particular period of time will prevent the council from challenging or enforcing against that use.

35. The council clarified that although it did not hold specific information showing that an application for a change of use to residential purposes had been received, it did hold an application for planning permission to build an extension on the property in 1971. An officer who carried out a review in 1999 had therefore concluded that residential use had begun at a point prior to 1971. In the review he stated that at the time of the planning application in 1971 the council had had the opportunity to challenge the change of use to residential purposes but had not done so. He concluded that this provided very strong evidence that a 4 year period of residential use had passed for the purposes of the 4 year rule by 1991 when this became an issue with the complainant. The complainant had been informed of this.
36. The above therefore explains when the residential use of the property came about, and also why the council decided that it could not take action against the owners of the property from 1990 onwards. It had had, but not used, the opportunity to question the use of the property as a residence in 1971, and had not done so. The council had therefore taken into account the owner's rights under the Four Year Rule after that point.
37. The Commissioner is therefore satisfied that the council's response to the request would serve no value in this instance. The council has already provided the reasons behind its decisions to the complainant and explained why it could not now change its position in this respect. The Commissioner is therefore satisfied that the complainant's request would serve no serious purpose or value in this instance.

Conclusions

38. The Commissioner has therefore considered all of the facts of the case and is satisfied that the council has provided sufficient evidence to prove that the request is manifestly unreasonable. He therefore considers that it is correct to apply Regulation 12(4)(b) to the request.
39. Regulation 12(4)(b) is subject to a public interest as required by Regulation 12(1)(b). When carrying out this test the Commissioner must take into account the presumption towards disclosure required by Regulation 12(2). The test is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

The public interest arguments in favour of disclosing the requested information

40. The central public interest in the disclosure of the information in this case rests in creating greater transparency and accountability on the actions of the council when regulating and applying planning laws in the county.
41. The council's actions in this case have led the complainant to believe that its actions led to a situation where changes which have taken place on his neighbours property has had a detrimental effect on him and his property.
42. The complainant has raised questions about how the council has taken account of the four year rule and why it has not taken action over the issues he has raised concerns over in this case. The Commissioner recognises that there is a public interest in the complainant being allowed to know how the situation arose and why the council has decided not to intervene in his property dispute.
43. However the Commissioner understands that the council has provided the complainant with an explanation, albeit that the complainant is not satisfied with that explanation. He also understands that the council has explained to the complainant that any resolution to the potential encroachment on his property would need to be via the courts as it is a civil matter between him and his neighbour.

Public interest arguments in favour of maintaining the exception

44. The central public interest arguments in respect of maintaining the exception in this instance address whether the complainant should be able to use the Regulations as a means to continue his complaint with the council when this has been addressed and fully considered by the council on a number of occasions already, and when the complainant's real resolution potentially lies through making a legal claim against his neighbour.
45. An explanation of the information which the council holds and the planning history of the case have been already been made available to him and the council has also explained its decisions to him on numerous occasions. The fact that the complainant disputes that the council has acted appropriately is a question which in reality should have been dealt with through a complaint to the Ombudsman.
46. There is also a secondary question as to whether the complainant should be able to seek what would amount to legal advice on the basis to the council's actions when this is actually available from other sources such as a legal adviser or through direct research.

47. There is a strong public interest in the council being able to draw to a close to a matter which has been ongoing for nearly 20 years. It is clear that disputes of such a long running nature build up in terms of the cost to the public and the public resources used to respond to the questions and concerns raised over that period of time. The council has made its decision as regards the application of the Four Year Rule and there were avenues to appeal that decision which the complainant could have taken. It is possible that there are still legal avenues which the complainant may be able to take and he is therefore able to take legal advice on the possibility of this if he wishes to take his case forward.
48. In the absence of this there is a strong public interest in the council being able to say to the complainant that it will no longer consider request for information on this same issue as it is clear that he will not be satisfied with any response that the council provides other than potentially an admission that it had made a mistake, and that the property in question should not have been developed in the way it has. The council however states that that is not the case. Any dispute over the boundaries of the land in question is a civil matter and the complainant has the right to seek a resolution through the courts.
49. The property in question is a residence and there is also a public interest in drawing the issue to a close in order that the owners of the property can feel secure that their property will not be subject to further investigation. The property's owners have a legitimate interest in being allowed peaceful enjoyment of their property without further questions and issues being raised about its compliance with planning law.
50. The council sought to make its final position clear to the complainant when it carried out its review of its actions in 2010 and provided the complainant with a copy of its findings. This however resulted in further requests and complaints being made by the complainant to the council.

Balance of the public interest arguments

51. The complainant's underlying complaint is that the council has failed to enforce against the change of use the subsequent extension of a property and the complainant considers that this should not have been allowed. The complainant's requests and concerns have centred on proving that the council's actions led to a position which has detrimentally affected him.
52. The Commissioner considers that it is not in the public interest to allow the Regulations to be used to further a dispute which has been ongoing

for such a length of time and to undermine the council's final decision on that complaint. It does not serve the best interests of the public to allow planning matters to be extended and/or manipulated in this way through the use of the Regulations and at a cost to the public. The council has made its decisions and has sought to explain these to the complainant. It has acted transparently and the information it holds has generally been provided to the complainant.

53. If there was an error in judgement by the council the complainant's route to resolve that was through the Ombudsman or through the courts. The council has provided its arguments and has provided the complainant with the evidence upon which it relied when making those decisions. The history of the complaints, together with the complainant's line of questioning indicates that he may be seeking to obtain an 'admission of guilt' or error from the council by making numerous requests under the Regulations or the Act.
54. The Commissioner has also taken into account the nature of the information which has been requested in this instance. The complainant has actually asked a general question about planning law. The information which is in fact held by the council which would answer the question more generally lies within publicly available documents and guides outlining the principles of planning law. The information could therefore equally be gained from planning guidelines or from a legal adviser who is an expert in planning matters.
55. The Commissioner has considered the alternative arguments. There is clearly a very strong public interest in the council acting transparently and being accountable for its actions. In this case the complainant suggests that the council's actions are lacking in some way, and there is therefore a public interest in him being able to seek clarification and evidence from it as to how it allowed this situation to develop. The council has however already provided this to the complainant, and stated that it has and allowed access to the planning history file should the complainant wish to see it. It has therefore already acted transparently on this matter.
56. The Commissioner is therefore satisfied that the public interest in transparency and accountability is outweighed in this instance by the public interest in allowing the matter to be drawn to a close. His decision is therefore that the public interest in maintaining the exception outweighs that of disclosing the information.

Procedural Requirements

57. The complainant made his request for information on 5 January 2011. The council responded on 11 January 2011 stating that it would not

respond to further correspondence. The Commissioner recognises that the council did not at that time recognise that the question which the complainant had asked was a request under the Regulations and therefore did not issue a decision in the form of a formal refusal notice under the Act. A formal refusal notice meeting the requirements of the Regulations was not issued to the complainant until 14 July 2011.

58. Nevertheless the Commissioner is satisfied that the council breached Regulation 14 in that its Refusal Notice of 11 January 2011 did not provide some of the other requirements of Regulation 14. In particular:
- The response breached section 14(3)(a) in that it did not specify the exception upon which the council was relying to refuse the request.
 - The response breached Regulation 14(3)(b) in that it did not specify the matters that the public had considered in reaching its decision with respect to the public interest under Regulation 12(1)(b).
 - The council also breached Regulation 14(5)(a) and (b) in that the refusal notice did not inform the applicant that he could make representations to the public authority under Regulation 11 or of the enforcement and appeal provisions of the Act applied by Regulation 18.

Decision

59. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The council correctly applied Regulation 12(4)(b) to the information.
60. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The council breached Regulation 14(3)(a) for the reasons provided above.
 - The council breached Regulation 14(3)(b) for the reasons provided above.
 - The council breached Regulation 14(5)(a) &(b) for the reasons provided above.

Steps Required

61. The Commissioner requires no steps to be taken.

Right of Appeal

63. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

64. 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.
65. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 19th day of September 2011

Signed

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire

Reference: FS50378227

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Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

Regulation 5 - Duty to make available environmental information on request

Regulation 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.

Regulation 5(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.

Regulation 14 - Refusal to disclose information

Regulation 14(1)

If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2)

The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3)

The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

Regulation 14(4)

If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

Regulation 14(5)

The refusal shall inform the applicant –

- (c) that he may make representations to the public authority under regulation 11; and
- (d) of the enforcement and appeal provisions of the Act applied by regulation 18.