

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 3 February 2014

Public Authority: Health and Safety Executive
Address: Redgrave Court
Merton Road
Bootle
Liverpool
L20 7HS

Decision (including any steps ordered)

1. The complainant has requested information concerning the enforcement of a regulation for the building of flue terminals. The Health and Safety Executive ("HSE") refused the request as 'manifestly unreasonable' under regulation 12(4)(b) of the EIR.
2. The Commissioner's decision is that HSE has correctly applied regulation 12(4)(b) of the EIR to this request. There are no further steps to be taken.

Background

3. The complainant first raised her concerns over her neighbour's gas flue terminal with Mid Lothian Council in November 1998 and then raised the same complaint with HSE in November 2011.
4. In 2011 the complainant complained to HSE about the distance of her neighbour's flue terminal to the boundary of her property. She was concerned with the location of the installation and argued that the responsible authorities had failed to carry out their duties and enforce the statutory regulations.
5. Over the course of the next few months, HSE responded to further questions and arguments from the complainant.
6. HSE explained that it enforces the Gas Safety (Installation and Use) Regulations 1998 (the "Regulations"). It explained that any gas related

work should be carried out by a class of person registered on the Gas Safety Register (the "GSR"). It explained that the GSR has a responsibility to ensure that installers registered with them operate safely. Therefore concerns on competency of installations are for the GSR's attention.

7. The complainant argued her complaint was not with the installers but about the enforcement of the Regulations. The matter was referred to the Complaints Appeals Manager at HSE.
8. On 2 December 2011, HM Principal Inspector of Health and Safety wrote to the complainant. HSE explained that it was treating her correspondence as a complaint about a potential risk to her health arising from a work activity. It explained that this is the only issue it could consider under its statutory powers. It explained it could not consider the complaint any further as it did not meet its investigation criteria.
9. HSE informed the complainant that it could only investigate the installer of the gas flue under the Regulations and advised her that it did not have the powers to change the flue.
10. Following further correspondence from the complainant, HSE again explained that although it is the enforcing authority for the Regulations, it does not always act solely when there is an apparent technical breach in a recognised standard (such as the proximity of her neighbour's flue). The complainant was provided with a link to HSE's policy on enforcement practices.
11. On 17 January 2012 HSE's Director of Scotland and Northern England responded to the complainant's letters. HSE explained it had repeatedly advised her of the limits of its enforcing powers and how it was also required to apply discretion in enforcing the Regulations in question. HSE reiterated that unless there was evidence of a risk to health and safety, it would take no action. It considered the matter closed.
12. The complainant continued to correspond with HSE throughout 2012 and 2013, asking further questions and requesting information, including details of HSE's formal complaints procedure. HSE continued to respond to the complainant, either with 'normal course of business' correspondence or formally under the EIR.
13. The complainant then submitted the information request which is under consideration in this case.

Request and response

14. On 23 May 2013 with respect to her neighbour's flue terminal, the complainant wrote to HSE and requested information in the following terms:

"Please give the following information.

1. *How many times has the above ACoP regulation been enforced?*
2. *As HSE claim they have no measurements of risk, what conditions must exist before the above statutory regulation is enforced?*
3. *What is the purpose of Health and Safety Executive / Local Authorities Enforcement Liaison Committee with regard to enforcement of the above Regulation.*
4. *Discretionary Powers
Where does it state within your framework of policies and procedures that HSE can ignore clear legal advice and use their "discretionary powers"?*
5. *What duties do HSE Inspectors have with regard to ACoP?*
6. *With regard to flue terminals, please provide evidence that HSE are taking ACoP guidance into account."*

15. HSE responded on 31 July 2013. It refused to respond under regulation 12(4)(b) of the EIR as it considered the request to be 'manifestly unreasonable'.

16. On 5 August 2013, the complainant informed the Information Commissioner's Office (the "ICO") that she did not accept this response. She was asked to request an internal review and did so on 17 September 2013. This was provided on 17 October 2013 and HSE upheld its original position.

Scope of the case

17. The complainant contacted the Commissioner on 29 October 2013 to complain about the way her request for information had been handled.

18. The Commissioner considers the scope of this case is to determine whether HSE is entitled to rely on regulation 12(4)(b) of the EIR as a basis for refusing to provide the requested information.

Reasons for decision

19. The Commissioner is satisfied that the information requested meets the definition for environmental information as set out in regulation 2(1)(c).

20. Regulation 12(4)(b) of the EIR states that:

"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..."

21. The Commissioner recognises that, on occasion, there is no material difference between a request that is manifestly unreasonable on vexatious grounds under regulation 12(4)(b) of the EIR and a request that is vexatious under section 14(1) of the Freedom of Information Act 2000 (the "FOIA"). The Commissioner has therefore considered the extent to which the request could be considered as vexatious.

22. The term "vexatious" is not defined in the FOIA. The Upper Tribunal recently considered the issue of vexatious requests in the case of the *Information Commissioner v Devon CC & Dransfield*.¹ The 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. The Tribunal concluded that 'vexatious' could be defined as the

"...manifestly unjustified, inappropriate or improper use of a formal procedure" (paragraph 27).

The decision clearly establishes that the concepts of 'proportionality' and 'justification' are central to any consideration of whether a request is vexatious.

¹ UKUT 440 (AAC) (28 January 2013)

23. In the Dransfield case, the Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues: (1) the burden imposed by the request (on the public and its staff); (2) the motive of the requester; (3) the value or serious purpose of the request; and (4) the harassment or distress caused to staff. The Upper Tribunal did, however, also caution that these considerations were not meant to be exhaustive. Rather it stressed the:

"importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests" (paragraph 45).

24. The Commissioner has therefore considered whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress in relation to the serious purpose and value of the request.

25. The Commissioner has identified a number of "indicators" which may be useful in identifying vexatious requests. These are set out in his published guidance on vexatious requests.² The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of the case will need to be considered in reaching a judgement as to whether a request is vexatious.

26. HSE has explained that it has no further information which can be provided to the complainant on this matter. It has provided various links to its website which clearly states its regulatory functions and complaints procedures. The complainant has been provided with numerous pieces of information.

27. HSE has explained that the frequency and volume of correspondence received from the complainant has resulted in disruption to HSE's functions, placing a significant burden on the organisation's resources and necessitating staff to be taken off their normal regulatory and enforcement duties.

28. Although the complainant has been repeatedly told that HSE can provide no further information, the complainant continues to write to it with regard to this matter.

² http://www.ico.org.uk/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/dealing-with-vexatious-requests.ashx

29. HSE has argued that further correspondence from the complainant would add pressure to HSE staff as reading and responding to her voluminous correspondence will continue to cause unnecessary irritation and distress.
30. HSE considers that the request has no purpose or value as the complainant has already been advised that it is not within HSE's regulatory remit to require the gas flue to be removed from its current location.
31. Furthermore, the complainant has provided no evidence as to when the gas flue was installed, or by whom. HSE believes (but cannot prove) that the flue terminal was located in its present position prior to the gas regulations coming into force, but without the necessary evidence from the complainant, and given the passage of time, it is unable to investigate this matter.
32. HSE has explained that it does not consider this complaint to be about the disclosure of information. It considers that the complainant is using the ICO's complaints procedure under the guise of non-disclosure as she is clearly unhappy with the outcome of her complaint to HSE. It considers that this is a matter relating to HSE's role as regulator of health and safety legislation.
33. The Commissioner agrees that it would appear the complainant is using the EIR as a means of keeping this issue alive. She has been repeatedly informed that HSE does not take action unless there is evidence of a risk to health and safety. HSE has explained that could only investigate the installer of the gas flue under the Regulations and it has advised her that it does not have the powers to change the flue.
34. Despite this clear confirmation of HSE's remit, it is apparent that the complainant wishes to pursue this issue with HSE and is not prepared to let the matter drop. This is a clear indicator of a vexatious request.
35. The Commissioner has reviewed the correspondence over the last two years and is satisfied that it is extensive and represents a significant burden in terms of workload.
36. The Commissioner is therefore satisfied that the effort involved in responding to this request is disproportionate. Although the complainant clearly considers that the request has a serious purpose it is apparent that HSE has nothing further to add on the matter.
37. For the above reasons the Commissioner is satisfied that HSE is correct to consider the request to be vexatious. He has balanced the purpose and value of the request against the detrimental effect on HSE and is

satisfied that the request reflects the complainant's desire to keep her dispute alive, rather than to access recorded information.

38. The Commissioner finds no substantive justification for the request, and is satisfied that compliance would prolong correspondence and constitute an unfair burden on HSE. Accordingly the Commissioner finds that regulation 12(4)(b) is engaged.

Public Interest Test

39. 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).
40. HSE has argued that it has nothing to disclose. It has argued there is no valid purpose to the request because it cannot help the complainant in this matter. The Commissioner is satisfied that the request is only of concern to the complainant and there is no wider public interest in HSE considering the request further.
41. Having considered the evidence provided in this matter the Commissioner finds that the public interest test in openness, transparency and the disclosure of environmental information, is outweighed by the public interest in refusing to respond to a manifestly unreasonable request.
42. 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.

Other matters

43. In its response to the Commissioner HSE has formally raised its concerns about the amount of time and effort invested into this matter. It has also explained that it considers the resource involved in responding to the ICO with respect to this complaint is vast.
44. The Commissioner appreciates the position HSE finds itself in and understands that HSE has spent a considerable amount of time responding to the correspondence of the complainant regarding this issue. However once a complainant has submitted a complaint to the

ICO, the Commissioner has a duty to investigate it thoroughly. This inevitably involves asking a public authority for its submissions and evidence to back up its arguments.

Right of appeal

45. 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: informationtribunal@hmcts.gsi.gov.uk

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

46. 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.
47. 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

Rachael Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF