

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

Decision notice

Date: 21 July 2014

Public Authority: London Borough of Southwark
Address: PO Box 64529
London
SE1P 5LX

Decision (including any steps ordered)

1. The complainant requested a copy of a report produced following an investigation in relation to very serious cases of fly-tipping at Camberwell Old, Camberwell New and Nunhead cemeteries. The public authority refused to comply with the request on the basis of section 14 FOIA (vexatious request). During the course of the Commissioner's investigation, it relied on the exception at regulation 12(4)(b) of the EIR in the alternative.
2. The Commissioner's decision is that:
 - The request should have been handled under the EIR, not the FOIA.
 - The public authority was not entitled to refuse to comply with the request on the basis of regulation 12(4)(b).
3. The Commissioner requires the public authority to take the following steps:
 - Disclose an unredacted copy of the report to the complainant, or

- Disclose a redacted copy of the report to the complainant and issue a refusal notice under the terms of regulation 14 of the EIR for any information redacted from the report. The public authority cannot however rely on the exception at regulation 12(4)(b), or
 - If the public authority considers all of the remainder of the information in the report exempt from disclosure, issue a refusal notice to the complainant under the terms of regulation 14 of the EIR. The public authority cannot however rely on the exception at regulation 12(4)(b).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. In January 2009 very large amounts of builders' demolition waste was discovered dumped at 3 cemeteries under the control of the public authority. The cemeteries were Camberwell Old, Camberwell New (known as Honor Oak) and Nunhead.
6. The public authority subsequently initiated a civil case in the High Court against one of its officers and a tipping company to recover the costs of removing the dumped waste and treating contaminated soil. Judgement was delivered by The Hon. Mr. Justice McCombe in March 2011¹ who was critical of some of the evidence given by senior officers of the authority as well as its handling of the matter.
7. W Roots Associates Limited (an independent consulting company) was commissioned by the public authority in April 2011 to examine the actions taken by officers responsible for the 3 cemeteries and to advise the authority whether the comments made by the Judge were accurate and reasonable. It issued a report (the report) to the public authority in September 2011 following the completion of its investigation.

¹ [2011] EWHC 685 (QB) - <http://www.bailii.org/ew/cases/EWHC/QB/2011/685.html> hereinafter referred to interchangeably as the Honor Oak cemeteries case.

Request and response

8. On 29 October 2013 the complainant wrote to the public authority requesting a copy of the report in the following terms:

'I received a FOI response that indicated a report by Bill Rootes [sic] made a recommendation that no action should be taken against 2 named individuals but failed to make any recommendation regarding the other 5 officer involved. [sic]

In response to another FOI question I was provided with Bill Rootes [sic] remit which was to (1) "advise if the Judge's comments were accurate and reasonable." (2) "assess whether any formal action was needed against current Southwark staff.

Given that the Court Transcript and subsequently the Judge's comments and the names to whom those comments are attributed are freely available to the public, and were reported on in the media could you, provide me with a copy of Bill Rootes report [sic].....'

9. As can be seen from his request, the remit of the investigation by W Roots Associates and the recommendations in the report had previously been supplied to the complainant.²
10. On 21 November 2013, the public authority informed the complainant that it considered the remaining information in the report exempt from disclosure on the basis of the exemption at section 41 FOIA.
11. On 27 November 2013 the complainant requested an internal review in the following terms:

'.....either Bill Rootes [sic] report exonerates the officers named publicly by Mr Justice McCombe in which case there would appear to be some justification for it to be made publicly available or its does not.[sic]

In the case of the former there would appear to an advantage to Southwark Council [sic] but with the latter it would be in the public interest to know if those charged with administering Council business have in fact complied with all Council policies including the Constitution, Code of Conduct for Employees and Code of Governance particularly with respect to accountability.'

² This information was disclosed to the complainant on 19 September 2013

12. On 23 December 2013 the public authority wrote to the complainant with details of the outcome of the internal review. The original decision was upheld.

Scope of the case

13. On 13 January 2014 the complainant contacted the Commissioner to complain about the way his request for information had been handled. This was accompanied by a detailed submission in support of his view that the public authority was not entitled to withhold the report on the basis of section 41 FOIA.
14. On 11 March 2014 the Commissioner wrote to the public authority. He requested a copy of the report and a detailed explanation in support of the application of section 41. He also set out the criteria that have to be met in order to successfully engage the exemption at section 41 and asked the authority to clearly explain how the criteria had been met in relation to the withheld report.
15. On 27 March 2014 the public authority responded. It provided the Commissioner with an unredacted copy of the report. However, it no longer sought to rely on the exemption at section 41. Instead, it considered that the request was vexatious within the meaning in section 14 FOIA on the grounds that it was one in a series of requests made by the complainant in connection with; *'The Honor Oak Cemeteries Case and the subsequent Bill Roots report, The complaint against the then monitoring officer and chief legal officer, and the 2012 change to the member officer protocol in the constitution.'* The authority also informed the Commissioner that the complainant's *'campaign'* had resulted in him being made a habitual complainant under the authority's habitual complainant policy.
16. It further claimed that the report was exempt on the basis of section 43 FOIA because, in its own words: *'one of the senior officers named in the report is no longer employed by the council and has said that they will take legal action against the council if the report.....is made public....The affect of potential legal action associated with such disclosure and any damages which may be awarded as a result of those actions could result in the use of public funds to defend or settle any such actions, which would not be in the public interest.'*
17. The public authority also stated that the name of a junior officer in the report was exempt from disclosure on the basis of section 40(2). However, it did not explain why it considered this to be case.

18. The Commissioner explained to the authority that the exemption at section 43(2) FOIA applies to the *commercial interests* not the *financial interests* of public authorities and/or third parties. Therefore, the explanation above could not engage the exemption because it is primarily in relation to protecting the financial interest of the public authority.
19. Upon considering the report, the Commissioner wrote to the public authority on 3 April 2014. He explained that the request should have been handled under the terms of the EIR rather than the FOIA. He also explained that he did not consider the request vexatious and advised the authority to re-consider its position.
20. The public authority disagreed that the request should have been handled under the EIR and maintained its view that the request was vexatious within the meaning in section 14 FOIA. However, it also relied on the alternative exception at regulation 12(4)(b) of the EIR – manifestly unreasonable request.
21. The reasons for the Commissioner's decision are explained fully below.

Reasons for decision

Applicable access regime

22. The Commissioner interprets '*any information.....on....*' in regulation 2 of the EIR fairly widely. He has issued guidance on the definition of *environmental information* within the meaning in the EIR.³ The subject matter of the report arises from complaints about the dumping of waste at cemeteries and the way in which the public authority handled, acted upon or failed to act upon those complaints. That is clearly '*information on*' the state of the land (regulation 2(1)(a)), waste, as a factor affecting the state of the land (regulation 2(1)(b)), and administrative measures or activities (complaint handling and responses) designed to protect land from the unlawful dumping of waste (regulation 2(1)(c)). The fact that the report is primarily focussed on the public authority's failure to properly address illegal dumping of waste at cemeteries does not mean that it cannot be environmental information for the purposes of the EIR.

³ <http://ico.org.uk/foikb/PolicyLines/FOIPolicyAnyinformationon.htm>

It is inherently linked to an activity which has or is likely to have an impact on the environment.

23. In view of the above, the Commissioner considers that the report falls within the broad definition of environmental information. Specifically by virtue of the provisions in regulations 2(1)(a), 2(1)(b) and 2(1)(c).

Regulation 12(4)(b) – request is manifestly unreasonable

24. A public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
25. The Commissioner considers that a request refused on the grounds that it is *vexatious* is likely to be manifestly unreasonable within the meaning in regulation 12(4)(b). The term *vexatious* may be defined as the manifestly unjustified, inappropriate or improper use of a formal procedure.⁴ It is important to note that what may constitute an improper use of the EIR and the FOIA information access regimes might not constitute an improper use of a different formal procedure and vice versa. The key question to ask when weighing up whether a request is *vexatious* is whether the request, in the context of the history of previous requests from the applicant (in some cases), is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
26. The public authority considers the request *vexatious* because in its view, the request can fairly be seen as obsessive, has the effect of harassing the authority and its staff, would impose a significant burden in terms of expense and distraction, is designed to cause disruption or annoyance and does not have a serious purpose.
27. The public authority considers that the volume and frequency of correspondence and requests received is of a level that could be described as obsessive and has the effect of harassing the authority and its staff. It provided the Commissioner with a list of requests for information it had received from the complainant since 2011, a summary of deputations, requests and public questions it had received (between 2011 and 2014) from campaign groups it claimed the complainant was part of, and copies of the requests for information actually relating to the report which were handled under the terms of the FOIA.

⁴ Information Commissioner v Devon CC and Dransfield [2012] UKUT 440 (AAC)

28. Although the complainant had previously made a number of requests for information between October 2011 and June 2013, it is far from clear whether they all relate to the Honor Oak cemeteries case. It is also not clear whether all of the requests were handled under the terms of the FOIA or the EIR. However, it would appear that the complainant made 5 requests directly related to the report between 2011 and 2013. Therefore, although the Commissioner can appreciate why the public authority, in view of the volume and frequency of the complainant's correspondence, decided to cease corresponding with him under its habitual complainant policy, that in itself is not indicative of an unjustified and improper exercise of the complainant's information rights under the FOIA or the EIR. The focus has to be primarily on the volume and frequency of the complainant's requests for information which were handled under the terms of the FOIA or the EIR. The complainant's 5 requests for information in relation to the report between 2011 and 2013 is not in the Commissioner's view indicative of an abuse of the information rights process. Therefore, in that context, the Commissioner is not persuaded that the request of 29 October 2013 was likely to cause a disproportionate and an unjustified level of disruption to the public authority.
29. It is revealing that the Chief Executive of the public authority wrote to the complainant on 6 February 2014 and pointed out that she had previously given the complainant the opportunity to read the report rather than publish it. The Commissioner notes that the public authority had previously overturned its own decision that the complainant's penultimate request of 12 June 2013 (in relation to the report) was vexatious and the information requested was subsequently disclosed to him on 19 September 2013. Under these circumstances, it is also difficult to ignore the fact that the public authority did not consider the request of 29 October 2013 vexatious until the Commissioner had suggested that the exemption at section 41 was unlikely to be available to it to withhold the report.
30. The public authority appears to be more concerned about the consequences of publishing the report rather than on the nature of the complainant's request. If it has concerns about any possible prejudice which might arise from disclosure, then it needs to consider whether any of the other exceptions in regulation 12 of the EIR apply. The exception at regulation 12(4)(b) cannot be available to the public authority for that purpose.
31. The public authority also stated that the complainant is part of a campaign, the purpose of which is to obtain compensation for the authority's former employee who was one of the defendants in the civil case but 'there may also be other reasons'. It provided the

Commissioner with a copy of an email (of January 2014) that the complainant had sent to the authority's Chief Executive. It is clear from the email that the complainant would like the former employee to receive financial compensation from the public authority. Although both the FOIA and the EIR are generally applicant or purpose blind – ie the motive or purpose of a request should not be a relevant consideration, it is inevitable that the applicant has to be taken into consideration in determining whether a request is vexatious because, depending on the circumstances, a request from one applicant might be considered vexatious by a public authority but the same request from another applicant might not be.

32. However, the Commissioner cannot be certain that the sole purpose of the complainant's requests was to obtain compensation for the former employee. Furthermore, an applicant's motive is one of other factors to consider in the context of assessing whether a request is vexatious. Although it is likely that obtaining compensation for the former employee was part of his motivation for requesting information from the public authority, most individuals or groups exercising their information rights usually do so for one reason or the other. To effectively penalise the complainant for having a reason for wanting the report disclosed would, in the circumstances of this case, undermine a key element of the FOIA and the EIR information rights regimes, which is that they are applicant and purpose blind.
33. The public authority further argued that due to previous questions and answers to previous requests, the request of 29 October 2013 lacked a serious purpose. The Commissioner considers that the request has a serious purpose. Regardless of previous responses to requests made by the complainant, there is very clearly a serious purpose to a request for a report which would increase the understanding of Southwark residents in particular and the public in general as to why it took so long for the public authority to detect that significant quantities of building waste were being dumped in 3 cemeteries, and the actions taken by its officers as a result.
34. In view of the above, the Commissioner finds that the request of 29 October 2013 was not manifestly unreasonable. Therefore, the exception at regulation 12(4)(b) was not correctly engaged.

Other matters

35. The Commissioner wishes to record his concern about the general quality of the public authority's responses to his queries. Although it disagreed that the request should have been handled under the EIR, this was stated as a matter of fact without any explanation in support of its position. Similarly, the explanation provided in support of the application of sections 43(2) and 40(2) fell very short of what is required from a public authority.
36. Even more concerning is that the Commissioner gave the authority more than one opportunity to clarify its position, yet it did not provide any additional explanation to properly justify the application of these exemptions. The Commissioner would be very concerned to see another case involving the public authority where the quality of its response is so poor, and asks it to take steps to ensure that this does not reoccur.
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Right of appeal

37. 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

38. 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.
39. 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

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