

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

Date: 15th June 2017

Public Authority: Hastings Borough Council
Address: Town Hall
Queens Road
Hastings
East Sussex
TN34 1QR

Decision (including any steps ordered)

1. The complainant has requested a 'validation check report 'relating to a planning application. The council responded asking the complainant to clarify what information he was requesting as they do not use a document entitled a validation check report. The complainant did not clarify his request further. The council therefore said that it did not hold any information falling within the scope of the request (Regulation 12(4)(a)). The complainant persisted with his request and so the council subsequently applied section 14 of the FOI Act on the grounds that the request was vexatious. During the Commissioner's investigation the council agreed that it should have considered the request under the EIR rather than the FOI Act. Amongst other things, Regulation 12(4)(b) provides the equivalent exemption to section 14 of FOIA.
2. The Commissioner's decision is that the council was not correct to apply Regulation 12(4)(b) to the request. She has however decided that the council was correct to apply Regulation 12(4)(a) on the basis that on a

balance of probabilities the council does not hold information falling within the scope of the request

3. The Commissioner does not require the council to take any steps.

Request and response

4. On 14 October 2016, the complainant wrote to the council and requested information in the following terms:

"I would be grateful if you could be so kind to supply under Freedom of Information Act and Environmental Information Rights the Hastings Borough Council Planning Validation Check Report for HS/0A/13/0600

This is required under National and Local List of Planning Application Requirements."

5. The council responded on 1 November 2016. It said that it does not use a Validation Check Report and asked him to clarify what information he was requesting.
6. The complainant wrote back on 2 November 2016. He said that the council's planning department would be aware of the document he was requesting and suggested that the responder at the council contacted that department.
7. On 7 November 2016 the council responded and said that it still did not understand what information he was requesting and asked the complainant to clarify his request. It explained to the complainant how it goes about validating planning applications are correct before taking them forward, and that its checks do not use any document called a Validation Check Report:

"The checklist informs those making planning applications as to what information may be required to make an application valid. The checklist does not detail the process of registering an application or require the Council to produce a 'Validation Check Report' but perhaps it would help to explain what happens when an application is submitted.

Once submitted, the Validation Officer goes through an application and compares it with the checklist to see if there is any missing information. If no additional information is required the application is validated, the applicant is informed and the necessary consultations are undertaken. If additional information is required in accordance with the checklist then we write to the applicant requesting that

information. Once all has been submitted the application is then validated. To reiterate, at no stage during this process is a 'Validation Check Report' produced.

I hope this explanation is useful to you.

In order for us to process your requests please can you clarify what information you are trying to obtain?"

8. On 11 November 2016 the complainant responded to the council and said that it had still not provided him with the information he had asked for. The council responded on the same day stating that it would provide a response when he clarified what information he was requesting.
9. However on 18 November 2016 the council responded again stating that no information is held falling within the scope of his request.
10. On 24 November 2016 the complainant wrote to the council and asked it to explain why it did not hold information when there was a statutory requirement to hold the document under the National Planning Policy Framework.
11. Following an internal review of its decision the council wrote to the complainant on 9 December 2016. It stated that the request was vexatious and applied section 14.

Scope of the case

12. The complainant contacted the Commissioner on 9 December 2016 to complain about the way his request for information had been handled.
13. He argues that the council says it holds these documents on its own website, and yet its response to his request was that it does not hold the report.
14. The Commissioner considers that the complaint is that information is not held which the complainant says the council has a duty to hold, and that the council has wrongly considered the request to be vexatious.
15. Although the council applied section 14 of FOIA initially, during the course of the Commissioner's investigation it reconsidered its position and decided that the EIR was the appropriate access regime to consider the information falling within the scope of the request. The Commissioner has therefore considered the equivalent exceptions from the Regulations; Regulation 12(4)(a) and Regulation 12(4)(b). The

central difference is that a public interest test needs to be considered where the EIR is applied.

Reasons for decision

Regulation 12(4)(b)

16. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
17. The Commissioner considers 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 simply being 'unreasonable'. 'Manifestly' means that there must be an obvious or tangible quality to the unreasonableness of complying with the request.
18. A request can be manifestly unreasonable for two reasons; firstly where it is vexatious and secondly where the public authority would incur unreasonable costs or where there would be an unreasonable diversion of resources. In this case the council argues that the request is vexatious.
19. The Commissioner firstly notes that the aim of Regulation 12(4)(b) is to allow an authority to refuse to disclose information if the request is manifestly unreasonable. In this case the council has already stated that no information is held and so, to this extent, the council's application of Regulation 12(4)(b) could be considered to be misplaced. It has already clarified to the complainant that it has no information which it is refusing to provide. However the Commissioner recognises that there will be some cases where the authority may wish to demonstrate that a request is vexatious even where no information may be held falling within the scope of the request. It would highlight the unreasonableness of the request in the first instance.
20. The key to determining whether a request is vexatious is a consideration of whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. Where this is not clear it is necessary to weigh the impact of the request on the public authority against the purpose and value of the request. To do this a public authority must be permitted to take into account wider factors associated with the request, such as its background and history.

21. The council's justification for its position in this case rests solely on its assertion that it has explained to the complainant that no specific document called a Validation Check Report is used by the council and that it is not therefore held. In accordance with Regulation 9, it has explained the process it does use in order to allow the requestor to identify what information he wishes to request. The complainant has however not clarified his request and has instead sought to argue that the council has a legal duty to hold the document he has requested. Other than this, the council has not provided the Commissioner with any further grounds to support why the complainant's requests are manifestly unreasonable.
22. The complainant provided the Commissioner with a link to the council's website which he believes is evidence that it should hold the document he has requested. The reference, <https://www.hastings.gov.uk/planning/mak...> provides a link to the council's guidance page for submitting planning applications but does not directly refer to a validation check report. However links within that page do direct individuals to pages which refer to a 'validation checklist'.
23. Paragraph 2.5 of Development Management Plan - Section Two - General and Development Management Guidance (available at <http://www.planvu.co.uk/hbc2015/written/cptdm2.htm>) states:

*"2.5 Part of the planning application process includes the requirement for supporting documents to be provided with an application before it can be validated (i.e. accepted as complete). To view what is required in support of an application, please see the **validation checklist** (ICO emphasis) available at:*

[http://www.hastings.gov.uk/environment_planning/planning/info_advise/app_forms_guidance_notes/.](http://www.hastings.gov.uk/environment_planning/planning/info_advise/app_forms_guidance_notes/)"
24. This webpage includes a link to a document which the council describes as a validation checklist at <http://www.hastings.gov.uk/content/planning/pdfs/validation-checklist.pdf>
25. Paragraph 2.11 states:

2.11 Planning application forms, guidance notes and validation checklists are available at:

[http://www.hastings.gov.uk/environment_planning/planning/info_advise/app_forms_guidancenotes/.](http://www.hastings.gov.uk/environment_planning/planning/info_advise/app_forms_guidancenotes/)

This link is no longer working but the Commissioner surmises that the link provided in paragraph 2.5 of the Development Management Plan is the intended target.

26. The Commissioner therefore understands that the request may have been for the documents described in these paragraphs, but that the requestor was specific in his request for a 'Validation Check Report'.
27. As stated above, the council explained that the validation checklist its webpage refers to is a checklist which is provided to parties wishing to submit a planning application. Effectively it is a guide to potential applicants, demonstrating the information it is necessary to submit in order for a planning application to be taken forward. Thus individuals can quickly check that all necessary information has been included when submitting an application.
28. The council confirmed that officers receiving a planning application will determine if all of the necessary information has been included by the applicant. If everything which is required has been included with the application then it is deemed 'validated' and moves forward in the planning decision process. If any of the necessary documentation is missing then the officer will contact the applicant and inform them of this. The council confirmed however that at no point in the process is a Validation Check Report produced.
29. The complainant however told the council that if it does not hold the report then it is not complying with the national planning policy framework. He said that it *"is a statutory part and requirement of the NPPF*
("https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6077/2116950.pdf") to be provided."
30. The council's argument is therefore that the complainant has shown intransigence in failing to clarify exactly what information he was requesting, particularly as it has explained to him that it does not use a Validation Check Report in its planning process. Beyond this it argues that the complainant has failed to, or refused to, engage further with it and provide further information in order to allow the council to identify what information he was actually trying to request.
31. The Commissioner notes that the council has not provided strong arguments to support its opinion that the request is manifestly unreasonable. The Commissioner notes that there is previous history between the parties and it has sought to apply section 14 to requests from the complainant previously. It did not however provide any evidence, or arguments to the Commissioner to this effect.
32. It is for an authority seeking to apply the exception in Regulation 12(4)(b) to justify its reliance upon the exception. The Commissioner accepts that the complainant has been unhelpful to the council with his refusal to clarify what information he is requesting. This is not however,

33. of itself, evidence which is strong enough for the Commissioner to determine that the request is vexatious. It is up to the authority to provide its arguments to the Commissioner demonstrating that the request is vexatious.
34. The council argued that the repeated requests of the complainant created a disproportionate burden on it. However the council had already stipulated to the complainant that it did not understand what information was being requested, and in the absence of further clarification from the complainant it had written to him stating that no information is held falling within the scope of his request. The response on each occasion he re-stated his request was simply to ask for clarification as to what information was required, until finally it simply stated that no information is held. Whilst the Commissioner considers that there is a degree of intransigence behind the complainant's refusal to either acknowledge a mistake on his behalf, to explain what information he was actually requesting or to admit his mistake in believing a Validation Check Report will be held, given the council's response she does not consider that the council has provided any significant evidence which would lead to a decision that the request was vexatious.
35. In view of the Council's failure to adequately justify its application of Regulation 12(4)(b) of the EIR, the Commissioner has decided that the Council is not entitled to rely on Regulation 12(4)(b) in respect of the request made by the complainant.
36. The Commissioner has therefore gone on to consider whether the council was correct to respond to the complainant stating that no information was held falling within the scope of his request.

Regulation 12(4)(a)

37. Regulation 5 states that subject to the application of exemptions and/or other qualification provided in the Regulations, a public authority that holds environmental information shall make it available on request.
38. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held, she is only

required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.

39. The council has argued that it does not understand what information the complainant has requested, but can say that it does not hold any documents entitled Validation Check Reports because these do not form part of its planning application processes. It does not wish to speculate what information he is actually requesting given that it has explained its processes to him and the complainant has still maintained that it should hold the document he has requested.
40. The complainant sought to argue that validation check reports are a requirement of the National Planning Policy Framework. The Commissioner therefore wrote to the complainant and asked him to pinpoint the relevant section which requires these reports to be held. The complainant did not however respond to this request.
41. Whilst the complainant did initially highlight the above links to the Commissioner to demonstrate (in his view) that the council would, or should, hold such a document for planning applications, the council's explanation of its service, together with the Commissioner's understanding of the meaning of the links leads her to conclude that the complainant has misunderstood the council's webpage and is effectively asking it to provide information which does not form part of planning processes. The complainant has not provided evidence to the Commissioner to demonstrate a requirement for the council to hold such a document.
42. In light of this the Commissioner has not needed to ask questions he would normally expect a public authority to answer regarding the searches they have carried out in order to determine what information is held. Effectively the council is aware of its planning processes and been able to state categorically that those processes do not involve a Validation Check Report. Questions to the complainant seeking to determine what the actual information was being sought by the complainant were not helpful in identifying any other document which the complainant may have been seeking to request. In light of this the council determined that no information was held falling within the scope of the request.
43. In light of the above the Commissioner's decision is that on a balance of probabilities the council was correct to state that no information is held falling within the scope of the request.

Right of appeal

44. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

45. 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.
46. 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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