

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

Decision notice

Date: 19 September 2018

Public Authority: West Lancashire Borough Council

Address: 52 Derby Street
Ormskirk
Lancashire
L39 2DF

Complainant: Gavin Rattray (via Rosie Cooper MP)

Address: rosie@rosiecooper.net

Decision (including any steps ordered)

1. The complainant through his MP requested information in relation to the Council's agreements and other arrangements with United Utilities (UU) including copies of all communication, notes, meeting agendas and minutes of the meetings between the Council and UU, and copies of all communication, notes, meeting agendas and minutes of the meetings between the Council and Environment Agency (EA). The Council refused to comply with the request as it considered it to be manifestly unreasonable under regulation 12(4)(b) of the Environmental Information Regulations ("the EIR").
2. The Commissioner's decision is that the Council has correctly applied regulation 12(4)(b) and the public interest favours maintaining the exception.
3. The Commissioner also finds that in failing to respond to the request for environmental information within the statutory timeline, the Council has breached regulation 5(2) of the EIR.
4. The Commissioner does not require the Council to take any steps to ensure compliance with the legislation.

Request and response

5. On 27 October 2017, the complainant wrote to the Council and requested information in the following terms:
 - "1. Copies of all legal and non-agreements and accommodations between WLBC and United Utilities made since 2005 concerning the local plans/local development frameworks. This would include the 'partnership text' referenced in section 4.17 of West Lancashire Borough Council Infrastructure Delivery Plan Update 2016/17 (Part 1).*
 - 2. Copies of all communications, notes taken, meeting agendas and minutes meetings between UU and WLBC since January 2013 concerning flooding in Burscough and the local plans/local development frameworks (please don't supply anything already supplied in 1 above).*
 - 3. Copies of all communications, notes taken, meeting agendas and minutes meetings between WLBC and the environment agency concerning surface water flooding (including sewers) and water management in Burscough and its outlying areas of New Lane Crabtree Lane and Martin Mere. This would include the 'information from the environment agency' for West Lancashire Borough Council Infrastructure Delivery Plan Update 2016/17 (Part 1) and referenced in section 4.17 of it."*
6. The Council responded on 7 December 2017, stating that it had decided to reject the request as vexatious relying on section 14(1) of the FOIA.
7. Remaining dissatisfied with the response, on 2 January 2018, the complainant requested the Council to conduct an internal review.
8. Following an internal review the Council wrote to the complainant on 30 January 2018. It stated that the appropriate legislation in this case was the Environmental Information Regulations 2014 (EIR) rather than the FOIA. However, in substance it upheld the response to the initial request, considering it to be manifestly unreasonable under regulation 12(4)(b) of the EIR on the basis that it was vexatious.

Scope of the case

9. The complainant contacted the Commissioner on 13 December 2017 to complain about the way his request for information had been handled.
10. The Commissioner determined that the focus of her investigation would be to determine whether the Council had handled the complainant's

request in accordance with the EIR and specifically whether the Council was entitled to rely on regulation 12(4)(b) of the EIR to refuse to comply with the request.

11. In addition, the Commissioner has examined whether the Council complied with its obligations to respond in timely manner as provided in regulation 5(2).

Reasons for decision

Regulation 2 - Is the requested information related to environment?

12. The Council initially quoted both 14(1) of the FOIA and subsequently in its internal review, regulation 12(4)(b) of the EIR as a basis for refusing this request. Therefore the Commissioner needs to establish whether the request falls under the EIR; essentially whether the request is for environmental information or not.
13. Regulation 2 of the EIR states that environmental information is information on:
 - a. *the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
 - b. *factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
 - c. *measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;*
14. The Commissioner agrees with the Council's assessment that the information requested by the complainant constitutes environmental information as it relates to the flooding in Burscough and the local plans/local development frameworks, it is on a measure that is likely to affect several of the elements of the environment referred to in 2(1)(a).

15. The Commissioner is therefore satisfied that the request asks for environmental information as per Regulation 2(1)(c) and so the EIR is the correct statutory instrument to apply to the request.

Regulation 12(4)(b) of the EIR

16. 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;

17. As stated in the Commissioner's published guidance on regulation 12(4)(b)¹, this provision can be cited either where the request is vexatious, or when the cost of compliance with the request would be too great. In this case the Council has cited regulation 12(4)(b) on the basis that the request was vexatious.
18. The Commissioner has published guidance on vexatious requests². As discussed in the Commissioner's guidance, the relevant consideration is whether the request itself is vexatious, rather than the individual submitting it. Sometimes, it will be obvious when requests are vexatious, but sometimes it may not. In such cases it should be considered whether the request would be likely to cause a disproportionate or unjustified level of disruption, irritation or distress to the public authority. This negative impact must then be considered against the purpose and public value of the request. A public authority can also consider the context of the request and the history of its relationship with the requester when this is relevant.
19. Regulation 12(4)(b) of the EIR requires a public authority to apply a public interest test (in accordance with regulation 12(1)(b)) before deciding whether to maintain the exception. The Commissioner accepts that public factors, such as proportionality and the value of the request, will have already been considered by a public authority in deciding whether to engage the exception, and that a public authority is likely to be able to 'carry through' the relevant considerations into the public interest test. However, regulation 12(2) of the EIR specifically states that a public authority must apply the presumption in favour of disclosure. In effect, this means that the exception can only be

¹ <https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf>

² <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

maintained if the public interest in refusing the request outweighs the public interest in responding.

The context of the request

20. The Commissioner has referred to the submissions of both parties in order to understand the context of the request.
21. The Council informed the Commissioner that its communication with the complainant in relation to the issues raised in the information request date back to January 2012. During that time the Council was holding public consultations regarding the development of the Local Plan. The complainant and the Burscough Action Group (BAG) were actively involved in the consultation process. An inspector who drafted a report found that the flooding and drainage concerns raised by the complainant were suitably addressed in the Local Plan.
22. According to the Council, the complainant may not have agreed with the outcome of the process and went on to submit different queries and requests related to drainage and flooding in Burscough.
23. The Commissioner notes that prior to the present complaint, there has been a lengthy exchange of communication between the complainant and the Council. By way of example, on 15 November 2015, the complainant requested copies of all communications between the Council, developers and their agents, UU and Lancashire County Council.
24. More recently, the complainant, representing Burscough Flooding Group (BFG), wrote to the Council on 28 February 2017 requesting information related to Lordsgate Lane, and flooding and the complaints process. The Council provided the requested information. Between 18 March and 22 May 2017, the complainant submitted three other information requests, all of them related to flooding and drainage issues. In addition to this, another individual from the same group, between March 2017 and October 2017 has submitted 11 information requests and a number of other queries related to Strategic Flood Risk Assessments, Critical Drainage Areas, Risk Management Authorities and other related matters.

The Council's position

25. The Commissioner wrote to the Council requesting a submission explaining why it believed that the request was vexatious. The questions were focused on the factors that the Council took into account when it decided to refuse the complainant's request for information.
26. The Council responded to the Commissioner's letter by answering all the questions and provided a chronological table of all the complainant's requests.

27. The Council also stated that when it decided to refuse the request as vexatious, it took into account wider factors including the background and history of the request.
28. The Council explained that in addition to numerous and frequently made requests under the FOIA and the EIR, there are a number of other relevant communications, which have not been registered as information requests. Further, there are other submissions through the Council's formal complaint procedures, all of which have been voluminous in themselves.
29. The Council maintains that it has already dedicated more than sufficient time and resources to the complainant's concerns over the last 6 years, with many of the requests or complaints found to be overlapping. Despite this, the complainant continues to repeat requests and queries, simply because he and members of BAG and/or BFG did not agree with the answers provided.
30. The Council is of the view that the complainant so far has shown an unreasonable persistence in an attempt to reopen issues, which have already been comprehensively addressed by the Council. Also it is unlikely that they will come to a shared view on many issues related to this topic. Further, the Council informed the Commissioner that the complainant has also written to the local press, which has resulted in the Council having to respond to press statements as well.
31. It is the Council's position that whilst this request may not, in isolation, be manifestly unreasonable, when considered in conjunction with other previous requests and with the level of other communication from the complainant and the other members of relevant groups, it represents the tipping point and becomes manifestly unreasonable.
32. The Council stated that it does not lightly cite regulation 12(4)(b) in rejecting information requests. However, in the present circumstances the Council claims that "*such voluminous amounts of correspondence have caused (and continue to cause) a disproportionate level of disruption to the Council and the complainant's actions appear to be an improper use of the formal procedure which the FOIA and the EIR allow for.*"

The complainant's position

33. The complainant has expressed his concerns that the Council is not doing enough to reduce the flood risk in specific areas in Burscough. He maintains that the information that he requested will enable him and the community to understand the level of flood risk and how the Council has responded to this risk.

The Commissioner's view

34. Firstly, the Commissioner would like to highlight that there are many different reasons why a request may be considered vexatious, as reflected in the Commissioner's guidance. There are no prescriptive 'rules', although there are generally typical characteristics and circumstances that assist in making a judgment about whether a request is vexatious. A request does not necessarily have to be about the same issue as previous correspondence to be classed vexatious, but equally, the request may be connected to others by a broad or narrow theme that relates them. A commonly identified feature of vexatious requests is that they can emanate from some sense of grievance or alleged wrong-doing on the part of the authority.
35. The Commissioner's guidance has emphasised that proportionality is the key consideration for a public authority when deciding whether to refuse a request as vexatious. The public authority must essentially consider whether the value of a request outweighs the impact that the request would have on the public authority's resources in providing it. Aspects that can be considered in relation to this include the purpose and value of the information requested, and the burden upon the public authority's resources.

The purpose and value of the request

36. Having carefully reviewed the documents submitted by the complainant and the Council, the Commissioner has identified 16 information requests submitted by the complainant and another member of the group between 28 February and 7 November 2017. In response to most of the requests the Council provided the requested information or requested further clarification, clearly demonstrating its willingness to provide the information requested or the necessary assistance. Only in response to the last two requests, submitted on 1 November 2017 and 7 November 2017 respectively, did the Council issue refusal notices.
37. The Commissioner recognises that a significant number of residents across the area may be affected by the Council's planning decisions. Consequently, there is a clear public interest that must be considered when requests for related information are submitted to the Council.
38. However, the Commissioner is aware that the Council maintains it has acted correctly, and that it has sought to engage with the complainant to address their concerns. The Commissioner also understands that there has been a complaint made to the Local Government Ombudsman (LGO) in regard to related matters. The LGO found no fault on the part of the Council.

39. Based on these factors, the Commissioner has concluded that there is limited public value inherent within the present request.

The burden upon the Council

40. The Commissioner has also taken into consideration the burden on the Council's resources caused by the requests, the complaints, and the other correspondence that all stems from the complainant's concerns about the planning decision.
41. It is the Commissioner's view that the Council has already expended a great deal of time and effort on this matter and for it to commit further resources at this time is seen as an unjustified disruption.

Conclusion

42. The Commissioner agrees with the Council that the complainant's requests have reached the point where a reasonable person would conclude they are vexatious and manifestly unreasonable. The Commissioner therefore finds that the Council has properly applied regulation 12(4)(b) of the EIR to the complainant's requests. She considers that complying with the complainant's requests would be unreasonably burdensome and an unwarranted use of the Council's resources.

The public interest test

43. Regulation 12(1)(b) provides that:

...a public authority may refuse to disclose environmental information requested if –

(b) in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.

44. The Commissioner recognises that the requests relate to issues that are of concern to the complainant, and that some of these issues may have direct impact on the complainant's community. The disclosure of information may therefore allow the complainant to better understand the basis and the nature of those issues.
45. In addition, the Commissioner considers that, in general, the public interest is served through transparency and accountability of the work and dealings of the elected bodies, especially in situations where certain activities of a public authority have a direct impact on the lives of its constituents. However, the Commissioner is also satisfied that the general public interest in transparency and accountability, as explained above, has been met to a significant extent by the information either

provided to the complainant or already placed in the public domain by the Council.

46. The Commissioner also considers that, taking into account the background of the request, the Council has already provided substantial information in respect of the issues raised but has not been able to satisfy the complainant and the group that he represents.
47. With this in mind, it is the Commissioner's assessment that that to provide the amount of information requested by the complainant and respond to the subsequent enquiries made within a relatively short period of time, would impose a burden that would be disproportionate compared to the benefit that the general public would receive.
48. Moreover, the Commissioner sees no clear evidence to suggest that the Council has unfairly or incorrectly considered the matters raised by the complainant. For these reasons, the Commissioner concludes that the public interest in the maintenance of the exception outweighs the public interest in disclosing the information.

Regulation 5 - duty to make available environmental information on request

49. Regulation 5(1) of the EIR provides that a public authority that holds environmental information shall make it available on request.
50. Regulation 5(2) provides that a public authority must comply with regulation 5(1) as soon as possible and no later than 20 working days after the date it receives the request.
51. In this case, the complainant submitted his request on 27 October 2017 and did not receive a response under the EIR until 7 December. Therefore, the Commissioner finds the Council in breach of regulation 5(2).

Right of appeal

52. 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

53. 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.
54. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.



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