

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 29 October 2018

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

Decision (including any steps ordered)

1. The complainant has requested information from the council relating to the ownership of a lane in the county. The council argues that the request is vexatious given the previous history of requests and correspondence between the parties. It therefore initially applied section 14 of FOIA but amended this to apply Regulation 12(4)(b) of the EIR during the course of the Commissioner's investigation of the complaint.
2. The Commissioner's decision is that the council was correct to apply Regulation 12(4)(b) to the information.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 2 January 2018, the complainant wrote to ERYC referring to a previous response to a request to EYRC dated 5 May 2017 which stated:

"This route is a private road as well as a public footpath and we would expect those with legitimate private rights and landowners to carry out reasonable repairs that are attributed to private use. This could include owners of the road, owners of adjacent land, utility companies and private residents..."

The documentary evidence ERYC must have to make such a statement and the documentary evidence that ERYC is either the enforcement authority in regard to utility co.'s causing damage or not..."

Who advised this next Guy [name redacted] not to collect fly tipping any more."

5. EYRC responded on 29 January 2018. It said that the request was repeated and was over grounds it had covered with him before. It therefore said that the request was vexatious and applied section 14 of FOIA.
6. Following an internal review ERYC wrote to the complainant on 2 March 2018. It upheld its decision that the request was vexatious under section 14(2) of FOIA.

Scope of the case

7. The complainant contacted the Commissioner 27 March 2018 to complain about the way his request for information had been handled. He made clear that his request was seeking to obtain information on who the owner of the road is. He referred to a previous request he had made which asked for information on:

"In most correspondence from ERYC to myself in regard to the Footpath Snuff Mill Lane (from Bricknell Ave. to the railway lines), Cottingham, all Officers replying to me rely on stating that the lane/footpath is a Private Road/land. Could you disclose to me all the Records you have to substantiate this claim of "Private Road" and which Records ERYC has showing who actually owns this "Private Road".

8. He said that he had made this request previously, 'reworded to attempt to get relevent [sic] answers to questions sent' and stated to the Commissioner that the basis of his complaint was:

"Please would you make an assessment of their (ERYC) latest "excuses" in refusing to answer my FOI questions with substance and questioning; their latest ploy has been to state the Footpath is a Private Road therefore besides refusing to carry out necessary maintainance [sic] they now refuse to collect Fly-tipping that is an obstruction (therefore a Duty of THE OWNER to remove) and an environmental issue."

9. He followed this by summarising his complaint, and the intention behind his request as:

"Could you please ask [name redacted] to answer the FOI request(s) specifically to "who are the Private owners" AND to whether they ERYC are responsible for maintainence [sic] and / or Enforcement of such AND why? have they never carried out such actions."

10. It is not the Commissioner's role to investigate the wider matters which the complainant has raised. She can only consider whether the council has complied with the requirements of the EIR or the FOI Act.

11. The Commissioner notes that the council's response to the request directly relates to the specific question as to who the private owners of the land are, although it did respond to the request for "Who advised this next Guy [name redacted] not to collect fly tipping any more" by stating that "the purpose [of the EIR] is not to provide you with a mechanism to question the public authority as to the level of its responsibilities. This also applies to how officers carry out their duties and who gives instruction to officers".

12. EYRC said that the earlier request from which this request resulted was worded:

"Could you provide the documentary evidence ERYC must have to make such a statement i.e. who are these private owners..."

...I have had many replies (such as what follows) from many requests to ERYC including FOI but never any documentary evidence other than the flawed [name redacted] (1996) Report so I am beginning to assume a private grudge by someone at a high level in ERYC

13. It said also that the request in paragraph 12 was virtually a repeat of a request for information made by the complainant on 22 June 2017 for :

"Could you please disclose to me all of the Records you have to substantiate this claim of 'Private Road' and which Records ERYC has showing who actually owns this 'Private Road.'"

14. The request of 22 June 2017 resulted in the council providing the complainant with a copy of a report (which the complainant considered to be 'flawed') but which outlines the council's understanding of the status of the lane. The council also said that it has explained to the complainant on a number of occasions why it is not taking further action in response to his complaints regarding the state of the footpath.
15. The Commissioner is aware that in this instance, both parties are seeking resolution as to whether the request was vexatious in light of the wider background of requests and complaints surrounding who owns the land in question and who is therefore responsible for its maintenance. This is explained further in the 'Background to the Request' below.
16. Although the Commissioner must consider the objective wording of the request therefore, in this instance the wider arguments submitted by both parties are clearly relevant to the question of whether the specific request made by the complainant on 2 January 2018 was vexatious. The Commissioner's analysis below is therefore set within this wider 'holistic' context.
17. The Commissioner therefore considers that the complaint is that the council was wrong to apply section 14 of FOI to the request of 2 January 2018.

Reasons for decision

Background to the case

18. ERYC state that it is responsible for Snuff Mill Lane, Cottingham, insofar as it is a highway authority and the lane is designated as a public footpath. Hull County Council admits responsibility for half of the lane, but the ownership of the remaining half is in question.

19. The complainant believes that EYRC is not keeping the public footpath up to an acceptable standard. He argues that deep potholes in the lane make it a danger to its users and that it is the council's duty to maintain it to a better standard than it currently is. The council however argues that it is kept to an acceptable standard for a designated footpath and disputes the complainant's assertions that it is in an unacceptable and dangerous condition. Whether the land is maintained to an appropriate standard is not a matter for the Commissioner.
20. Whilst accepting its duty to maintain the land as a public footpath, EYRC has stated in response to previous requests that the lane is privately owned and that wider maintenance issues are a responsibility of the land owner(s). The complainant therefore asked EYRC to tell him who the land owner is, but the council claims that it does not hold that information.
21. EYRC argues that in response to the complainant's request of 22 June 2017 it provided the complainant with a copy of a report dated 1996 demonstrating why it considers that the land is privately owned without having specific information as to who the owners are. The complainant however believes that this report is 'flawed'. The complainant believes that the council must know who the owners are in order for it to rely upon its assertion that the land is privately owned. EYRC counter argues that that is not the case.
22. The Commissioner has no jurisdiction to consider whether the council's reliance upon the report to decide that it is the land owners role to carry out wider maintenance is correct or not.
23. EYRC argues that it has previously provided the complainant with the information which it does hold, including a copy of the report, and has categorically stated to the complainant on a number of occasions that it does not hold information identifying the owner of the land. Having read the relevant report it appears clear to the Commissioner that the report does demonstrate that it did not hold the ownership information at the time that the report was produced.
24. EYRC argues that when taken into context, along with other requests and complaints which the complainant has made, and following a previous complaint to the Local Government Ombudsman over the issue of the maintenance of the land, the complainant's request is vexatious.

Regulation 12(4)(b)

25. EYRC initially claimed that the exemption in section 14 of FOIA applied to the request for information. In her initial letter to EYRC the Commissioner asked the council to consider whether the relevant information is environmental information, and therefore the request should have been considered under the EIR. The Council confirmed that after reconsidering its position it accepted that the request should have been considered and responded to under the EIR, but it argued that in this instance this made no difference to its final decision that the request was vexatious.
26. The Commissioner's published guidance¹ on Regulation 12(4)(b) sets out her view that a request that is vexatious under section 14(1) of the FOIA, would be likely to be manifestly unreasonable under the EIR if it were for environmental information.
27. In light of the above the Commissioner has considered the Council's arguments in relation to section 14(1) under her consideration of the application of Regulation 12(4)(b).
28. Regulation 12(4)(b) states:

"(4) 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;"
29. The term 'vexatious' is not defined in the legislation. In *Information Commissioner v Devon County Council & Dransfield*², the Upper 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 <https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonablerequests.pdf>

² UKUT 440 (AAC) (28 January 2013)

30. 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:

- (a) the burden imposed by the request (on the public and its staff);
- (b) the motive of the requester;
- (c) the value or serious purpose of the request; and
- (d) and harassment or distress of and to staff.

31. 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).

32. The Commissioner has also identified a number of "indicators" which may be useful in identifying vexatious requests. These are set out in her published guidance on vexatious requests³. 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 a case will need to be considered in reaching a judgement as to whether a request is vexatious.

33. Following the above, the Commissioner essentially needs to consider 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.

34. The Commissioner has therefore considered the councils arguments in respect of the factors listed above.

³ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

(a) the burden imposed by the request (on the public and its staff);

35. The council argues that the impact of the complainant's request is entirely disproportionate to the value of the request itself. It argues that the complainant has been corresponding with the council over the issue of the lane for a number of years. This has included correspondence with various council officers, complaints dealt with via the council's complaints procedure, and a complaint which was made to the Local Government Ombudsman (the LGO).
36. It argues that the basis of these complaints all revolve around the question of whether it is the council's responsibility to maintain the lane to a standard which the complainant believes is satisfactory. It says the complainant will not accept that the council does not know who owns the land, that wider maintenance issues are a matter for the private owner(s), and that the state of the lane is adequate for that of a public footpath. It argues that he therefore constantly seeks to revisit and reopen these points with council staff.
37. EYRC further argues that this is extremely frustrating for council officers who have to deal with the correspondence as they are continually having to address points and issues that have already been covered. It said that this takes up valuable officer time which could be better used to more productive effect.
38. ERYC has outlined to the Commissioner a series of previous requests made to it by the complainant since April 2017 which revolve around the same issue of who is responsible for the maintenance of the lane. These include requests on 13th, 15th, (2 requests), 18th and 20th April 2017 and a further request on 22 June 2017.
39. On the other hand the Commissioner does recognise that this request in itself is not overly burdensome. The response in this instance would appear to be reasonably easy to provide to the complainant if the council holds the relevant information.
40. However, the fact that a public authority may be able to comply with a single request, such as the one that is the subject of this decision, without imposing a disproportionate impact on its resources does not preclude the request from being vexatious. The Upper Tribunal in Dransfield considered that "*a long history of requests e.g. over several years may make what would otherwise be taken in isolation, an entirely reasonable request, wholly unreasonable in light of the anticipated present and future burden on the public authority*".

(b) the motive of the requester;

41. The motives of the request in this case are clearly established in the section 'scope of the request' as outlined above. The complainant considers that the council is seeking to avoid its responsibility to maintain the lane to, (in his opinion), an appropriate standard by claiming that the land is privately owned. The motive of the requests is to demonstrate that that is the case in order to persuade the council to take action to rectify this. In his complaint to the Commissioner he said that:

"The implication of ERYC now introducing the Statement of the Footpath being a Private Road is to try to negate their statement of adoption... and the legal requirements associated with adoption and thus trying to pass responsibility [sic] to myself and neighbour, AGAIN."

42. Although the legislation is generally "motive blind", the Upper Tribunal in Dransfield noted that the motive of the requester "...may well be a relevant and indeed significant factor in assessing whether the request itself is vexatious...What may seem an entirely reasonable and benign request may be found to be vexatious in the wider context of the course of dealings between the individual and the relevant public authority."
43. Whilst the complainant has a right to question and complain about the councils decisions, the council has been clear on the grounds upon which it has made the decision it is not responsible for the wider maintenance of the land, and on the exact information it has used to reach this decision.
44. The Commissioner considers that the response to the request of 22 June 2017 is of paramount importance in considering this request. The council has provided the information to the complainant which it considers justifies its position, and has clearly explained that it does not hold information which identifies who the owner of the land is. Wider requests, reworded to ask for essentially the same information create a burden on the authority which has little value given that it has provided its clear response to this same issue previously.

(c) the value or serious purpose of the request

45. At the heart of this argument there is a serious purpose and value to the request. The complainant has noted a deterioration in the state of the footpath, and he has previously used his own resources and money to carry out repairs to the lane. He was also willing to make further repairs using his own resources however he wished the council to provide further funds or services to aid in this.
46. For its part, the council believes that lane is in an appropriate condition for a public footpath, and although it was willing to provide some materials to aid the complainant to carry out maintenance of the land it does not believe that it is responsible for taking these measures itself beyond ensuring that the condition of the lane is adequate for a public footpath.
47. The Commissioner notes that the serious purpose of value of the request is significantly undermined in that the information the council holds, and upon which it bases its decision, has been made clear to the complainant previously.
48. The Commissioner also notes that the LGO's decision over the issue was that it would not investigate the complaint further as the complainant has an alternative means of resolution. He has the clear right to take the council to court to seek a judgement on whether the council was not maintaining the lane to the appropriate standard or not under rights provided in the Highways Act 1980.
49. Its decision clearly sets out the legal grounds for taking the dispute to court, and it has outlined the legal process for doing this should the complainant wish to do so.

(d) harassment or distress of and to staff.

50. ERYC has outlined that its staff feel frustrated that they are being asked to respond to the same, or variations of the same request and deal with the same issues repeatedly when they have previously answered the questions and sought to clarify the situation to the complainant on a number of occasions over a number of years. For instance the council provided an email to the complainant from one of its officers which begins:

"Following our earlier correspondence and your subsequent telephone call to the Council, I have once again set out below what we understand to be the current position regarding Snuff Mill Lane in Cottingham."

51. The council has pointed out that the complainant's requests often overlap, and all revolve around the same matters.
52. The Commissioner therefore understands the frustration of council officers. They have given the complainant the answers to his questions and clarified their understanding of the status of the land, highlighting why they have reached the decision they have. The complainant, however, continues to make the same points and make further requests for information he knows the council has said that it doesn't hold.

Conclusions

53. The Commissioner must take a holistic view to the overall situation surrounding the request for information. She considers that the aims of the complainant in approaching the council have merit, and notes his willingness to provide funding previously towards the rectification of the footpath surface.
54. The complainant has suggested that he is not interested in the lane being suitable for vehicular access but simply wishes the footpath to be maintained to an appropriate (and safe) standard.
55. Countering this the council considers that the standard of the lane is appropriate for a public footpath, notes that the lane is also used as a private road, and suggests that its use as such, and the standard appropriate for use as such is an issue for the private owners of the land, not ERYC.
56. The Commissioner does not consider that the complainant's requests have been intended to harass or to distress staff. The motivation is clearly to persuade the council to maintain the land to a better standard than it currently is, and address issues such as fly-tipping. She also does not consider that the request is particularly burdensome in this case.
57. However it follows a list of previous requests and complaints surrounding the same issue, and crucially, the council has clearly responded to these same issues previously.

58. The Council does not hold information which could help to identify the owners of the land, has explained its reasons for stating that the land is privately owned, and has provided the complainant with the report which it holds which demonstrates why it believes this to be the case. In essence therefore the request is a repeated request. The complainant does not trust the councils previous responses and believes it is seeking to avoid its responsibilities to maintain the lane to an appropriate standard. However, the responses of the council have been clear, and in this sense, responding to this request again, highlighting its view and reiterating its previous responses would serve little value or purpose.
59. The Commissioner is also satisfied that if EYRC were to respond to the request further this would not be an end to the questions and requests being submitted by the complainant. It has already answered a very similar request, providing the information as to why it has reached the decisions it has, and this has simply resulted in further, re-worded requests being made for the same or similar information.
60. Essentially the complainant believes that the council should carry out repairs on the lane and the Commissioner considers that he is likely to continue his persistent questioning until the work he considers necessary is carried out.
61. The wider issue as to whether the land should be maintained to a greater standard by the council has been considered by the LGO, and the decision was that it was appropriate for the complainant or others to take the council to court to seek a judgement over this issue. The Commissioner is not aware that the complainant has taken this step.
62. Whilst the council may be able to respond to the question, who told '*this next Guy*' not to collect fly-tipping from the land any further, the issue which the complainant has admitted he is actually seeking is to the question 'who owns the land and is responsible for its maintenance'. Responding to the specific request asked would not provide the information which the complainant has stated to the Commissioner that he actually wants, and would not resolve the wider issues which the complainant is seeking to address with the council. Therefore further requests for information would inevitably follow on even if the council were to respond to this part of the request.
63. The continuation of the complainant's campaign to take action to maintain the land through making information access requests has reached a point where further requests are misplaced. The complainant has the evidence he requires from the council and his means of resolving the issue is to take the council to court to prove his point. There is little value or purpose in him making further requests for the same information given this.

64. The Commissioner therefore considers that the council was correct to apply Regulation 12(4)(b) to the request.
65. Unlike under section 14(2) of FOIA, Regulation 12(4)(b) requires that a public interest test is carried out once the exception has been engaged. The test provided in Regulation 12(1)(b) is whether, in all of the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

The public interest test

The public interest in the information being disclosed

66. The Commissioner notes that the primary consideration is quite simply that the council does not hold the information which the complainant has indicated he wishes the council to provide to him. It holds no information as to who owns the land, and has provided a copy of the report outlining how it reached its conclusion that the land is privately owned. In this respect it could simply have provided a copy of the report it had provided previously.
67. The council has, however, reached a point where it considers that continuing to respond to the complainants line of questions serves no purpose and simply adds to the burden and the frustration of its workforce. It has therefore sought to apply Regulation 12(4)(b).
68. The Commissioner recognises that the overarching issue regarding the status of the lane is an important one and has important environmental connotations. The complainant has complained about fly-tipping and the potentially unlawful use of the lane to dump large amounts of commercial waste and concrete in past years. He has also argued that utility companies have damaged the land through large vehicles using it for access. In its response to the fly-tipping point the council argued that fly-tipping on the land is a matter for the private landowner to deal with, and it would not take action regarding the land unless the right of way fell below the standard expected.
69. The Commissioner therefore recognises the good intentions of the complainant, and also that there is clearly a public interest in seeking to clarify who is responsible for maintaining this land so that actions can be taken to ensure that the environment is not damaged further.

The public interest in the exemption being maintained

70. The central public interest in the exception being maintained in this case rests in ensuring that the resources of EYRC are not wasted responding to a long and continued line of questions from the complainant over matters which, in effect, they simply disagree over. There is an established legal solution for the complainant through the courts, however the complainant is seeking to reopen his complaint to the LGO with the council through making further requests for information.
71. There is a public interest in protecting public resources from being used to respond to requests where there is no reasonable value or purpose for continuing the line of questioning and no further information which the complainant could receive in response to the request.

Conclusions

72. The Commissioner fully recognises that the complainant's request is not intended to be vexatious, nor is it intended to create a greater burden upon the council. The complainant is simply, albeit persistently, seeking to persuade the council to take the measures he considers it should do to carry out maintenance on the lane and does not trust the council's response that it is not liable to do so.
73. Whilst this is the case, and whilst the Commissioner recognises the wider public interest in the actual liable party being identified, there is a history to the current request which clearly demonstrates that the situation is simply a disagreement over the exact obligations of the council over its decisions over the lane.
74. The council has responded appropriately to the complainant's previous requests however the complainant mistrusts the information that he has been provided with. This is not a basis for re-making additional requests for the same information, creating a greater burden for the council, when the council's position can be clarified in the courts.

The Commissioner therefore considers that the public interest rests with maintaining the exception in this instance.

Right of appeal

75. 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

76. 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.

77. 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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