

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

Decision notice

Date: 5 July 2019

Public Authority: Telford and Wrekin Council
Address: Darby House
Lawn Central
Telford
Shropshire
TF3 4JA

Decision (including any steps ordered)

1. The complainant has requested information relating to a drainage scheme. The request was refused under Regulation 12(4)(b) of the EIR as manifestly unreasonable.
2. The Commissioner's decision is that Telford and Wrekin Council ("the Council") has failed to demonstrate that the exception is engaged and is thus not entitled to rely on Regulation 12(4)(b) to refuse the request. She also finds that the Council's original refusal notice failed to meet the requirements of Regulation 14 of the EIR and the Council therefore also breached that regulation.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the request which does not rely on Regulation 12(4)(b) of the EIR.
4. The Council 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.

Request and response

5. On 14 January 2019, the complainant wrote to the Council and remade two requests about a particular drainage scheme that he had made previously, but which he claimed the Council had not properly answered:

"Please can you answer the following:

[1] On what basis did the council waive the planning condition requirement for a flood risk assessment?

[2] Who authorised the waiver?

[3] How was the waiver lawful?

[4] Since 01.01.13, which developers have received free access to the council's flood depth and velocity maps? Was it all, most, some or just this developer? Who makes the decision? Please can you be specific?

[5] Please can you explain how the design outlined by [redacted] protects surrounding properties?

[6] Please can you explain his approach to my drainage strategy, which he admits is very good, for a development of seven two bedroom houses in flood zone 1 with no record of ever flooding?"

And:

"[7] Please let me have a copy of the model made at the time showing how the risk of flooding to the proposed and neighbouring properties was mitigated."

6. The Council responded to this combined request on 18 January 2019. It refused to respond to the request. It did not cite an exception under the EIR and instead commented that:

"As previously communicated to you, Telford & Wrekin Council will not respond to any additional FOI/EIR requests relating to planning and/or drainage. This is in line with the Information Commissioner's Office Decision Notice dated 12 September 2016."

7. Following the intervention of the Commissioner, the Council issued a further response on 8 February 2019. It now refused the request as manifestly unreasonable and cited Regulation 12(4)(b) of the EIR.

Scope of the case

8. The complainant first contacted the Commissioner on 21 January 2019, to complain about the way his request for information had been handled
9. The Commissioner did not consider the Council's response of 18 January 2019 to have been a valid refusal notice and advised the complainant to seek an internal review. She also wrote to the Council to set out that she considered the response to be defective.
10. Although not explicitly labelled as an internal review, the Commissioner considered the response which the Council provided on 8 February 2019 met the requirements of the EIR and accepted the case for investigation.
11. The Commissioner considers that the scope of her investigation is to determine whether the request was manifestly unreasonable.

Background

12. The background to the current request involves a planning application which the complainant submitted to the Council in 2013. The application sought to demolish an existing building and replace it with seven new houses. Permission was granted for the development but the permission was conditional upon the complainant submitting a scheme for draining surface water from the site which was acceptable to the Council.
13. There followed a dispute between the complainant and the Council over the precise interpretation of the condition and the point in the development process by which it was required to be discharged. The Council attempted to enforce the condition, but the complainant successfully appealed to the Planning Inspectorate for a Certificate of Lawful Development for part of his development scheme.
14. In September 2016, the Commissioner issued decision notice FS50622051 which found that previous requests which the complaint made, relating to drainage matters, were manifestly unreasonable¹. The decision notice was upheld on appeal to the First-Tier Tribunal². It is this

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1625025/fs_50622051.pdf

decision notice to which the Council referred when it issued its first response to the current request.

Reasons for decision

15. Regulation 2(1) of the EIR defines environmental information as being 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)...as well as measures or activities designed to protect those elements;*
- (d) *reports on the implementation of environmental legislation;*
- (e) *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
- (f) *the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*

16. The Commissioner has not seen the requested information but, as it is information relating to drainage, she believes that it is likely to be information about “measures” affecting the elements of the environment and affecting “factors” which would themselves affect the elements of the environment. The Commissioner’s view is that the requested information would be environmental under Regulation 2(1)(b) and therefore the Council was correct to deal with the request under the EIR.
17. Regulation 5(1) states that:

“a public authority that holds environmental information shall make it available on request.”
18. Regulation 12 of the EIR states that:
 - (1) *Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—*
 - (a) *an exception to disclosure applies under paragraphs (4) or (5); and*
 - (b) *in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*
 - (2) *A public authority shall apply a presumption in favour of disclosure.*
 - (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;*
19. Following the lead of the Upper Tribunal in *Craven v Information Commissioner & DECC* [2012] UKUT 442 (AAC), the Commissioner considers that there is, in practice, no difference between a request that is vexatious under the FOIA and one which is manifestly unreasonable under the EIR – save that the public authority must also consider the balance of public interest when refusing a request under the EIR. The analysis that follows looks at vexatiousness as, if the request is found to be vexatious, then it will also be manifestly unreasonable and hence Regulation 12(4)(b) will be engaged.
20. The term “vexatious” is not defined within the FOIA. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that “vexatious” could be defined as the “*manifestly unjustified, inappropriate or improper use of a formal procedure*”. The Upper

Tribunal's approach in this case was subsequently upheld in the Court of Appeal.

21. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
22. *Dransfield* also considered four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained 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).
23. The Commissioner has published guidance on dealing with vexatious requests, which includes a number of indicators that may apply in the case of a vexatious request³. However, even if a request contains one or more of these indicators it will not necessarily mean that it must be vexatious.
24. When considering the question of vexatiousness, a public authority can consider the context of the request and the history of its relationship with the requestor, as the guidance explains: "*The context and history in which a request is made will often be a major factor in determining whether the request is vexatious, and the public authority will need to consider the wider circumstances surrounding the request.*"

The complainant's position

25. The complainant has not set out to the Commissioner why he does not consider his request to be manifestly unreasonable – although the Commissioner notes that he is under no obligation to do so. His submissions have focused on the Council's procedural handling of the request – which the Commissioner will address below.
26. From reading the correspondence between the complainant and the Council, the Commissioner considers that the complainant has implied that the Council has treated his drainage scheme less favourably than

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

others. The complainant also appears to have questioned whether the Council's decision to take Enforcement action against him was proportionate and whether such an approach was consistent with the approach the Council had taken with larger developers.

The Council's position

27. The Council initially appeared of the view that, because the Commissioner had previously found requests submitted by this particular complainant to have been manifestly unreasonable, the present request would automatically be manifestly unreasonable. The Commissioner explained that this was not the case and that the Council would either have to demonstrate that the pattern of behaviour previously identified had continued, or it would have to make the case afresh.
28. When asked to provide details of the disproportionate or unjustified burden that the complainant's requests were imposing, the Council responded to say that it considered that the complainant was using the EIR as a tool to reopen and revisit matters which were closed or which ought more properly to be addressed via other means. It stated that previous experience suggested that responding to one request would likely generate numerous other pieces of correspondence from the complainant which would, in turn, require further responses.
29. When asked about the burden that the complainant placed upon the Council's resources, the Council commented that:

"This request, when aggregated with other FOI/EIR requests, with their subject access request and other related service requests/comments place a drain on the authority. The Council Team that deals with FOI/EIR and SAR requests also helps the Council manage data breaches and any other requirements of the Data Protection Act 2018. Therefore time spent by the team dealing with the requesters submissions result in time not being spent supporting the Council on a range of other matters.....The requester previously inundated the Council with requests and associated correspondence on planning/drainage relating matters as they were unhappy with their planning condition. It appears reasonable given the requesters recent requests/comments/correspondence that they are still unhappy with this planning condition and the Council will again have to take up finite resource in complying with their request."

30. The Commissioner was keen to see evidence of the burden that the complainant's correspondence imposed. The Council provided a screenshot which demonstrated that, including the current request, the

complainant had submitted three information requests, one subject access request and a general enquiry over a period of five months.

31. Whilst noting that the three information requests were all submitted on the same week, the Commissioner gave her view to the Council that five items of correspondence over a five month period did not seem excessive. She asked to be provided with evidence that the Council had been "inundated" with correspondence as it claimed. The Council responded to say that:

"we cannot evidence volumes received as some correspondence has not been maintained as there was no legal/business need to keep it. We still have concerns in respect to potential volumes of correspondence from [the complainant] given his past pattern."

The Commissioner's view

32. The Commissioner notes that refusing a request as manifestly unreasonable places a severe restriction on an individual's right to access information. When a public authority chooses to rely on this particular provision, it must be prepared to supply the Commissioner with evidence to support its use of the exception. Supplying the Commissioner with assertions or assurances is unlikely to be acceptable.
33. The Commissioner notes the findings of her previous decision notice and that it was upheld by the Tribunal. She further notes that this new request also relates to drainage and is connected to the underlying dispute that the complainant has previously had with the Council. However she also notes that the most recent of the requests which that notice covered was submitted to the Council more than three years prior to the current request. She therefore considers that the onus was on the Council to demonstrate that the patterns of behaviour which had caused her to determine that the previous requests were vexatious had continued in the intervening period.
34. Refusing a request as manifestly unreasonable does not impose a "lifetime ban" on making requests. Whilst it is able to consider previous history and context, a public authority must consider each request on its own merits.
35. The Council has not demonstrated to the Commissioner that it is dealing with large volumes of correspondence from the complainant. Nor has it demonstrated that the complainant has continued to pursue any sort of campaign in the intervening period since the previous decision notice.
36. In addition, the Commissioner also considers that there is value to the complainant's request as it is for information that would show whether a public authority is making decisions consistently and in accordance with

legislation . Whilst this may not necessarily excuse other unreasonable behaviour on behalf of a requestor, it does mean that the public authority must demonstrate that the unreasonableness of the request outweighs its value.

37. Whilst the Commissioner does have concerns about the complainant's use of the EIR to pursue grievances which would be better addressed via other channels, the Council was required to make a persuasive case that the request was manifestly unreasonable and this it has failed to do.
38. The Commissioner therefore considers that the Council has failed to demonstrate that the exception is engaged and it must issue a fresh response which does not rely on regulation 12(4)(b).

Refusal Notice

39. Regulation 14 of the EIR states that:

- (1) *If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.*
- (2) *The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.*
- (3) *The refusal shall specify the reasons not to disclose the information requested, including—*
 - (a) *any exception relied on under regulations 12(4), 12(5) or 13; and*
 - (b) *the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).*
- (4) *If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.*
- (5) *The refusal shall inform the applicant—*
 - (a) *that he may make representations to the public authority under regulation 11; and*

(b) of the enforcement and appeal provisions of the Act applied by regulation 18.

40. The Commissioner notes that the Council's response of 18 January 2019 failed to cite an exception from the EIR, failed to inform the complainant of his right to request an internal review and failed to inform him of his right to complaint to the Commissioner. Whilst this was subsequently addressed via an internal review, the Commissioner considers that the Council failed to issue an adequate refusal notice and thus breached Regulation 14 of the EIR.

Right of appeal

41. 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@justice.gov.uk

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

42. 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.
43. 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

**Ben Tomes
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