

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 30 October 2020

**Public Authority:** City of York Council  
**Address:** Station Rise  
York  
YO1 6GA

#### **Decision (including any steps ordered)**

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1. The complainant made a number of requests to the City of York Council ("the Council") for information regarding the creation of a road. The Council did not respond to the complainant's first request and refused the third request under regulation 12(4)(b) of the EIR (manifestly unreasonable).
2. The Commissioner's decision is that the Council has failed to demonstrate that the exception is engaged and is therefore not entitled to rely on regulation 12(4)(b) to refuse Request 3. She also finds that the Council has not complied with its obligations under regulation 5(2) of the EIR for Requests 1 and 2.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
  - Issue a response to Request 1.
  - Issue a response to part 1 of Request 2.
  - Issue a fresh response to Request 3 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

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5. On 25 April 2019 the complainant requested an internal review of the Council's response to a previous information request. This previous information request was handled by the Council under the reference number IGF/13646. The Council interpreted some of the wording of the internal review request of 25 April 2019 as a new request for information. It treated this new request under the reference IGF/15570. This request was worded as follows:

### Request 1

*"A. Specifically, I am looking for conditions imposed on my house concerning planning regulations, maintenance that has been carried out on the road that is entirely on my property, utility maintenance that is on my property (water works, street lighting, etc), and other records that may help me understand my property better.*

*B. Could you please forward any records about the creation of this road and its highway status when created? Was it originally a private cul-de-sac?*

*C. Can you forward me records of part of Water End in the green area (below) being changed to Government House Road after 1963?"<sup>1</sup>*

6. The Council acknowledged this information request on 6 June 2019 (within its internal review response to IGF/13646).
7. As the complainant had not received a response to Request 1, she contacted the Council again on 22 May 2019 to chase that response, but to no avail.
8. She contacted the Council again on 5 July 2019 and stated the following:

### Request 2

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<sup>1</sup> For reference, each part of the request has been labelled with a letter for the purposes of this notice.

*"1. Can you provide the record of the creation of Government House Road, when it was created and if it was established as a private road?*

*2. Can you please provide me with the record when part of the original Water End was turned into Government House Road sometime after 1963"*

9. The Council responded to Request 2 on 2 August 2019. It stated:

*"1. We do not have a record of the date of adoption of Government House Road, therefore this information is not held.*

*2. We do not have a record regarding a change of name, the original Water End is still adopted Highway and is considered still to be part of Water End."*

10. The complainant requested an internal review of Request 2 on 2 August 2019. On 2 September 2019, the Council issued its internal review response. It stated that it had not correctly answered part 1 and intended to issue a fresh response for this but it did not do so. It also provided clarification on part 2 of the request.

11. The Council identified the following wording from the complainant's internal review request of 2 August 2019 to be a new information request:

### **Request 3**

*"- I have asked for any all records of Government House Road dealing with the creation of Government House Road, which was created sometime in the early 1960s.*

*- Correspondence, notes, records of funds to create the road, etc. I am quite sure you could find something about Government House Road.*

*- You could look up the creation of Water End Bridge to see how it talks about Government House Road, which I am sure will go into the history of the road.*

*- When I purchased my house in 2014, the Local Land Charges executed by York Council has mentioned a 1956 Development Plan by the War Department. I would like to see this document.*

*- I am also requesting the FOI department to give us records concerning the creation of a parking lot on the slip road that is part of old Water End. This will, I am sure, also go in to how the parking may affect residents on Government House Road, and a bit of its history?"*

12. As part of its internal review outcome to Request 2 the Council also provided its initial response to Request 3. It stated that it was applying regulation 12(4)(b) of the EIR (manifestly unreasonable) to Request 3, and would do so in response to any further requests regarding these matters.
13. The Council advised the complainant to contact the ICO if they were dissatisfied with the internal review response to Request 2 and initial response to Request 3. As such, no internal review was conducted following the Council's application of regulation 12(4)(b) to Request 3 and this complaint was accepted for investigation without an internal review.

### Scope of the case

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14. The complainant contacted the Commissioner on 9 December 2019 to complain about the way her requests for information had been handled.
15. The complainant initially also complained about the Council's handling of information request IGF/13646 (as mentioned at paragraph 5 above) however the Commissioner deemed this complaint to be unduly delayed due to the length of time that passed between receiving the internal review outcome (6 June 2019) and bringing this complaint the ICO (9 December 2019).
16. The complainant's concerns that were accepted for investigation can be summarised as follows:
  - The Council did not respond to Request 1.
  - The Council did not provide a corrected response to part 1 of Request 2, as they had promised to.
  - The Council refused Request 3 under regulation 12(4)(b) of the EIR.
17. In response to the Commissioner's investigation, the Council stated that while it applied regulation 12(4)(b) to Request 3, it should have also provided a refusal notice for the following points from Request 1 (dated 25 April 2019) within which it would have also cited regulation 12(4)(b):

*"Specifically, I am looking for conditions imposed on my house concerning planning regulations, maintenance that has been carried out on the road that is entirely on my property, utility maintenance that is on my property (water works, street lighting, etc), and other records that may help me understand my property better.*

*Could you please forward any records about the creation of this road and its highway status when created? Was it originally a private cul-de-sac?"*

18. The Council stated that its reasoning for applying regulation 12(4)(b) to Request 3 also applied retrospectively to Request 1. While the Council has stated that it would retrospectively apply regulation 12(4)(b) to Request 1, it did not issue a valid refusal notice at the time so this is not a matter the Commissioner will address further.
19. Therefore, the scope of this notice is to determine whether the Council were entitled to refuse Request 3 under regulation 12(4)(b) of the EIR. It will also consider the timeliness of the Council's responses to Requests 1 and 2.

## **Background**

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20. The background to these information requests concerns a dispute between the complainant and the Council regarding planning alterations made at a property neighbouring the complainant's house. This has caused the complainant to submit complaints to the Council as the Council has said that it will not be taking enforcement action.

## **Reasons for decision**

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*Is the requested information environmental?*

21. 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);*

22. As the information requested all relates to the creation of a road and property, the Commissioner accepts that this is environmental information under Regulation 2(1)(c). She has therefore assessed this complaint under the EIR.

### **Regulation 5(2)**

23. Regulation 5(1) requires a public authority that holds environmental information to make it available on request.
24. Regulation 5(2) of the EIR requires this information to be provided to the requester within 20 working days following receipt of the request.

### **Request 1**

25. The Council acknowledged but did not respond to Request 1. In its submissions to the Commissioner the Council stated that it, *"agreed to pursue these further points as a new request in June 2019, but failed to do this."* It added:

*"In the review response for reference number IGF/13646 the council said it would deal with this as a new request but failed to do this. This was not re-submitted as a further request and therefore no further response has been provided.*

*Whilst the council accepts a refusal notice was not provided, it considers the information to respond to this information has been provided, including in response to the information provided for reference number IGF/12645."*

26. Therefore, the Council has breached the statutory timeframe under the EIR by not providing any response to Request 1. The Council is required to take the step as outlined at paragraph 3 above.

### **Request 2**

27. Request 2 was submitted on 5 July 2019. The Council issued its initial response to this request within the statutory timeframe of 20 working days on 2 August 2020. However, the Council admitted to the complainant that it had not answered part one of the request correctly and therefore stated that it would issue a fresh response. It did not do so.
28. In its response to the Commissioner's investigation, the Council stated that for part one of Request 2, it considered it had already responded to this under a separate reference number IGF/12645. The Council stated *"in pursuing this request the council considered it had already responded to this under a separate reference number IGF/12645. However the council did not provide the further agreed response, which should have been to issue a refusal notice. The council accepts a response should have been provided stating it was considered exempt under section 12(4)(b) as it was substantially similar to the request under IGF/12645."* The Council's handling of IGF/12645 was subject to a previous ICO investigation and decision.<sup>2</sup>
29. In relation to providing a further response to part one of Request 2, the Council stated, *"the council did not provide the further agreed response. The council accepts that although this would have been to provide a refusal notice stating section 12(4)(b) a response should have been provided."*
30. Therefore, the Council has also breached the statutory timeframe under the EIR by not providing this revised response to Request 2 within 20 working days. The Council is required to take the step as outlined at paragraph 3 above.

### **Regulation 12(4)(b) – Manifestly unreasonable (vexatious)**

31. Regulation 5(1) states that:

*"a public authority that holds environmental information shall make it available on request."*

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2616098/fs50831447.pdf>

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;*

32. Regulation 12(4)(b) provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
33. The exception will typically apply in one of two sets of circumstances; either where a request is vexatious, or where compliance with a request means a public authority would incur an unreasonable level of costs, or an unreasonable diversion of resources. In this case the Council argued that the request was vexatious.
34. Following the lead of the Upper Tribunal in *Craven v Information Commissioner & the DECC* (GIA/786/2012), 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.
35. The term “vexatious” is not defined within the FOIA. The Upper Tribunal considered the issue of vexatious requests in the case of the *Information Commissioner v Devon County Council & Dransfield* (GIA/3037/2011) (Dransfield). 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.



36. The Dransfield definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
37. 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).*

38. The Commissioner has published guidance<sup>3</sup> on dealing with vexatious requests, which includes a number of indicators that may apply in the case of a vexatious request. However, even if a request contains one or more of these indicators it will not necessarily mean that it must be vexatious.
39. When considering the question of vexatiousness, a public authority can consider the context of the request and the history of its relationship with the requester, 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."*

40. However, the Commissioner is also keen to stress that in every case, it is the request itself that is vexatious and not the person making it.

#### *The complainant's position*

41. In bringing this matter to the ICO, the complainant stated that their main focus was to obtain sight of any complaints from previous owners of their property. She stated, *"my neighbour erected a structure under*

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<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/1198/dealing-withvexatiousrequests>. Pdf

*permitted development, however the property has conditions that would deem this structure as in breach of the conditions. I want to know if the previous owners complained about the structure, and how the council responded, as the council themselves were not aware of the conditions restricting development on the cul-de-sac."*

42. Disputing the Council's determination of the request as vexatious, the complainant stated, *"the accusation that I have made 'manifestly unreasonable' requests needs to be seen in the context that the council rarely provide satisfactory responses. This tends to lead to more questions, seeking further clarification. My husband and I are really only after a couple of answers revolving around the status of the road we live on and the illegally built garage."*

#### *The Council's position*

43. The Council provided the Commissioner with background to this complaint. It stated that these information requests relate to a dispute between the complainant and their neighbours and a complaint against the Council regarding enforcement action on the matter. The Council further explained that the basis of the dispute concerns the construction of the neighbour's garage and gates. The Council state that this matter has been the subject of complaints to the Local Government and Social Care Ombudsman prior to the submission of these information requests.

#### *Request 3*

44. During its internal review of Request 2, the Council stated that some points raised by the complainant in her internal review request, *"were different to the original request [...] but were substantially similar to previous requests"*. Therefore it stated that it applied regulation 12(4)(b) in its internal review response of Request 2 to the new requests submitted which became Request 3.

45. In response to Request 3, the Council stated:

*"The Council has continuously worked with both you and your partner over several months to address numerous complaints and requests for recorded information. However, we now consider the ongoing correspondence making overlapping requests and complaints to be manifestly unreasonable under section 12(4)(b) of the EIR and that it is therefore now appropriate to apply this section to the further requests noted above and to further requests and complaints related to the same issues which have already been responded to in full."*

46. In response to the request the Council also stated that it considered Request 3 to be substantially similar to multiple previous requests and

that the information is unlikely to have changed since its previous responses to the complainant. It stated that spending further time responding to further similar and overlapping requests and correspondence would be contrary to the public interest as it would divert officers' time away from their usual duties. The Council argued that all information to assist the public understanding of the actions it had taken and how decisions had been made had already been disclosed. It further explained to the complainant that it understood she had a personal interest in the issues being raised, *"however it is also considered information relevant to your personal interests has also been provided. Further to this your concerns have been subject to independent scrutiny of the council's actions through both the relevant Ombudsman and the Information Commissioner's Office."*

47. As part of this investigation, the Council was asked to provide details of the detrimental impact of complying with the request. The Council stated that dealing with Request 3 would cause, *"a disproportionate and unjustified level of disruption to the council and its abilities to carry out its functions"*.
48. The Commissioner asked the Council to explain why this impact would be unjustified or disproportionate in relation to the requests themselves and their inherent purpose or value. In response, the Council stated that it had taken into account the history and context of these requests and believed them to be substantially similar to requests for information it had already disclosed in response to previous requests. The Council argued that it accepted the complainant remained unhappy with responses provided to requests, reviews and complaints however it stated that *"there are routes for appropriate independent scrutiny"*. The Council argued that providing a further response would not resolve the complainant's dissatisfaction. Ultimately, it argued that it is unable to provide a different response and that spending time responding to further overlapping or substantially similar requests, albeit on occasions with slightly different wording, would cause a disproportionate and unjustified level of disruption.
49. Regarding the wider context and history, the Council provided the Commissioner with evidence in the form of documents and correspondence between the Council and the complainant concerning the wider complaint about the neighbour's garage and gates. It stated that it could provide more correspondence should the Commissioner require.

#### *The Commissioner's view*

50. 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.

51. The Commissioner considers that a public authority must satisfy a high bar in order to demonstrate that a request is vexatious and thus manifestly unreasonable. In this particular case, she does not consider that the Council has demonstrated that this bar has been met.
52. The Commissioner has considered the Council's arguments for applying regulation 12(4)(b) to Request 3 and all of the supporting information it has provided. This includes correspondence between the complainant and the Council's planning department regarding the enforcement complaints about the neighbour's property. This information provides context to the information requests but does not necessarily demonstrate how this particular request was vexatious. The Council also did not clearly evidence how a burden would be caused by complying with the request.
53. The Council has also not clearly identified which of any of the key points of vexatiousness from the Commissioner's published guidance it intended to demonstrate in the evidence it has provided. It refers to frequent or overlapping requests, however, from the evidence provided, it appears these overlapping requests have only been submitted when previous requests have not been responded to in a timely manner or at all.
54. It is clear that the complainant and the Council have exchanged a series of correspondence regarding the matter the requests relate to. However, the Commissioner's role here is only to determine whether these information requests have been complied with in line with the EIR.
55. Request 3 was submitted as part of the internal review request for Request 2. The information requested in Request 3 largely concerns the creation of the road. This was information that had been requested previously at part 1 of Request 2 for which the Council has admitted it did not answer correctly and then failed to issue a subsequent fresh response. At Request 2, the complainant had asked for information concerning the *creation* of Government House Road and the Council misinterpreted this and provided information concerning the *adoption* of the road, later apologising and stating that a new response would be issued. It therefore appears reasonable that the complainant asked further questions regarding the creation of the road in her internal review request following the Council's incorrect response.
56. The Council also argued that the complainant would not be satisfied with any further responses given, however it has not evidenced this argument strongly. For instance, the complainant was unhappy because

her initial request was ignored and her second request misunderstood. The Council has therefore demonstrated that further requests have only been submitted due to a lack of valid responses to previous requests.

57. The Council has not demonstrated to the Commissioner that it is dealing with large volumes of correspondence from the complainant. 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. This does mean that the public authority must demonstrate that the unreasonableness of the request outweighs its value.
58. The Council was required to make a persuasive case that the request was manifestly unreasonable, but it has not done so. The Commissioner therefore finds that regulation 12(4)(b) was not engaged in relation to Request 3. Having reached this conclusion, it is not necessary for the Commissioner to go on to consider the balance of the public interests.
59. At paragraph 3 above the Council is now required to issue a fresh response to the complainant which does not rely on regulation 12(4)(b).

## **Other matters**

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60. The Commissioner is of the view that the following aspect of Request 1 should have been considered as a request for personal data, not a FOI request:

*"Specifically, I am looking for conditions imposed on my house concerning planning regulations, maintenance that has been carried out on the road that is entirely on my property, utility maintenance that is on my property (water works, street lighting, etc), and other records that may help me understand my property better."*

61. This is because the complainant has requested information relating to her property, and in turn, this constitutes her personal data.

## Right of appeal

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62. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

63. 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.
64. 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**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**