

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

Decision notice

Date: 5 June 2013

Public Authority: Sandwell Metropolitan Borough Council
Address: Sandwell Council House
Oldbury
Sandwell
West Midlands
B69 3DE

Decision (including any steps ordered)

1. The complainant has requested information regarding Sandwell Metropolitan Borough Council's (the council) inspection of contaminated sites in the borough. The council refused the request relying on the exceptions at 12(4)(b), 12(4)(d) and 12(5)(e) as it considered that the request was manifestly unreasonable, the information was in the course of completion and its disclosure would adversely affect the confidentiality of commercial information.
2. The Commissioner's decision is that the council has incorrectly relied on the exceptions cited and he therefore requires the council to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information.
3. The public authority 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

4. On 18 February 2012 the complainant made the following request for information:

"(i) Having been supplied with the inspection strategy in another Freedom of information request-51906-b519a8e1@whatdotheyknow.com, I am seeking further explanation of the gradation of "inspection priority category" which I cannot find any reference to in the inspection strategy document. Could I therefore ask for the Council's full numbered gradation category scheme in respect of identification of priority and an explanation of each numbered category?"

(ii) Could I ask if the "Trans-Thematic Working Party on Contaminated Land" still exists or when it ceased to exist and if minutes of its meetings are publically available? On how many occasions does it meet per month/annum?"

(iii) Can you confirm that [the inspection] timetable was met and that all sites have now been assigned an "inspection priority category" in the Metropolitan Borough of Sandwell?"

(iv) Could you provide a full location list of sites that have so far been categorised according to the numbered "inspection priority category", stating the number assigned for each site, and whether these sites have been inspected under the council's inspection strategy? Could I request this in excel spreadsheet form if possible?"

5. The council responded on 14 March 2012. In respect of questions 1-3 it either provided information or confirmed that it was not held. In respect of question 4, the council applied the exception at regulation 12(4)(d) as it considered that the list of sites categorised according to the inspection strategy was in the course of completion.
6. On 20 March 2012 the complainant requested an internal review of the council's response to question 4. The council responded on 18 May 2012 and revised its position. It explained that it was now relying on regulation 12(4)(b) with regard to all four requests as they were considered to be manifestly unreasonable. The council also applied regulations 12(5)(e) and 12(5)(g) to the information requested at question 4 as it was prejudicial to the confidentiality of commercial information and also to the protection of the environment to which the information relates.

Scope of the case

7. The complainant contacted the Commissioner on 19 August 2012 to complain about the way question 4 of his request for information had been handled.

8. During the course of the Commissioner's investigation, the council confirmed that it was relying on the exceptions at regulations 12(4)(b), 12(4)(d) and 12(5)(e). It withdrew its reliance on 12(5)(g).
9. The Commissioner considers the scope of this case to be to determine whether the council was correct to refuse question 4 citing regulations 12(4)(b),(d) or 12(5)(e); the list of sites categorised according to the inspection strategy (the list).

Reasons for decision

Regulation 12(4)(b) – Manifestly unreasonable

10. Regulation 12(4)(b) of 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;"

11. The Commissioner recognises that the exception at regulation 12(4)(b) of the EIR contains a broadly similar provision to section 14(1) of FOIA, which relates to the refusal of vexatious requests. Therefore, although there are some differences in the structure of section 14 and regulation 12(4)(b), these should not make any difference in practice and the Commissioner has therefore considered the extent to which the request could be considered as vexatious.
12. In *Information Commissioner vs Devon County Council & Dransfield* [2012] UKUT 440 (AAC), 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.' The decision clearly establishes that the concepts of 'proportionality' and 'justification' are central to any consideration of whether a request is vexatious.
13. The Commissioner will therefore 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.

Detrimental impact on the public authority

14. There are a number of indicators which could apply to a vexatious request to demonstrate the detrimental impact on the public authority.
15. The council has specifically stated that it considers the request to be burdensome, disruptive and annoying, harassing and obsessive. The majority of the council's arguments in the application of this exception surround the fact that the council considers the requested information to be potentially inaccurate. It has explained that the requested information lists properties which, according to historical data and current use information, have a potential risk of being contaminated. It has stated that it considers the list to be a work in progress as a full scientific analysis of each site would need to be undertaken in order to confirm whether or not it is contaminated, and to what degree.
16. The council has argued that disclosing the withheld information would create an unnecessary burden on the council and its staff. It considers that if potentially inaccurate information about contaminated land was released it would find itself in the position of either having to publically defend itself for publishing potentially inaccurate information, or it would have to undertake expensive exploratory investigations to satisfy the needs of landowners whose property appears on the list. It considers that this would result in the council having to spend excessive resources in terms of time and money.
17. The council has also argued that due to the number of requests the complainant has made to the council and to other local authorities on the whatdotheyknow.com website, which it states numbers at around 90, the complainant has placed a significant burden on the resources of the public sector as a whole. Whilst the Commissioner accepts that the number of requests the requester has made to other public authorities is a useful indicator of the context and history of a request, any burden that a public authority envisages in relation to a request must only be on the authority that has received the request.
18. On the basis of the council's submissions, the Commissioner is not persuaded that the burden envisaged is likely to occur. Moreover he does not consider it relevant to the engagement of regulation 12(4)(b). Regulation 12(4)(b) is concerned with the impact of complying with a request, rather than the impact of disclosure of the information sought. The ICO's guidance on 'How exceptions and the public interest test work under the EIR' highlights that the fact that information may be misleading or is inaccurate is not a relevant argument for the majority of exceptions. In the Commissioner's view, the potential risk or burden from releasing information which is misleading could be easily mitigated

by publishing an explanation of the information or putting the information into context when it is disclosed.

19. The council has also stated that it considers that the disclosure of the list of potentially contaminated sites would cause disruption and annoyance to the council and to local residents and businesses who appear on the list. It has suggested that the list would show which properties are sited on potentially contaminated ground and that this would have a negative impact on property prices. The council considers that this would be more than a mere annoyance to a property owner if their property was on the list.
20. The Commissioner again finds that this argument relates to the nature of the information and the fact that the council considers it likely that much of it will be inaccurate once full scientific research has been carried out on each site. His position therefore remains that these concerns could be mitigated by the council explaining the nature of the list, and stating that it is a record of potentially contaminated sites which is likely to change with full investigation.
21. In addition to this, the Commissioner notes that the council has not provided any evidence to suggest that the requester deliberately intended the request to cause annoyance.
22. The council also considers that the volume of requests the complainant has made regarding the local environment to be harassing. It has provided the Commissioner with a list of 16 requests the complainant has made to the council through the whatdotheyknow.com website dating back to July 2010. It has also stated that it considers the number of requests, general enquiries and complaints made regarding Rhodia Lagoon to be harassing.
23. The council has argued that the language used by the complainant in some of the requests is an indicator that his requests are vexatious. For example, he has commented that the council are "apologists for industry" and his tag on whatdotheyknow.com refers to "sinister agents in Government agencies." The council has also stated that it considers that the requests and other correspondence from the complainant are mingled with these negative comments and complaints about the council.
24. The Commissioner has had regard to the wording of the requests and notes that the language in a minority of the correspondence could be considered slightly inflammatory. However, for the most part, he finds that the complainant has been polite in his requests and has not used language which could be termed as harassing. The Commissioner is not

persuaded, on the basis of the council's submissions, that the request could reasonably be considered to be harassing.

25. Finally, the council has explained that it considers the number of requests made by the complainant to Sandwell and other local councils to be an example of unreasonably persistent behaviour. The Commissioner is not persuaded that the number of requests made to the council or to other public authorities is sufficient to demonstrate that the request could be considered as unreasonably obsessive, particularly given the time frame over which such requests have been made. The council has also inferred that it considers the tone of the requests as mentioned in paragraph 23 to be obsessive. Again, the Commissioner is not convinced by this argument based on the council's evidence. Therefore he does not find the request to be unreasonably persistent.

Conclusion on the application of regulation 12(4)(b)

26. The Commissioner finds that the council has not provided sufficient evidence to support a claim that the request can reasonably be considered as manifestly unreasonable. He is particularly sceptical of the council's arguments surrounding the impact of the release of what it considers to be potentially inaccurate information. As none of the indicators of a disproportionate or unreasonable burden have been met in the Commissioner's view, he has not found it necessary to consider the serious purpose and value of the request.
27. The Commissioner therefore finds that regulation 12(4)(b) is not engaged, he has therefore found it necessary to consider the council's application of regulation 12(4)(d).

Regulation 12(4)(d) – information in the course of completion

28. Regulation 12(4)(b) of EIR states that:

"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data;"

29. The Commissioner has considered the withheld information in some detail and notes that there is a column for officers to record whether an investigation has taken place and what the decision is as to whether the site is contaminated or not. However, he also notes that in many cases, the initial assessment of a site occurred over 10 years ago, and that the vast majority of sites listed are yet to be fully investigated.

30. The council has stated that it considers the information in the list of sites that have so far been categorised according to the inspection priority category is potentially inaccurate. It has stated that due to the fact that the inspection category is based on a combination of historical data and current use information, it is possible that a site which is listed as potentially contaminated is not. It considers this information to be in the course of completion because further detailed scientific investigation of each site is required to confirm whether or not a site is contaminated.
31. In its response to the Commissioner the council stressed that the list recorded potentially contaminated sites and explained that the information had been gathered from historical data and current use sources. The council said that the document is for internal use only to assist officers to assess risk and allocate scarce resources accordingly to fully investigate and determine sites of actual contamination. It therefore considers that the record is held only as a draft or a work in progress until such a time that expensive exploratory work can be carried out. It has not provided a timescale for such work and given that the majority of sites are yet to be fully investigated, it is clear that the work will be ongoing for some time.
32. The Commissioner's view is that the list is clearly of potentially contaminated sites rather than sites proven or assumed to be contaminated. He therefore agrees that the council is correct to highlight the word potential, but for different reasons. The Commissioner considers that a list of potentially contaminated sites cannot be in the course of completion or in draft form. It is clear that this list exists for the purpose of assisting officers to direct scarce resources on a risk based approach to determine whether any of the sites are actually contaminated.
33. The ICO guidance 'Material in the course of completion (regulation 12(4)(d))' advises that the fact that a project has not been completed does not necessarily mean that all the information relating to the project is incomplete. Therefore, whilst it is clear that the project is ongoing, this does not necessarily mean that the information is incomplete. Where the public authority is relying on or using the data at the time of the request, it cannot be considered as incomplete on the basis that it may be modified or amended in the future. In this case, the council has stated that it is using the information internally as a tool to direct resources for full contamination investigations. The Commissioner considers that the information is therefore a living document which is used to track and monitor assessments of potentially contaminated land. As such, he finds that there is not a clear point at which the information could be considered complete, and so it cannot be considered to be in the course of completion.

34. As outlined in relation to the council's arguments under regulation 12(4)(b), the Commissioner considers that the majority of the council's concerns surrounding what it has termed as potentially inaccurate information would easily be mitigated by stressing that the list is of potential contaminated sites and that the information is based only on historical and current use information and is not backed up by scientific investigation of each site.
35. Having considered the arguments put forward by the council, the Commissioner is not satisfied that the information is either in the course of completion, incomplete or an unfinished document. Whilst the analysis of the information is ongoing, the information represents a complete picture of the current position regarding potentially contaminated sites at a particular point in time. The fact that this may change once a detailed scientific investigation is conducted does not mean that the information is unfinished or incomplete with regard to the information that is available at this point. Therefore, the Commissioner is not satisfied that the exception is engaged.
36. As the Commissioner finds that the exception at regulation 12(4)(d) is not engaged there is no requirement to consider the public interest test. He has therefore gone on to consider the application of regulation 12(5)(e).

Regulation 12(5)(e) – Confidentiality of commercial or industrial information

37. Regulation 12(5)(e) of EIR states that:

"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;"

38. Breaking down the constituent parts of the exception, the Commissioner considers that the disputed information must satisfy the following conditions in order for regulation 12(5)(e) to be engaged –
 - The information is commercial or industrial in nature.
 - The information is subject to confidentiality provided by law.
 - The confidentiality is provided to protect a legitimate economic interest.

- The confidentiality would be adversely affected by disclosure.
39. The Commissioner will normally test each of these conditions in turn when considering the application of the exception.
40. The council, however, has not provided arguments that address each of these four conditions. Instead, its justification for non-disclosure relies on the apparent assumption that disclosure of what it considers to be potentially inaccurate information about the potential of a site to be contaminated would adversely affect property prices. It considers that the price of property and land is a legitimate economic interest, and the Commissioner does not disagree with this. However, the council has not provided evidence to demonstrate why such an adverse effect is more probable than not. Nor has the council provided any information about how the list of potentially contaminated sites is commercial or industrial information. Neither has it stated how the confidentiality of the information in question is provided by law. In view of this, the council has failed to demonstrate that the exception is engaged.

Conclusion

41. The Commissioner has not found any of the exceptions cited by the council to be engaged, and consequently, he finds that the council was incorrect to withhold the requested information.

Right of appeal

42. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

43. 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.
44. 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

Jo Pedder
Policy Delivery Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF