

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 12 September 2019

Public Authority: North Somerset Council
Address: Town Hall
Walliscote Grove Road
Weston-super-Mare
BS23 1UJ

Decision (including any steps ordered)

1. The complainant has requested various information relating to the development of a crematorium. North Somerset Council ("the Council") refused the request as vexatious under section 14(1) of the Freedom of Information Act 2000 ("the FOIA"), but subsequently informed the Commissioner that the request would fall under the Environmental Information Regulations 2004 ("the EIR"), and as such, sought to refuse the request as manifestly unreasonable on vexatious grounds under regulation 12(4)(b).
2. The Commissioner's decision is that the Council is entitled to refuse the request under regulation 12(4)(b) of the EIR, but breached regulation 14 by failing to inform the complainant of its refusal within the time for compliance.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 22 January 2019, the complainant wrote to the Council and requested information in the following terms:
 1. *All communications and documentation not entered onto the Council's Planning Portal in respect of Planning Application 14/P/2274/F before 6th January 2018 between the Applicant and his Agents.*
 2. *All communications and accompanying documents from June 2017 to date in respect of communications both internally between Council Officers including Press Office, Councillors including members of the Executive and externally with Dignity, its Agents and Contractor. This to include all diary notes, records of meetings including liaison meetings and any other meetings between the Council's Team responsible for the Crematorium Contract Management with Dignity, their Agents and Contractors.*
 3. *Records of all applications in respect of Statutory Notices and Orders made by the Applicant, his Agents and Contractors in respect of work associated with Planning Application 14/P/2274/F since June 2017.*
5. The Council responded on 25 January 2019. It refused to comply with the request under section 14(1) of the FOIA.
6. Following an internal review the Council wrote to the complainant on 6 March 2019. It maintained the application of section 14(1) of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 13 March 2019 to complain about the way his request for information had been handled, and specifically that the Council was not entitled to apply section 14(1) of the FOIA.
8. Having considered the request, the Commissioner identified that it seeks information that may be environmental in nature, and therefore fall under the terms of the EIR. The Council subsequently confirmed to the Commissioner that this was correct, and advised that, rather than rely upon section 14(1) of the FOIA, it should have refused the request on the basis that it is manifestly unreasonable on vexatious grounds under regulation 12(4)(b) of the EIR.
9. The Commissioner considers the scope of the case to be the determination of whether the Council is entitled to refuse the request under regulation 12(4)(b) of the EIR.

Reasons for decision

Is the information environmental?

10. Information is “environmental” if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR rather than the FOIA. Under regulation 2(1)(c), any information on activities affecting or likely to affect the elements of the environment listed in regulation 2(1)(a) will be environmental information. The requested information relates to the development of land. This can be clearly identified as affecting the land. The Commissioner therefore accepts that the request should be dealt with under the EIR.

Regulation 12(4)(b) – Manifestly unreasonable requests

11. Regulation 12(4)(b) 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;

12. The Commissioner recognises that, on occasion, there can be no material difference between a request that is vexatious under section 14(1) of the FOIA and a request that is manifestly unreasonable on vexatious grounds under the EIR. The Commissioner has therefore considered the extent to which the request could be considered as vexatious.
13. The Commissioner has published guidance on vexatious requests¹. As discussed in the Commissioner’s guidance, the relevant consideration is whether the request itself is vexatious, rather than the individual submitting it. Sometimes, it will be obvious when requests are vexatious, but sometimes it may not. In such cases, it should be considered whether the request would be likely to cause a disproportionate or unjustified level of disruption, irritation or distress to the public authority. This negative impact must then be considered against the purpose and public value of the request. A public authority can also consider the context of the request and the history of its relationship with the requester when this is relevant.

¹ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-withvexatiousrequests>.

14. While section 14(1) of the FOIA effectively removes the duty to comply with a request, regulation 12(4)(b) of the EIR only provides an exception. As such the EIR explicitly requires a public authority to apply a public interest test (in accordance with regulation 12(1)(b)) before deciding whether to maintain the exception. The Commissioner accepts that public interest factors, such as proportionality and the value of the request, will have already been considered by a public authority in deciding whether to engage the exception, and that a public authority is likely to be able to 'carry through' the relevant considerations into the public interest test. However, regulation 12(2) of the EIR specifically states that a public authority must apply a presumption in favour of disclosure. In effect, this means that the exception can only be maintained if the public interest in refusing the request outweighs the public interest in responding.

The Council's position

15. In 2011, a planning application was submitted to extend the cemetery adjoining a crematorium. Since that time, the complainant, acting on behalf of neighbouring residents, has submitted multiple grievances about the development. Since 2014, the complainant has referred the Council's handling of these grievances to the Local Government Ombudsman ("the LGO") on at least three occasions.
16. Those grievances lead to four information requests being submitted by the complainant in 2016 (one on 14 January, two on 4 May, and one on 13 June). One of the information requests submitted on 4 May was significantly large, extending to 36 pages in length. Following the request of 13 June, the Council elected to disclose "*every file held anywhere in the council systems relating to the crematorium*".
17. The completeness of the Council's disclosure was referred as a complaint to the Commissioner, who subsequently found that the Council had disclosed all relevant held information (decision notice FS50643694²). This finding was subsequently upheld by the First-tier Tribunal (Information Rights) ("the Tribunal").
18. In November 2018, further works were undertaken on the development, leading to almost daily contact from the complainant to the relevant

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014017/fs50643694.pdf>

service area in the Council. In December 2018, the complainant made a formal complaint to the Council about the development, to which a Stage 2 complaint response was provided by the Chief Executive in January 2019. Simultaneous to that complaint, the complainant also submitted a further two complaints focused on the developers' non-compliance with planning permission conditions, which were investigated and addressed by the Enforcement team through the statutory enforcement process.

19. The complainant disputed the Council's Stage 2 complaint response, and was advised that he should contact the LGO should he remain dissatisfied.
20. The Council considers that the request, which was submitted shortly after the Stage 2 complaint response, was submitted in an effort to reopen and extend the complaint, and has noted that the complainant has acknowledged this in their request for an internal review, where they explained that the request was to *"to give the new Chief Executive the opportunity to review the indisputable facts already in our possession"*. The Council also considers that the request seeks information that is of limited value, as the development is nearing completion, and the Council has maintained a high level of transparency about it; this point was previously raised by the Tribunal, which raised concerns that the complainant was seeking information of dubious value, to which the Council had devoted a disproportionate effort to provide.
21. Lastly, the Council has noted that the complainant has since made a complaint to the LGO, which is currently underway.

The Commissioner's analysis

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

whether the value of a request outweighs the impact that the request would have on the public authority's resources in responding to it. Aspects that can be considered in relation to this include the purpose and value of the information requested, and the burden upon the public authority's resources.

The purpose and value of the request

24. The request seeks information about the development of specific land; this is an action that will not only impact upon the environment, but also upon the lives of local residents. As such, there is an inherent expectation of transparency in the Council's handling of the matter.
25. However, it is evident to the Commissioner that the various concerns held by the complainant have been considered by the Council's Enforcement team, as well as through the Council's Stage 1 and Stage 2 complaints process, and that the complainant has the right to appeal the Council's handling to the LGO. The Commissioner also notes that the request not only takes place immediately following the Council's Stage 2 complaint response, but that the complainant clearly refers to the purpose of the request as being to re-open the matter.
26. In such a scenario, it is reasonable for the Commissioner to conclude that the request has been made specifically to reopen a matter that the Council considers to be closed, despite the appropriate route of appeal being to submit a complaint to the LGO. The availability of a proper route of appeal significantly reduces the value of the request. The Commissioner further notes that there is no evidence that suggests the Council has acted incorrectly in handling either the development, or the complainant's concerns.

The burden upon the Council

27. The Commissioner has considered the wide parameters request, and acknowledges that compliance would require the Council to expend significant public resources. In particular, the Commissioner notes that the information sought by part 1 of the request may include that originally disclosed by the Council in 2016.
28. It is also evident to the Commissioner that the Council has previously expended substantial resources in disclosing information about the development, as well as handling related concerns about it. In the circumstances of this case, it is reasonable for the Commissioner to consider that compliance with the request would not only impose a burden upon the Council, but also be likely to generate further correspondence.

The public interest test

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

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

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

30. The Commissioner recognises that the request relates to concerns held by the complainant about the Council's handling of planning application 14/P/2274/F, as well as alleged breaches of the planning conditions laid out in the planning decision.

31. However, there is no evidence available to the Commissioner that indicates that the Council has acted incorrectly, and it is evident that the Council has not only ensured significant transparency about the development, but has repeatedly engaged with the concerns raised by the complainant. It is also recognised that there is an appropriate route of appeal (to the LGO) should the complainant remain dissatisfied with the Council's Stage 2 complaint response, and the Commissioner understands that this route of appeal has now been pursued.

Conclusion

32. Having considered these factors, the Commissioner has concluded that regulation 12(4)(b) has been correctly engaged, and that the outcome of the public interest test indicates the exception should be maintained.

Regulation 14 – Refusal to disclose information

33. Regulation 14 requires that where a public authority refuses to disclose information under an exception, this is stated in writing within 20 working days.

34. In this case, the Council applied the wrong legislation whilst handling the request, and subsequently did not apply regulation 12(4)(b) until a complaint was brought to the Commissioner. On this basis the Commissioner finds a breach of regulation 14.

Right of appeal

35. 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

36. 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.
37. 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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