

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

Date: 27 January 2015

Public Authority: Colchester Borough Council
Address: Rowan House
33 Sheepen Road
Colchester
CO3 3WG

Decision (including any steps ordered)

1. The complainant has requested information from Colchester Borough Council concerning the adoption of a footpath at St Luke's Chase, Tiptree, Essex. The Council has refused to correspond with the complainant further about this matter and has done so in reliance of Regulation 12(4)(b) – where, if it is held, the information would constitute environmental information, and section 14(1) – where, if it is held, the information would fall for consideration under the FOIA.
2. The Commissioner's decision is that Colchester Borough Council is entitled to rely on both Regulation 12(4)(b) of the EIR and section 14(1) of the FOIA to refuse to comply with the complainant's request. He has also decided that the Council has breached Regulation 14(3) of the EIR and section 17 of the FOIA by failing to inform the complainant that it was refusing to comply with his request in reliance of an appropriate exception and exemption.
3. The Commissioner requires no further action to be taken by the public authority in respect of this matter.

Request and response

4. On 25 January 2014, the complainant wrote to Colchester Borough Council making a request for information. The terms of the

complainant's request may be found at the foot of this notice in annex 1.

5. The Council sent the complainant an email on 24 April in which it responded to each of the eleven elements of his request.
6. On 5 May the complainant wrote to the Council again. In his email the complainant explained to the Council that the response it had made to his request had not 'cleared any of [his] requests'. In this email the complainant asked a series of further questions which relate to St Luke's Chase / Tiptree Book Site.
7. On 12 May the Council sent the complainant its final response to his questions. The Council's email concluded by stating:

"All of the questions you have asked have been answered in full, many on several occasions. That being the case, please accept this statement as notice that Colchester Borough Council will not enter into no further correspondence and will not respond to any further letters or emails from you on this matter."

Scope of the case

8. The complainant contacted the Commissioner on 11 September 2014 to complain about the way his request for information had been handled.
9. The Commissioner's investigation of this complaint sought to determine whether Colchester Borough Council has handled the complainant's request in accordance with the Freedom of Information Act 2000 and/or the Environmental Information Regulations 2004; and specifically, to establish the grounds the Council is relying on when it says it will not enter into further correspondence with the complainant about this matter.

Reasons for decision

Background to the complaint / Findings of fact

10. Approximately ten years ago houses were built at the Tiptree Book Site in Tiptree, Essex. During the building of these houses the developer widened a footpath at St Luke's Chase and did so using a different surfacing method to that used on the existing path.

11. Until April 2005 Colchester Borough Council had delegated responsibility in respect of highway maintenance.
12. From April 2005 the delegated responsibility ceased and it reverted to Essex County Council Highways Department. At that point all of the records and functions previously exercised by Colchester Borough Council in respect of highway maintenance were transferred to the County Council.
13. Essex County Council has inspected the footpath at St Luke's Chase. It has determined that the footpath, including the additional strip, was adequate for its purpose and that the additional strip had become part of the adopted footpath and had become a public right of way ("PROW").
14. The complainant disagrees with the County Council's view that the surface of the path is adequate and he appears to assert that the additional surfaced area of the path has not become part of the PROW on the grounds that no documentation exists which confirms this.
15. The Commissioner understands that it is not a requirement of the Highways Act 1980 to have documentation which would confirm the legal transfer of ownership/adoption of the additional strip of land adjoining the footpath.

The nature of the information sought by the complainant

16. The Commissioner has considered the nature of the information sought by the complainant. He has determined that some of the information falls to be considered under the provisions of the Environmental Information Regulations 2004 ("the EIR"): The information, if it is held, would satisfy the definition of environmental information which is provided by Regulation 2 of the EIR, in that it directly relates to a footpath and its adoption as a PROW.
17. Some of the information sought by the complainant, if it is held in recorded form, concerns his on-going correspondence with the Council about the footpath. In the Commissioner's opinion the requested information would be sufficiently removed from the footpath and its adoption as a PROW, to require its consideration under the Freedom of Information Act 2000 ("the FOIA"). This information primarily relates to how the Council has dealt with the complainant's correspondence and enquiries.
18. Other information sought by the complainant does not fall to be considered by either the EIR or the FOIA. It is information which is unlikely to be held by the Council: It is information which the complainant has asked the Council to produce, e.g. to be given a definitive statement as to the ownership of the strip of land adjoining the footpath. This type of

information is not considered in this decision notice. This is because a public authority is only obliged to consider requests for recorded information which is held at the time of a request: Neither the EIR nor the FOIA require a public authority to create information in order to satisfy a request.

Is the requested information 'environmental information'?

19. Regulation 2(1) of the EIR defines what constitutes 'environmental information'. Subsections (a) to (c) state –

'(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 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) and (b) as well as measures or activities designed to protect those elements.'

16. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the European Parliament and Council Directive 2003/4/EC, which the EIR enact.
17. In the Commissioner's opinion the information sought by the complainant is likely to constitute environmental information. The information relates to the state of the land – the state of the footpath – and to measures which affect the land – the footpath's adoption as a PROW. He therefore finds that the information falls to be considered under the EIR.

Regulation 12(4)(b) – where the request is manifestly unreasonable

18. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose environmental information to the extent that the request for information is manifestly unreasonable.
19. There is no definition of 'manifestly unreasonable' under the EIR. The Commissioner considers that 'manifestly' implies that the request should 'obviously' or 'clearly' be unreasonable.

20. A request can be manifestly unreasonable for two reasons: Firstly if it is vexatious and secondly where the public authority would incur unreasonable costs or where there would be an unreasonable diversion of resources.
21. There is no definition of the term "vexatious" in the Freedom of Information Act, however the issue of vexatious requests has been considered by the Upper Tribunal in the case of *The Information Commissioner and Devon County Council v Mr Alan Dransfield (GIA/3037/2011)*. In the Dransfield case the Tribunal concluded that the term could be defined as "manifestly unjustified, inappropriate or improper use of formal procedure." The Tribunal identified four factors likely to be relevant in vexatious requests:
 - The burden imposed by the request on the public authority and its staff
 - The motive of the requestor
 - Harassment or distress caused to staff
 - The value or serious purpose of the request.
22. The Upper Tribunal's decision established the concepts of "proportionality" and "justification" as being central to any consideration of whether a request for information is vexatious.
23. The key to determining whether a request is vexatious is a consideration of whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. Where this is not clear it is necessary to weigh the impact of the request on the public authority against the purpose and value of the request. To do this a public authority must be permitted to take into account wider factors associated with the request, such as its background and history.
24. In this case the Council asserts that the request is manifestly unreasonable by virtue of being vexatious. It considers that complying with the complainant's request of 25 January 2014 would result in a disproportionate use of its resources in relation to a matter which it asserts it has endeavoured to fully address since February 2010, when the complainant first asked for information in respect of the Tiptree Book Site development.
25. To illustrate the effects of the complainant's requests on the Council, the Council has provided the Commissioner with a spreadsheet which documents five requests for information concerning the Tiptree Book Site/St Luke's Chase footpath, made by the complainant between 9 February 2010 and the date of this request.

26. The Council has provided the Commissioner with documents which evidence how it has dealt with the complainant's requests and correspondence about this matter – these were dealt with under the Council's references of 100209004573, 110902008840, 131004016075, 13102116214 and 140131017267. The Council has assured the Commissioner that it has answered all of the complainant's requests and queries as fully as it can, beyond providing him with the recorded information it holds relevant to his requests.
27. It is clear to the Commissioner that the complainant's continued correspondence about this matter illustrates that he is seldom satisfied with the information sent to him and with answers given to him by the Council. It is apparent that each time the Council responds to a request or query the complainant is likely to make further requests or queries.
28. The spreadsheet also shows that the complainant also referred the Council to the Local Government Ombudsman in 2010. Here, the complainant asked the Ombudsman to consider 'the ignorant failure and arrogant stupidity time after time to answer the following simple question who was and/is now responsible for the Tiptree Book Site development'. The Commissioner understands that this complaint was not upheld by the Ombudsman.
29. The Commissioner has decided that the requests made by the complainant on 25 January 2014 must be considered in the context of his other requests (referred to above) and his complaints about the Council's service. This is because they all relate to information concerning the Tiptree Book Site development and the footpath at St Luke's Chase. It is the burden of the complainant's request and queries in relation to this single matter which the Council considers represents a significant burden.
30. The Commissioner takes the view that the information sought by the complainant is not trivial in nature and does represent a genuine intention to establish responsibility for a footpath which the complainant considers to be unsatisfactory. Nevertheless the Commissioner he considers that the Council has done all it can do to provide the complainant with information relevant to his concerns.
31. The Commissioner must acknowledge the facts which underpin this request as outlined above at paragraphs 11- 14.
32. It is clear that the Council is not responsible for the footpath or for its adoption as a PROW. It is equally clear that the Council has explained these facts to the complainant on more than one occasion and has provided all the recorded information it can to assist the complainant's understanding of these matters.

33. The position with regards the complainant's continued pursuit of information has, in the Commissioner's opinion, passed the point where a reasonable person would conclude enough is enough and that his request of 25 January has added to the significant burden imposed by his aggregated requests and enquiries. It is clear to the Commissioner that the complainant's request has become disproportionate and unreasonable.
34. He finds that the complainant's pursuit of information from the Council has now passed the point where a reasonable person would conclude enough is enough: It has crossed the threshold where the request has become vexatious on the basis that it is manifestly unreasonable.

The public interest test

35. The Commissioner has gone on to consider whether the balance of the public interest in maintaining the exception outweighs the public interest in disclosing further information.
36. The Commissioner will always give weight to factors which favour the disclosure of information which would increase the public's understanding of the actions taken by the Council and of the processes by which it makes its decisions. Such disclosure of information increases transparency and provides accountability of public authorities.
37. In this case the Council has assured the Commissioner that it holds no further recorded information relevant to the complainant's request. The Commissioner must therefore conclude that the information already disclosed about the St Luke's Chase footpath has gone some way in satisfying any public interest in this matter.
38. In the Commissioner's opinion there is little or no public value to be had by asking the Council to spend further time or expense in responding to the complainant's requests, which, as the evidence suggests, are unlikely to satisfy his on-going scrutiny of the Council.
39. Taking all of the above into consideration, the Commissioner has decided that Regulation 12(4)(b) of the EIR has been properly applied by the Council.
40. Notwithstanding the Commissioner's decision above, he feels obliged voice his sympathy with the complainant's initial confusion about the status of the St Luke's Chase footpath. This confusion appears to have arisen following advice being given to the complainant by Essex County Council. The County Council misunderstood the terms of another of the complainant's requests and advised him that it was not responsible for the St Luke's Chase footpath.

41. The Commissioner understands that the County Council clarified its mistake with the complainant. He further understands that a representative of the County Council has met with the complainant at the site and has explained to him the PROW status of the footpath, assured him that it is maintained by the County Council and that its surface is considered adequate for its purpose. Furthermore, a plan of the site has been sent to the complainant and a written explanation given.

Section 14(1) – vexatious requests

42. Having established that the Council is entitled to rely on Regulation 12(4)(b) of the EIR on the basis that the complainant's request is manifestly unreasonable by virtue of being vexatious, the Commissioner has been drawn to the conclusion the request is equally vexatious in respect of any non-environmental information which the Council may hold, which is relevant to this request.

Procedural breaches of the EIR and FOIA

43. The Commission finds that the Council has breached Regulation 14(3) of the EIR. The Council should have advised the complainant that it was refusing to disclose information to him and informed him that it was doing so in reliance of Regulation 12(4)(b) of the EIR.
44. The Commissioner also finds that the Council has breached section 17 of the FOIA by failing to inform the complainant that it was refusing his request in reliance of section 14(1) of the FOIA.

Right of appeal

45. 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

46. 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.
47. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex 1

The complainant's request

Council Reference: 140131017267

I understand that Mr Dempsey wrote to the Council on 25 January 2014. The terms of his request were:

1. When is the Colchester Borough Council going to take action over this site?
2. Why did it take the Council eight years to inform me that they were not responsible for the surfacing of St Luke's Chase when from eight years ago I have a statement from the Council that the footpath could be resurfaces when the development was taken over...?
3. How is it that the Council planning staff are unable to differentiate between the original St Luke's Chase footpath and the land still in the possession of the developer? This land is clearly defined in particular by the bicycle chicane which is no longer operative because of the additional ground "donated" by the developer... It is self-evident that the strip is in no way compatible to the original St Luke's Chase by its composition and the incompetent way in which it has been laid.
4. To facilitate 3 above I want your assurance that the Council has the plans of the old book site before the development and the plans that the developers submitted and which the Council approved before granting permission to develop.
5. As you might have the plans in 4 above why is it that your staff are unable to resolve the issue which is evident to anyone using St Luke's Chase (except CBC and ECC employees) that there is a strip of land which is not St Luke's Chase and obviously must be the developers or in the far future become part of CBC tenure.

I want a definite statement from you as to the ownership of the strip of land which now adjoins the original St Luke's Chase.

6. Your staff's attempt to solve the question as to the ownership of the disputed strip is to inform me that it is part of the curtilage of the houses fronting onto St Luke's Chase. This is nonsense but to pander to the Council's lack of knowledge as to who owns what I have previously asked for confirmation that all the relevant house owners have been notified of this ridiculous assertion that they are responsible and own part of the unrecorded strip and that this fact is embodied in their deeds. No response from the officials concerned. I suggest that they look up the definition of curtilage and examine the houses abutting the strip bordering St Luke's Chase. I maintain that the curtilage is clearly marked by wooden fences and on the ground by inset edging stones. This clear and prominent marking of the curtilage of each house does not include any part of the land between their boundaries and the commencement of the original St Luke's Chase. If your explanation is by some obscure reasoning correct it follows that the Council/developer is responsible for the entrance to the footpath between the two housing blocks and the strip adjacent to the open area and the children's playground. There are two options 1. The Council/developer and the house owners are liable for the strip of land in dispute or 2. It is totally owned by the developer which at some time in the next century may become the responsibility of the Council. Which is it?
7. In August 2011 you informed me that you were serving a completion/enforcement notice on the developer. This was not done and I want to know your full and considered detailed reasons for this default.
8. Following on from 7. above I was informed that the Council would now be setting five professionally qualified and competent skilled Council staff under your command who could complete all outstanding queries and work and that the development would be completed in six months. Once again the Council made promises that they did not keep. I want to know your many and varied excuses why the development is still in the hands, I assume, of the developer after eighteen or so months of earnest and high powered work by the five highly skilled and no doubt commensurably highly paid dedicated professionals? I want the total cost to date of all the people employed in this fruitless endeavour which is still on-going with no result.
9. I want to know the name and professional qualifications of the Council employees who will be responsible for authorising the adoption of the disputed strip of land...

10. In the summer of 2013, I was in contact with Beverly Jones pointing out that in the chicane near the children's playground that there were four to six bricks missing, some of which were thrown into the path leading to the school. In spite of several reminders nothing has been done. There are now twenty or more bricks missing. Does the whole road have to be demolished before the Council can deign itself to stir itself and rectify a minor defect? [...] How can the developer ignore the Council and refuse to rectify obvious defects or is it that the Council cannot be bothered by such minor remedial work for it [is] only the people of Tiptree who are suffering.

Why does it take so long for the Council to act and when are these bricks being replaced?

11. Throughout my correspondence with you regarding the incompetence shown at all levels of the Council you have maintained an apparent confidence in the efficiency and professionalism of your staff. However, there comes a time when even the best rose coloured spectacles are not enough to prevent the glaring beam of truth breaking through bringing even you into the reality of the everyday world portrayed by the facts. This brings forth the question what are you going to do regarding yourself and your staff so that this long-running but minor development is completed?