

Environmental Information Regulations 2004 (EIR) Decision Notice

Date: 4 September 2019

Public Authority: London Borough of Croydon
Address: Bernard Weatherill House
8 Mint Walk
Croydon
CR0 1EA

Decision (including any steps ordered)

1. The complainant requested information relating to pre-application advice regarding a specified property. The London Borough of Croydon refused the request in reliance on regulation 12(4)(b) on the basis that the request was manifestly unreasonable.
2. The Commissioner's decision is that the Council was not entitled to rely on regulation 12(4)(b) to refuse the request. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the request that does not cite the exception at regulation 12(4)(b) of the EIR.
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. The complainant submitted the following request, regarding a specified planning application, to the Council on 19 June 2018:

"Please provide copies of all information regarding consultation on the above planning application and of all comments provided by consultees [statutory or otherwise]."

Please ensure that Council's response includes copies of the letters TO those with whom Development Management chose to consult."

5. The Council responded on 23 July 2019, disclosing most of the requested information. The Council stated that it had withheld personal information in reliance on the exception at regulation 13 of the EIR.
6. The complainant requested an internal review on 29 July 2018, disputing the Council's application of regulation 13. He also pointed out that the Council had in fact provided him with information relating to a wholly separate application, and submitted a further request for information about that application.
7. On 6 September 2018 the Council advised the complainant that it had decided not to conduct an internal review as requested. The Council referred to its correspondence to the complainant dated 3 September 2018 regarding a separate request, in which the Council advised that it would refuse future requests in reliance on regulation 12(4)(b).

Scope of the case

8. The complainant confirmed to the Commissioner on 2 January 2019 that he wished the Commissioner to investigate the way his request for information had been handled.
9. The Commissioner notes that the Council refused to conduct an internal review. The Commissioner would not normally accept a complaint without an internal review having been conducted. She is also mindful that the EIR explicitly requires that a public authority consider representations from the applicant. However in this case the Commissioner has decided to use her discretion to accept the complaint as valid without an internal review.
10. The Commissioner notes that the complainant in this case has asked her to investigate a number of requests he made to the Council. This decision notice relates only to the request made on 19 June 2018. Although some of the analysis will be the same as that set out in other decision notices, the Commissioner has carefully considered the correspondence and chronology of this particular request.
11. During the course of the investigation the Council advised the Commissioner that it also sought to rely on regulation 6(1)(b) since the requested information had been published on its website. However the Council subsequently confirmed that the specific requested information had not been published, therefore it withdrew this claim.

12. The Commissioner sought to explore whether informal resolution might be possible but the Council confirmed that it wished to maintain its reliance on regulation 12(4)(b).

Reasons for decision

Regulation 12(4)(b): manifestly unreasonable request

13. Regulation 12(4)(b) of the EIR provides an exception from disclosure to the extent that the request is manifestly unreasonable.
14. The term “manifestly unreasonable” is not defined in the EIR. However the Commissioner follows the lead of the Upper Tribunal in *Craven v Information Commissioner & DECC*.¹ In this case the Tribunal found 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.
15. A differently constituted 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. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.

The Council’s position

16. The Commissioner invited the Council to explain why it considered the complainant’s request of 19 June 2018 to be manifestly unreasonable. The Council referred the Commissioner to the arguments set out in a refusal notice dated 3 September 2018, issued in response to a similar request made by the complainant. The Council stated that the complainant had submitted 19 requests for information between October 2017 and August 2018. Most of them related to pre-planning and planning applications submitted by a particular developer, although the Council said that the complainant had made several requests about another developer. The complainant had also requested “over 12

¹ *Craven v Information Commissioner & DECC* [2012] UKUT 442 (AAC)

internal reviews” and the Council said it had exchanged correspondence with the Commissioner’s case officers regarding some of these requests.

17. The Council cited at length the Commissioner’s published guidance regarding regulation 12(4)(b).² The Council considered that the following indicators, as outlined in the guidance, were met:
- Burden on the authority
 - Unfounded accusations
 - Frequent or overlapping requests
 - Unreasonable persistence
 - Disproportionate effort
 - Futile requests and frivolous requests
18. The Council provided the Commissioner with a further detailed submission in support of its position. In respect of burden the Council said that the number of requests submitted by the complainant took up substantial financial and staff resources. The Council had advised the complainant that each request he submitted took six hours to process. The Council explained to the Commissioner that the head of planning signed off all EIR requests in order “to ensure accurate, relevant and necessary information is provided”, which took approximately one hour. It also set out that the legal team took six to eight hours to conduct internal reviews since they required research including reading ICO and Tribunal decisions. The Council further estimated that it spent six to seven hours dealing with the Commissioner’s enquiries each time the complainant submitted a complaint about the handling of the request.
19. In respect of unfounded accusations, the Council said that the complainant had continually made accusations of impropriety, alleging that Council officers had not carried out their responsibilities correctly. The Council said that the complainant ought to have brought these concerns to its Planning Committee but he had not done so.
20. In respect of frequent or overlapping requests, the Council said that the complainant had demonstrated a pattern of submitting numerous follow-up enquiries regardless of the information provided to him. In one case he had requested an internal review of a response, and had in the same correspondence commented on separate planning applications. The

² <https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf>

Council was of the view that this caused confusion and additional work for its staff.

21. In respect of unreasonable persistence and disproportionate effort the Council said that the complainant made excessive demands on staff time and resources, sending lengthy responses to Council correspondence. The Council also indicated that he also expected immediate responses to his requests and requests for internal review. The Council set out that the complainant refused to accept decisions, repeatedly arguing points with no new evidence, and raising detailed but unimportant questions.
22. In respect of futile requests and frivolous requests, the Council said that the EIR was not the correct mechanism to challenge alleged non-compliance with proper processes. The Council suggested that the complainant was seeking to use his information access rights in a manner that was "inconsistent with the purpose of the legislation". It was not aware of any value the requests provided to the complainant, and was of the view that the requests were of no value to the public.

The complainant's position

23. The complainant disputed the Council's assessment that his request was manifestly unreasonable. He set out that he was concerned about so-called "windfall" development sites (where large, single-dwelling buildings are converted into multiple flats). He wanted to ensure that the process for considering such applications was being carried out properly, that the proper advice was being sought and provided by planning officers and that relevant material objections were being properly considered when applications were approved.
24. The complainant pointed to local concern about "overdevelopment" in the area and argued that it was imperative that such developments be subject to scrutiny. He also stated that a considerable amount of the information was not in the public domain (which he believed it should be) and therefore the EIR was his only tool for accessing it.
25. Finally, the complainant disputed the burden that his requests were imposing upon the Council and argued that some of the burden had been created as a result of its failings to handle his requests adequately.

The Commissioner's findings

26. The Commissioner acknowledges that the complainant has concerns about the way the Council's planning processes, in particular pre-application meetings with developers. However the Commissioner cannot comment on these concerns insofar as they extend beyond the Council's handling of information requests. She acknowledges the

importance of the public being able to scrutinise the Council's decision making, but is equally mindful that there are more focused channels of complaint available to the public, such as the Local Government Ombudsman.

27. Having examined the correspondence the Commissioner accepts that the Council did receive a number of information requests from the complainant within a relatively short period of time. She considers that the number and frequency of the complainant's requests would be likely to increase the burden on a relatively small number of staff. This is particularly the case in the context of increasing demands on limited resources, which is apparent across the public sector.
28. However, the Commissioner also notes that the Council appears to have adopted an unduly time-consuming approach to dealing with what appear to be relatively straightforward requests. The Council appears to have committed considerable time to activities that are not necessary in every case, such as the head of planning signing off every response, and the legal team reading ICO and Tribunal decisions each time an internal review is requested.
29. The Commissioner observes that the complainant's requests are for similar information relating to various pre-application and planning applications. The Commissioner would expect the Council to have built up some experience in dealing with requests for this type of information, since planning is one of its core functions and EIR access rights came into force in 2005. Therefore she would expect the Council to have become more comfortable handling what could be seen as fairly routine requests. Accordingly, the Commissioner accepts the principle that the volume and frequency of requests contributes to burden, but given the Council's lack of efficiency in handling these requests she cannot attach substantial weight to these arguments.
30. In conclusion, the Commissioner considers this to be a finely balanced case. She questions the reasonableness of the complainant in the way he has corresponded with the Council, but she is of the opinion that the Council ought to be better able to deal with requests for routine information. The Commissioner is equally of the view that the complainant should be more mindful of the pressures on the Council's resources, but on balance she is not satisfied that the Council has demonstrated that this request is manifestly unreasonable. Therefore the Commissioner finds that the exception at regulation 12(4)(b) is not engaged and she is not required to consider the public interest.

Procedural requirements

Regulation 11 – reconsideration (internal review)

31. Regulation 11 of the EIR states that a public authority must consider an applicant's request for internal review and notify the complainant of the outcome no later than 40 working days after the date of receipt. There is no provision for the authority to refuse to conduct an internal review, therefore the Commissioner finds that the Council failed to comply with regulation 11.

Right of appeal

32. 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: now grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

33. 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.
34. 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

Sarah O'Cathain
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