

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

**Date:** 2 September 2019

**Public Authority:** Carmarthenshire County Council

**Address:** [foi@pembrokeshire.gov.uk](mailto:foi@pembrokeshire.gov.uk)

**Decision (including any steps ordered)**

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1. The complainant submitted three requests for various information in respect of Mill Bay Homes from Pembrokeshire County Council. The Council refused all three requests on the basis that they were vexatious, citing section 14(1) of the FOIA. Following the Commissioner's investigation, Pembrokeshire Council reconsidered the requests under the Environmental Information Regulations 2004 ('the EIR'), citing regulation 12(4)(b). The Commissioner's decision is that Pembrokeshire County Council should have originally considered the request under the EIR, and was not entitled to rely on regulation 12(4)(b) in respect of all three requests. The Commissioner has also recorded a breach of regulation 14(2) in respect of the first request due to its response being outside of the required timescale (20 working days) to provide a response.
2. The Commissioner requires the public authority to take the following steps:
  - Issue a fresh response to each request under the EIR without relying on 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.

## Requests and response

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### Request one

4. On 13 March 2018, the complainant wrote to Pembrokeshire County Council and requested the following information in respect of Mill Bay Homes:

*"I refer to the above development site and, specifically, to minor amendments agreed 7 March 2016 following discussion between Planning Officer and architect Trevor Hopkins; as set out in attached document. Reference is made to a "management plan for the wildlife buffer zone". The management plan does not appear to be available on the planning portal. I would be grateful if you could arrange to provide me with a copy. Thank you."*

### Request two

5. On 31 May 2018, the complainant submitted a further request for information to the Council in respect of Mill Bay Homes:

*"...as dwellings have been sold, or reserved, it remains unclear whether easements have been negotiated with the new owners and transferred to the Highway Authority to enable access to the drainage structures for future maintenance...I would be grateful if you could liaise with your colleagues in the Highway Authority and advise how you Authority intends to gain access to these highway drainage structures located in private land...I look forward to receiving clarification on the role undertaken by Building Inspectors in this process when you have had an opportunity to discuss the matter with your colleagues in the Highway Authority. I would normally expect these issues to be highlighted by conveyance solicitors representing prospective purchasers."*

6. The Council responded on 7 June 2018, refusing both requests under section 14(1) of the FOIA and informing the complainant that it would not be responding to any further requests in respect of Mill Bay Homes.
7. The complainant requested an internal review of this decision and in respect of his first request, commented that the management plan for a wildlife corridor should be available on the planning portal in the public domain, and stated that it should not be necessary to request it under the FOIA. In respect of request two, he informed the Council that its decision would hinder the progress of an on-going external investigation and requested to view documents on site on a specified date.

8. Following an internal review the Council wrote to the complainant on 3 July 2018. It upheld its original decision to refuse the requests on the basis of section 14(1) of the FOIA.

### **Request three**

9. On 12 July 2018 the complainant submitted a further request as specified below:

*"I refer to planning application 17/1300/PA and note that a new application form has been received by your Authority and validated 12 June 2018. I would be grateful whether you could advise me whether this extends the period of determination by a further 8 week period. Are the general public to be given an opportunity to comment on the amended proposals?"*

10. The Council responded on 14 July 2018 informing the complainant that although his request had been logged, it would not be issuing a response as explained in the section 14 notice it had previously issued to him.

### **Scope of the case**

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11. The complainant contacted the Commissioner on 5 July 2018 to complain about the way his request for information had been handled. He was not satisfied with the Council's decision that the requests were vexatious and expressed concern that the Council had not provided evidence to substantiate its reliance on the various indicators specified in its internal review.
12. He also alleged that the Council has withheld information which should be available on the planning register, and has argued that its disclosure could compromise a criminal investigation without providing evidence that it is liaising with the relevant police force in respect of such an investigation.
13. The complainant further alleged that the Council has denied access to information in a Building Regulations public register by requests for information to be made under the FOIA and then relying on section 14 to deny the public right of access to the public register.
14. The complainant argued that the Council's refusal of his requests would have the following impacts:
  - Hinder progress of an on-going external investigation running in tandem with the Council's planning enforcement investigation.

- Prevent the complainant from advising his clients on whether they have a right to comment on planning application 17/1300/PA following the decision to re-validate the application one day before it was due to be determined.
  - Enable the Council to avoid following correct legal process with regard to planning and drainage law.
  - Hinder the complainant's ability to respond to his clients in a timely and professional manner on development management issues [Planning, Drainage/Flood Risk and Highways].
15. The Commissioner considers that the scope of her investigation is to consider whether the Council has responded to the requests using the appropriate legislation, and whether it was entitled to refuse the requests on the basis that they are vexatious.

## **Reasons for decision**

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### **The appropriate legislation**

16. The Council originally dealt with these request under the FOIA. However, the Commissioner considers that the information relevant to all three requests is likely to be environmental as defined by regulation 2 of the EIR.
17. Regulation 2(1) of the EIR defines what 'environmental information'. The relevant parts of the definition are found in 2(1)(a) to (c) which state that it is any information in any material form 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) and (b) as well as measures or activities*

*designed to protect those elements...'*

18. The information requested relates to various aspects of planning which would fall within the category of a 'measure' affecting the land. The Commissioner is therefore satisfied that the information is environmental as defined by regulation 2(a) and (c) of the EIR.

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

19. 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. There is no definition of 'manifestly unreasonable' under the EIR, but the Commissioner's opinion is that 'manifestly' implies that a request should be obviously or clearly unreasonable.
20. 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, and/or an unreasonable diversion of resources. The Council has refused all three requests on the basis that they are vexatious.
21. The term 'vexatious' is not defined in the FOIA, however, the Upper Tribunal in the Information Commissioner vs Devon CC and Dransfield [2012] UKUT 440(AAC), (28 January 2013) 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 on the circumstances surrounding that request.
22. In further exploring the role played by circumstances and whether the request has adequate and proper justification, the Tribunal concluded that 'vexatious' could be defined as the *"...manifestly unjustified, inappropriate or improper use of a formal procedure."* (paragraph 27)
23. Consistent with the Upper Tribunal's decision which established the concepts of 'proportionality' and 'justification' as central to any consideration of whether a request is vexatious, the Commissioner's guidance for section 14 confirms that the key question to ask when weighing up whether a request is vexatious is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
24. Where this not clear, the public authority should weigh the impact on the authority of complying with the request and balance this against the purpose and value of the request. In doing this, public authorities will inevitably need to take into account the wider factors such the background and history of the request.

25. In this case, the Council has cited the following indicators as evidence in support of its decision to refuse all three requests on the basis that they are vexatious.

*Burden on the authority*

26. The Commissioner's guidance in respect of this suggests that in cases where complying with the request would be so grossly oppressive in terms of the strain on time and resources that it cannot reasonably be expected to comply.
27. The Council provided details of requests the complainant has submitted in respect of Mill Bay Homes (MBH) from 2007 up to his requests in 2018. It has argued that it indicates only some of the time and resources that have been spent answering questions about MBH as many emails were sent directly to officers and were answered by them instead of being logged as requests for information under the FOIA.
28. The Commissioner notes that whilst the requests date back to 2006, it was not until 2015-2016 that the volume of requests and correspondence increased significantly, with at least 20 specifically considered under the FOIA/EIR and a further 19 considered during the normal course of business. However, the Council has not provided any estimate of the time taken responding to the requests/correspondence and the Commissioner notes that whilst the requests relate to MBH, they are in relation to various aspects of the development mainly at its Cilgerran site.

*Unreasonable persistence*

29. The Commissioner considers that criteria falling within this indicator would be evidence that the requester is trying to re-open an issue which has already been comprehensively addressed by the public authority, or otherwise subjected to some form of independent scrutiny.
30. The Council has informed the Commissioner that the complainant was not happy that planning permission had been granted to MBH for its developments and has stated that he continues to attempt to find planning conditions that have been contravened in the hope that planning permission will be revoked, even though this cannot happen as contraventions of planning conditions are dealt with under a separate procedure. The Council considers that this demonstrates unreasonable persistence on the part of the complainant and that he is using the FOIA/EIR as a means to try to re-open a process which is closed.
31. The Commissioner notes that whilst the planning permission has been granted, an Enforcement investigation which commenced in early 2018 remains open. She also notes that an application for planning

permission, under section 73 of the Town and Country Planning Act 1990, has been made to vary conditions 2 and 3 on decision notice 16/0992/PA (Council referenced number 17/1300/PA) which is yet to be determined. The complainant's requests therefore appear pertinent.

### *Unfounded allegations*

32. The Council has provided information to the Commissioner containing an email which it considers alleges collusion between officials and Mill Bay Homes. The Council has further informed the Commissioner that its Officers from the Building Control department were upset at the allegation and the manager specifically asked for evidence from the complainant in relation to these allegations, which the Council has stated has not been provided.

33. The Commissioner has reproduced the relevant section from the complainant's email below:

*"The investigation is being undertaken by myself to establish whether there has been collusion between officials and a developer to enable the developer to circumvent statutes and regulations."*

34. The Commissioner would note that whilst the complainant is raising his suspicion that there may have been collusion, it is not the same thing as making an explicit allegation.

35. The Council further informed the Commissioner that Planning Officers present at the review panel commented that the complainant had alleged Planning Officers had given advice and guidance to the developers, inferring that this was inappropriate. The Planning Officers felt this was unfair as it is permitted practice and they were upset at the implications against their professional conduct.

36. However, the Council has provided no evidence in support of the above and Commissioner would point out that if the advice provided by Planning Officers was permitted practice that whilst these were not technically unfounded 'allegations', the Planning officers have not acted inappropriately, rather, simply doing their job.

### *Intransigence*

37. The Council provided emails from its Building Control Manager it believes demonstrates that the complainant was not listening or taking on board the information being provided to him, which it has argued is evidence of him having an entrenched position. It appears that this was particularly in relation to section 73 of the Town and Country Planning Act 1990 (Planning Act) with the complainant continuing to challenge the Council in respect of various conditions contained within this section.



38. The Council has stated that MBH has a voluntary agreement which means that section 73 of the Planning Act does not apply.
39. The Commissioner notes however that the evidence here is contradictory as the Council has also confirmed that applications to vary both conditions 2 and 3 were made under section 73 of the Planning Act which have not yet been determined.

*Frequent or overlapping requests*

40. The Council has referred to its comments discussed in paragraph 27 of this notice in terms of the number of requests the complainant has submitted. Stating that new ones are received before others have been responded too. In addition, the Council has stated that Officers have dealt with hundreds of emails outside of the FOIA and sent a print of several paper files containing correspondence from the complainant in relation to MBH.
41. Whilst the Commissioner accepts that there has been considerable correspondence from the complainant, she has not been provided with copies of the "*hundreds of emails ...*". Additionally, having considered summaries of the correspondence, a proportion is requesting responses to previous queries/requests. For example, the complainant wrote to the Council's Highways Development Control Department on 27 January 2018 regarding the Cilgerran site in relation to Section 38 of the Highways Act, sent a reminder on 15 February with a further reminder on 6 March. The Commissioner does not consider this unreasonable. She also notes that some of the correspondence is informing the Council of further flooding on the Cilgerran site.

*Disproportionate effort*

42. The Council considers that the end result the complainant is striving for is the revoking of Planning permission for MBH and it has stated that this cannot be achieved. The council therefore views the requests as trivial and considers that it would take a disproportionate amount of resources in order to meet the requests.
43. The Council further stated that the review panel was provided with a report from its IT department which detailed the email correspondence the complainant has sent to certain officers, including its FOI team. It stated the report details 249 emails in the period from July 2017 to June 2018.
44. The Council further informed the Commissioner that several officers attended the review meeting to explain the level of effort and work involved in dealing with the complainant both in respect of FOI requests and additional correspondence sent directly to officers



45. The Council provided evidence of the contributions from these officers which can be summarised as follows:

- Meetings have been offered to the complainant which have sometimes been taken up, with the last one in April 2016. The issues are very technical with complainant often refusing to attend meetings which have been offered where it would be easier to explain. Contact has therefore been via email and letter with one officer bringing numerous files detailing the level of contact in relation to MBH. (The Commissioner has been provided with photographic evidence of the files).
- The technical nature of the FOI/EIR requests are very repetitive and there is often a need to revisit old requests to check for duplication or advise on changes in the law and to check legislation. This requires a team effort with several officers providing expert advice, guidance and documentation.
- Flooding at the site was an issue prior to MBH activity. Additionally, the complainant challenged the flooding issues at the early stages of the MBH development which resulted in tanks being installed significantly reducing flooding. It was further stated that although there may have been infringements to the Planning consent, they would be picked up by enforcement action.

46. The Commissioner has not received evidence of the report from IT detailing the 249 emails referred to in paragraph 43 of this notice. Additionally, whilst she acknowledges that the Council has offered to have various meetings with the complainant, if he considers he has the technical knowledge not to require such clarification, that is his decision.

#### *Futile requests*

47. The Council considers that as the public consultation period is over, the complainant's requests into planning conditions are a moot point as any breaches of planning conditions are dealt with via a different investigation process and will not lead to the revoking of the development site's planning permissions. It therefore regards the requests as futile.

48. The Commissioner acknowledges that an applicant will not generally consider their request for information as futile and will have some purpose at its root. Additionally, the Commissioner notes that a significant proportion of the complainant's requests are relating to conditions 2 and 3 of section 73 of the Planning Act, which are awaiting determination. The Commissioner also notes that an Enforcement investigation in relation to the access road having been constructed without temporary surface water attenuation remains open. Based on

the above, the Commissioner does not therefore share the Council's view that the requests are futile.

49. Having considered the arguments and supporting evidence from the Council, whilst the Commissioner accepts that the complainant has submitted a large volume of correspondence either in the form of FOI requests or general enquiries, placing a significant burden on the authority, she considers that the Council has failed to sufficiently demonstrate that many of the indicators specified, including unreasonable persistence, unfounded allegations, intransigence and futile requests are justified. The Commissioner has therefore concluded that the Council was not entitled to rely on regulation 12(4)(b) in respect of any of the three requests and does not therefore need to consider the public interest test.

## Right of appeal

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50. 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)

51. 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.
52. 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 .....**

**Catherine Dickenson  
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