Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **24 September 2019**

Public Authority: **Middlesbrough Borough Council**
Address: **Civic Centre**
Middlesbrough
TS1 9FT

Decision (including any steps ordered)

1. The complainant made three information requests relating to a particular housing development. Middlesbrough Borough Council ("the Council") refused all three requests because it deemed them to be vexatious and thus manifestly unreasonable.

2. The Commissioner's decision is as follows. Although none of the requests were vexatious, Request 3 was burdensome and thus manifestly unreasonable. However, whilst the Council was entitled rely on Regulation 12(4)(b) of the EIR to refuse Request 3, it was not entitled to rely on that exception to refuse either Request 1 or Request 2. In respect of Request 3, the Commissioner also finds that the Council was under a duty to provide advice and assistance to the complainant to help him narrow his request which it failed to discharge. The Council thus breached Regulation 9 of the EIR. Finally, the Council also failed to issue refusal notices to any of the requests within 20 working days and thus breached Regulation 14(2) of the EIR in respect of each request.

3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.

    - Issue fresh responses, under the EIR, to both Request 1 and Request 2, which do not rely on Regulation 12(4)(b).

    - Provide the complainant with advice and assistance to help him refine Request 3 such that it can be answered without imposing an unreasonable cost on the Council.

4. The Council 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

Request 1

5. On 20 December 2018, the complainant wrote to the Council and requested information in the following terms:

> *"With regard to the Local Plan, the SHMA update 2018 to consider jobs uplift refers to:*
>
> *1. the Oxford Economics econometric forecast September 2016) for Middlesbrough*
>
> *2. the Employment Land study, which estimates that 6325 jobs of the 25000 jobs identified in the TV SEP, will be within Middlesbrough*
>
> *Please provide a copy of each of these documents."*

Request 2

6. On the same day, the complainant also made a second request:

> *"With regard to the Local Plan, the SHMA update 2018 to consider jobs uplift provides estimates of dwellings needed to accommodate workers to fill 6325 jobs. Please provide the detailed calculations that support the estimates, shown in paragraphs 19 and 22 of the report, for:*
>
> *1. 5172 residents*
>
> *2. 6053 residents*
>
> *The 2014 SNPP figures include 1761 workers for 267 additional dwellings. Please show how these have been taken into account in the calculations for the 6325 workers under the two options."*

Request 3

7. On 9 November 2018, the complainant wrote to the Council and requested information in the following terms:

"My request is for the following information concerning the proposal for additional housing at De Brus Park as included as policy H3.20 in the Middlesbrough Publication Local Plan (October 2018):

a copy of every document or part document (including but not limited to reports, plans, maps, notes of meetings or discussions or telephone calls or anything else, whether formal or informal, correspondence whether internal to the Council or external, and whether in hard or electronic form such as emails and whether sent or received) concerning the proposal."

8. That request was initially refused by the Council, who cited Regulation 12(4)(b) and the broad nature of the request. The complainant thus refined his request on 9 January 2019 thus:

"I am happy to restrict [this] request to emails and other items held in electronic form which can be searched electronically, covering the period from 1 April 2017 to 30 April 2018."

9. The Council issued a consolidated response to Requests 1, 2 and 3 on 7 March 2019. Referring specifically to Request 3 it stated that:

"responding to the request would require the Council to divert a disproportionate amount of its resources from its everyday core functions and therefore we must refuse this part of your request for the information under regulation 12 (4) (b) of the Environmental Information Regulations."

10. In relation to Requests 1 and 2, it stated that:

"these requests are forthwith and immediately made vexatious and manifestly unreasonable under regulation 12(4)(b)."

11. Following an internal review the Council upheld its original position.

Scope of the case

12. The complainant contacted the Commissioner on 18 April 2019 to complain about the way his request for information had been handled.

13. The Commissioner's guidance[1] on the application of Regulation 12(4)(b) states that a request can be manifestly unreasonable either because it is vexatious or because it is particularly burdensome. She has therefore considered both limbs of the exception.

14. The Commissioner considers that the scope of her investigation is to determine if any or all of the requests are manifestly unreasonable.

Reasons for decision

Is the requested information environmental?

15. Regulation 2(1) of the EIR defines environmental information as being information 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)…as well as measures or activities designed to protect those elements;*
>
> *(d) reports on the implementation of environmental legislation;*
>
> *(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
>
> *(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life,*

[1] https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf

cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

16. The Commissioner has not seen the requested information but, as it is information relating to planning and development, she believes that it is likely to be information about "measures" affecting the elements of the environment. For procedural reasons, she has therefore assessed this case under the EIR.

Were any of the requests vexatious?

17. Regulation 5(1) states that:

"a public authority that holds environmental information shall make it available on request."

18. Regulation 12 of the EIR states that:

(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—

(a) an exception to disclosure applies under paragraphs (4) or (5); and

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

(2) A public authority shall apply a presumption in favour of disclosure.

(4) 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;

19. Following the lead of the Upper Tribunal in *Craven v Information Commissioner & DECC* [2012] UKUT 442 (AAC), the Commissioner considers 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. The analysis that follows looks at vexatiousness as, if the request is found to be vexatious, then it will also be manifestly unreasonable and hence Regulation 12(4)(b) will be engaged.

20. The term "vexatious" is not defined within the FOIA. The 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.

21. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.

22. *Dransfield* also considered four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained the importance of: *"…adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests."* (paragraph 45).

23. The Commissioner has published guidance on dealing with vexatious requests, which includes a number of indicators that may apply in the case of a vexatious request.[2] However, even if a request contains one or more of these indicators it will not necessarily mean that it must be vexatious.

24. When considering the question of vexatiousness, a public authority can consider the context of the request and the history of its relationship with the requestor, as the guidance explains: *"The context and history in which a request is made will often be a major factor in determining whether the request is vexatious, and the public authority will need to consider the wider circumstances surrounding the request."*

The complainant's position

25. The complainant has noted that he is seeking information about a large housing development which will have a significant impact on the local community. He argued that his requests were reasonable and proportionate.

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[2] https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatiousrequests.pdf

26. In addition, the complainant noted that, whilst he had occasionally had to follow up information requests, this had been because of failures, by the Council, to handle his requests appropriately.

27. Finally, he noted that:

> *"As I have indicated, my requests are to hold the Council to account and to bring together evidence for use at the Planning Inspector review of the Local Plan."*

The Council's position

28. The Council provided a detailed submission setting out why it believed that the requests were vexatious. It stated to the Commissioner that:

> *"The decision to apply regulation 12(4)(b) was taken because of the complexity, frequency, overlapping nature and volume of repeated requests for information on local planning issues, which also often, once answered, resulted in further lengthy correspondence from [the complainant]."*

29. It provided the Commissioner with numerous correspondence trails relating to previous requests the complainant had made which, it contended, showed he was exercising an unreasonable degree of persistence. It argued that the complainant was engaged in a "fishing expedition" by seeking a large volume of information in the hope of finding something of use.

30. The Council noted that the complainant had submitted a total of 16 requests over the course of six months (including the three requests which are the subject of this decision notice and the request which preceded Request 3). It estimated that it had spent around 63.5 hours responding to his requests and noted that it had taken a decision to publish a great deal of information relating to the development proactively. All these requests, it argued, tended to fall on the same, reasonably small, number of employees with the necessary technical expertise to answer the queries – who were thus taken away from the jobs which they were employed to do.

31. Finally the Council noted that it had spent around 237 hours answering requests from a "wider group of individuals." However, it failed to specify how those other individuals were connected to the complainant beyond a mutual interest in the development.

The Commissioner's view

32. The Commissioner acknowledges that the complainant in this case has submitted a number of requests and that some of these requests have

generated follow-up correspondence. However, she considers that vexatiousness is a high bar and that all three requests fall short of it.

33. On the issue of burden, whilst the Commissioner accepts that 16 requests is quite a high number, she does not accept that it is sufficient, of itself, to be vexatious.

34. The Commissioner also has concerns about the Council's argument about cumulative burden. For example, she notes that the Council has claimed that it had already spent 18 hours responding to Request 3 before refusing it. The Commissioner considers it highly unlikely that it would have taken 18 hours of work to determine that a request would be manifestly unreasonable to respond to.

35. In respect of unreasonable persistence, the Council helpfully supplied the Commissioner with copies of the correspondence it had had with the complainant. The Commissioner notes from the correspondence that, whilst in some cases, the complainant does indeed appear to have moved the goalposts after receiving a response, on other occasions, he has sought information which would appear to have been caught by his original request but which had not been supplied – or has sought clarification of the information he had received.

36. The Commissioner is also mindful that the requests revolve around a housing development and local development plan which are likely to be of significant public interest in the Middlesbrough area. She therefore places a considerable weight on the value of the information which has been sought.

37. Finally, the Commissioner notes the EIR's presumption in favour of disclosure. Where arguments for and against disclosure are broadly equal, disclosure should prevail.

38. Having taken all these matters into consideration, the Commissioner concludes, that none of the requests were vexatious.

Was Request 3 unduly burdensome?

39. The Commissioner notes that in its response and at internal review, the Council has drawn attention to the burden which answering Request 3 would impose. As a result, she sought more detailed arguments as to the extent of this burden.

40. The EIR do not provide a definition of what constitutes an unreasonable cost. This is in contrast to section 12 of the FOI Act under which a public authority can refuse to comply with a request if it estimates that the cost of compliance would exceed the "appropriate limit". This appropriate limit is defined by the Freedom of Information and Data

Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") as £600 for central government departments and £450 for all other public authorities.

41. Although the Regulations are not directly applicable to the EIR, in the Commissioner's view they can provide a useful point of reference when public authorities argue that complying with a request would incur an unreasonable cost and therefore could be refused on the basis of regulation 12(4)(b).

42. The Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time:

- Determining whether the information is held;
- Locating the information, or a document which may contain the information;
- Retrieving the information, or a document which may contain the information; and
- Extracting the information from a document containing it.

43. The Council argued that Request 3, even when limited to items held electronically, encompasses a very large amount of information which is not held in a central location. In its initial response it argued that it would be required to search in excess of 65,000 emails (and 19,000 emails held by a single officer) – although the Commissioner notes that the Council has been vague as to why it would need to search this many emails or how long this would take.

44. However, the Council made the more reasonable argument that because of the way the request was worded, it would need to search emails and electronic documents which were only held on its backup discs and tapes. The Commissioner accepts that a search of the backup would be necessary given the way the request was worded.

45. The Council went on to say that:

> *"We currently store email back-ups for a duration of 12 months only. The 12 monthly back-ups are split and stored either on hard disks or tapes as we don't have the capacity to keep a full 12 months retention on disk. As a result, the most recent 8 months are kept on disk, with the older 4 months being stored on tape.*
>
> *The process of restoring a single email account from disk and carrying out necessary searches is estimated to take around 1.5 hours on average per account (time would vary slightly depending on the size of the email account).*

The process of restoring an email account from tape is significantly longer, as there are more steps involved. This would include identifying the relevant tape(s) where the backups are located, retrieving backup tapes from off-site storage, loading tapes into tape library, running the inventory of the tapes, restoring the data from the tapes and then searching the email account. I would estimate that this process would take around 4 hours for a single restore.

In order to restore and search an email account for a 12 month period, it would take an estimated total of 28 hours per account to complete a search."

46. Once again, the Council was vague as to how it came about its estimate of 28 hours, but even taking the figure of 1.5 hours to restore and search an account from disk and adding the 4 hours necessary to restore and search an account from tape would produce a figure of 5.5 hours per email account. On that basis, the Council would only need to restore four email accounts to exceed the cost limit – and the Commissioner considers it is unlikely that restoring just four accounts would be sufficient to identify all the information within scope (the Council had already identified eight officers who it considered would be likely to hold the bulk of the information).

47. The Commissioner notes that, even in its refined form, Request 3 is still broadly framed and would be likely to encompass a large volume of information. She also notes that, due to the numerous other requests which the complainant has submitted, this information is likely to include a high proportion of documents which he already possesses, further reducing the value of the request when set against the burden of responding.

48. The Commissioner therefore considers that Request 3 was manifestly unreasonable and Regulation 12(4)(b) is thus engaged in relation to this request.

Public Interest Test

49. For a public authority to rely on Regulation 12(4)(b) to refuse a request, it must also demonstrate that the balance of public interest favours maintaining the exception.

50. As the Commissioner has already noted, the issues to which this request relate are likely to be of significant public interest in the area surrounding the proposed development. She also notes that there is an inherent public interest in organisations which spend taxpayers' money being transparent about the work they do.

51. Set against that is the substantial burden which the Commissioner has already identified would have to be borne by the Council in responding to the request. There is also an interest in a public authority being able to protect its resources from wide-ranging requests which impose a disproportionate burden.

52. In this case, the Commissioner considers that the balance of the public interest favours maintaining the exception in the case of Request 3. She considers that the request is unlikely to add significantly to public debate when set against the volume of information already available. The fact that the request is likely to catch a great deal of information which has already been disclosed reduces the public interest in the request being responded to.

53. The Commissioner therefore finds that Request 3 was manifestly unreasonable and thus the Council was entitled to rely on Regulation 12(4)(b) to refuse it.

54. Requests 1 and 2 do not appear to the Commissioner to be unduly burdensome to answer and she notes that the Council does not appear to have claimed otherwise. She does not therefore consider either request to have been burdensome and thus neither is manifestly unreasonable. The Commissioner therefore finds that Regulation 12(4)(b) is not engaged in relation to either Request 1 or Request 2 and thus the Council is not entitled to rely on the exception to refuse either request.

Advice and Assistance

55. Regulation 9(1) of the EIR states that:

> *"A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants."*

56. When a request is refused because it is burdensome and thus manifestly unreasonable, the Commissioner considers that the public authority should provide the requestor with advice and assistance such that the request can be refined to bring it within a reasonable cost.

57. The Council did not provide advice and assistance in relation to any of the above requests. Whilst the Commissioner accepts that this is likely to have been because the Council's application of Regulation 12(4)(b) was based on the request being vexatious, because the Council should have relied on the burden, it should also have provided advice and assistance.

58. The Commissioner has therefore ordered a remedial step so that the Council can readdress this matter.

Timeliness

59. Regulation 14(2) of the EIR states that, when a public authority wishes to refuse a request for information:

> *"The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request."*

60. From the evidence presented to the Commissioner in this case it is clear that the Council's refusal notice was not provided within 20 working days of the latest request. As this refusal notice covered all three requests, the Council thus breached Regulation 14(2) in respect of all three requests.

Other matters

61. Due to the remedial step she has ordered, the Commissioner considers it likely that a further request will be forthcoming. Whilst she has found that the requests in question in this notice were not vexatious, the complainant must nonetheless be mindful of the burden which his requests are placing upon the Council.

Right of appeal

62. 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

63. 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.

64. 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 .....

Pamela Clements
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