

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

Date: 13 May 2014

Public Authority: Copeland Borough Council
Address: The Copeland Centre
Catherine Street
Whitehaven
Cumbria
CA28 7SJ

Decision (including any steps ordered)

1. The complainant has made a number of requests to Copeland Borough Council (the Council) regarding a housing development over three separate dates. The Council claimed it did not hold some of the requested information, advised that other requests were vexatious and did not respond to the remaining requests. The complainant has subsequently complained to the Commissioner about these matters. The relevant issues have been handled under three case reference numbers – split along the dates the requests were made – although the findings in each are set out in this decision notice.
2. Regarding FS50519261 and the question of whether the requested land level drawings are held, the Commissioner is satisfied on the balance of probabilities that the Council is not in possession of the information. With respect to FS50516358 and FS50522472, the Commissioner has found that the requests are manifestly unreasonable for the purposes of regulation 12(4)(b) of the EIR and that in all the circumstances the balance of the public interest favours maintaining the exception. The Commissioner does not therefore require any steps to be taken as a result of this notice.

Request and response

3. This decision notice refers to the requests made by the complainant to the Council on three separate dates; 20 June 2013, 7 July 2013 and 17 August 2013. All the requests relate to a greater or lesser extent to a housing development in Beckermest. The Council's response to each of the three sets of requests has been considered by the Commissioner under three case reference numbers: FS50519261, FS50516358 and FS50522472 respectively. The exact wording of the requests are set out in the appendix (A) attached to the notice, with a summary of the Council's position at the time a complaint was made to the Commissioner outlined below.

FS50519261

4. Taking each of the items of the request in turn, the Council informed the complainant of the following:
- A) It does not hold the requested information. This was because the drawings with land levels had been sent to the Local Government Ombudsman (LGO) on 13 January 2011 and a copy of the information had not been made.
 - B) There was no separate site visit recorded in the planning notes. The officer's observations on the site at the time were incorporated into a report, a copy of which could be viewed at the Council's offices.
 - c) A copy of the requested letter was provided.

FS50516358

5. The Council refused to comply with the requests on the basis that they were vexatious or repeated for the purposes of section 14 of FOIA.

FS50522472

6. At the time of making the complaint, the complainant had not received a response to the requests.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way her requests for information had been handled. In particular, she asked

the Commissioner to consider the following issues arising from the submission of her requests:

- FS50519261 – the Council's claim that it did not hold the drawings specified at part A) of her requests.
 - FS50516358 – the Council's application of section 14 of FOIA to her requests.
 - FS50522472 – the Council's failure to issue a response to her requests.
8. During the course of the Commissioner's investigation, the Council withdrew its reliance on section 14 of FOIA in FS50516358 and instead sought to rely on regulation 12(4)(b) of the EIR as the ground for refusing the request. The Council also confirmed that it had chosen not to reply to the requests covered by FS50522472 as it considered they were vexatious under section 14 of FOIA and was not obliged to issue a response under section 17(6) of FOIA. The Council subsequently decided that these requests were also subject to regulation 12(4)(b) of the EIR.

Reasons for decision

The applicable access-regime – FOIA or the EIR?

9. The requested information in each of the three cases relates to a development in Copeland dating from the early 2000s and what the complainant considered were unresolved problems associated with its design and construction. The Council originally processed some of the requests under FOIA rather than the EIR, although following the Commissioner's involvement it subsequently revised this position.
10. When a request is received by a public authority, a decision must be made on whether the requested information is 'environmental' and should therefore be dealt with under the EIR and not FOIA. When considering this issue, it is necessary to refer to the definition of 'environmental information' provided by regulation 2(1) of the EIR. In accordance with the Council Directive 2003/4/EC, from which the EIR derives, the Commissioner will afford the definition a wide interpretation; an approach reflecting the fact that regulation 2(1) states environmental information is "any information" on the factors and activities described at paragraphs (a) through (f). Significantly, it is not necessary for the requested information to have a direct effect on the environment or to record or reflect an effect, in order for it to be environmental.

11. The Commissioner is satisfied that the issues specified in the requests, all of which are connected to a building development, are ones that would have an environmental impact and are captured by the definition set out at regulation 2(1)(c) . He has therefore gone on to consider the complaints under the EIR.

FS50519261

12. Regulation 5(1) of the EIR provides that a public authority holding environmental information shall make it available on request. However, regulation 12(4)(a) states that a public authority is not obliged to do so if it does not hold the specified information when a request is received.
13. Where there is any dispute about whether or not information is held, the Commissioner recognises that there will frequently be circumstances in which it is not possible to make a decision that is beyond any doubt. Therefore, in the absence of absolute certainty, the Commissioner will apply the civil standard of the balance of probabilities. Following the approach taken in his previous decisions and by the Information Tribunal, the Commissioner's decision on where the balance lies will take into account the scope, quality, thoroughness and results of any searches carried out by the public authority, as well as considering any other explanations offered by the public authority to demonstrate why it can be confident the requested information is not held.
14. The question in this case is whether at the time of the request the Council held a drawing of the development which identified the land levels of the site. The Council informed the complainant that a drawing of this description had been produced. However, the original version of this document formed part of a bundle provided to the LGO on 13 January 2011 pursuant to its investigation of a complaint made about the development. In response to a separate enquiry, the LGO said to the Council that the papers on the complaint file had been destroyed after 12 months and the Council confirmed that a copy of the information was not made.
15. The complainant doubts the veracity of the Council's explanation; considering either that the drawing with land levels had not been provided to the LGO as suggested or else was never produced. The principal reasons given for this position are:
 - In an email dated 12 January 2011, a Planning Enforcement Officer stated that he had managed to locate "drawings of development, including those with land levels show". This conflicted with earlier advice given by the Council, which said that the developers had not submitted land levels.

- Correspondence received by the complainant from the LGO indicated that it did not have sight of any drawings with land levels. Instead, the LGO referred to the Council's acceptance that it had failed to require details of the ground levels as part of the planning permission.
 - Beyond the particular references made in the points listed above, the mapping and reviewing of levels is a major consideration when deciding whether plans for a development should be approved.
 - It is reasonable to expect that the Council would have made a copy of any official documents before sending them to the LGO.
16. In the Commissioner's view, these points when considered together provide a strong case for the complainant's position. It was therefore put to the Council that two options immediately presented themselves: 1) The Council never produced a drawing with land levels. In this regard, it was noted that the planning officer's email (referred to in the first point above) simply reproduced the list of documents requested by the LGO and did not specifically identify a drawing with land levels. 2) For whatever reason, the drawing was never provided to the LGO and so potentially remains with the Council.
17. The Council has responded by denying that either of these options applies and providing further clarification on what happened to the requested information. Critically, the Council has confirmed that a drawing showing land levels was only received from the developer some time *after* the development had commenced. In a letter to the LGO dated 15 December 2010, the Council accepted that cross sectional drawings could and should have been submitted prior to any work commencing. This did not happen despite it being what the Council conceded was a fairly standard requirement. The Council went on to explain that it had been unable to confirm why these requirements had not been met on this occasion due to the passage of time and the departure of relevant staff.
18. In terms of the retention of the document, the Council has advised that its policy is not to destroy any significant papers on a planning file. However, it has pointed out that this policy did not apply in this case because the drawing was not lodged as part of the development application and so was not kept on the planning file. Further, the Council considered there was no business need to keep a copy of the drawing in light of the fact that the development had been completed and the practical problems associated with making a copy due to the size of the drawing.

19. In this case the complainant's expectation that the requested information would be held by the Council, if indeed it had ever been produced, is easily understood. A drawing of the nature described would appear integral to the consideration of work being carried out. The Commissioner has also been provided with correspondence dating from 2009, the year that the plans were apparently shared with the Council, which reflects some confusion on the Council's part about whether the requested information was held; with the Council informing the complainant that it did not hold the requested information at around the same time the developers were meant to have provided the information. However, from an overall evaluation of the information provided to him, the Commissioner is satisfied that the requested information was not held by the Council at the time the request was made.
20. Significantly, the Council's explanation would seem to go some way towards reconciling what on the face of it would appear to be contradictory positions; namely, the LGO's reference to the Council's failure to require details of ground levels from the developer as part of the planning permission (these could only have been received afterwards) and the Council's insistence that the drawing had at one time been held. In the absence of definitive proof to the contrary, the Commissioner also considers the reasons behind the Council's decision not to make a copy of the document plausible if unhelpful in this situation.
21. Returning to the test of whether information is held, the Commissioner observes that he does not need to be absolute certain one way or the other to make a finding. Rather, any decision will be based on whether it seems more probable than not in the circumstances. Taking into account all the submissions provided, the Commissioner has concluded that on the balance of probabilities the Council does not hold the requested information.

FS50516358 and FS50522472

22. Regulation 12(4)(b) of the EIR allows that a public authority may refuse a request for information where it considers that a request is manifestly unreasonable. The fact that the exception is qualified by the word "manifestly" means, in the Commissioner's opinion, that there must be an obvious or clear quality to the unreasonableness.
23. It is permissible for a public authority to refuse a request under regulation 12(4)(b) on the grounds that it is vexatious. However, the exception is wider in scope than section 14(1) of FOIA, which specifically covers vexatious requests, and contains a formal requirement to carry out a public interest test when deciding whether the exception applies.

24. The approach to the issue of vexatiousness in the context of regulation 12(4)(b) of the EIR will be guided by the findings of the Upper Tribunal in *Information Commissioner vs Devon County Council & Dransfield* [2012] UKUT 440 (AAC), (28 January 2013)¹. This decision established that the concepts of 'proportionality' and 'justification' are fundamental considerations when deciding whether a request can reasonably be classified as manifestly unreasonable. Accordingly, the Commissioner's view is that a crucial question for a public authority is whether the purpose and value of a request justifies the distress, disruption or irritation that would be incurred by complying with the request. Importantly, it is the request and not the requester that must be vexatious. However, a public authority may take into account the history and context of a request when deciding whether the exclusion applies.
25. Although the Upper Tribunal in *Dransfield* stressed that a decision on whether a request is vexatious or manifestly unreasonable should not be reduced to a box-ticking exercise, certain factors are frequently cited as the reason for refusing a request on that basis (as demonstrated by the annex of example Information Tribunal decisions attached to the Commissioner's guidance '[Dealing with vexatious requests](#)'). These include instances where a request: imposes a disproportionate burden; is aiming to reopen issues that have been resolved; is unjustifiably persistent; is harassing in the circumstances; or is vexatious when viewed in context.
26. It is clear that the background to the requests is a long and difficult one. The complainant has emphasised that problems with the development have blighted her living conditions. The complainant's view is that it is entirely justifiable in this situation for her to want to know more about the decisions made in relation to the development and the consequences leading from these.
27. The Commissioner has a great deal of sympathy with the complainant's predicament. In this regard, he understands the difficulties faced by private citizens seeking to challenge organisations that have specialist expertise and far greater resources at their disposal. However, the Commissioner is also aware that the complainant has been in contact with the Council on the same issue over a sustained period of time. Consequently, the Commissioner considers that the question to be asked is not whether there was ever any justification for the complainant

¹ <http://www.ossccsc.gov.uk/Aspx/view.aspx?id=3680>

approaching the Council for answers by way of recorded information; clearly there was. Instead, to the Commissioner's mind the key question in this situation is whether by the time the requests under consideration were made their purpose and value still justified the impact that responding to the complainant's enquiries was having on the Council. The answer to this involves a balancing exercise between competing interests; on the one hand the interest that promotes an individual's right to access public information and, on the other, the interest that seeks to protect a public authority from abuses of the access-legislation, whether FOIA or the EIR.

28. The Council considers that the application of regulation 12(4)(b) of the EIR must be viewed against the wider background in which the requests were made and the burden placed on the Council's resources. The Council does not argue that complying with the requests in isolation would necessarily be burdensome but rather that they contribute to the aggregated burden created by dealing with previous requests and enquiries made by the complainant on the same issue.
29. The Council also doubts whether the requests, in the way they are presented, have any serious purpose or value. In particular, it considers that the requests are deliberately framed in such a way that any response given would be liable to misinterpretation. This is because, in the Council's view, the requests are predicated on an assumption that there has been a breach of planning law; something the Council disputes.
30. The Commissioner has no doubt that the complainant's concerns have generated a considerable amount of correspondence. It is also accepted, not least by the aforementioned Upper Tribunal, that the vexatious nature of a request may only show itself when the history and context of a request are considered. However, that a significant volume of correspondence has been received from the complainant is not necessarily unexpected given the seriousness of the issues in question and the complainant's personal interest in these. Furthermore, it has been acknowledged that mistakes were made in respect of the development, which the Commissioner considers would only fuel the complainant's motivation to seek information about issues that directly affect her. The evidence provided to the Commissioner by the complainant also indicates that the Council has not always been in a position to provide clear answers to questions, again explaining why the complainant may have felt it necessary to return to it for other information that may help to shed light on matters relating to the development.
31. Put simply, there will be occasions when sustained correspondence with a public authority is not indicative of vexatious behaviour but is instead

a reflection of the gravity and complexity of the subject matter. Taking this into account, the Commissioner has found that the Council has failed to demonstrate in its submissions that the aggregated burden imposed by the complainant's requests was not only unreasonable but manifestly unreasonable.

32. The Commissioner has therefore gone on to consider the argument that the way the requests were phrased was indicative of them being manifestly unreasonable. Perhaps the clearest example of a request that could be considered manifestly unreasonable on the basis of its wording is where the request itself contains abusive or threatening language. This is patently not the case here, nor is there any evidence to suggest that any of the complainant's correspondence to the Council included intemperate language. However, the Commissioner considers it is fair to say the framing of the requests suggests that the complainant was not only seeking information by making the requests but also an acceptance of some liability by the Council for problems arising from the development.
33. The Commissioner considers that this factor, in and of itself, would not carry sufficient weight to find that the requests were manifestly unreasonable. However, he considers that it does lend some weight to the wider view that the cumulative effect of the requests on the Council had become disproportionate.
34. Crucially, the issues that form the basis of the complainant's ongoing dispute have not only been reviewed as part of the Council's internal processes but were also the subject of a complaint to an independent body, the Local Government Ombudsman. The complainant has also confirmed that she has already sought legal advice on her position and the possibility of pursuing remedial action. Taking this into account, the Commissioner considers that the complainant is now seeking to revisit issues that have already been considered and, in so doing, has crossed the line between persistence and obsessiveness.
35. The Commissioner considers that it is not incumbent on a public authority to continue engaging with enquiries relating to a dispute where the issues have been reviewed and there is no realistic chance that the engagement will lead to an amicable resolution. At that stage it is fair for a public authority to say enough is enough. The fact that a public authority has admitted previous failures or mistakes on its part does not mean that an individual has an automatic right to monopolise the resources of a public authority in the future. In the Commissioner's view, the pattern of the complainant's requests also suggests that any response given by the Council will automatically lead to follow up enquiries and serve only to extend the life of the dispute. On this basis,

the Commissioner has decided that the requests are manifestly unreasonable.

36. As previously mentioned, regulation 12(4)(b) of the EIR differs from section 14(1) of FOIA in being qualified by the public interest test. Plainly, any finding that the exception is engaged on the grounds that it is vexatious will carry significant weight when considering the balance of the public interest. This is because it is to the benefit of the wider public that an authority's resources are focused on carrying out its day-to-day functions. Nevertheless, there may be occasions when the importance of the requested information itself is such that the arguments for finding against the application of the exception are compelling. For example, the information may allow the public authority to be held accountable for an important and far-reaching decision affecting a wide number of the people that it serves. However, this is not one of those occasions.
37. The Commissioner considers that the fact that information may hold some value for a particular individual does not mean that it has value for the wider public. In this case the complainant has argued that she is trying to hold the Council accountable for mistakes it has made, which affect not only her but a number of other people living in the area. The Commissioner acknowledges that the complainant has genuine reasons for seeking information from the Council about the development and has not seen any evidence indicating the complainant went out with an agenda to disrupt or harass the Council. It is also accepted that decisions made with regard to the development have affected not just the complainant but others in the surrounding area.
38. However, the Commissioner has decided that the inherent value of the information had diminished by the time the requests were made, particularly when taking into account the resources that the Council has already had to expend on dealing with the issues raised by the complainant. The Commissioner has therefore decided that in all the circumstances the balance of the public interest favours maintaining the exception.

Right of appeal

39. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

40. 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.
41. 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

Rachael Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Appendix A – information requests

• FS50519261 – 20 June 2013

Please see the attached doc 192 which makes reference to the information which I am requesting below.

*A) item 2 for the LGO – Drawings of development including those with land levels shown. Please provide me with the drawings with the **land levels** shown which the council provided to the LGO. If the Council believes that it has already provide me with this drawing please provide me with the drawing reference number.*

B) item 5 for the LGO refers to site visit notes. Please provide me with the Officer's notes. I have been provided with some notes from the Building Inspector but not the Planning/Case Officer's notes.

C) [individual a] (LGO) email dated 16.12.2010 refers to a letter about the complaint by [individual b] which was attached to an email from [individual c] to [individual a]. Please provide me with a copy of the letter which [individual a] received from [individual d] which is also referred to in the email.

Please note that my request at C) relates to my complaint about the Council therefore may fall under the Data Protection Act.

• FS50516358 – 7 July 2013

1). When considering the HGD planning application at Becks Rise and accepting the altering of the adjacent land levels or allowing the Developers to assert the right to alter land levels did the Council mitigate against adjacent home owners being electrocuted due to flooding of water and did the Developers provide the Council with the information to do so?

2). Does the Council consider the safety of adjacent owners when considering a planning application and mitigate against electrocution or consider that a circuit breaker which may or may not work is sufficient protection?

3). Since the Council has informed that the Development in breach of planning conditions and my consultants have shown that the Development was not subject to scrutiny by the Council has the Council assess or considered the risk of electrocution to myself or any persons on my property if it were flooded for whatever reason?

4). Are there or were there in force at the time of the development any building or planning regulations which prevented the Developers from putting nearby homeowners at risk of electrocution?

5). *Have the emergency services been informed that should my property be flooded caution should be made when entering if needed to?*

- **FS50522472 – 17 August 2013**

*The highlighted text [of correspondence previously provided by the Council] states **"The TPO issue is, I presume, really regarding the accusation that the developer backfilled the site and subsequently raised the ground levels which has led to protected trees dying and making [named individual]'s property more vulnerable to flooding."***

*By stating that the property is **"more"** vulnerable to flooding indicates that there was a flood risk to my property prior to the raising of the ground levels or construction of the adjacent estate/development [...].*

Please provide me with the following information:

1, Evidence/information that there was a risk of flooding to my property when the Council approved the building of my property and other properties by Eden Homes.

2, Evidence/information that there was a risk of flooding to my property prior to the development of the adjacent homes which were constructed by High Grange Developments and under the control of Copeland Borough Council.