

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

Decision notice

Date: 17 May 2012

Public Authority: West Berkshire Council
Address: Market Street
Newbury
Berks
RG14 5LD

Decision

1. The complainant requested information relating to environmental impact screening for a proposed development. The public authority refused the request as 'manifestly unreasonable' under the provisions of regulation 12(4)(b) of the EIR.
2. The Commissioner's decision is that West Berkshire Council has incorrectly applied the provisions of regulation 12(4)(b) to the complainant's request and, by its refusal of the request, has not dealt with the request in accordance with the requirements of the EIR.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Respond to the request in compliance with the requirements of regulation 5(1) of the Environmental Information Regulations 2004.
4. 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

5. On 12 September 2011, the complainant wrote to West Berkshire Council (the council) and requested information in the following terms:

"(1) A copy of, or link to, a signed copy of the Environmental Impact Screening Opinion for application number 10/01928/FULEXT - Demolition and redevelopment of the Priory/Platt Court.

(2) A copy of the letter from [name and company details] dated 27th July referred to in the unsigned copy of the screening opinion published on the planning portal:

<http://planning.westberks.gov.uk/rpp/index.asp?caseref=10/01928/FULEXT>

(3) Any other correspondence to/from WBC from any source (applicant/agents/consultees/objectors etc) relating to the requirement or not for an Environmental Impact Assessment Assessment and/or screening opinion.

(4) The information 'considered' by [name] to support his assessment that the proposed development is

- (a) modest*
- (b) on brownfield land*
- (c) within the settlement boundary,*

given that the application was presented to committee as a major application, that the applicants acknowledged in their D&A statement that following changes to PPS3 the garden/grounds of the existing buildings could no longer be classified as brownfield, and that the proposed buildings straddle the settlement boundary."

6. The council responded on 13 September 2011. It refused the request on the grounds that it is vexatious, under the provisions of section 14 of FOIA.
7. Following an internal review the council wrote to the complainant on 12 October 2011. It reaffirmed its earlier decision to refuse the request as vexatious.
8. Following the intervention of the Information Commissioner, who pointed out that the requested information was likely to be environmental information, and therefore the request should be considered under the provisions of the EIR, the council produced a

further response to the complainant on 9 January 2012, which refused the request on the grounds that it was manifestly unreasonable, under regulation 12(4)(b) of the EIR. It confirmed that it considered the public interest in refusing the request outweighed the public interest in disclosure.

9. A subsequent letter, dated 25 January 2012, confirms this position and, additionally, accepts that the complainant has not received, or had access to item (2) in her request. An extract, one paragraph, from the requested letter is quoted, but the letter in its entirety is not disclosed.

Scope of the case

10. The complainant contacted the Commissioner to complain about the way her request for information had been handled. She initially complained about the council's refusal of her request as vexatious. Subsequent to the Commissioner's intervention, the complaint was taken to relate to the council's subsequent refusal of the request as manifestly unreasonable, under the provisions of the EIR.
11. The Commissioner considers the scope of his investigation is to determine whether or not the council has correctly refused the request as manifestly unreasonable, under regulation 12(4)(b) of the EIR.
12. The Commissioner has also discussed with the complainant which information has not been made available to her over the course of her requests, and she has explained that she has not received item (2) in the request, nor the signed copy of item (1). An unsigned copy of item (1) has been made available to the complainant previously.

Reasons for decision

13. Regulation 12(4)(b) of EIR states that

“Regulation 12(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;”

14. The Commissioner recognises that the exception at regulation 12(4)(b) of EIR contains a broadly similar provision to section 14(1) of FOIA, which relates to the refusal of vexatious requests. The Information Tribunal has also endorsed this approach, see the tribunal's findings in

the case of *Carpenter v IC (EA/2008/0046)*¹. Furthermore, in the specific context of this case, the council has applied regulation 12(4)(b) as an alternative to section 14 of FOIA, and its arguments for both are the same.

15. Consequently, the Commissioner will apply similar consideration to that contained in his guidance on the application of section 14 of FOIA. He will consider the context and history of the request as well as the strengths and weaknesses of both parties' arguments in relation to some or all of the following five factors, to reach a reasoned conclusion as to whether a reasonable public authority could refuse to comply with the request on the grounds that it is manifestly unreasonable:
- whether compliance would create a significant burden in terms of expense and/or distraction
 - whether the request is designed to cause disruption or annoyance
 - whether the request has the effect of harassing the public authority or its staff
 - whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable
 - whether the request has any serious purpose or value
16. The Commissioner requested the council's arguments in support of its position. The council has provided a chronology of correspondence, and a compilation of correspondence. With regard to its detailed arguments, the council has referred the Commissioner to its position, as expressed in its refusal notices and internal reviews sent to the complainant. Its principal argument is that the complainant has been engaged in extensive correspondence with it, in respect of a matter which is now resolved, and that this correspondence constitutes a substantial burden on it. It further argues that as the planning matter has been determined and cannot now be undone, there is no serious purpose to the complainant continuing to pursue the matter.

Would compliance create significant burden in terms of expense and/or distraction

17. The council refers to a total of 256 emails exchanged with members and officers of the council. It subsequently clarified that this figure of 256

1

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i271/Carpenter%20v%20IC%20\(EA-2008-0046\)%20Decision%2017-11-08.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i271/Carpenter%20v%20IC%20(EA-2008-0046)%20Decision%2017-11-08.pdf) see paragraphs 7 to 8.

emails includes responses from the council, and is not 256 emails sent by the complainant. The council provided a chronology of correspondence between it and the complainant, and an 846-page document containing this correspondence in its entirety.

18. The Commissioner has examined these document with some care, and observes that the latter contains some correspondence which post-dates the request under consideration. He also observes that that document is, to a very substantial degree, comprised of duplicates. For example, where an email chain has developed, each response (from either party) also includes all the previous emails in the chain. Rather than provide each chain once only from start to finish, the document contains each response in sequence, accompanied by all the preceding emails in the chain. This results in numerous copies of each chain, building up response by response. By the end of the chain, each of the prior documents in that chain has therefore been repeated, the earlier ones having been repeated numerous times.
19. The Commissioner asked the council if it was able to confine its submissions to those which supported its arguments for the refusal of the request as manifestly unreasonable. It has not done so.
20. The Commissioner, after examining the 846-page correspondence file, concludes that once the duplications have been removed, the remaining correspondence is neither particularly excessive, nor does its scope and content appear manifestly unreasonable. The burden argued by the council in respect of these particular sequences of emails is not made out.
21. Furthermore the content is generally polite and businesslike, and confines itself to a range of topics which are germane to the complainant's expressed areas of concern. Neither do those topics, in themselves, appear manifestly unreasonable. They relate largely to the complainant's concerns about the planned redevelopment of a property, about which she has submitted a series of requests on various aspects of the proposed development and the council's actions. The issues raised by the complainant are consistent with the normal range of concerns and objections raised in respect of planning matters, which, in the Commissioner's experience, are common concerns for many people in similar circumstances.
22. From the evidence available to him, the Commissioner has identified a total of 11 requests submitted since the start of the complainant's engagement with the council on the matter, a period somewhat greater than one year. There is a substantial body of correspondence cited by the council in its evidence, 256 letters from 7 June 2010 to 6 June 2011, however this also appears to include material which is not directly

relevant, for example correspondence about a matter raised with the Local Government Ombudsman, and the council's settlement of that matter following the Ombudsman's findings. It also includes, for example, routine acknowledgements by the council, and a note of thanks from the complainant in respect of a response received.

23. The Commissioner is left with an impression that this is correspondence between a citizen and her local council, about matters which appear to be legitimate areas for enquiry. The council has suggested to the Commissioner that the degree of engagement with the complainant is burdensome for it, however it has not materially assisted the Commissioner's understanding of how this burden can be said to arise. The council wrote to the complainant, listing various aspects of her correspondence which it categorises as having an impact on its normal working, including:

- questioning the authority of officers to act;
- exhibiting a predetermined intent to escalate;
- presuming that the council intended to deceive or falsify;
- misinterpreted evidence provided to her; and
- misusing FOIA and other processes.

However, the council has not provided the Commissioner with any examples or evidence to support these arguments, and the Commissioner has been obliged to infer this position from the council's correspondence to the complainant.

24. The Commissioner observes that the council has focussed on the volume of the complainant's correspondence in its submissions and has not provided any arguments or supporting evidence relating to the effect of any linked requests, or the history of the complainant's dealings with it. In the absence of such evidence, the Commissioner has been unable to reach any conclusions about the context and history of the request, beyond the specific frame of reference of the volume of correspondence associated with this particular request. He finds the council's arguments and evidence insufficient to permit him to give weight to this particular factor.

Whether the request is designed to cause disruption or annoyance

Whether the request has the effect of harassing the public authority or its staff

25. The council argues that the complainant's habit of submitting further replies whenever she receives a response has the effect of harassing the public authority or its staff and, furthermore, that she is fully aware of

the impact her correspondence is having. It therefore suggests that the request (and associated correspondence) has the effect of harassing it, and is designed to do so.

26. The Commissioner recognises that a public authority in receipt of a regular and considerable volume of correspondence may feel harassed, however he also observes that in the case of the complainant, her responses to replies appear, in the main, to be reasonable and logical further enquiries on the topic at hand. The Commissioner recognises that, in many cases, the FOI process can be an iterative one: a request elicits a response, which in turn prompts further enquiries. This is not, in itself, indicative of any vexatious or manifestly unreasonable purpose.
27. In circumstances where the further enquiries may be seen to have little value other than to prolong the dialogue, that may suggest that the harassment or disruption of the public authority or its staff is a primary purpose and this would consequently be a valid argument, but the Commissioner does not consider it applies in the circumstances of this case as, for the most part, any follow-up comments and enquiries are requests for clarification or further information which lead logically and reasonably from the responses received.

Can the request otherwise fairly be characterised as obsessive or manifestly unreasonable

28. The council cites the complainant's history in this matter, explaining that in addition to the various requests for information, she has also raised several complaints direct to its Monitoring Officer and raised questions with her Member of Parliament about the legality of the development. These have all proved fruitless as the development has been approved and its progress cannot be halted by any of the processes she has tried to initiate. It states that she is aware of the judicial review process, which the Commissioner understands she has not pursued and which is now out of time. The council argues that this suggests an obsession going beyond a reasonable objection to the development, which could be characterised as manifestly unreasonable.
29. This is associated with the council's arguments about the complainant's serious purpose, and will be dealt with in the section below.

Does the request have any serious purpose or value

30. The council has not provided the Commissioner with any justification for its claim that the complainant's requests lack serious purpose. The council's 25 January 2012 refusal to the complainant cites her stated purpose as being an intention to submit a report to the relevant Secretary of State with the intention of having the development

stopped. It argues that the Secretary of State has no powers to act once planning permission has been issued and, therefore, this serious purpose cannot be achieved. The council has not elaborated on this position in its submissions for the Commissioner's investigation, nor provided him with evidence to support its assertion about the complainant's motive or purpose.

31. In her complaint to the Commissioner, the complainant argues that the request is self-explanatory and seeks information on *"how the many adverse environmental impacts of the Priory/Platt Court development were overlooked, disregarded or outweighed in the consideration of [the] planning application [...]. The request, if answered, will also assist in raising awareness of the Environmental Regulations and the 'duty to consult' on environmental issues in circumstances which are very likely to arise in the future [...]"*.
32. The complainant subsequently directed the Commissioner to a report, disclosed in response to a previous request submitted by the complainant² about the proposed development. This report shows that the council agreed to enter into a risk-sharing arrangement with the developers, which indicates that the council had a financial interest in the outcome of the planning and development. The complainant contends that the council is attempting to use the provisions of FOIA and EIR regulations to delay answering her questions until such time as the information is no longer useful.
33. The council also argues that the information requested by the complainant is available to her within the relevant planning file, to which she has had full access and obtained copies. The complainant maintains that not all the information she has requested has been located by those means. The Commissioner observes that, for example, item 2) in the request has not been located by the complainant on the planning file, and has not been disclosed to the complainant. This is acknowledged by the council, see paragraph 2, above. Nor does the planning file contain a signed copy of item 1) in the request.
34. In response to a query from the Commissioner, the complainant explained that, in respect of item 1) in her request: *"A copy of, or link to, a signed copy of the Environmental Impact Screening Opinion for application number 10/01928/FULEXT - Demolition and redevelopment of the Priory/Platt Court"* the document she had obtained was unsigned. She wished to verify the signed version and confirm that the signatory was indeed the head of development control. She maintained that the

² http://www.whatdotheyknow.com/request/extra_care_facility_in_hungerford#outgoing-170251

information she had requested is not, and has never been publicly available on West Berkshire Council's planning portal. The unsigned screening opinion now published on the council's planning portal was published at her request in May 2011.

35. The Commissioner notes that the complainant has a copy of the unsigned document, and therefore has access to the material information content of the document. Further, the right of access under FOIA and EIR is a right of access to *information*, not specifically to *documents*. Nevertheless, the presence, or absence, of a signature is information to the extent that it signifies whether or not a specific individual with responsibility for a given matter can be shown to have seen, agreed, and appended his name to a specific document. The Commissioner does not therefore dismiss the complainant's position entirely, but acknowledges that the provision of a signed copy, in preference to an unsigned copy, will be of limited purpose and value.
36. In contrast to the council's view about the complainant's serious purpose, she argues an alternative position: specifically that she is seeking to uncover information which might indicate that planning was granted without due process, in circumstances where the planning authority had a financial interest in the outcome.
37. The Commissioner considers that the council has failed to provide adequate evidence to show that the complainant's request lacks serious purpose and he gives no weight to this factor.

Summary

38. The council's submissions in support of its position rely, in the main, on its arguments as expressed in its letters to the complainant, refusing the request. It has provided very little additional information or material evidence to assist the Commissioner in considering its position more carefully. The information it has provided (a chronology of correspondence, and a grossly oversized compilation of that correspondence) has been unsatisfactory in various regards.
39. Insofar as the council's position is stated in its various letters to the complainant, its arguments are not accompanied by the necessary supporting evidence. Clearly, when writing to the complainant the council will not need to attach copies of relevant material, however unless the Commissioner is furnished with evidence necessary to support the council's assertions, those assertions remain simply unsupported allegations and cannot be given any weight.
40. The complainant argues, in part, that her persistence has been necessary due to the piecemeal nature of the council's response to her

requests. There is evidence to suggest that the council has responded with reluctance to some of her requests. The Commissioner is struck by the fact that, despite an explicit request for a copy of the entire letter in item (2) of the request (in September 2011), the council eventually disclosed only one paragraph from that letter, as an extract, in late January 2012. The Commissioner has had the benefit of viewing the entire letter, and observes that there is nothing in the remainder which would appear to justify any reticence, save perhaps for a small amount of (job-related) personal data.

41. There is therefore some evidence to suggest that at least some of the complainant's correspondence resulted from the council's unsatisfactory responses to some of her requests and it has, to that extent, contributed to its own problem. It is therefore unfair to characterise the complainant's persistence, in the face of that approach, as manifestly unreasonable. Furthermore, given the evidence that the council had a financial stake in the outcome of the planning application the complainant's evident concerns about the propriety of the council's actions cannot be dismissed as groundless.
42. The Commissioner accordingly finds that the council has failed to comply with the provisions of regulation 12(4)(b) of the EIR and has incorrectly refused the complainant's request as manifestly unreasonable.

Public interest

43. Even if the exception at regulation 12(4)(b) had been considered to be applicable in the circumstances, whether the information would be withheld or disclosed would then depend on the balance of the public interest. The council's letter to the complainant of 9 January 2012 indicates its view that the balance of the public interest favours refusal of the request, on the grounds that in the face of staffing and operational constraints brought on by the present economic situation, continuing to allocate staff time to her correspondence is an inappropriate use of resources.
44. The Commissioner observes that this argument is essentially the same as the council's key argument for applying the exemption, namely that dealing with the request constitutes a burden on the public authority. It is therefore applying a circular argument. The Commissioner rejects this approach.
45. Consequently even if, contrary to the Commissioner's findings above, it could be argued that the council had satisfactorily shown that the exception at regulation 12(4)(b) of the EIR could be applied, it has failed to give any relevant arguments as to why the public interest favours maintaining that exception in this case. Therefore, irrespective of

whether or not the exception has been correctly applied, the public interest presumption in favour of disclosure would still require the requested information to be disclosed.

Right of appeal

46. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

47. 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.
48. 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

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