

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 March 2016

Public Authority: Hampshire County Council
Address: The Castle
Winchester
Hampshire
SO23 8JU

Decision (including any steps ordered)

1. The complainant has made a request to Hampshire County Council ("the council") for emails that are referenced in a council document relating to a recreational trail called the 'Meon Valley Trail' ("the MVT"). The council refused the request under regulation 12(4)(b) of the Environmental Information Regulations ("the EIR").
2. The Commissioner's decision is that the council has incorrectly applied regulation 12(4)(b), and has breached the requirement of regulation 14(2).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response under the terms of the EIR that does not rely on regulation 12(4)(b).
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 5 June 2015 the complainant requested information of the following description:

*HCC's Decision Report LSTF2NP and Cycling Ambition Grant (CiNP)
Meon Valley Trail Cycle Route/Bridleway upgrade: Contact name:
[redacted name] Page 7 of this document: 7.0 Community
Engagement refers to "Emails of support were received from those who
took the opportunity to respond". Please provide copies of these
"emails of support".*

6. On 24 July 2015 the council responded. It refused the request under the exception provided by regulation 12(4)(b) if the EIR.
7. The complainant requested an internal review on 27 July 2015.
8. The council provided the outcome of its internal review on 11 August 2015. It maintained its position.

Scope of the case

9. The complainant contacted the Commissioner on 12 August 2015 to contest the council's response. The Commissioner considers the scope of this case to be the determination of whether the council is entitled to refuse the request under the exception provided by regulation 12(4)(b).

Reasons for decision

Is the information environmental?

10. Information is "environmental" if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR rather than the Freedom of Information Act ("the FOIA"). Under regulation 2(1)(c), any information on activities affecting or likely to affect the elements of the environment listed in regulation 2(1)(a) will be environmental information. The requested information relates to the development of a recreational trail. This can be clearly identified as affecting the land. The Commissioner therefore considers that the request should be dealt with under the EIR.

Regulation 12(4)(b) – manifestly unreasonable requests

11. Regulation 12(4)(b) of the EIR states that:

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;

12. The Commissioner recognises that, on occasion, there can be no material difference between a request that is vexatious under section 14(1) of the FOIA and a request that is manifestly unreasonable on vexatious grounds under the EIR. The Commissioner has therefore considered the extent to which the request could be considered as vexatious.
13. The Commissioner has recently published new guidance on vexatious requests and for ease of reference, this can be accessed here: <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>
14. As discussed in the Commissioner's guidance, the relevant consideration is whether the request itself is vexatious, rather than the individual submitting it. Sometimes, it will be obvious when requests are vexatious, but sometimes it may not. In such cases, it should be considered whether the request would be likely to cause a disproportionate or unjustified level of disruption, irritation or distress to the public authority. This negative impact must then be considered against the purpose and public value of the request. A public authority can also consider the context of the request and the history of its relationship with the requester when this is relevant.
15. While section 14(1) of the FOIA effectively removes the duty to comply with a request, regulation 12(4)(b) of the EIR only provides an exception. As such the EIR explicitly requires a public authority to apply a public interest test (in accordance with regulation 12(1)(b)) before deciding whether to maintain the exception. The Commissioner accepts that public interest factors, such as proportionality and the value of the request, will have already been considered by a public authority in deciding whether to engage the exception, and that a public authority is likely to be able to 'carry through' the relevant considerations into the public interest test. However, regulation 12(2) of the EIR specifically states that a public authority must apply a presumption in favour of disclosure. In effect, this means that the exception can only be maintained if the public interest in refusing the request outweighs the public interest in responding.

The context of the request

16. The request relates to the MVT, which is recreational trail that is part bridleway and part restricted byway, and which is managed by the council. Following the publication of a report on the future of the MVT in 2013 (which was commissioned by the council from a third party organisation), the council obtained funding from the Department for Transport to improve the MVT through a range of works, which the Commissioner understands included its resurfacing. These works commenced during Spring 2015 in partnership with the South Downs National Park Authority ("the SDNPA").
17. Since these works began, and particularly since the MVT started to be resurfaced in April 2015, the council has received comments, complaints and information requests that appear to derive from a group called the 'Meon Valley Railway Line Users Group' ("the Group"), of which the complainant is a member.

The council's position

The purpose and value of the request

18. The council considers that the complainant's (and therefore the Group's) arguments on the public interest of the request are based on two premises, and the council has provided its position in respect of both:
 - The complainant considers that the work undertaken on the MVT was illegal due to no planning permission being sought. The council's position is that this is incorrect as no planning permission was required, but that the correct process to challenge this is to seek a judicial review within the relevant timescale, which the complainant has not done. Any disclosure of held information would not in itself address the complainant's view on the matter.
 - The complainant considers that the council failed to undertake proper public consultation before undertaking work on the MVT. The council's position is that no statutory consultation was required as no planning permission was necessary. However, informal consultation has been undertaken in respect of strategy and improvements for the MVT since 2003; including an informal public consultation that was undertaken for the 2013 report.

The burden placed on the council

19. The council has provided a spreadsheet of requests from the complainant, as well as other members of the Group. On this it is recorded that the complainant submitted eight information requests between 10 April 2015 and 23 July 2015, with a further nine information

requests made by the other individuals between 8 April 2015 and 20 August 2015.

20. The council considers that the requests made by the complainant seek a wide range of internal correspondence, and represent an effort to gain a large volume of information in order to search for details that may or may not support the Group's aims, and which are unlikely to contribute to wider public understanding of the matter. In particular, the council has drawn the Commissioner's attention to the nature of the three previous information requests that the complainant submitted:

- The first (on 10 April 2015) sought all internal emails relating to the MVT, and was refused under regulation 12(4)(b) on the grounds of cost (and to which the complainant did not respond to an invitation to narrow the request).
- The second (on 27 April 2015) sought legal advice provided by the council's solicitors, and was refused under regulation 12(5)(b) on the basis that the information was subject to legal professional privilege. The complainant made the same request to the SDNPA, which subsequently refused the request on the same basis as the council. The refusal by the SDNPA was later upheld by the Commissioner in decision notice FS50586791.
- The third (on 19 May 2015) sought various information relating to the 2013 report, including details about the informal consultation which formed its basis. The council provided held information in response, and the Commissioner later concluded in decision notice FS50586790 that no more information was likely to be held that would fall within the scope of the request.

The complaint submitted the fourth request (which is the subject of this decision), on 5 June 2015, and in this sought email responses that were referenced in (what the Commissioner understands to be) a decision report issued by the council. Shortly after making the fourth request, the complainant submitted four more requests (on 22 June 2015, 6 July 2015 and 23 July 2015) that focussed on specific email correspondence about the MVT.

21. The council considers that these requests, in conjunction with various comments and complaints received by the council (not including the email correspondence between the Countryside Service and the Group, which has been treated as 'normal course of business'), amount to 89 pieces of correspondence received by the council between 31 March 2015 and 6 July 2015. Responding to these requests and correspondence has placed substantial burden on the council, and particularly on the Countryside Service, which is a small specialised

service within the council that has a relatively small budget and amount of staff. The council has further advised the Commissioner that significant time and resources have been expended in addressing the concerns raised by the Group, including approximately 10 hours of public meetings and site visits with representatives of the Group.

The impact of the campaign on the council

22. The council has asked the Commissioner to consider the effect that the Group, as an organised campaign, has had on the council and its operation. In particular, the council has referred the Commissioner to commentary on the Group's social media accounts that urges individuals to complain to the council and other involved public authorities, despite the Group's earlier assurance to the council that it would seek to funnel all information requests and complaints through select representatives of the Group.
23. The council has further referred the Commissioner to a statement by the Group within the (publically available) complaint that it has recently submitted to the Local Government Ombudsman. In this the Group stated that it had asked all Group members to refrain from submitting their own information requests to the council so that a representative could instead do this on behalf of Group. The council considers that this statement is in opposition to the public actions of the Group, which have focussed on encouraging formal complaints to the council.

The complainant's position

24. The complainant has not provided specific arguments or evidence to the Commissioner as to why the request should not be defined as manifestly unreasonable. However it is evident to the Commissioner that the complainant, and the Group that he is part of, has concerns about the legality of the work undertaken on the MVT, and that the Group has received legal advice that is contradictory to the council's own position on whether planning permission was required.
25. The Commissioner further understands that the Group is representative of wider public dissatisfaction with the work undertaken on the MVT, and in particular, that the Group contests that the resurfacing of the MVT is unsuitable for its use, and that insufficient public consultation was undertaken.

The Commissioner's analysis

26. Firstly, the Commissioner would like to highlight that there are many different reasons why a request may be vexatious, as reflected in the Commissioner's guidance. There are no prescriptive 'rules', although there are generally typical characteristics and circumstances that assist

in making a judgement about whether a request is vexatious. A request does not necessarily have to be about the same issue as previous correspondence to be classed as vexatious, but equally, the request may be connected to others by a broad or narrow theme that relates them. A commonly identified feature of vexatious requests is that they can emanate from some sense of grievance or alleged wrong-doing on the part of the authority.

27. The Commissioner's guidance has emphasised that proportionality is the key consideration for a public authority when deciding whether to refuse a request as vexatious. The public authority must essentially consider whether the value of a request outweighs the impact that the request would have on the public authority's resources in responding to it. Aspects that can be considered in relation to this include the purpose and value of the information requested, and the burden upon the public authority's resources.

The purpose and value of the request

28. In the circumstances of this request, the Commissioner has considered the context of the request in detail; particularly in relation to the requests that preceded it, and its purpose and public value.
29. Of the preceding three requests, two were refused, and the remaining one resulted in the disclosure of less information than expected by the complainant. The outcome of these requests was either accepted by the requester or else upheld by the Commissioner. Consequently the amount of information disclosed was proportionately less than that requested in total.
30. When considered against this context, the complainant's submission of a further request, and particularly one that specifically seeks recorded information (which is understood to be referenced in a council document), seems a feasibly expected action for him to take. The Commissioner therefore considers it reasonable to conclude that the purpose of the request is to gain information which has not yet been requested but is believed to be held.
31. Whilst the request may have a genuine purpose, the Commissioner must also consider whether it has public value. It has become evident through the submissions of both parties that the Group disputes the legality of the council's work on the MVT, and that a complaint has already been submitted to the Local Government Ombudsman on the matter. The Commissioner's role here is not to comment or confer recognition of either party's position, but to decide whether the request, on the date it was made, held value when considered in context.

32. It has become evident to the Commissioner that the complainant seeks information about support that the council received prior to initiating work on the MVR. Wider public concern about the extent of the council's public consultation appears to be evidenced through the existence of the Group itself and the council's corresponding activities to provide public assurance on this topic.
33. The specific information requested by the request are the emails of support which are referenced in a document titled '*LSTF2NP and Cycling Ambition Grant (CiNP) Meon Valley Trail Cycle Route/Bridleway up-grade*' which the Commissioner perceives to be a decision report issued by the council on an unknown date (but sometime after February 2014). The Commissioner also notes that the request took place following the Council's confirmation that limited information about the 'informal consultation' which formed the basis of the 2013 report was held (as upheld by the Commissioner in decision notice FS50586790).
34. Having considered these factors, it is reasonable for the Commissioner to conclude that the request holds public value, as it could potentially result in the disclosure of information that would allow the council's actions to be better understood, particularly in light of the limited information about the informal consultation that informed the 2013 report.

The burden upon the council

35. The council's arguments for burden have referred to a range of information requests that were received after the date of the request under consideration, by both the complainant and other parties who are believed to be members of the Group. Whilst the time of compliance for these requests overlapped, the council's response to this request was made outside the time for compliance by a significant margin. As such, the Commissioner must consider whether the request was vexatious on the date that it was received and not on the basis of the proceeding activity in the months following it.
36. Having noted the timing and results of the previous three requests submitted by the complainant, the Commissioner does not consider that, at the time of the fourth request being submitted, there was a disproportionate burden placed upon the council. The request appears to have taken place against the context of a contentious local decision, and it is realistic to assume that a public authority should expect to receive a greater number of information requests in such a situation. Associated with this, the Commissioner recognises that a large public authority such as a county council must have a higher threshold of burden than authorities of smaller size and jurisdiction.

37. The Commissioner has also considered the council's position on the effect of the Group on its operation. The Commissioner recognises that the existence of a campaign has the potential to place significant burden on a public authority where the campaign is actively seeking to disrupt that authority through making information requests. However in the context of this request, there is limited evidence to suggest that it has been made to purposely disrupt the council's operation. Whilst the Commissioner has noted that a total of six information requests have previously been submitted by the complainant and other members of the group (in addition to a range of complaints which the council has recorded as deriving from different individuals), the evidence in this case suggests that these actions are a result of public concern about the MVT and a desire to publicise this, rather than a malevolent intent to disrupt the councils operation.

Conclusion

38. The Commissioner has considered the submissions of both parties in detail, and has also considered previous decision notices relating to this matter.
39. At the time that the request was made, the Commissioner considers that it served a serious purpose to which public value was attached. Previous requests had resulted in limited disclosure, and the public value in the matter appears to be generally acknowledged by the council itself through the public meetings (and meetings with the Group's representatives) that it has taken part in. It is also noted that whilst this Group has provided a focus for public concern about the matter, and has advised members of the public to submit relevant complaints to the council; the Group's actions appear to be based in a recognised public concern rather than a malevolent intent to disrupt the council's operation. The Commissioner is also mindful that the council is a county authority with significant decision making powers, and that consideration about burden needs to take place against the size and resources of the authority in question.
40. Having considered these factors, the Commissioner has concluded that the request made by the complainant on 5 June 2015 has public value which is not outweighed by the burden on the council, and that regulation 12(4)(b) is not engaged. Having reached this conclusion, the Commissioner does not consider it necessary to apply the public interest test required by regulation 12(2).

Regulation 14(2) – time limit for issuing a refusal notice

41. Regulation 14(2) provides that when a public authority wishes to refuse to provide information, it must specify the exception in question within 20 working days.
42. As the council did not issue a refusal notice and cite regulation 12(4)(b) until after 20 working days, the Commissioner finds that the council breached regulation 14(2).

Right of appeal

43. 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@hmcts.gsi.gov.uk

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

44. 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.
45. 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

Andrew White
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