

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

Date: 6 March 2020

Public Authority: Bethersden Parish Council
Address: Sunnyslawn
Densole Lane
Densole
Folkestone
CT18 7BL

Decision (including any steps ordered)

1. The complainant requested various information, including information regarding the planning, tendering, construction and payment for repair works due to be carried out on two footpaths. Bethersden Parish Council (the Council) initially refused the request under section 12 of the FOIA. During the course of the Commissioner's investigation, it subsequently refused the request under regulation 12(4)(b) of the EIR on the basis that it was vexatious.
2. The Commissioner's decision is that the request was vexatious and the Council was, therefore, entitled to rely on regulation 12(4)(b) to refuse the request. She also finds that the public interest lies in maintaining the Council's application of the exception.
3. However, as the Council failed to both specify the EIR exception under which it was refusing the request and explain its consideration of the public interest within the time for compliance, the Commissioner also finds that the Council breached regulation 14 of the EIR.
4. The Commissioner does not require the Council to take any steps.

Request and response

5. On 1 February 2019, the complainant wrote to the Council and requested information in the following terms:

"IN RELATION TO: The contract for new pathways on the George Field approved by BPC on 14 November 2018 (Item 197/2018) which was awarded to 'Company A'

PLEASE PROVIDE:-

1. All communication, be it written letter email telephone or through social media, between Bethersden Parish Council (including the chairman (Cllr A. Boyd), the Bethersden Parish clerk (Colin Tearle) and any others in relation to all works (both capital works and maintenance works) to be carried out in connection with the assessment, planning, tendering, construction, supervision, approval and payment for the new footpaths constructed on the George field, Bethersden.

2. The time period covered by this FOI request is 1st January 2018 to 31 January 2019.

3. Details on how chosen tenderers were selected and how invitation to tender was drafted, with details on how it met Council Constitution, Policies and Procedures for Procurement.

4. Disclosure of any relationship by members of the Council and BPC Officers with chosen tenderers, whether direct or indirect through family members and their known acquaintances

5. Information and details on how the invitation to tender was made to companies or individuals for these works, including related phone conversations and texts.

6. Copies of invitations to tender and/or specifications for this project as sent to all prospective contractors selected by BPC, together with their accompanying e-mails or covering letters.

7. Copies and details of all unredacted responses received to the invitation to tend, including quotation and questions raised.

8. Details of references taken with dates, names, and transcript to assess the quality of the past work of each tenderer, their reliability, and delivering on time and to price

9. *Details on the criteria of how tenders were scored and the name of the selected contractor and why the contract was awarded to them since it is understood they were the most expensive*
 10. *Details of Planning Approval from Kent County Council and Ashford Borough Council, and a copy of decision notices*
 11. *How the contract award process satisfied BPC Constitution, Policy and Procedures for Procurement*
 12. *A complete and full copy of the final contract signed between BPC and Contractor, including all design drawings, sketches and specifications for works to be undertaken*
 13. *Details of guarantees given and maintenance regime offered by the Contractor to ensure good value to the Parish Council and the village community*
 14. *The measures taken by BPC and guarantees obtained to ensure that the newly completed works do not suffer from the construction problems related to the original build of George field paths*
 15. *Details of quality controls employed at key stages of works and eventual sign off and certification that the Contract was delivered to the building standards for footpaths laid down by KCC and all other interested construction bodies.*
 16. *Details of the financing of the works and the source(s) of the funds utilized including any correspondence relating to the source of the funding, particularly if provided from 106, and the agreement of the full BPC, ABC and Kent County Council."*
6. The Council's response to the request was undated and sent by post. The complainant stated he received it on 2 March 2019. The Council refused to provide the requested information citing section 12 of the FOIA (cost of compliance).
 7. The complainant requested an internal review on 4 March 2019.
 8. Following an internal review the Council wrote to the complainant on 22 April 2019. It maintained its original position.

Scope of the case

9. The complainant initially contacted the Commissioner on 20 March 2019 to complain about the Council's failure to respond to his internal review request. After the Council issued its internal review response, the

complainant contacted the Commissioner again on 1 May 2019 to complain about the way his request had been handled. Specifically, he disputed the Council's decision to refuse his request under section 12 of the FOIA.

10. During the course of the Commissioner's investigation she asked the Council to consider whether the request should have been considered under the EIR rather than the FOIA. The Council subsequently amended its response and refused the request under regulation 12(4)(b) of the EIR (manifestly unreasonable) on the basis that it was vexatious.
11. The scope of this case and the following analysis is to consider whether the Council was correct to rely on regulation 12(4)(b) as its grounds for refusing to comply with the request.

Reasons for decision

Regulation 2 – Is the requested information environmental?

12. Environmental information must be considered for disclosure under the terms of the EIR rather than the FOIA.
13. Regulation 2(1)(c) of the EIR defines environmental information as any information on "*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 [2(1)](a) and (b) as well as measures or activities designed to protect those elements.*"
14. The request in this case is for various information relating to planning and construction of footpaths. The Commissioner is satisfied that the requested information is on a measure that would or would be likely to affect the elements listed in regulations 2(1)(a) and so it is environmental in accordance with regulation 2(1)(c).

Regulation 12(4)(b) – Manifestly unreasonable

15. Regulation 12(4)(b) provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
16. The exception will typically apply in one of two sets of circumstances; either where a request is vexatious, or where compliance with a request means a public authority would incur an unreasonable level of costs, or an unreasonable diversion of resources. In this case the Council argued that the request was vexatious.

17. Following the lead of the Upper Tribunal in *Craven v Information Commissioner & the DECC* (GIA/786/2012), 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.
18. The term “vexatious” is not defined within the FOIA. The Upper Tribunal considered the issue of vexatious requests in the case of the *Information Commissioner v Devon County Council & Dransfield* (GIA/3037/2011) (Dransfield). 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.
19. The Dransfield definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
20. 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).
21. The Commissioner has published guidance¹ on dealing with vexatious requests, which includes a number of indicators that may apply in the case of a vexatious request. However, even if a request contains one or more of these indicators it will not necessarily mean that it must be vexatious.

¹ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatiousrequests.pdf>

22. When considering the question of vexatiousness, a public authority can consider the context of the request and the history of its relationship with the requester, 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."

23. However, the Commissioner is also keen to stress that in every case, it is the request itself that is vexatious and not the person making it.

The Complainant's view

24. At the time he submitted the request the complainant was a serving councillor. The information he requested related to the tender and contract for work to repair and replace two footpaths on land owned by the Council. The complainant stated that, prior to submitting the request, he asked for the information in his capacity as a councillor but he was ignored.
25. The complainant believed that inadequate information was provided to councillors in advance of the vote held on 14 November 2018 in which a particular quote was accepted for the works on the footpaths. He said he was unhappy with the lack of transparency in the operation of the Council, particularly in relation to the appointment of contractors.
26. The complainant told the Commissioner he was a chartered civil engineer with 50 years' experience and was fully aware of the processes involved in tendering and implementing these type of works. He said that the chairman and clerk had continually chosen to ignore his advice and expertise.
27. Based on his knowledge, he assessed that the quotes provided for the work on the footpaths were far over budget. He requested the information so that he could determine whether the quotes were reasonable or, as he suspected, excessive. He told the Commissioner that if the latter was true his intention was to present the information to auditors to follow up.
28. The complainant stated that on two previous occasions he raised concerns with the public auditor, but he said they were dismissed as falling outside the auditor's remit.
29. The complainant argued that the request did not impose a burden on the Council. His view was that all of the information should be readily available and it should take no more than a couple of hours to locate and provide it to him. The complainant said that all of the information he

requested was standard for such a contract. He believed that the Council may have had something to hide and this was the real reason for failing to provide the information.

30. With regard to the serious purpose and value of the request, the complainant said that he had no personal interest in the information other than ensuring value for money was achieved by the Council. Specifically, he said:

"It is important to establish, for the public interest, that the basis for the quotations received were comparable, directly and indirectly, and that the information used to determine the contracts had been derived correctly and fully using the Bethersden Parish Council Financial Regulations. By choosing the most expensive quotation with no details provided, it is impossible to see whether this is the case or not."

31. The complainant's position was that his request was not vexatious. He argued that the Council was being vexatious by refusing to provide information that he was entitled to in the first instance as a member of the Council, but that should also have been freely available to the public.

The Council's view

32. The Council provided the Commissioner with its reasons as to why it believed the request was vexatious and was therefore manifestly unreasonable under regulation 12(4)(b). In doing so, it considered the context and history leading up to this request being made.
33. The Council argued that the request was designed to cause harassment and problems for the Council by requiring it to undertake unnecessary work. It described some parts of the request as unreasonable and complex. The Council believed the complainant had no real interest in the outcome and was pursuing a complaint with the Commissioner to cause stress and upset to the clerk and chairman.
34. It was the Council's view that the complainant was abusing his rights of access to information to extend his long term intention to cause political and economic damage to the Council. It asserted that the request was part of a campaign of disruption run by a group of councillors (the group), including the complainant, which had been ongoing for three years. It believed the group had the intention of taking control of the Council, or causing it to become so dysfunctional that particular work and projects would be obstructed.
35. In relation to the requested information, the Council asserted that a councillor within the group had interfered with the procurement

procedure in relation to the quotes sought for the works on the footpaths, by discouraging a contractor from providing a quote. For this reason, to prevent further interference or bias the Council decided to present the quotes to councillors without disclosing the names of the contractors.

36. The Council stated that the complainant had been provided with information in his role as a councillor, including the quotes and the specification for the work on the footpaths, ahead of the meeting on 14 November 2018 in which the Council voted in favour of accepting a particular quote. It said that he was part of the decision-making process and had ample opportunity to scrutinise everything. The Commissioner notes that the complainant voted against accepting the quote.
37. The Council confirmed the project was funded by the section 106 agreement it had with Ashford Borough Council. It explained that there was a lengthy approval process before Ashford Borough Council authorised the release of the money. The Council also argued that, aside from the group, no one had expressed any concerns regarding the works.
38. In support of its position the Council provided the Commissioner with various documentary evidence which demonstrated the disruptive behaviour of the complainant and the group it considered he was part of. It provided minutes of the Council meeting held on 11 October 2017 in which the chairman had to suspend the meeting due to the complainant's behaviour. The minutes stated that the complainant was asked twice to stop making defamatory and abusive comments but failed to do so. Appended to the minutes was the chairman's statement from the meeting in which he made the following comments:
- "Over the last year the level of personal animosity building up within this council has reached such pitch that it is now immobilising the functioning of the parish Council."*
- "It is very apparent that these three councillors are waging a war of attrition against the chairman, vice chairman and the clerk to the detriment of the parish Council and the parish constituents".*
39. In November 2017 the Council received several complaints from local residents about the complainant, copies were provided to the Commissioner. One referred to the complainant's behaviour in meetings as *"loud, domineering and persistent"*, it said that he intimidated councillors, the clerk and members of the public and *"his behaviour is bullying and scares those around him. He harasses those around to get his own way"*. Another said they were appalled by the behaviour of the

group and said they all seemed to have "*either political or personal agendas to the detriment of the village*".

40. The Council contended that the group caused the previous clerk considerable distress which led to her resignation. It provided the Commissioner with a copy of the chairman's statement from the Council meeting on 8 August 2018, in which he said that the previous clerk had received a constant barrage of negative and bullying emails over most of 2017 which had caused significant stress. The chairman's statement went on to say that the current locum clerk had received 60 emails from three councillors alone since 22 June 2018. The Council clarified that those emails were sent by the group.
41. At the same meeting, on 8 August 2018, the Council said that the complainant and another councillor in the group made false accusations against an IT consultant hired by the Council. They asserted that he was not qualified to carry out the IT work and that he had little experience in the field. They went on to allege that he ran websites featuring explicit pornography. The Council argued that this was an attempt to disrupt the implementation of a new email system.
42. The Council believed that the complainant had already placed a significant burden on it. It said that in July 2018, alongside another councillor in the group, the complainant posed as an elector and submitted a request to examine the Council's files for the previous financial year under the Local Audit and Accountability Act 2014. The Council explained that preparation for this inspection took 35 hours and was a considerable cost to the Council. It stated that the councillors already had answers to most of the questions they raised in the file of papers they brought with them. The Council described it as a pointless exercise which it believed was intended to undermine the Council and which caused unnecessary stress on the staff who had to prepare the files.
43. The Council also argued that the request being considered in this case was part of a pattern of requests. It provided evidence of four previous requests which were submitted by the complainant's business partner. These requests were submitted in May, August, November and December 2017 and all related to the Council's Neighbourhood plan.
44. The Council highlighted the fact that it was a small organisation with one part time clerk and limited resources. It said that the parish precept had already been raised considerably to offset the deficiency in the Council's funds which it claimed were depleted by "*continuing unnecessary information requests and other unwarranted actions*" by the group.

The Commissioner's decision

45. 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 issues 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 to 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.

46. As the Upper Tribunal in Dransfield observed, there is:

"no magic formula – all the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of the FOIA."

47. A request which would not normally be regarded as vexatious in isolation may assume that quality once considered in context. As in many cases which consider the question of whether a request is vexatious, in this case the evidence showed a history of engagement. The Council considered that the particular context and history strengthened its argument that the request was vexatious.

48. In reaching a decision the Commissioner has balanced the purpose and value of the request against the detrimental effect on the Council. She has also considered, in light of the dealings between the complainant and the Council, whether, at the time, the request crossed the threshold of what was reasonable.

The purpose and value of the request

49. With regard to the purpose and value of the request, the Commissioner understands that the complainant believed there were wider issues regarding a lack of transparency and openness within the Council. He claimed that information was purposefully withheld from himself and other councillors. In correspondence to the Commissioner he stated that he was *"extremely concerned about this failure to disclose routine information"*. His specific concern in this case was whether the Council followed its financial regulations for this particular contract and ascertaining whether the Council achieved value for money.

50. The Council argued that the complainant had already been provided with various information regarding the contract for the works in his role as a

councillor. He was involved in the decision-making process for the selection of the contract. The Council believed the request was motivated by the complainant's political agenda. Its view was that there was no serious purpose or value to the request as it was solely designed to cause disruption and distress to the Council and its staff.

51. As observed in Dransfield, public authorities should be wary of jumping to conclusions about a request lacking any value or serious purpose.
52. In this case, the request sought various information relating to the repair and replacement of particular footpaths. The works would have an impact on both the environment and the lives of local residents. The Commissioner recognises that there is an inherent value in the Council being transparent regarding its decision-making and the way public money was spent on this project.
53. However, the Commissioner is also aware that the finances of the project were scrutinised by Ashford Borough Council who authorised the release of money for the works.
54. The Commissioner notes that, as the complainant was a serving councillor at the time he submitted the request he would have had access to the type of information he requested. Indeed, he was likely to have had a greater level of access to information in his capacity as a councillor than he would have been entitled to under the EIR. If the complainant had concerns about the lack of information which was being provided to him in his role as a councillor, the Commissioner considers there were other, more appropriate, means of remedying this open to the complainant.
55. Aside from the complainant's assertions regarding the Council's handling of its finances and tendering processes, the Commissioner has not been provided with any evidence from regulatory bodies finding the Council to have acted inappropriately. She acknowledges that the complainant has concerns, but without any finding of wrongdoing it is difficult for the Commissioner to place any weight on this argument.
56. It is apparent from the evidence in this case that there is a challenging relationship between the Council and the complainant. While it may not have been the complainant's sole purpose to cause the Council disruption and annoyance by submitting the request, the Commissioner's view is that the complainant was motivated to submit the request due to his wider disagreement with the Council. As a result, the Commissioner considers that the purpose and value of the request are somewhat limited.

The burden on the Council

57. The Commissioner considered the complainant's argument that his request was not burdensome. The complainant claimed that he asked for specific information which should be readily available if the Council had followed statutory financial procedures. He stated that it should take a couple of hours to locate and provide the information.
58. However, in the Commissioner's view the scope of the request was broad. It was made in 16 parts and the first part alone asked for "*all communication*" regarding the assessment, planning, tendering, construction, supervision, approval and payment for the works. Given the wide parameters of the request and taking into account the limited resources available to the Council, it is reasonable for the Commissioner to consider that complying with the request would be likely to place a substantial burden on the Council.
59. The Commissioner also considered the Council's arguments and evidence regarding the burden the request placed on it.
60. The Commissioner does not agree with the Council's view that the request was part of a pattern of requests. Although four requests were submitted by an individual connected to the complainant, the Commissioner notes that those requests did not ask for the same, or similar, information to that requested by the complainant. Additionally, all four requests were submitted over a year prior to the request in this case. Therefore, the Commissioner's view is that the request in this case is not part of a pattern of requests and she has not considered this as a factor in relation to the burden on the Council.
61. The Commissioner notes that the Council did not claim to have received any other FOIA or EIR requests from the complainant. Instead, it argued that a burden was placed on it by the complainant's request to view the Council's files under the Local Audit and Accountability Act 2014, which took the Council 35 hours to prepare for. It also asserted that the group had bombarded the clerk with emails. The Commissioner accepts that this placed a substantial burden on the Council.
62. The Commissioner views as significant the Council's main argument, which was that the request was just one part of an ongoing campaign of disruption aimed at the Council which, at the time the request was submitted, had been ongoing for three years. It provided evidence of the complainant's disruptive and inappropriate behaviour at Council meetings, including making unfounded accusations against the Council's IT consultant and defamatory and abusive comments about other councillors. The Council also provided the Commissioner with copies of complaints from several members of the public about his behaviour and

the behaviour of the group. The Commissioner accepts this reasoning from the Council and that the complainant's behaviour caused the Council and its staff considerable distress and irritation.

63. The purpose of regulation 12(4)(b) is to protect public authorities and their employees in their everyday business. It is the Commissioner's view that complying with the request would contribute to the aggregated burden imposed on the Council by the complainant's wider dealings with it.
64. Taking into consideration the full context and history as explained by the Council, the Commissioner finds that the limited purpose and value of the request was clearly outweighed by the detrimental impact on the Council's services and the distress caused to its staff.
65. For the reasons set out above, the Commissioner is satisfied that the request was manifestly unreasonable and therefore regulation 12(4)(b) was engaged.

Public interest

66. The Council's reliance on regulation 12(4)(b) is subject to consideration of the public interest test. The Commissioner must decide whether the balance of the public interest lies in favour of maintaining the exception or in complying with the request.
67. The complainant argued that disclosure of the requested information would allow him to determine whether the Council had achieved value for money on this project. It would also prove whether or not it had complied with its financial obligations.
68. The Commissioner recognises there is an inherent expectation for both transparency and accountability in relation to the way in which public money is spent and the Council's decision-making, particularly in relation to projects which may impact the environment.
69. However, as the Commissioner has recorded above, this particular project has already been subject to scrutiny by Ashford Borough Council who permitted release of the funds for the works. The Commissioner also considers that as no one apart from the group expressed any concerns or dissatisfaction with the works this suggests it is not a matter of wider public concern.
70. It is important to recognise that public authorities have the right to protect themselves from requests which are unreasonable and it is in the wider public interest that they are able to do so.

71. The Commissioner's position is that the public interest in this case lies in ensuring that the Council's resources are used effectively. She considers that dealing with the request does not best serve the public interest.
72. The Commissioner therefore concludes that the balance of the public interest favours maintaining the exception at regulation 12(4)(b) of the EIR. As a result the Council was entitled to rely on that exception to refuse the request.

Presumption in favour of disclosure

73. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019), "*If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...*" and "*the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations*" (paragraph 19).
74. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(b) was applied correctly.

Regulation 14 – Refusal to disclose information

75. Regulation 14 of the EIR sets out the provisions that must be complied with when refusing a request for environmental information. It requires that where a public authority refuses to disclose information under an exception that this is stated in writing within 20 working days.

76. Regulation 14(3) of the EIR states:

"The refusal shall specify the reasons not to disclose the information requested, including –

(a) any exception relied on under regulations 12(4), 12(5) or 13; and

(b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3)."

77. In this case, the Council applied the wrong legislation whilst handling the request, and subsequently did not apply regulation 12(4)(b) until a complaint was brought to the Commissioner. On this basis the Commissioner finds a breach of regulation 14.

Right of appeal

78. 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

79. 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.
80. 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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