

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

Date: 24 June 2015

Public Authority: Cornwall Council
Address: County Hall
Treyew Road
Truro
Cornwall
TR1 3AY

Decision (including any steps ordered)

1. The complainants requested information from Cornwall Council ("the council") relating to land adjacent to a holiday park. The council refused to respond to the requests because it considered that they were manifestly unreasonable under regulation 12(4)(b) of the Environmental Information Regulations 2004 ("the EIR") and the public interest did not favour disclosure. The Commissioner considered that regulation 12(4)(b) was correctly applied to some of the information requested but not all of it. In relation to the information that was not excepted, the Commissioner found a breach of regulation 5(2) for the failure to respond appropriately to the request within 20 working days.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Respond to the request dated 11 August 2014 by either providing the information or relying on an exception other than regulation 12(4)(b).
3. 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

4. For clarity, the analysis below refers to "the complainants". There are two complainants in this case acting together to pursue the same interests. In the circumstances, regardless of whether the correspondence was sent by or to both of the complainants or only one of them, the term "complainants" has been used throughout the Commissioner's analysis for ease of reference.

5. On 22 July 2014, the complainants requested information from the council in the following terms:

"Can you please forward evidence that the land has been used for many years, copies of receipts from builder's for payments to National Trust would be acceptable, or a list of all builders' names and address who have made use of the land within the past ten years..."

If you claim that the land has been used as a dumping ground for many years and is now also being used as a public walkway please can you forward copies of soil sampling and Risk Assessments from the National Trust, you should have these as you have accepted the use of the land".

6. On 11 August 2014, a solicitor acting on behalf of the complainants made a further request to the council in the following terms:

"On 9 September 2014 (actual request made on 10 July 2014) we made a FOIA request on behalf of our clients [complainant's names] the owners of [name of holiday park]. You responded on 6 August 2014. To our request:

1.

2. Tell us whether there is any other evidence in the possession of Cornwall Council of user of the land as a builders transfer station for a continuous period in excess of ten years.

3.

You replied:

2. Yes.

Please take this letter as a further FOIA request as follows: please provide copies of the evidence referred to above and to the extent that any part of it is no longer in the possession of the Council please state its whereabouts and the name, address and reference of the person to whom a request for copies should be directed".

7. The council responded to the requests dated 22 July 2014 on 20 August 2014. It said that it was not going to respond because the requests were manifestly unreasonable under regulation 12(4)(b) and the public interest did not favour disclosure.
8. On 9 September 2014, the council wrote to the complainants' solicitors in relation to the request on 11 August 2014. The council said that it was not going to respond to this request for the same reasons.
9. The complainants remained dissatisfied with those responses and the council conducted an internal review on 4 February 2015. The council said that it had decided that its decision to refuse further requests from the complainants or their legal advisor using the exception under regulation 12(4)(b) of the EIR was correct.

Scope of the case

10. The complainants made an eligible complaint to the Commissioner on 4 February 2015. They asked the Commissioner to consider whether the council had correctly refused to respond to the requests using regulation 12(4)(b) of the EIR.

Reasons for decision

Regulation 12(4)(b)

11. Regulation 12(4)(b) of the EIR provides the following:

"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. In accordance with regulation 12(1)(b), information may be withheld under regulation 12(4)(b) if:

"...in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information".

13. The council told the Commissioner that it had judged the requests to be vexatious and therefore manifestly unreasonable under the terms of the EIR. The Commissioner has published guidance on applying section 14(1) of Freedom of Information Act 2000 ("the FOIA") which relates to vexatious requests. While the guidance above is focused on section

14(1) of the FOIA, the Commissioner's general approach to applying regulation 12(4)(b) of the EIR is the same in relation to vexatious requests. For ease of reference, it 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 patently obvious when requests are vexatious. In cases where it is not so clear-cut, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. This will usually be a matter of objectively judging the evidence of the impact on the authority and weighing this against any evidence about the purpose and value of the request. Public authorities may also take into account the context and history of the request where relevant.
15. As in many cases which give rise to the question of whether a request is vexatious, the evidence in the present case shows a history of previous information requests and various difficult encounters between the parties. The council relies on this history when characterising these request as vexatious.
16. The background to this matter is that the complainants purchased a holiday park in Cornwall in 2007. The complainants have raised a variety of issues about the use of a neighbouring site and in particular, associated noise and health and safety issues. They have complained that they have incurred financial loss as a result of these problems driving customers away from their holiday park and they have not been satisfied with the council's investigation of these issues or their informal attempts to resolve them.
17. In April 2013, an Environmental Protection Officer at the council received a complaint from the complainants regarding the use of the land. The complainants stated that the land was being used as a builders' yard, producing noise, rubbish and dust. Section 79(1) of the Environmental Protection Act 1990 imposes a duty on local authorities to take reasonably practical steps to investigate complaints of statutory nuisance made by persons living within the area of the local authority. The council has the power to issue an abatement order to prevent a 'statutory nuisance'. For clarity, a 'statutory nuisance' is much more than annoyance or the fact that the noise is audible. The noise must be a significant or unreasonable emission of noise that materially interferes with the use and enjoyment of a person's home. The council must be able to assess factors such as the time of day the noise occurs, how

often it occurs and how loud it is. It is important that the council is able to witness the noise.

18. The department concerned made it clear to the complainants that it could only investigate matters which affected their own use and enjoyment of the property. It said that the impact on the business was not something that the council could consider as a 'statutory nuisance' and would need to be pursued privately as a civil matter. The council visited the site on four occasions but there was no noise or dust present at those times. The council said that the complainants declined to participate fully in the investigation which would be necessary to gather evidence. It said that it had the impression that the main issue was the disturbance to customers rather than the complainants, but it could not take action under the legislation regarding that due to their residential status. However, the council had also contacted the relevant parties, including the National Trust, in order to try to control the noise and dust issues on an informal basis and it also provided other general advice.
19. In May 2013, an enforcement investigation was opened relating to the site. On 26 September 2013, the council issued a report. It confirmed that there had been a planning breach, which would normally require planning permission, but it said that there was no aspect of planning law that would require the landowners to submit retrospective applications. The council said that it had advised the contravener in this case that permission ought to be applied for, but it said it could take no further action. The council explained that it was not prepared to pursue any enforcement action on this occasion since it considered that there was sufficient evidence to show that the land had been used for many years as a builders' yard. The council referred in particular to evidence from the National Trust dating back to 1992 and the storage of timber on the site in 1999. The council therefore considered that the site would be immune from planning enforcement by virtue of the time limitation provided by section 171B(3) of the Town and Country Planning Act 1990 (as amended).
20. The complainants made a number of complaints about the way the above matters had been handled, including a complaint to the council's Chief Executive, a formal complaint under the council's complaint procedure, and a complaint to the independent body, the Local Government Ombudsman ("the LGO"). The council's Chief Executive responded personally to the complainants on 18 October 2013 and explained the reasons why the council had taken the decisions that it had. A 'Step 1' complaint investigation report was also completed by the council on 31 October 2013. The council did not uphold the complaints raised by the complainants. As the complainants did not wish to pursue a 'Stage 2' complaint with the council, they submitted a complaint to the LGO instead for an independent review. On 21 May 2014, the LGO

produced a report finding that there had been no fault in the way the council had handled the reports of statutory nuisance and no fault in the way the council arrived at the decision that the site was immune from planning enforcement action. The LGO said that it was satisfied that the council had properly considered the evidence. The LGO found that there had been a delay in dealing with the enforcement complaint and he asked the council to apologise to the complainants.

21. The council explained to the Commissioner that it relied on the background above and the wider context of these requests when characterising them as vexatious. The council said it had received a significant volume of frequent correspondence from the complainants relating to these issues and it was able to supply evidence of its engagement with the complainants on this issue. It said that in addition to the formal routes pursued by the complainants there had been extensive correspondence with the departments concerned. The council noted that in the past year, the complainants had sent 29 emails to the Enforcement and Private Sector Housing HMS Group Leader, 16 of these being sent despite the fact that the requester had been given a single point of contact email address to use for all correspondence. In addition, since October 2013, over 25 emails had been sent to the single point of contact email address provided.
22. The council supplied evidence to the Commissioner showing that the complainants had contacted a wide range of parties, including the press, National Trust, builders on the site, the parish council, a councillor, individual council officers as well as the council's Chief Executive. The complainants even said that they had written to the Prime Minister to criticise the council's actions in this case on 20 May 2014:

"A letter regarding this issue has been sent to David Cameron, who is a regular visitor to his holiday home in North Cornwall, I have emphasised largely that Cornwall Council has no respect or interest...I have also mentioned the lack of time [name of individual council officer] spent on the case and the amount of weeks spent taking holidays..."

23. The evidence supplied included previous requests for information made by the complainants. This correspondence had included three requests for information under the EIR prior to the ones forming the subject of this complaint. The details of these requests are as follows:

Requests made on 22 May 2014

"I am requesting all information for case No EN13/01117,

- 1. Proof of evidence from National Trust regarding this case, evidence that this area of land has been in existence as a builders' transfer station for more than thirty years.*
- 2. Please supply date, time and logs of all visits and inspections to this land carried out by Cornwall Council".*

Request made on 11 June 2014

"Further to my email below I have been advised that under the Freedom of Speech [sic] I am entitled to view any planning agreement (complete history) on the land adjacent to our park".

Requests made on 10 July 2014 by solicitors acting on behalf of the complainants:

"Please:

- 1. Confirm the identity of the organisation of the sender of the note dated 13/07/92 since the National Trust is not a person for DPA purposes and so this piece of information cannot be personal data.*
 - 2. Tell us whether there is any other evidence in the possession of Cornwall Council of user of the land as a builders transfer station for a continuous period in excess of ten years.*
 - 3. Provide a copy of the letter of 4 June referred to in the letter of 25 June 1992 from the [name of holiday park] to the National Trust and any response from the National Trust to the letter of 25 June 1992".*
24. The council explained that it had responded to the above requests. In relation to the requests made on 22 May 2014, the council supplied a redacted copy of correspondence from the National Trust and information relating to visits by the enforcement team. In relation to the request on 11 June 2014, this information was not held as the council had not granted planning consent for this use of the land. In relation to the requests on 10 July 2014, the council confirmed that the correspondence had been sent by the National Trust. The council confirmed that there was other evidence in the possession of the council by writing the response "Yes" regarding point 2 of this request. The information requested in point 3 was not held.
25. The council said that dealing with the complainants' contact described above had been a significant burden which had diverted the authority's resources. It said that at the time of the requests forming the subject of this complaint, it had already spent 20 hours dealing with the previous requests. It said that the overall impact of the correspondence was increased because of the 'scattergun' approach adopted by the

complainants, which had necessitated a great deal of coordination between the council's officers in order to try to avoid the duplication of work.

26. The council has questioned the value of responding to these requests, arguing that its position on the substantive complaints has been made clear. It has highlighted that the complainants have refused to accept those outcomes, even though they have been upheld independently by the LGO. Although the council has acknowledged that responding to these requests may give the complainants some additional understanding, it considers that the stronger interest is in maintaining its resources in view of the history of events described and the burden this is now imposing.
27. The complainants have argued that these requests are not vexatious. They primarily argue that the council has not given a straight answer about what evidence it relied upon when making this decision. The complainants have stressed to the Commissioner that these decisions have resulted in a great deal of personal distress, and that aside, they continue to have concerns about the impact on the local area including safety.
28. It is clear that the complainants continue to believe that their complaints have not been adequately considered by the council and that they were at fault in not pursuing these issues formally. The complainants appear to disagree with the council over the interpretation of the law and where the balance of probabilities lies in view of the evidence presented. The complainants have argued that changes to the use of the land over the period in question mean that the position on the enforcement could be challenged. In relation to the complaint under the Environmental Protection Act 1990, the complainants also told the Commissioner that they believe that the council was wrong in law to reject the complaints made by their customers because of their residential status. The complainants have also offered various counter-arguments to the council's assertion that they failed to participate adequately in the investigation relating to statutory nuisance and questioned the thoroughness of the enforcement investigation.
29. The complainants accept that there has been a lot of contact with the council, but they say that this reflects their frustration and desperation to resolve this matter and prevent their business from being destroyed by the council's inaction. The complainants say that they feel "no guilt" about the manner in which they have pursued these issues with the council, which they consider was necessary because of the council's "laid back approach" and the importance of the issues.

30. Turning now to the question of whether the requests were vexatious in the Commissioner's view. It is clearly a matter of public interest that public authorities are accountable and transparent about their actions. In this particular case, the complainants have expressed serious concerns about the use of an area of land near to their holiday park, the impact upon their business and the wider area, the council's investigation of these issues and the outcome. There is a significant public interest in understanding how the council makes decisions relating to planning enforcement and environmental protection.
31. It is fair in the Commissioner's view for the council to consider these requests in the context of the wider pattern of behaviour by the complainants. It is clearly part of an ongoing chain of correspondence and requests relating to the land use dispute which has been difficult to manage and which the Commissioner accepts has caused a significant burden. The Commissioner agrees with the council that at times, the complainants have taken a disproportionate and inappropriate approach. For example, they had to be reminded on multiple occasions to use a single point of contact address. The complainants have repeatedly contacted the council about individual instances of customer dissatisfaction, adding to their demands for compensation and making it clear that the contact will continue until "such time as the use of land is reversed". Being unwilling or unable to accept any view that differs from one's own, and pursuing multiple avenues of complaint, is often a characteristic seen in vexatious requests in the Commissioner's experience.
32. The Commissioner notes that the complainants have repeatedly criticised the individual officer who made the planning enforcement decision to various parties, at one point writing to the Chief Executive to suggest that she should resign and stating that they had included individual criticism of her in a letter to the Prime Minister. This is despite the fact that her decision had been upheld internally and the LGO had found no fault in the way in which that decision had been arrived at. They have accused the council or its staff of taking the easy way out, taking sides with the National Trust, having vested interests, and being rude, arrogant, disrespectful, disgraceful and incompetent. The Commissioner has noted the tendency of the complainants to unfairly characterise the actions of the council. For example, in a letter to the Chief Executive on 28 September 2014, the complainants state, inaccurately, that

"Cornwall council have taken no action or made no effort whatsoever to prevent our business from being destroyed, or to prevent any kind of fatal injury to members of the public".

33. Clearly, the dispute has a very personal dimension for the complainants because they say that their business is being severely affected, and are able to supply various letters from unhappy customers as evidence. An amount of frustration is understandable in the circumstances. However, on occasion, the complainants have adopted an inappropriate tone in the correspondence. In an email on 16 May 2014 copied to the National Trust, individual council officers, a councillor, the parish council and a building company using the site, the complainants said:

*"Our booking [sic] this year are already more than 30% down due to the disruption over the past two years, but who gives a s**t"*

34. In this case, the council has been able to demonstrate that it has engaged to a significant extent with the complainants, responding to the requests and many enquiries over this period of time. The council even considered additional evidence and arguments supplied by the complainants following the formal closure of the planning enforcement case. There were clearly some engagement, and legal, issues that prevented the success of the complaint for statutory nuisance. However, the complainants have refused to accept those outcomes, even after independent review by the LGO. The reality is that the parties have simply reached a different view and it may be the case that it is not possible to remedy this situation without private legal action, which the complainants have suggested they are pursuing. It seems unlikely that any amount of additional evidence that the council could supply would change the complainants' unwillingness to accept the outcomes presented.
35. Despite the above, considering whether a particular request is vexatious is a balancing exercise, which involves considering the serious purpose or value to the request itself and even where the supply of information would not necessarily lead to acceptance of an outcome, there may still be sufficient value in understanding more about how a decision was made depending on the circumstances of an individual case.
36. The council has acknowledged specifically that there is a public interest in accountability to support decisions taken by public authorities and to assist the public in understanding them. In this case, the council made a judgement that on this occasion, that serious purpose and value was outweighed by the wider context and history of the requests and the associated burden on its resources. However, when the Commissioner considered the details of this matter, he was not persuaded that the refusal had been correct in relation to all of the requested information.
37. The Commissioner has already noted in this decision notice the terms of a previous request made on behalf of the complainants by their solicitor on 10 July 2014. At point 2 of the request, the complainants asked the

council to tell them whether there is any other evidence in the possession of the council that the site had been used as a builders' transfer station for a continuous period in excess of ten years. The council's response to that request, which it did not refuse, was simply "Yes" with no other details provided. Following that, the two requests that form the subject of this complaint were made. The Commissioner raised this issue with the council, highlighting the lack of details provided by this previous response. He suggested that given that response, it seemed inevitable that a further request would be made to know what that evidence actually was and to ask for a copy of it, which is indeed what happened.

38. In response to the Commissioner's concerns, the council said that it wished to maintain that the requests were vexatious in view of the wider context. It said that it had not considered the requests in isolation. It supplied a copy of the additional evidence it has in its possession and which it referred to in its response to a previous request. This was a file note made following a telephone conversation that the planning enforcement officer had with a third party. It said that it was unclear whether or not this had been made available to the complainants on a previous occasion but the council said some reference had been made to the third party telephone conversation in correspondence sent by the complainants to the council on 7 November 2013. The Commissioner also notes that the council appears to have made some brief references to this contact in its correspondence to the complainants. It appears that there is a disagreement between the parties over what was reported.
39. The Commissioner's guidance on vexatious requests clearly points to the importance of considering the wider context and history of a request where appropriate, however, as described, the overall consideration of a request should involve a balancing exercise with due regard to the serious purpose or value of the particular request that has been made. This is not the same as considering the request in isolation. The Commissioner's judgement is that the council did not give due regard to this part of the balancing exercise when it made its decision to refuse the request for clarification of its earlier response about the evidence it had in its possession relating to this matter.
40. There are a number of factors in this case that lead the Commissioner to the conclusion that there is sufficient room to doubt that the request for clarification of the evidence the council had in its possession was vexatious. These factors include the clear uncertainty expressed by the complainants over the evidence being relied upon by the council in relation to the enforcement decision, the council's lack of clarity over what evidence it has made available to the complainants already, the apparent disagreement over the precise nature of the evidence relied

upon, and the council's non-specific acknowledgement in the complainants' previous request that it has more evidence. As pointed out, referring to having additional evidence, and then providing no further clarification, would inevitably invite a further request. The Commissioner was not persuaded that it was unreasonable for the complainants to pose a question about the nature of that evidence given the council's previous response. There is also a significant public interest in understanding how the council arrives at planning enforcement decisions as well as the general fundamental principles of accountability and transparency. Of course, it may be the case that the evidence the council actually relied upon is excepted under the EIR for another reason, however, the Commissioner considers that the complainants should have the opportunity to test the arguments relating to its disclosure should they so wish.

41. Clearly, the request on 22 July 2014 covers part of the same ground as the request on 11 August 2014. The Commissioner has already explained why he does not consider that this aspect of the request could be described fairly as vexatious. However, the request on 22 July 2014 goes on to describe within the first paragraph what evidence would be "acceptable" to the complainants, and two wide-ranging requests are made for receipts and a list of all builders' names and addresses who have made use of the land within the past ten years. The second paragraph of the request asks about soil sampling and risk assessments from the National Trust. The complainants state that the council "should" have this information.
42. The Commissioner's assessment is that the additional elements of the request on 22 July 2014 described in the paragraph above can fairly be characterised as vexatious in view of the background described by the council. The wide-ranging requests for receipts and builders' names and addresses in the first paragraph goes beyond a fair enquiry for clarification on what other evidence the council was referring to in its response to the previous information request. While the previous response provided by the council may have contributed to the speculative approach taken, making wide-ranging requests of this nature before giving the council the appropriate chance to clarify its position serves an insufficiently useful purpose and would contribute to the significant burden already imposed upon the council up until this point. Moreover, the council has already stated that it considers that the information it has relied upon was sufficient evidence, and further investigation is not necessary or proportionate in the circumstances. The council is entitled to make that judgement and there must come a point where ongoing correspondence should be brought to an end.
43. The requests about soil sampling and risk assessment in the second paragraph of the request on 22 July 2014 similarly do not appear to

serve a sufficiently useful purpose in the circumstances of this case and would again contribute to the already significant burden shouldered by the council in this matter. Indeed, these requests are even more tangential from the main issues at the heart of this dispute and seem part of the ongoing campaign to challenge repeatedly the council's position on the issues connected to this area of land.

44. The Commissioner's analysis above explains why he has formed the view that the public interest does not favour responding to these requests in their entirety. The Commissioner would add to this the general comments that the legislation gives individuals unprecedented rights to access information held by public authorities. It is important that those rights are exercised responsibly. It is not the intention of the legislation that individuals should be allowed to pursue grievances to an unreasonable extent or that valuable and limited resources should be spent on continuous, unproductive exchanges. In this case, the public interest is best served by protecting the council's resources and upholding the refusal to respond in part.
45. In view of the above, the Commissioner's decision is that regulation 12(4)(b) was correctly applied in part and the public interest favoured upholding the council's use of the exception in relation to this information. However, it is the Commissioner's view that the council should have responded to the request on 11 August 2014 and also the request for that same information covered by the earlier request on 22 July 2014. As the request on 11 August 2014 describes the information that the Commissioner does not consider was excepted, the Commissioner requires the council to respond to that request in the step associated with this decision notice. The Commissioner has found a breach of regulation 5(2) of the EIR because of the council's failure to respond appropriately in relation to this information.

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

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

Andrew White
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