

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 4 June 2019

Public Authority: Surrey Heath Borough Council

Address: Surrey Heath House
Knoll Road
Camberley
Surrey
GU15 3HD

Decision (including any steps ordered)

1. The complainant has requested information about the fencing off of a particular area of land. Surrey Heath Borough Council refused to comply with the request on the grounds that it was manifestly unreasonable within the meaning of regulation 12(4)(b) of the EIR.
2. The Commissioner's decision is that Surrey Heath Borough Council was entitled to refuse the request under regulation 12(4)(b) of the EIR and that the public interest favoured maintaining the exception.
3. The Commissioner does not require Surrey Heath Borough Council to take any steps.

Background

4. The complainant has been in dispute with Surrey Heath Borough Council for several decades about issues to do with the boundary between his land and neighbouring open land ('The Heath') which is owned by Surrey Heath Borough Council.
5. In 1971, or thereabouts, the complainant says Bagshot Rural District Council ('BRDC') fenced off The Heath, and that in doing so it mistakenly placed its fence over the proper boundary and onto his land, and onto that of other neighbouring properties. The complainant says that at the time, he reached an agreement with BRDC that the fence could remain where it was as long as it was recognised that it did not mark the true

boundary between his land and The Heath. Some years later, a stile was placed on the fence.

6. BRDC merged with another district council in 1974 to form Surrey Heath Borough Council ('the Council').
7. When the Council replaced the fence in the 1990s, the complainant says he asked it to position the new fence where he believed the true boundary to be. It appears that this was not done and since then the complainant has repeatedly challenged the decision not to reposition the fence.
8. The Commissioner has previously considered the complainant's requests for information on the matter in decision notice reference FS50695083¹.

Request and response

9. On 3 January 2019, referring to the fence, the complainant wrote to the Council and requested information in the following terms:

"Can you please confirm

(a) Land Registry [property reference redacted] was properly penned off.

(b) What year did your Park Ranger place stile on fence?

(c) What permission was given?

(d) On whose authority did he do so?"

10. The Council responded on 7 January 2019. It refused to deal with the request, on the grounds that it was vexatious and therefore manifestly unreasonable within the meaning of regulation 12(4)(b) of the EIR. It said the request was seeking to reopen matters on which it had previously responded and to which it had nothing further to add.
11. The complainant requested an internal review, which the Council completed on 31 January 2019. It upheld its decision with regard to the request, referring the complainant in particular to a similar request he had submitted to it in 2015, in respect of which it had explained it held no information.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2258453/fs50695083.pdf>

Scope of the case

12. The complainant contacted the Commissioner on 4 February 2019 to complain about the way his request for information had been handled. He said that he wanted the Council to respond to his request for information.
13. The analysis below considers whether the request was for environmental information and should therefore have been handled under the EIR, rather than under the Freedom of Information Act 2000 ('the FOIA'). The Commissioner has then considered whether the Council was entitled to rely on regulation 12(4)(b) of the EIR to refuse to deal with the request.

Reasons for decision

Is the information environmental information?

14. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR rather than the FOIA if it meets the definition set out in regulations 2(1)(a) to 2(1)(f) of the EIR.
15. The Commissioner considers the information in this case can be broadly classed as environmental information, as defined in regulation 2(1)(c) of the EIR. This says that any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors of the environment listed in regulation 2(1)(a) and 2(1)(b) will be environmental information. One of the elements listed under 2(1)(a) is land.
16. The request is for information relating to the fencing off of land. The Commissioner considers the request therefore relates to a measure as defined in regulation 2(1)(c) of the EIR which will or would be likely to affect the elements described in 2(1)(a), namely land.
17. The Commissioner is therefore satisfied that the request was for environmental information, and that the request fell to be dealt with under the EIR.

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

18. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose information where the request for information is manifestly unreasonable.
19. In considering the Council's conclusion that the request of 3 January 2019 was manifestly unreasonable, the Commissioner makes reference

to her guidance, 'Dealing with vexatious requests'². Although this guidance primarily refers to vexatious requests under the FOIA, in practice there is no material difference between a request that is vexatious under that regime and a request that is manifestly unreasonable on vexatious grounds under the EIR.

20. The term "vexatious" is not defined within the FOIA (or the EIR). The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). 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.
21. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
22. *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).
23. The Commissioner's guidance on dealing with vexatious requests 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. All the circumstances of the case will need to be considered in reaching a judgement as to whether or not a request is vexatious.
24. When considering whether a request is vexatious (or, under the EIR, whether it is manifestly unreasonable) 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

² <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

wider circumstances surrounding the request before making a decision as to whether section 14(1) applies”.

25. The Commissioner would also stress that the relevant consideration for public authorities is whether the request itself is vexatious, rather than the individual submitting it.
26. In some cases it will be obvious when a request is vexatious but in others it may not. The Commissioner’s guidance states: *“In cases where the issue is not 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”.*

The complainant’s position

27. The complainant impressed upon the Commissioner the importance of the Council providing an answer to his request. However, he did not offer any specific arguments to counter the Council’s argument that the request was manifestly unreasonable.

The Council’s position

28. The Council considers the request to be part of the complainant’s ongoing dispute with it about the location of the boundary between his land and The Heath, as well as other matters relating to the neighbouring land.
29. It told the Commissioner that it had been dealing with communications from the complainant for many years on broadly the same issues as that referred to in this request. It said that the decision to designate this request as manifestly unreasonable was not taken lightly, but that the complainant has repeatedly asked for information on matters that occurred over 40 years ago, in respect of which it had repeatedly told him it held no information. It said:

“I feel that we have exhausted all avenues and cannot produce information or offer opinion on things that either do not exist or we do not know anything about.”

30. The Council referred the Commissioner to a decision notice she had issued under reference FS50695083 in March 2018. The decision notice considered two requests to the Council, from the complainant.
31. On 22 July 2017, he asked:

“Can you please confirm that

- 1. There was no free access across [property name redacted]*
- 2. That the land was fully fenced 1971 – 1985*

3. That in 1985 your warden placed a stile on said fence

4. That those claiming free access were mistaken."

32. On 24 July 2017, he asked:

"I write to ask confirmation of the following and enclose SHBC letter 1990

1. The fence was put in place by Bagshot Rural District Council in 1971 on private land

2. That Surrey Heath Borough Council fully maintained it

3. That there was no free access to the park

4. That there was no free access to private property adjacent

5. The park warden place a stile about 1985 on the boundary fence."

33. The Council's position with regard to those requests was that it did not hold the information specified in either one and that it did not hold records going back to the 1970s and 1980s. The Commissioner's decision notice upheld the Council's position. The complainant did not appeal the Commissioner's decision to the First-tier Tribunal (Information Rights).

34. The Council said that, prior to that decision notice, the complainant had been told that the Council does not hold the requested information and that dealing with his persistent correspondence was taking up a disproportionate amount of time and resources, with staff being taken away from other work to accommodate him. It cited an instance where the same information was provided to the complainant three times, and advised that he had also been to view the information *in situ*, with the assistance of Council staff, but he continued to dispute that he had been provided with the information he asked for.

The Commissioner's conclusion

35. The Commissioner has firstly looked at whether the request in this case is for the same information dealt with under decision notice FS50695083. She determined in that case that the Council did not hold the requested information. If the request in this case is for essentially the same information, it would strongly suggest that the request was manifestly unreasonable.

36. She considers that part (a) of this request corresponds with parts (1) and (2) of the request of 22 July 2017, as the Council has explained to the Commissioner that the Land Registry reference number corresponds with the property identified in the request of 22 July 2017. That being

the case, the Commissioner refers back to her decision in FS50695083, that the Council does not hold this information.

37. With regards to points (b), (c) and (d) of the current request, the Commissioner considers that point (3) of the request of 22 July 2017 and point (5) of the request of 24 July 2017 are pertinent. Both asked the Council for confirmation that the stile was placed on the fence in 1985. The Commissioner's decision was that the Council did not hold that information. That being the case, it would be illogical to consider that the Council nevertheless holds information from which it could answer points (b), (c) and (d) of this current request.
38. In decision notice FS50695083, the Commissioner made the following observation, which she considers pertinent here:

"The Council has confirmed that the complainant has been notified in writing on numerous occasions that it does not hold any records going back to the 1990s, let alone concerning events in the 1970s and 1980s that are relevant to matters the complainant has referred to in his letters. The Council finally confirmed that no further information has been located since November 2015 when the complainant had made his previous request."
39. Taking all the above into account, the Commissioner considers that the complainant has requested information which he has previously been told the Council does not hold. This has been the subject of a decision notice, which the complainant had the opportunity to contest, but he did not do so. In light of this, and since the complainant's requests for information and other correspondence are placing significant demands on the Council's resources, the Commissioner considers that the request in this case was manifestly unreasonable.

Balance of the public interest

40. Regulation 12(4)(b) is subject to the public interest test. This means that the Council should nevertheless process the request unless the public interest in maintaining the exception at regulation 12(4)(b) is stronger.
41. The Council considered that the public interest in transparency would be served if it set its claim to regulation 12(4)(b) aside and processed the request. However, it felt that on balance, the public interest in avoiding further unjustifiable cost diversions was significantly stronger. It said that it had dealt with multiple requests from the complainant on substantially similar matters and they were taking up a disproportionate amount of time and resources.
42. In considering the balance of the public interest, the Commissioner recognises that the complainant appears to be motivated by a genuinely

held belief that the Council has acted improperly with regard to his land boundary with The Heath (although she makes no judgement as to whether that belief is correct). However, in the case of the stile, the complainant is asking for documentation about a minor maintenance matter that would be over thirty years old. The Commissioner has no difficulty accepting that the Council's information management protocols would have resulted in the destruction of such information many years ago. With regard to the older information about the original placement of the fence, the situation is further aggravated by the fact that it was undertaken by a separate entity, BRDC.

43. The Commissioner notes that if regulation 12(4)(b) was set aside, compliance with the request would ultimately result in the complainant being told, once again, that the Council does not hold the requested information and thus it would be a futile exercise which would cost public money to perform. She does not consider that it would be in the public interest for the Council's resources to be expended in this way.
44. The Commissioner also considers that processing the request in this case would effectively involve disregarding the decision she reached in FS50695083. She considers that this would not be in the public interest. A decision notice is a formal record of the Commissioner's finding under section 50 of the FOIA. Where a complainant disagrees with the Commissioner's decision, the proper course of action is to appeal it to the Information Tribunal. It is not an appropriate use of the EIR for a complainant to simply ask for the information again in the hope of a different outcome.
45. Taking all the above into account, the Commissioner considers that the public interest in maintaining the exception outweighs the public interest in complying with the request.
46. The Commissioner's decision is therefore that the Council was entitled to rely on regulation 12(4)(b) of the EIR to refuse the request.

Right of appeal

47. 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

48. 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.
49. 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

Samantha Bracegirdle
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