

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 October 2013

Public Authority: Steyning Parish Council
Address: The Steyning Centre
Fletchers Croft
Steyning
West Sussex
BN44 3XZ

Decision (including any steps ordered)

1. The complainant has requested information relating to a planning process that is taking place for a local skate park. Steyning Parish Council (the council) has refused to respond to the request relying on regulation 12(4)(b) of the EIR deeming it to be manifestly unreasonable.
2. The Commissioner's decision is that the council has breached regulation 14(5)(a) of the EIR in failing to advise the complainant of his right to make representation to the public authority under regulation 11 of the EIR in its refusal notice. He does not require any steps to be taken in this case, but the council should ensure there is no repetition of this breach. The Commissioner has then gone on to conclude that the council have correctly relied on regulation 12(4)(b) of the EIR.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 26 January 2013, the complainant wrote to the council and requested information in the following terms:

"You are fully aware of your ongoing legal duty to have regard to National Park statutory purposes in exercising or performing any functions in relation to, or so as to affect, land in an Area of Outstanding Natural Beauty or a National Park. You know that the legal duty applies to all decisions and activities that may affect land within an AONB or National Park and that activities undertaken outside AONB/National Park boundaries may affect land within them. You also know that this legal duty is ongoing and requires that this process should include consideration of all potential impacts on AONB/National Park purpose with the expectation that adverse impacts will be avoided or mitigated where possible. Finally, you also know that the performance of the legal duty should be documented. In the circumstances of this significantly increased impact on the National Park and on the view of the Area of Outstanding Natural Beauty from the Town as compared with the old plan where the bunding was much lower, and in the light of the fact that you know there is an alternative scheme for a skatepark in the Leisure Centre car park, please let me see the documented performance of your duty, or confirm that the duty has not been performed. Non-performance of your duty leaves the whole planning process open to judicial review."

5. The council responded on 6 February 2013. It refused to provide the information because it considered the request to be manifestly unreasonable under regulation 12(4)(b) of the EIR.

Scope of the case

6. The complainant contacted the Commissioner on 8 February 2013 to complain about the way his request for information had been handled.
7. The Commissioner contacted the council on 18 April 2013 to ask it to conduct an internal review.
8. The council advised the Commissioner that this would not serve any purpose as the council's response would not change, and therefore would rely on Regulation 11(2) of EIR for not having to provide an internal review. Regulation 11(1) states that:

"...an applicant may make representations to a public authority in relation to an applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request".

And Regulation 11(2) states:

"Representation under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement."

9. The complainant did not request an internal review in this case and is outside the 40 working days, and under normal circumstances this would conclude the case. However the council's refusal notice did not advise the complainant that he was entitled to request an internal review, which the council is required to do under regulation 14(5)(a) of the EIR. Its refusal notice only advised the complainant that he can complain to the Commissioner. This will be discussed further below.
10. The Commissioner considers the scope of the case is to determine whether the council have breached regulation 14(5)(a) of the EIR in not advising the complainant of his right to request an internal review and if this is the case, will go on to consider whether it is correct to rely on regulation 12(4)(b) to refuse to provide the requested information.

Reasons for decision

Regulation 14(5)(a) of the EIR

11. Regulation 14 states that:

"If a request for environmental information is refused by a public authority under regulation 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation"

Regulation 14(5)(a) states:

*"The refusal shall inform the applicant –
that he may make representations to the public authority under
regulation 11..."*

12. As the council's refusal notice did not advise the complainant of his right to request an internal review of its decision the Commissioner finds that the council have breached regulation 14(5)(a) of the EIR. With that the complainant would not be expected to know that he would have to request an internal review inside 40 working days of the refusal notice. So because of this breach of regulation 14(5)(a) by the council, the Commissioner is of the opinion that he is able to go on to investigate whether the council are able to rely on regulation 12(4)(b) of the EIR.

Regulation 12(4)(b) – Manifestly unreasonable

13. Regulation 12(4)(b) of 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;"

14. The Commissioner recognises that, on occasion, there is 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.
15. The term 'vexatious' is not defined in the legislation. In *Information Commissioner vs Devon County Council & Dransfield*¹ the Upper Tribunal took the view that the ordinary dictionary definition of the word vexatious is only of limited use, because the question of whether a request is vexatious ultimately depends upon the circumstances surrounding that request. The Tribunal concluded that 'vexatious' could be defined as *"...manifestly unjustified, inappropriate or improper use of a formal procedure"* (paragraph 27). The decision clearly establishes that the concepts of 'proportionality' and 'justification' are central to any consideration of whether a request is vexatious.
16. In the Dransfield case, the Upper tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues: (1) the burden imposed by the request (on the public 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. The Upper Tribunal did, however, also caution that these considerations were not meant to be exhaustive. Rather, it stressed 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 previous course of dealings, the lack of proportionality that typically characterise vexatious requests"* (paragraph 45).

¹ UKUT 440 (AAC) (28 January 2013)

17. The Commissioner has therefore considered whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress in relation to the serious purpose and value of the request.
18. The council advised that the correspondence started in May 2012 when the council put forward a planning application to build a skateboard facility in a memorial playing field.

As part of the council's consultation process a public meeting was held in January 2012, attended by over 450 residents. The Commissioner notes that there is a dispute between the complainant and the council in the percentage of votes in favour, and against the skate park.

19. The council state that complying with this request will result in an unreasonable level of disruption, burden and distress on the council.
20. The council has advised the Commissioner that the complainant has overwhelmed it with emails, correspondence, requests, questions, comments and statements which it believes has been designed to deter or stop the council from progressing the skate park. The council have provided the Commissioner with a log that it has kept, demonstrating the level of contact it has received from the complainant from 25 May 2012 to 19 July 2013. The council has recorded 133 dates of contact from the complainant in this time. The Commissioner considers that up until the request was refused by the council, it had received 89 items of correspondence in 8 months, which averages out to approximately 11 items of correspondence a month.
21. The council argue that this request along with the numerous other pieces of correspondence from the complainant has formed a pattern of behaviour designed to overburden the council. The council claim that dealing with all the previous correspondence has caused a disproportionate and unjustified level of disruption and distress on council staff and that it has caused considerable impact on staff and the council in carrying out its other everyday functions and administrative duties.
22. The council advised the Commissioner that since January 2013 it has begun to keep a log of hours taken to deal with the complainant's correspondence. It has advised in January alone, over 20 hours has been spent dealing with the complainant's emails, and to date (July 2013) that total is now over 75 hours. The council has advised that it estimates from May 2012 to December 2012, the time taken to deal with the correspondence from the complainant would have been on the same level as that recorded in January. The council supplied the Commissioner with a copy of this log along with a selection of emails

from the complainant spanning the time line indicated. This does seem to support the council's record of the amount of correspondence it has received. The council state that they have responded to many of the complainant's previous requests but now considers that the complainant will continue to submit further requests for information no matter what answers are supplied.

23. The Commissioner recognises that the council is a small parish council that has two paid staff members, consisting of the clerk and the deputy clerk employed for 37 hours per week each. However, half of the deputy clerk's contracted hours are required to be used solely for the running of the community centre. The level of correspondence received from the complainant between May 2012 and February 2013, albeit that not all were information requests, does seem to be excessive, given the size of the council, and the Commissioner considers that this would have placed a burden on the council's resources to carry out its other duties.
24. The council also state that although the complainant has not used profane or threatening language in any correspondence, there have been repeated allegations of negligence, cover ups, and fraudulent activities by the council. The council advised this has created annoyance and distraction, particularly over the length of time in which this correspondence and questioning has been going on for. The council have supplied the Commissioner with a selection of email correspondence and outlined comments made by the complainant that accuses the council of negligence, cover ups, and fraudulent activities. The following is a few of these statements:

"It is still a very important question as it relates to the apparent unlawful breach of statutory duty by the Parish Council."

"In any event this correspondence arises not because I have suddenly decided I like writing to the Parish Council; it arises only because the Parish Council has deceived, dissembled and repeatedly broken the law in pursuit of its aims."

"I do not believe that you can possibly be so stupid, either individually or collectively, as you pretend to be when you repeatedly fail to follow an argument and confuse one point with another."

25. The council state the complainant is also, in much of its correspondence to it, making reference to the council being open to a judicial review and making mention to the cost it would incur in a judicial review. The council argue that this is the complainant trying to cause distress to the council to make it overturn its decision in the building of the skate park.

26. The council has supplied the Commissioner with an email from its solicitors advising that the administrative court has refused permission for both of the complainant's requests for judicial reviews. It is also noted that the complainant has appealed this decision, so this is still on-going at present.
27. The council has advised the Commissioner that the request has no real value or purpose for the reasons that most of the information requested was already in the public domain on the planning authorities' website, council website, or had been previously provided either to the complainant or other members
28. The complainant has advised that this request is for new information based around the council's newly revised plan for the skate park.
29. It is apparent to the Commissioner that there is an on-going process to the planned construction of a skate park and its location. If as the complainant says, it is illegal for the council to build the park on the area then the complainant would be able to direct this to the appropriate body, such as the planning authority, who the Commissioner considers would be able to make the necessary conclusions as to whether the complainant's statements are correct or not and act accordingly.
30. The Commissioner has to consider the council's responsibilities to its other public duties and not just to responding to requests for information. Considering the volume of correspondence received by the council from the complainant on this matter over a period of 8 months, and comparing that with the size of the council and its ability to respond to all these requests. The Commissioner does consider that this is placing a burden on the council's resources to carry out its daily duties.
31. The Commissioner has also taken in to account that there is an on-going issue with where the skate park should be built. This is not something the Commissioner is able to determine and there are other authorities that deal with green belt and building issues that the complainant can address these concerns with.
32. The complainant has provided the Commissioner with a schedule outlining illegal, unlawful, deceptive and inappropriate conduct by the council. The Commissioner has reviewed this correspondence, and is of the opinion that if the council is doing anything unlawful, deceptive, or inappropriate that this should again be addressed through the appropriate channels such as the planning authority, or as the complainant is doing, through a judicial review. It would be outside the Commissioner's powers under the EIR to make findings on these accusations.

33. The council has stated that the planning authority has undertaken consultation with a variety of agencies because of the complainant's correspondence to the planning authority, which has in turn advised the council that amendments are needed to the plans for the skate park and that these amendments will have to go to committee for approval. This demonstrates to the Commissioner that there are avenues for complainant to go down other than the council to oppose the skate park plans.
34. The Commissioner recognises that the complainant may have legitimate reasons for the requests and correspondence, in that the skate park is still in the planning process. However the Commissioner needs to balance this against the volume of correspondence that the council has been receiving from the complainant coupled with the accusatory statements. He is therefore satisfied that this is placing an unjustified level of burden on the council in terms of time and distress. The fact that the council consists of only two employees, dealing with this volume of correspondence is going to have a negative knock on effect in its ability to conduct its other council duties. The Commissioner has to take into account the council's ability to be able to deal with a high level of correspondence over a sustained period of time, and in that has to recognise that this is a parish council and not a large city council that would have greater resources to deal with large volumes of requests, and therefore considers the amount of correspondence to be disproportionate in this case. Also, there are other bodies, such as the planning authority that the complainant can go to in order to object or submit to, in considering the above the Commissioner finds that the council are correct to rely on regulation 12(4)(b) of the EIR to refuse to respond to the request.

The public interest test

35. Regulation 12(4)(b) is a qualified exemption and is therefore subject to the public interest test at regulation 12(1)(b) which states that information can only be withheld if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

36. The council have stated it recognises that disclosure of environmental information helps to promote transparency in public authorities' decision making.
37. The complainant has stated his reasons for obtaining the information are that the information requested relates to an on-going planning application. Prior correspondence is in relation to persuading the council

to take into account national and planning guidance and policies as well as its own statutory duties. This request relates to the council's amended plan submitted to planners on the 11 January 2013 and so this request relates to a change in the plans.

38. The complainant has also advised he is acting on behalf of the council and lawfully lobbying against the council's plans for a skate park. He is also of the opinion that the council have made false claims in relation to the planning process.

Public interest in maintaining the exemption

39. The council states that this level of correspondence is diverting the clerk and deputy clerk away from their normal duties, which is having a detrimental impact on them ensuring proper administration of the council and with this it is in the public's interest that the council is able to conduct its other daily functions.
40. The council have advised that there are other authorities such as the planning authority that the complainant is able to go to if he wants to object to any plans for the skate park and this helps to satisfy that the public interest is carried out correctly and lawfully. The council has stated that because the complainant has previously approached other bodies in relation to the council's planning application that the council had to make changes to its plans for the skate park. The council have also stated that it has delayed its planning application to allow the complainant and the council to put forward a proposal for an alternative site for the skate park. The council see this as demonstrating the public interest is being met by allowing for alternative options for consideration.

Conclusion

41. The Commissioner accepts that there is a strong interest in disclosure of environmental information in general as it promotes transparency and accountability for the decisions taken by public authorities relating to environmental matters and public expenditure.
42. The Commissioner recognises the complainant's reasons for making the requests as being legitimate, in terms of ensuring the council are conducting the correct processes and that it is transparent and open about how it makes its decisions in relation to the skate park plans. He has also taken into account the other avenues available to the complainant with regards to any concerns or objections to the planning process, such as the planning authority. In cases where existing mechanisms for scrutiny or regulation have actually been utilised or exercised and/or where a report providing the conclusions of that other

mechanism for scrutiny or regulation is publicly available, then the Commissioner may accept, depending on the circumstances of the case, that to some extent this goes to reduce or satisfy the public interest in disclosure.

43. However, there will always be some public interest in disclosure of new information in order to provide as full a picture as possible and therefore the fact that another regulatory mechanism has been used will never fully satisfy the public interest in transparency, openness and encouraging public debate.
44. The Commissioner has to also consider any burden placed on the council to deal with the amount of correspondence from the complainant. He is of the opinion that the level of correspondence has placed a disproportionate burden on the council and considering that this is a parish council, he has to recognise it has fewer resources than a larger council to deal with high levels of correspondence. The Commissioner is also of the opinion that it is not the intention of the act to be designed to overburden a council in as much that it has a detrimental effect on its other public functions.
45. In balancing the public interest test the Commissioner is of the opinion that the public interest to disclose would need to be substantial enough to justify the severe impact placed on the council responding to such a volume of correspondence over 8 months.
46. So in balance of the above the Commissioner has concluded that the public interest in maintaining the exception outweighs the public interest in disclosure of the information for this request as he considers the burden being placed on the council by the volume of correspondence received from the complainant outweighs the public interest in disclosure of information for this request. Therefore regulation 12(4)(b) is still engaged.