

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 27 February 2018

**Public Authority:** Babergh District Council

**Address:** Council Offices  
Corks Lane  
Hadleigh  
Ipswich  
IP7 6SJ

#### **Decision (including any steps ordered)**

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1. The complainant has requested information about the analysis and subsequent conclusions relating to land supply for development. Babergh District Council ("the Council") refused to comply with the requests as it considered them manifestly unreasonable on vexatious grounds under regulation 12(4)(b) of the Environmental Information Regulations ("the EIR").
2. The Commissioner's decision is that the Council has correctly applied regulation 12(4)(b).
3. The Commissioner does not require the public authority to take any steps.

## **Request and response**

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4. Between 26 June and 13 July 2017, the complainant submitted 9 information requests. These are recorded in Annex A.
5. The Council responded on 21 July 2017. It refused to comply with the requests under regulation 12(4)(b).
6. On 23 July 2017, the complainant asked the Council to undertake an internal review.
7. Following an internal review the Council wrote to the complainant on 21 August 2017. It maintained its original position.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 23 August 2017 to complain about the way his requests for information had been handled, and specifically that the Council was incorrect to apply regulation 12(4)(b).
9. The Commissioner considers the scope of the case to be the determination of whether the Council has correctly applied regulation 12(4)(b).

## **Reasons for decision**

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### **Is the information environmental?**

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

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

11. Regulation 12(4)(b) states that:

*For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that-*

*(b) the request for information is manifestly unreasonable;*

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

### The complainant's position

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

15. The complainant has informed the Commissioner that the requests relate to public concerns (of the East Bergholt Parish Council, and other interested village entities) about the Council's Five Year Land Supply Statement ("the Statement"), and in particular, the data from which the Council's has concluded that the land supply for development has fallen into deficit.
16. The complainant believes that the Council's conclusion is based on incorrect data, and has referred to there being significant changes applied to the data between the interim and final Annual Monitoring Report that was published in April and June 2017 respectively. The complainant believes that the Council's conclusions from this incorrect data will have a significant impact on the handling of planning applications for East Bergholt.

#### The Council's position

17. The Council has informed the Commissioner that it has previously complied with 19 information requests deriving from the complainant that relate to the Statement. The Council considers that each time a response has been issued, this has then generated further requests. Compliance with these requests has consumed up to 70% of the most involved officer's time, and has impacted on the wider operation of the Strategic Planning team.
18. The Council believes that it has published all necessary information in relation to the Statement. However, in order to provide resolution to the complainant's concerns, relevant officers offered (on 23 June 2017) to arrange a meeting with him to discuss his concerns. However, the complainant declined this request and has continued to submit information requests. The Council now understands that an application for leave to appeal has now been submitted to the High Court, and that one of the grounds for challenge is the data that the complainant holds concerns about.
19. The Council has informed the Commissioner that it has considered the importance of transparency and public involvement in the Statement, but considers there to be a greater public interest in maintaining the exception, as compliance with the requests would divert a significant amount of resources and impact upon the Council's daily operation. Additionally, the Council notes that some of the requests seek recorded information that has already been published or otherwise disclosed to the complainant, and that others seek information that would need to be created (such as analysis and opinion).

#### The Commissioner's analysis

20. Firstly, the Commissioner would like to highlight that there are many different reasons why a request may be vexatious, as reflected in the Commissioner's guidance. There are no prescriptive 'rules', although there are generally typical characteristics and circumstances that assist in making a judgement about whether a request is vexatious. A request does not necessarily have to be about the same issue as previous correspondence to be classed as vexatious, but equally, the request may be connected to others by a broad or narrow theme that relates them. A commonly identified feature of vexatious requests is that they can emanate from some sense of grievance or alleged wrong-doing on the part of the authority.
21. The Commissioner's guidance has emphasised that proportionality is the key consideration for a public authority when deciding whether to refuse a request as vexatious. The public authority must essentially consider whether the value of a request outweighs the impact that the request would have on the public authority's resources in responding to it. Aspects that can be considered in relation to this include the purpose and value of the information requested, and the burden upon the public authority's resources.

*The purpose and value of the requests*

22. In the circumstances of this case, the Commissioner recognises that a significant number of residents across the district may be affected by the Council's conclusions about land supply. Consequently, there is a clear public interest that must be considered when requests for related information are submitted to the Council.
23. However, the Commissioner is aware that the Council maintains it has acted correctly, and that it has sought to engage with the complainant to address his concerns. The Commissioner also understands that any formal dispute about the Statement would need to be submitted to the relevant authorities for consideration, and in relation to this an application for leave to appeal has been submitted by relevant parties to the High Court. The Commissioner also understands, from the complainant's own correspondence with the Council, that the complainant may hold the right to appeal the Council's Annual Monitoring Report to the Secretary of State.

*The burden upon the Council*

24. The Commissioner understands that a substantial number of requests were submitted by the complainant between April and July 2017. The Council has created a record detailing the chronology of these requests as part of its internal review outcome. From this record, the

Commissioner understands that 14 requests (dating from 26 April 2017 to 22 May 2017), have been previously responded to, and that a further 9 requests (dating from 26 June 2017 to 13 July 2017) have been received but refused under regulation 12(4)(b).

25. The Commissioner has reviewed the 9 refused requests, and notes that whilst some of these requests also contain general correspondence, there are also a large number of individual requests for recorded information. When considered as a whole, the Commissioner recognises that compliance with these requests would be likely to divert significant public resources, and impact upon the Council's ability to manage other information requests.

*The public interest test*

26. Regulation 12(1)(b) provides that:

*...a public authority may refuse to disclose environmental information requested if-*

*(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*

27. The Commissioner recognizes that the requests relate to concerns held by the complainant, and possibly by local groups or entities within East Bergholt, about the validity of the conclusions reached by the Council about land supply for development. These conclusions may have considerable implications for any decisions that the Council may make, such as those relating to planning applications.
28. However, and notwithstanding the complainant's position, there is no clear evidence available to the Commissioner that indicates that the Council has acted incorrectly. It is also understood that there are appropriate mechanisms by which the Council's Statement and the conclusions provided in the Annual Monitoring Report can be formally challenged should a party wish to do this.

*Conclusion*

29. Having considered these factors, the Commissioner has concluded that regulation 12(4)(b) has been correctly engaged and that the outcome of the public interest test indicates the exception should be maintained.

## Right of appeal

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30. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

31. 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.
32. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

## Annex A

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### 33. Request made on 26 June 2017:

*In respect of the 5 Year HLS data contained in this report it seems that a significant proportion of the 'Land Supply' rests with eight sites that can be described as allocated or strategic. These are all contained in the "Babergh Housing Land Supply Trajectory Table", and it's disappointing that explanations are not provided as to why more dwellings are not being provided earlier in the delivery cycle., especially as this 'drag' is principally responsible for the short term land supply metric.*

*These 3,100 (now increased to 3,200) dwellings represent a major part of BDC's Core Strategy, and I regard the lack of a more detailed explanation as a major oversight. In order to achieve greater transparency I would appreciate receiving detailed explanations on each of the eight sites in question, which I have summarised on the attachment. I trust you will be able to correct this data deficiency expeditiously, rather than kicking this request into the FOI 'long grass'. I would appreciate learning when I may expect to receive this data.*

### 34. Request made on 26 June 2017:

*Thanks for your response. I reserve the right to make my own judgement of BDC's management of assessments that may have a profound impact on my personal circumstances and that of the good people of East Bergholt. That data has been manipulated and resultant facts misrepresented cannot be in question, for reasons that I have articulated in earlier correspondence. You will be aware of the DCLG guidance in this area which says;*

*"Local planning authorities should ensure that they carry out their annual assessment in a robust and timely fashion, based on up to date and sound evidence, taking into account the anticipated trajectory of housing delivery, and consideration of associated risks, and an assessment of the local delivery record. Such assessment, including the evidence used, should be realistic and made publicly available in an accessible format." This guidance has implications both for the conclusions in the 'Interim Report' and the output of the 2017 AMR with lack of transparency of "evidence used" as described. This failings may have significant implications, and I would ask you to consider again your refusal to provide such information which is clearly essential to fully analyze the data. The FOI process provides no certainty of data being provided expeditiously. It could be a meeting would be beneficial, but I would not entertain such without first receiving requested data. For the the record I have made no judgement of*



*individual's behaviour in respect of their discharge of duties. I look forward to an early response.*

35. Request made on 3 July 2017:

*Babergh District Council's 2017 Annual Monitoring Report fails to provide any information on the progress of the Core Strategy's urban development sites, which are critical to achieving the Core Strategy (CS 2.4) Plan for growth, which was centred on delivering 5,975 new homes by 2031, including 60% urban housing. This urban focus placed great stress on delivering the following strategic developments, all due to be complete within the Core Strategy plan period. The AMR's trajectory analysis indicates that all housing developments will be delivered within the 2031 timeframe, albeit the number of units now due in Phase 3 has risen to 2,113, an increase of 535 units over the 2015 AMR forecast. Please confirm delivery of 5,975 completions remains BDC's plan and intention, and provide updates on the following key sites, including progress on preparing/approving/implementing promised Masterplans for each.*

*1. CS4 – Chilton Woods mixed use site, including 1,050 dwellings and employment land, for which a Masterplan would define the 131 hectare site.*

*2. CS5 – Sudbury Great Cornard mixed use site to be utilised for employment purposes and approximately 500 homes. The amount of employment land to be determined by reference to the employment trajectory and land availability.*

*3. CS6 – Land East of Hadleigh with 5.5 hectares for employment and 250 homes, with early delivery guided by a Masterplan.*

*4. CS7 – Babergh Ipswich Fringe with new employment development and 350 homes, details aided by a Masterplan.*

*NB DCLG guidance says, "Local planning authorities will need to provide robust, up to date evidence to support the deliverability of sites, ensuring that their judgements on deliverability are clearly and transparently set out".*

*Please also provide copies of related papers or communications on this matter.*

36. Request made on 3 July 2017:

*Babergh District Council's 2017 Annual Monitoring Report fails to provide any information on its strategy for providing accommodation for older people. Please provide a copy of any related policy documents and provide the following additional information:*

*1. The number of homes provided in the plan period for older people by year, including residential institutions.*

*2. The number of homes for older people that should be included in the AMR's 5 Year Housing Land Supply figure,*

*and the figure that should be included in the housing completions data for the plan period to date.*

*Please also provide copies of related papers or communications on this matter.*

37. Request made on 3 July 2017:

*Babergh District Council's 2017 Annual Monitoring Report fails to provide information on its strategy to comply with NPPF recommendation to bring empty housing back into use. Please provide a copy of all related policy documents and provide the following additional information:*

*1. The number of empty homes brought back into use in the Core Strategy plan period to date, analysed by year since 2011.*

*2. The number of remaining empty homes at the end of each of the six years of the plan period to date.*

*3. The same data as 2., split between public and private ownership.*

*Please also provide copies of any related papers or communications on this matter.*

38. Request made on 3 July 2017:

*Babergh District Council's 2017 Annual Monitoring Report fails to provide adequate transparency of data within its 5 Year Housing Land Supply assessment, and I would like to request the following information:*

*1. Schedules showing detail of all line item sites/housing units shown in the 'Summary Breakdown of Land Supply'*

*2. Rationale for continuing to use 82 dwellings as the appropriate rate for 'windfall' trajectory outside the 5 year period, when this figure has been exceeded every year to date in the Plan period.*

*i. NB DCLG guidance suggests, "The main information to record (in respect of windfall) is, "Whether the windfall allowance (where justified) is coming forward as expected, or may need to change."*

*ii. NPPF Para 48 says, "LPA's may make an allowance for windfall sites in the 5 year supply if they have compelling evidence that such sites have consistently become available in the local area and will continue to provide a reliable source of supply Any allowance should be realistic having regard to the SHLAA, historic windfall delivery rates and expected future trends.."*

*3. Provide a schedule for all 480 homes described in the 'Summary Breakdown of Land Supply', please advise why the attached "Trajectory Table", only shows 480 units in the "Phase 1 dwellings (20172022)" column, but makes no assumption for windfall in this 5 year period.*

*4. Provide rationale for not including advanced planning applications in the land supply data 'Application' section. All sites that satisfy the, "Suitability, Availability, Achievability and Economically Viable" criteria should by virtue of NPPF definition, be included in land supply data, and applications covering 674 dwellings are in advanced stages, indeed soon to be considered by BDC. NB Previous BDC AMR's have included applications that satisfy this criterion. Please also provide copies of related papers or communications on this matter.*

39. Request made on 3 July 2017:

*Babergh District Council's 2017 Annual Monitoring Report fails to provide adequate transparency of data within its 5 Year Housing Land Supply assessment, and I would like to request the following information:*

*1. For the 'Housing Trajectory' data; a significant and growing increase of dwellings forecast to be complete in Phase 3, suggests erosion in BDC's confidence in its Core Strategy Housing Plan.*

*i. In order to examine this more closely please provide the trajectory data for each of the remaining 14 years of the Plan.*

*ii. Provide rationale for a 738 Phase 3 windfall figure for each of the last four AMR reports, especially when the Phase 3 period in the 2017 AMR only covers a 4 year period.*

*2. DCLG guidance is for annual assessments to be carried out,.."in a robust and timely fashion, based on up to date and sound evidence, taking into account the anticipated trajectory of housing delivery, and consideration of associated risks, and an assessment of the local delivery record." With an apparent deteriorating supply trajectory it is wholly reasonable for BDC to adjust the forward annual targets, placing greater emphasis on Phase 2 and Phase 3 housing completions, in line with the trajectory.*

*i. Please advise what corrected targets would be appropriate for the remaining 14 year period of the plan, also including correction of windfall assessments.*

*ii. As a result of this and corrections to the housing land supply data please provide a revised 5 Year Housing Land Supply assessment.*

*NB To continue with a flat 325 target, born of the Core Strategy assumption is wholly unrealistic, and misrepresents the true short term land supply figure. This is further supported by BDC's land supply data suggesting sufficient land is available to achieve the Core Strategy requirement of 5,975 dwelling completions through to 2031.*

*Please also provide copies of related papers or communications on this matter.*

40. Request made on 3 July 2017:

*The 2017 AMR provides no assessment of BDC's Core Strategy affordable homes housing plan as required by NPPF Para 47. "To update annually a supply of specific deliverable sites sufficient to provide 5 years worth of housing against their housing requirements", and "for market and affordable housing, illustrate the expected rate of housing delivery through a housing trajectory for the plan period..." Please provide an update of BDC's affordable homes strategy and a schedule showing the completions record to date and forward trajectory, including the 5 Year housing land supply data for 2017/22. Please also provide copies of related papers or communications on this matter.*

41. Request made on 13 July 2017:

*Babergh District Council's 2017 Annual Monitoring Report has a number of significant deficiencies, about which I have written to the CEO and other Officers. Amongst these are concerns with the accuracy of the 5 Year Housing Land Supply data assumptions and resultant calculations. Notable amongst which is the dwellings completion deficiency in the SHMA 5 Year HLS table, quoted as -510. This is at significant variance with the figure quoted in the Core Strategy calculation quoted as -101, because of differences in baseline data. Examination of the 'Key Assumptions' shows the SHMA calculation utilizes inflated historical annual targets of 355 as opposed to the CS Housing Targets of 220/325, thus misrepresenting the completions delivery performance.*

*Quite apart from questions of concern with the 355 calculation, the AMR is required to represent a realistic perspective of key matters within the remit of a Local Authority, and I ask the Council how it's constituents can be asked to take seriously data that 'reverse engineers' performance metrics in what appears to be a deliberate attempt to misrepresent a key strategic measurement."*