

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 October 2013

Public Authority: Essex County Council

Address: County Hall
Market Road
Chelmsford
Essex
CM1 1QH

Decision (including any steps ordered)

1. The complainant has requested information from Essex County Council ("the council") about chilli powder that was found to be contaminated with the illegal food colour 'Sudan 1'. The council refused the complainant's request citing section 14(1) of the Freedom of Information Act 2000 ("the FOIA"). This exclusion relates to vexatious requests.
2. The Commissioner's decision is that the council has correctly refused the request as vexatious. However, the Commissioner identified that the refusal should have relied upon regulation 12(4)(b) of the Environmental Information Regulations ("the EIR"), which provides an exception for manifestly unreasonable requests.
3. He requires no steps to be taken by the council.

Request and response

4. The complainant submitted a request for information on the 28 February 2013 for:

"The "SPECIFICATIONS" of 5 ton chilli powder batch 3039/02 which according to you (trading standards) & as informed to me in May 2011 was supplied by [name of company] via [name of company] to [name of company] who used it in the manufacture of the [name of product]."
5. The council responded on 20 March 2013. It stated that it considered the request to be vexatious and was therefore refusing it.
6. The complainant reiterated his request on 25 March 2013.
7. The council responded on 25 March 2013 and confirmed that it was continuing to refuse his request.

Scope of the case

8. The complainant initially wrote to the Commissioner on 28 November 2012 to contest the authenticity of documents held by the council's Trading Standards office as part of investigations it had undertaken. The complainant then made a request to the council for information, which was subsequently refused as vexatious under section 14(1) of the FOIA. The complainant then asked the Commissioner to consider whether the council had correctly refused his request.
9. On receiving the complaint, the Commissioner identified that the requested information should be considered under the EIR, rather than the FOIA. The council subsequently confirmed that it would rely on the exception provided for manifestly unreasonable requests by regulation 12(4)(b) of the EIR.

Background

10. In 2005, the finding of the illegal food colour 'Sudan 1' within food products led to a large scale recall by the Food Standards Agency ("the FSA") of contaminated raw materials and finished products in the UK. The FSA's investigation led it to believe that the contamination was introduced into the food chain through imported chilli powder. A subsequent investigation was undertaken by the council's Trading Standards office into a food business that fell within its jurisdiction. The complainant has repeatedly sought information about the contaminated

chilli powder that formed the basis of the council's investigation and prosecution of this business, and has corresponded at length with the council about this point.

Reasons for decision

Is the information environmental?

11. 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 FOIA. Under regulation 2(1)(f), any information on the state of human health and safety, including that pertaining to contamination of the food chain, will be environmental information. The Commissioner therefore considers that the request should be dealt with under the EIR.

Regulation 12(4)(b) – requests that are manifestly unreasonable.

12. Regulation 12(4)(b) of the 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..."

13. The Commissioner recognises that, on occasion, there is no material difference between a request that is manifestly unreasonable on vexatious grounds under regulation 12(4)(b) of the EIR and a request that is vexatious under section 14(1) of the FOIA. The Commissioner has therefore considered the extent to which the request could be considered as vexatious.
14. The Commissioner's guidance on requests that are manifestly unreasonable on vexatious grounds under the EIR are available here:
http://www.ico.org.uk/for_organisations/environmental_information/guide/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/manifestly-unreasonable-requests.ashx
15. The Commissioner's guidance on requests that are vexatious under the FOIA can be accessed here:
http://www.ico.org.uk/news/blog/2013/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/dealing-with-vexatious-requests.ashx

16. 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.
17. 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 withholding the information outweighs the public interest in disclosure.

The interaction between the parties

18. In this particular case the complainant started to communicate with the council on the 31 August 2009, when he made a request for information relating to the council's prosecution of a specified food business. The council responded and provided a public press release, and advised that it held further information that was exempt from disclosure under section 30 of the FOIA. The complainant made a further request on 21 September 2009 for specific information about the origin and quantity of the chilli powder that was the basis of the council's and the FSA's investigations. The council issued a refusal claiming exemption under sections 30 and 43 of the FOIA. This was subsequently maintained at an internal review requested by the complainant, although the council did release some related documents that had become publically available as part of court proceedings.
19. The complainant returned to the issue on 23 November 2010 by submitting a fresh request for information about the origin and tracking of the chilli powder, to which the council issued a further refusal citing sections 30 and 43 of the FOIA. The complainant requested an internal review, which the council offered to undertake by way of a meeting to explain the council's response, and to address wider concerns that the complainant had. This meeting was undertaken on 11 March 2011, and

the council summarised its content in a letter sent to the complainant on 13 May 2011.

20. Following this meeting and its outcome, the complainant then continued to sporadically write to the council from June 2011 to October 2012 in order to contest the information that the council held, and allege misconduct on the part of different public authorities. The council corresponded with the complainant on these points, and offered to undertake an independent review to address his concerns. This independent review was provided to the complainant on 11 September 2012, and addressed the concerns and allegations that the complainant had expressed, in addition to confirming that the council's responses to his information requests were correct.
21. The complainant wrote further to the council in which he continued to make allegations of misconduct. The Chief Executive of the council wrote to the complainant on 26 October 2012, in which she reviewed the council's previous responses to his correspondence and information requests. The Chief Executive stated that the council had provided all information that it was able to in response to the complainant's requests, and advised the complainant that any further requests for information on this issue would be considered vexatious.
22. The complainant submitted a further request to the council on 28 February 2013, in which he requested the specifications of the chilli powder batch that the council had investigated. The council then advised the complainant that it considered the request to be vexatious.

The complainant's position

23. The Commissioner has been made aware during his investigation of this complaint that the complainant has a strong personal interest in the information that he has requested, and in the wider issue that the information relates to, due to the potential implication of his own business. The complainant's concern is clearly evidenced in his correspondence, in which he alleges that the information held by the council is incorrect.
24. The complainant was asked by the Information Commissioners Office ("the ICO") to confirm the grounds of his complaint against the council, and to provide any information to support his position that the request was not vexatious. The complainant advised the ICO that he believed he was the subject of "*fake investigations*", and that this was the basis of his requests for information.

The council's position

25. The council, in their submission to the Commissioner, has outlined the basis of the investigations that were undertaken by itself and the FSA, as well as some of the wider implications for food ingredient and food manufacturing businesses that resulted from the 2005 recall. Included within these wider implications was the prosecution of a business that was believed to be a customer of the complainant's own business. It is this connection that the complainant is contesting, and which forms the basis of his requests and correspondence with the council.
26. The council has explained to the Commissioner that throughout the history of the complainant's requests and correspondence, it has continually reassessed the information that it was able to disclose into the public domain, and has sought the advice of investigating officers in order to ensure that its responses were accurate.
27. The council explained that it engaged with the requests and wider correspondence from the complainant up until 2012, when it determined that the complainant was pursuing substantially the same information that he had requested before, and was failing to take account of the council's responses.
28. The council has advised the Commissioner that continuing to further engage with the Complainant on this issue would require its officers to be further diverted from their core duties. The council has detailed how the issues that the complainant is concerned about have been revisited with each request and item of correspondence in order to provide clear and consistent responses to the complainant, and that the council arranged a meeting between the head of Trading Standards and the complainant in order to address his concerns. The council has further stressed that the value of the refused request is inherently limited, because it is asking the council to provide information that the council has already advised the complainant cannot be publically disclosed.

The Commissioner's assessment

29. Firstly, the Commissioner would like to highlight that there are many different reasons why a request may be manifestly unreasonable on vexatious grounds, 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.

30. 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 providing 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 request

31. Having reviewed the correspondence between the complainant and the council, the Commissioner has identified that four information requests were submitted to the council between 31 August 2009 and 28 February 2013. All four requests have sought information about the prosecution of a specified food business, and in particular, details about the contaminated chili powder that formed the basis of the council's investigations.
32. In addition to these requests for information, there have been at least eight items of detailed correspondence in which the complainant has continued to refute the council's position and any supplementary information that it has provided to him. The Commissioner has identified that the council has so far undertaken four reviews in order to confirm that responses to information requests were correct, and to attempt to address the complainant's wider concerns. It is clearly apparent that the council has repeatedly informed the complainant of his right to appeal to the ICO, but this has never been pursued by the complainant, despite the council's continued reliance on exemptions provided by the FOIA.
33. The Commissioner is particularly aware that the sustained correspondence and requests for information relate to a much larger issue, which has been the subject of substantial investigations by the FSA and the council, and which have since been concluded, but are ultimately contested by the complainant. While the Commissioner appreciates that the issue is important to the complainant, he does not consider that the information rights regime provided by the EIR should be used as a means of forcing continued correspondence on the issue, particularly where further similar requests for information are likely to only result in refusal notices under the EIR.
34. Based on this information, the Commissioner has concluded that there is limited public value in the request. The request itself is for information that has already been refused to the complainant, and the grounds of

this previous refusal have not been appealed. Further to this, the issue that the requested information relates to has already been extensively investigated and concluded by the proper public authorities.

The burden upon the council

35. Having reviewed the correspondence between the complainant and the council, and Commissioner has identified that significant public resources have already been used in responding to the complainant's information requests and correspondence. In particular, the council has drawn the Commissioner's attention to the resources that were used in providing its responses to the complainant, which included seeking the advice of officers involved in the original investigation, and reassessing the extensive held material itself. Further to this, the Commissioner has identified that all four reviews that the council undertook were conducted by senior staff, two by the head of Regulatory Services, one by the head of Trading Standards, and the last by the Chief Executive.
36. Having reviewed the complainant's correspondence to the council, the Commissioner considers that this would have added further burden on the council due to its length and complexity, in which it is not immediately apparent whether information is being requested or not.
37. The Commissioner has concluded that responding to the complainant's most recent request, and thereby further engaging with the complainant in relation to the substantive issue, would place an unjustified burden on the council's resources.

The public interest test

38. Regulation 12(1)(b) of the EIR 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."

39. In the circumstances of this case, the council did not explicitly undertake a public interest test. However, having considered the council's arguments, the Commissioner is satisfied that the council had implicitly considered the public interest factors in their refusal of the complainant's request.
40. The council argued that there was a strong public interest in preventing its resources from being further diverted by the complainant's request, which asks for substantially the same information as his previous requests that have already been refused on other grounds. The request

itself is therefore of limited public value, as any response would be likely to replicate the council's previous refusal notices. The council explained that the complainant has not taken account of these previous refusals, nor has he appealed their grounds through the ICO.

41. Having considered the evidence provided in this matter, the Commissioner concurs with this view and finds that the public interest in openness, transparency and the disclosure of environment information, is outweighed by the public interest in preventing further public resources being diverted to respond to the complainant's request. Having reviewed wider the circumstances of this case, the Commissioner considers that should the council provide a response, it would be highly likely to issue a repeat of its previous refusal notice. Consequently, this would further weaken the public interest in a response being provided, as it would be unlikely to release any information into the public domain other than a duplicate refusal notice.

Conclusion

42. The Commissioner considers that the complainant's information request has been made as a means of continuing engagement from the council. In particular, the Commissioner has noted that the council's previous use of exemptions under the FOIA to withheld specific information has not been contested by the complainant, despite being advised repeatedly of the right to appeal to the ICO. It appears to be the council's refusal to further engage with the complainant on the wider issue that has led to a complaint being made to the Commissioner.
43. While the Commissioner appreciates that this issue is highly personal to the complainant, he considers that the public value in the request being responded to is inherently limited. The underlying matter that the complainant contests has already been concluded by the proper authority, and the complainant's subsequent appeals to public authorities such as the FSA and the Parliamentary and Health Service Ombudsman have not been successful, which would indicate to the Commissioner that there is little or no plausible basis for suspicion on the part of the complainant.
44. The Commissioner considers that should the council respond to the complainant's request it would place further burden upon the council's Trading Standards office, which would be required to divert specialist resources away from its public duties. There is a strong public interest in preventing this, as outlined in the public interest test that the Commissioner has undertaken as part of his assessment.
45. Having considered the limited public value of the request in conjunction with the burden on the council resources, the Commissioner has

concluded that the council's refusal of the request as manifestly unreasonable on vexatious grounds was correct.

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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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

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