Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 March 2017

Public Authority: Rother District Council
Address: London Road,
Bexhill On Sea
TN39 3JX

Decision (including any steps ordered)

1. The complainant has requested information from Rother District Council relating to a planning application. The request was refused by Rother District Council under regulation 12(4)(b) (manifestly unreasonable) of EIR.

2. The Commissioner has considered Rother District Council's application of regulation 12(4)(b) of EIR in the context of its previous application of the same exception to a prior related request made by the complainant.

3. The Commissioner's decision is that Rother District Council has applied regulation 12(4)(b) of EIR appropriately.

4. The Commissioner does not require Rother District Council to take any further steps as a result of this decision.

Request and response

5. On 28 June 2016 the complainant wrote to Rother District Council (RDC) and requested information in the following terms:

"As requested time and time again, please publish all pre-planning application advice letters. The application form makes it explicitly clear you have received such information

First Tier Tribunal Decision Appeal No. EA/2014/0025 upheld the ICO decision to release such documentation

I cannot locate the legally required biodiversity studies also on this application."

6. The RDC responded on 25 July 2016. It explained to the complainant that it was not going to respond to the request as it considered it to be manifestly unreasonable. RDC also explained that it had informed the complainant previously that it would not be responding to any more requests regarding Planning and Planning Policy and Grove Farm, Robertsbridge.

7. There was some confusion as the whether the complainant had requested an internal review. The Commissioner contacted RDC and the complainant to ascertain this; the complainant responded: *"You have more than enough information on file and why you require a biodiversity report in isolation is beyond belief."*

8. RDC confirmed to the Commissioner that it had not received a request for an internal review but if it had, it would have upheld its application of regulation 12(4)(b) to the present request.

Scope of the case

9. The complainant contacted the Commissioner on 15 August 2016 to complain about the way his request for information had been handled.

10. The complainant complained to the Commissioner about both RDC's handling of his various requests and the Commissioner's handling of his various complaints in relation to those requests, including complaints about individual members of the Commissioner's staff. Eventually, the complainant confirmed that this was the outstanding request for information.

11. During the Commissioner's investigation, it was clarified that the present request related to a previous request concerning a specific planning application in relation to Grove Farm, Robertsbridge.

12. The Commissioner will consider whether RDC has applied regulation 12(4)(b) appropriately to the present request under the EIR.

Background

13. RDC provided the Commissioner with information in order to put the complainant's request into its proper context. It explained to the Commissioner that, in line with previous requests from the complainant, the present request relates to a specific planning application in relation to Grove Farm, Robertsbridge.

Reasons for decision

Is the information environmental information?

14. Information is "environmental" if it meets the definition set out in regulation 2 of the EIR. 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), which include land, will be environmental information. The requested information relates to a planning application. As this would affect the land the Commissioner considers that the request is should be dealt with under the EIR.

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

15. 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;"*

16. There is no definition of 'manifestly unreasonable' under the EIR. The Commissioner considers that 'manifestly' implies that the request should 'obviously' or 'clearly' be unreasonable.

17. A request can be manifestly unreasonable for two reasons: Firstly where it is vexatious and secondly where the public authority would incur unreasonable costs or where there would be an unreasonable diversion of resources.

18. There is no definition of the term "vexatious" in the EIR. However, the issue of vexatious requests under section 14 of the Freedom of Information Act 2000 has been considered by the Upper Tribunal (UT) in the case of *The Information Commissioner and Devon County Council v Mr Alan Dransfield (GIA/3037/2011).* The UT concluded that the term could be defined as "manifestly unjustified, inappropriate or improper use of formal procedure." The Tribunal identified four factors likely to be relevant in vexatious requests:

- The burden imposed by the request on the public authority and its staff
- The motive of the requestor
- Harassment or distress caused to staff
- The value or serious purpose of the request

19. The UT's decision established the concepts of "proportionality" and "justification" as being central to any consideration of whether a request for information is vexatious. The Commissioner considers that this can also be applied when considering the application of regulation 12(4)(b).

20. The key to determining whether a request is vexatious is a consideration of whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. Where this is not clear it is necessary to weigh the impact of the request on the public authority against the purpose and value of the request. To do this a public authority must be permitted to take into account wider factors associated with the request, such as its background and history.

21. To support its position RDC provided the Commissioner with background information (above) and copies of previous correspondence which has passed between it and the complainant in relation to his previous requests.

22. RDC provided the Commissioner with a copy of the previous request it had applied regulation 12(4)(b) to dated 9 September 2015 RDC number 3241. This request followed on from previous requests made by the complainant, principally 3179, 3182 and 3186.

23. RDC explained to the Commissioner that request 3179 was a follow up request in response to a previous request concerning the calculation of 155 net additional homes in Robertsbridge 2011-2018 contained in its Core Strategy. The complainant had also complained that links he was previously provided with were out of date. RDC provided a fresh link and provided the complainant with additional information.

24. With regard to request 3182, in its refusal notice of 16 September 2015 RDC provided the complainant with a log of the requests it had received from him in 2015. RDC explained that the complainant had requested information in relation to Grove Farm (RR/2015/1929/P) including a viability study. RDC had responded explaining that it did not hold the requested information and confirmed that it had not received a viability study.

25. With regard to request 3184, RDC explained that the complainant had requested information about the land at Grove Farm, Robertsbridge. The complainant was provided with information and also referred back to previous advice provided to him on 17 April 2015.

26. RDC also explained that, with regard to its application of regulation 12(4)(b) to the complainant's request under reference 3241, it had explained to him that he had submitted 23 previous requests; they related largely to planning policy issues concerning the development site at Grove Farm, Robertsbridge.

27. In addition, RDC explained to the complainant that his requests had asked for the justification or a legal basis of policies/decisions rather than just seeking information. It explained that he had made a number of complaints to both RDC itself and the Local Government Ombudsman. Furthermore, RDC pointed out that it had offered to meet with him to discuss his requests for information, procedures relating to them, what information it held and any limits on what it could disclosed. RDC noted that he had declined to attend a meeting.

28. Having considered the explanation provided to the complainant on 16 September 2015 in relation to request 3241 and related requests, it is clear to the Commissioner that RDC and the complainant have engaged in specific correspondence regarding this planning application.

29. RDC explained that the nature of the requests combined with the volume, time and resources it had already invested in responding to the requests, meant they had become burdensome in nature. Furthermore, RDC explained that it was a small district council of 250 staff, with a planning policy team of 4 staff. It explained that these requests were tying up a disproportionate amount of their time, to the detriment other work in the district and community.

30. RDC also explained that these requests were taking up 0.5 of a full time equivalent post in the planning policy team (a team of 4), as well as a similar level of legal and administrative resources.

31. In addition to submitting requests for information, the RDC explained that complainant has endeavoured to clarify and argue points and to challenge decisions. RDC explained that the complainant's correspondence appeared hostile to it and contained threats to consult lawyers. RDC provided example of this both in relation to a past request and in relation to the present request.

32. RDC also argued that the complainant was unreasonably persistent. It explained that his previous requests related to the same or substantially similar matters. It pointed out that the requests occur because of the complainant's objection to the development of land at Grove Farm, Robertsbridge for which the planning application had not initially been submitted and therefore information had not been held. It explained that it had tried to answer the complainant's request even so.

33. Furthermore, RDC explained that it considered that the complainant was intransigent. It explained that it considered that this was closely associated with unreasonable persistence and it could not see an end to the requests.

34. RDC also explained that it considered that the requests were frequent or overlapping. As explained above, it provided the complainant with a log

of his requests and pointed the Commissioner to this. RDC explained that it had done its best to respond to him fully but that he continued to make numerous lengthy requests, all of which relate to the same matter.

Conclusion

35. The Commissioner has considered RDC's representations in respect of its application of regulation 12(4)(b) to the present request and also the documents RDC provided in support of its position. She has also noted the persistent nature of the complainant's correspondence.

36. She considers that regulation 12(4)(b) is engaged and will go on to consider the public interest test.

Public interest test

37. Regulation 12(1)(b) states: in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

38. The Commissioner will always give weight to factors which favour the disclosure of information which would increase the public's understanding of the actions taken by RDC and of the processes by which it makes its decisions. Such disclosure of information increases transparency and provides accountability of public authorities

39. The Commissioner has difficulty in discerning how complying with the present request would further the public's greater awareness of environmental matters, the exchange of views or provide greater public participation in environmental decision making. She notes that the complainant has queried why the Commissioner would want a copy of the biodiversity report in isolation – however, the Commissioner has not asked for the biodiversity report; the complainant mentioned it in his request.

40. Given that the complainant appears to be querying the necessity of the biodiversity report, the Commissioner is satisfied that it is not clear that the complainant actually wants this.

41. In the Commissioner's opinion, it is not in the public interest to continue to use public resources to satisfy a complainant who shows no sign of being satisfied by RDC's responses to his requests, particularly where the complainant apparently wants to pursue a dispute which RDC cannot resolve.

42. Having considered the limited public interest in the requested information against the burden, disruption and unwarranted use of RDC's resources which the request would necessitate, the Commissioner

finds that the public interest lies in favour of the RDC's application of regulation 12(4)(b).

43. Taking all of the above into account, the Commissioner is satisfied that regulation 12(4)(b) has been applied appropriately in this case and that the public interest in maintaining the exception outweighs the public interest in disclosure.

44. The Commissioner notes that the complainant has mentioned the publication of pre-planning application advice letters and has referred to a First Tier Tribunal (FTT) decision. She will deal with this below.

Other matters

45. The Commissioner notes that the complainant has stated in his request: *"As requested time and time again, please publish all pre-planning application advice letters … First Tier Tribunal Decision Appeal No. EA/2014/0025 upheld the ICO decision to release such documentation."*

46. RDC explained that it did not agree with the complainant's interpretation of the immediate requirement to publish all pre-planning application advice. It explained that it considered the correct approach was that an assessment was necessary as to whether pre-application advice could be disclosed, including consideration of the public interest and the interests of the developer in terms of confidence and other matters.

47. The Commissioner notes that in the its decision the FTT notes that it (like the ICO) had not been asked to decide, as a matter of principle, all pre-planning application information supplied by a developer benefits from the application of regulations 12(5)(e) (confidentiality of commercial or industrial information) and 12(5)(f) (interest of the person who provided the information). The FTT explained that it was required to examine the particular information withheld in the case and to say whether it engaged the exceptions.

48. The FTT found that the public authority in question had not provided enough arguments in support of withholding the information in that particular case.

49. The Commissioner considers that RDC's approach is appropriate. Her view is that each request for pre-application planning advice should be dealt with on its merits. She also considers that there will be circumstances when pre-planning application advice can be withheld and

has issued decision notices regarding this, for example decision notice FER0581990.[1]

[1] https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432938/fer_0581990.pdf

Right of appeal

50. 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

51. 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.

52. 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 ……

Jon Manners
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