Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 September 2020

Public Authority: Historic England
Address: The Engine House
Fire Fly Avenue
Swindon
SN2 2EH

Decision (including any steps ordered)

1. The complainant has requested information associated with a report they had produced for Historic England ('HE'). They subsequently withdrew two parts of the request. HE categorised the remaining two parts of the request as manifestly unreasonable under regulation 12(4)(b) of the Environmental Information Regulations (EIR). It refused to comply with these parts.

2. The Commissioner's decision is as follows:

   - The information requested in parts 1 and 4 of the request is not environmental information and HE was incorrect to handle these parts under the EIR.

   - Parts 1 and 4 of the complainant's request cannot be categorised as vexatious under section 14(1) of the FOIA.

3. The Commissioner requires HE to take the following step to ensure compliance with the legislation:

   - Provide the complainant with a response to parts 1 and 4 of the complainant's request that complies with the FOIA.

4. HE must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 28 May 2019 the complainant wrote to HE and requested information in the following terms:

> *"*[1] *Please send me a copy of* [name 1 redacted] *detailed comments on the report and do contact me to discuss this further.* [2] *Could you also send me pdf copies of examples of* [subject redacted] *reports produced by* [name 1 redacted] *and* [name 2 redacted]*? I would be very interested to see examples of their report format, material analysis - and images produced using a polarising microscope to examine mounted cross-sections."*

6. On 8 July 2019 the complainant requested information of the following description:

> *"…As yet I have had no response to my comments on* [name 1] and [name 2]*'s comments.*
>
> *If you can you send me examples of the reports they have produced which illustrate the format they are recommending* [a variation of part 2]
>
> [3] *And can you send me all the data you sent ICON relating to my Grievance. I have asked for this"*

7. The 30 August 2019 HE responded. It handled parts 1 and 2 of the request under the EIR. It categorised these parts as manifestly unreasonable under the EIR and refused to comply with them. HE advised it considered that the public interest favoured maintaining the exception. HE handled part 3 under the FOIA and categorised that part as vexatious under the FOIA.

8. The complainant requested an internal review on 29 October 2019. They withdrew their request for examples of research reports by two named individuals ie part 2 of the request. The complainant submitted a new request (part 4) for:

> *"…I would also like to read the report written by* [name 2] *about my report."*

9. The complainant also asked HE to consider their request under the data protection legislation.

10. HE provided an internal review on 26 November 2019. It confirmed that it was maintaining its reliance on regulation 12(4)(b) and section 14(1); going into more detail as to why it considered the request was manifestly unreasonable/vexatious. HE also refused to release the requested information under the data protection legislation, citing the protection of the rights of others.

Scope of the case

11. The complainant contacted the Commissioner on 16 January 2020 to complain about the way their request for information had been handled. As noted, they had withdrawn part 2 of their request and confirmed to the Commissioner that they had also withdrawn part 3 of the request. The focus of the complainant's complaint is therefore HE's response to parts 1 and 4 of their request.

12. The Commissioner's investigation has first considered whether HE was correct to handle parts 1 and 4 of the request under the EIR. She has then focussed on whether HE can rely on regulation 12(4)(b) of the EIR or its FOIA equivalent, section 14(1), to refuse to comply with these parts of the complainant's request.

Reasons for decision

Is the requested information environmental information?

13. In parts 1 and 4 of their request, the complainant has requested comments/reports that two individuals made about a report the complainant had written for HE. The complainant's report concerned a particular historic building. HE had referenced regulation 12(4)(b) of the EIR with regard to part 1. Its position regarding part 4 was less clear, but since part 4 requests information that is very similar to part 1, the Commissioner must assume that HE was also relying on regulation 12(4)(b) in respect of part 4.

14. Broadly, information is environmental information and must be considered under the EIR rather than the FOIA if the information concerns the state of the elements of the environment (such as air, land, water); factors affecting those elements (such as noise, waste, emissions) and measures designed to protect those elements (such as policies, plans, programmes).

15. The Commissioner appreciates the probable thinking behind HE's categorisation of information about work carried out on a building as environmental information. However, the Commissioner does not consider that there is a sufficiently direct link between that matter and the EIR's definition of environmental information, above. As such the Commissioner finds that HE was incorrect to rely on the EIR and that it should have handled parts 1 and 4 of the request under the FOIA.

Section 14– vexatious and repeat requests

16. Under section 1(1) of the FOIA, anyone who requests information from a public authority is entitled to be told if the authority holds the information and to have the information communicated to him or her if it is held and is not exempt information.

17. Under section 14(1) of the FOIA a public authority is not obliged to comply with section 1(1) if the request is vexatious.

18. The term 'vexatious' is not defined in the FOIA but the Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. These are set out in her published guidance and, in short, they include:

- Abusive or aggressive language
- Burden on the authority – the guidance allows for public authorities to claim redaction as part of the burden
- Personal grudges
- Unreasonable persistence
- Unfounded accusations
- Intransigence
- Frequent or overlapping requests
- Deliberate intention to cause annoyance

19. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.

20. The Commissioner's guidance goes on to suggest that, if a request is not patently vexatious, the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In doing this the Commissioner considers that a public authority should weigh the impact of the request on it and balance this against the purpose and value of the request.

21. Where relevant, public authorities also need to take into account wider factors such as the background and history of the request.

22. In its internal review response, HE noted that:

- the complainant had submitted multiple requests on similar issues
- the complainant's focus appeared to be on one individual HE staff member
- an Institute of Conservation (ICON) investigation [into the conduct of a particular HE staff member] had concluded that HE had no case to answer
- the complainant's position appeared to be entrenched
- the complainant contacted multiple HE staff in succession, before the original process had concluded or request had been dealt with
- dealing with the complainant's correspondence placed a disproportionate burden on HE
- the complainant had already been provided with one of the named individual's comments on their report

23. In its submission to the Commissioner HE has advised that the substantive matter has been on-going for two years. That matter is the complainant's dissatisfaction with HE's response to a report that they had been commissioned to prepare for HE.

24. HE has explained that, in its view, the complainant's persistent requests for information, their on-going disagreement with HE's advice and their determination to see a particular member of HE staff reprimanded or punished by ICON has caused unjustifiable level of distress, disruption and irritation to HE staff. HE considers that if it was to comply with this request that would do nothing to stem the complainant's "barrage" of requests. The evidence suggests to HE that if it was to comply, the complainant would not drop their complaints against HE and the particular staff member.

25. HE provided the Commissioner with email correspondence that staff have had with the complainant. HE considers this correspondence clearly demonstrates that the complainant is never satisfied with its responses. It says that when it has provided information in the past to answer their queries, the complainant usually avoids responding or sidesteps and instead raises a new query. It appears to HE that the complainant is determined to pursue every possible avenue to try to get their own way. HE argues that it has already spent "an inordinate amount of time" corresponding with the complainant. It is concerned that having to deal with more complaints and appeals is very disruptive, causes additional pressure on HE staff and is distressing, particularly for

the staff member who appears to HE to be the focus of the complainant's dissatisfaction.

26. HE considers that the complainant has made their grievance very personal. It has told the Commissioner that by complaining to ICON about a particular staff member as an individual, they made that staff member feel very exposed and vulnerable, and wholly responsible for the complainant's grievance, which was not the case. HE says that the staff member was responding as part of a process. It notes that other people had made comments on the report as part of that process, which the complainant disagreed with, but they were not singled out for such wholehearted criticism. HE considers that if the complainant was dissatisfied with its process or service, advice or activities then the right thing to do, if the complainant could not get a satisfactory response from the staff member's line manager, would have been to submit a formal complaint to HE. The staff member was acting in their capacity as an HE employee, with their line manager's support, and they should not have had to face a personal attack as a result. HE says it considers that complying with the request would re-new the personal attack on that staff member which would cause them unjustifiable distress.

27. HE has noted to the Commissioner that in an email dated 24 May 2019 (a copy of which it provided to the Commissioner), the complainant had been provided with "examples" of comments on the complainant's report made by the one of individuals named in one part of the request. In that email the complainant had also been provided with all of the second individual's comments on the report. HE confirmed, however, that it considered that categorising the request as manifestly unreasonable under EIR (ie as vexatious under FOIA) at this time is crucial to protecting its increasingly pressurised resources going forward and shielding its staff from manifestly unreasonable behaviour.

28. The complainant in this case has also provided the Commissioner with a submission to support their position. This is a response to HE's internal review, in which they dispute HE's arguments under each of the criteria for categorising a request as being manifestly unreasonable or vexatious.

29. The complainant notes that the grievance they raised with ICON about the HE staff member was settled in 2018 and the matter of any 'personal grudge' is not relevant. The complainant says their interest in the comments/reports they have requested is because they consider they set out a change of policy in HE which is of interest and importance to them and others working in the field in question. They consider it is important that researchers have a good understanding of HE's requirements. The complainant argues that HE's refusal to comply with the two parts of the request directly impedes them in their work. In

their view, the two sets of reports/comments that the complainant is seeking and which they consider HE holds could result in them losing work and to suffer professional defamation.

Commissioner's conclusion

30. The Commissioner understands that HE had commissioned a report from the complainant. HE was not satisfied with the report and considered it fell below the expected standard in a number of areas. The complainant disagrees with HE's assessment of their report. That matter goes back to at least May 2018 which is the earliest date in the email correspondence HE provided to the Commissioner to support its position. At the time the complainant submitted their requests therefore, the matter had been ongoing for approximately one year.

31. The fact that HE's resources may be increasingly under pressure is not a factor the Commissioner can take account of when considering whether the request is vexatious. Pressure on its resources is an issue for HE and not one that should necessarily prevent this complainant, or any future applicant, from receiving a response to their request under section 1(1) of the FOIA.

32. The Commissioner can take account of the criteria for vexatiousness suggested in her published guidance on section 14(1), which are broadly those HE discusses in its internal review. She can also take account of the background and context of the request.

33. Factors that could support the categorisation of the two parts of the request as vexatious in this case are as follows:

- The complainant raised their concern with the individual who reviewed their report with ICON in 2018. ICON subsequently advised that HE (and the staff member in question) did not have a case to answer
- The complainant is attempting to keep 'live' a matter that has been dealt with and concluded through their complaint to ICON
- The complainant was provided with information within the scope of the two parts of their request in correspondence of 24 May 2019
- The correct recourse for the complainant is to progress a complaint through HE's complaints procedure, rather than through the FOIA

34. Factors that could support a view that the two parts of the request are not vexatious are as follows:

- In the correspondence that the complainant received on 24 May 2019, HE provided some comments on the report by one of the individuals named in the request. HE refers to these as being "examples" of that individual's comments. This would suggest that HE holds further information relevant to at least one part of the request

- In the Commissioner's view (based on her experience of considering many complaints about requests categorised as vexatious), the correspondence HE has provided to the Commissioner to support its position does not evidence the complainant being abusive or aggressive. Neither does it demonstrate a "a determination" to see a particular staff member "reprimanded or punished" or by ICON

- Nor does the correspondence evidence – to a significant degree - multiple or overlapping requests, and contact by the complainant to multiple staff

35. The complainant is entitled – rightly or wrongly – to feel aggrieved by HE's reaction to the report they produced for it and to want to fully understand what HE considered to be its shortcomings. Similarly, HE is entitled to feel frustrated by the complainant's reluctance to accept its position regarding their report. HE is also entitled to exhibit a duty of care towards a staff member, who HE considers is the complainant's focus. As such, the question of the request's vexatiousness is perhaps more finely balanced on this occasion than is usual.

36. However, the Commissioner is required to make a decision, and she has based her decision on the information that both parties have provided to her. On this occasion, she has not been persuaded that the two parts of the complainant's request meets the threshold of vexatiousness at this point. That is not to say, though, that if HE was to categorise another of the complainant's requests as vexatious in the future, the Commissioner would again find that that request was not vexatious. The Commissioner considers each complaint on a case by case basis.

37. Given the reference in the 24 May 2019 correspondence to one individual's comments on the complainant's report being "examples", and its data protection position below, HE should first confirm to the complainant whether or not it holds further information that falls within the scope of both parts of the complainant's request.

38. In its internal review response, HE advised the complainant that it was withholding "third party data" under data protection legislation (again, this suggests HE holds information relevant to the request). If the complainant was not satisfied with that response, the Commissioner

would have expected them to have submitted a data protection complaint to her, which the Commissioner would have considered separately.

39. As it is, this current complaint concerns the FOIA legislation. The Commissioner has decided that the two parts of the request are not vexatious under section 14(1) and that HE must therefore provide a response to them under FOIA. The Commissioner reminds HE that if it holds further relevant information, in addition to other provisions, there is provision in the FOIA that enables a public authority to exempt from disclosure an applicant's own personal data, and/or to exempt from disclosure the personal data of third persons.

Right of appeal

40. 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

41. 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.

42. 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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