

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice dated 6 June 2013
FER0481077**

Appellant: Stephen Booth

Respondent: Information Commissioner

Considered on the papers on 7 October 2013

Before
John Angel
(Judge)
and
Roger Creedon and Jacqueline Blake

Subject matter: Regulation 12(4)(b) EIR manifestly unreasonable

Cases: *Craven v IC & Department of Energy and Climate Change* [2012] UKUT442 (AAC)

IC v Devon CC & Dransfield [2012] UKUT 440 (AAC)

Decision

The appeal is dismissed.

Reasons for Decision

Background

1. There has been a long standing disagreement between Mr Booth and the East Riding of Yorkshire Council ("the Council"). That disagreement is set out in the Information Commissioner's previous decision notice dated 19 September 2011 in this matter, reference number FS50378227 ("DN 1"). In brief Mr Booth is very concerned that a neighbouring property obtained planning permission based on an inaccurate plan and he believes that the way the Council dealt with the planning application resulted in a wrong permission being granted. As a result he has been trying to clarify how this

might have happened through enquiries of the Council since the early 1990s. Mr Booth has not been satisfied with the responses and made a further request on 14 November 2012 in the following terms:

“The council has conducted there [sic] own investigation into planning application 317-473.

Could you supply me with answers to the following questions within twenty-one working days.

- 1) Was all the information presented to the council in planning application 317-473 correct.*
- 2) Was the use of any part of the proposed site restricted under any planning development applications.”*

2. The Council refused the request by letter dated 22 November 2012 as being manifestly unreasonable under regulation 12(4)(b) of the Environmental Information Regulations 2004 (“EIR”). Mr Booth asked for an internal review and by letter dated 21 December 2012 the Council upheld its decision.
3. Mr Booth complained to the Commissioner. The Commissioner concluded in his Decision Notice of 6 June 2013 (“DN 2”) that there was a very strong case and a strong body of evidence in support of the Council’s refusal of this request (DN 2 §20). Accordingly he concluded that the Council was correct to apply regulation 12(4)(b) EIR to the Appellant’s request in this case (DN 2 §2).
4. Mr Booth appealed to the FTT. He considers in his Grounds of Appeal that his request for information is not manifestly unreasonable for the purposes of regulation 12(4)(b) EIR, stating that if he *“had received the information it would have helped in bringing some sort of closure to the case”*.
5. He further considers that *“It is in the public interest that the council are carrying out their duties and checking planning applications and that information is correct”*.

Legal framework

6. Regulation 12(4)(b) provides that, subject to a presumption in favour of disclosure and the application of a public interest test, a public authority may refuse to disclose environmental information requested if a request is “manifestly unreasonable”.
7. In *Craven v The Information Commissioner and the Department of Energy and Climate Change* [2012] UKUT 442 (AAC), the Upper Tribunal concluded that, in practice, there was no material difference to the two

tests to be applied in determining whether an information request was manifestly unreasonable for the purposes of regulation 12(4)(b) EIR or vexatious for the purposes of section 14 FOIA (see *Craven* §22).

8. In *The Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAAC), heard at the same time and by the same panel as *Craven*, the Upper Tribunal considered the approach to be taken to requests which were vexatious for the purposes of section 14 FOIA. The Upper Tribunal's overall analysis of what may constitute a vexatious request under section 14 FOIA is to be found at §§ 24-39 of that decision.
9. By way of overview, in *Dransfield*, Judge Wikeley considered the purpose of section 14 FOIA, stating that:

“The purpose of section 14...must be to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA.” (Dransfield, §10).

10. He continued:

“27. The common theme underpinning section 14(1), at least insofar as it applies on the basis of a past course of dealings between the public authority and a particular requester, has been identified by Judge Jacobs as being a lack of proportionality... for the reasons above I agree with the overall conclusion that the FTT in Lee reached, namely that “vexatious” connotes “manifestly unjustified, inappropriate or improper use of a formal procedure.”

(Dransfield, § 27)

11. Therefore, whilst making it clear that they were *“not intended to be exhaustive, nor ... meant to create an alternative formulaic check-list”* Judge Wikeley took the view that misuse of FOIA may be evidenced in a number of different ways and it was helpful to approach the question of whether a request was truly vexatious by considering four broad issues or themes, which were:-

- (1) The burden placed on the public authority and its staff;
- (2) The motive of the requester;
- (3) The value or serious purpose of the request; and
- (4) Any harassment of, or distress caused to, the public authority's staff.

(Dransfield §28)

12. However the Upper Tribunal noted that the concepts of 'vexatiousness' or 'manifest unreasonableness' are inherently flexible and that the facts of each case should be considered by a public authority holistically.

13. As the First-tier Tribunal (FTT) we are bound to follow the decisions of the Upper Tribunal.

Applying the facts to the law

14. Under EIR (and FOIA) public authorities are required to disclose information which they hold (regulation 4(1)) subject to certain exceptions. They are not required to create information. The evidence before us indicates that Mr Booth has been given access to or the opportunity for access to all the Council's files in the planning matters involved. What he first requests is

Was all the information presented to the council in planning application 317-473 correct.

He appears to be asking the Council to go back and check the information in the file to see if it is correct. There is no requirement under EIR to do this unless there is already say a document in the file showing whether or not it is correct. If there is such a document then we assume it would have been revealed and Mr Booth would not have requested the information. So we can conclude that this is information that the Council does not currently hold and therefore is not subject to EIR.

15. A similar analysis and conclusion can be made in relation to the second part of the request.

16. If we are wrong, then we need to decide whether there has been a misuse of EIR as set out above.

17. Mr Booth has been trying to resolve the planning issue since 1991. DN 1 sets out at §§19, 30 and 31 the extent of the involvement of the Council over some 20 years. Mr Booth does not challenge this. The latest request which is the subject of this appeal appears to us to be another attempt to engage the Council and its staff with the same issue. It is a continuation of the same campaign. Mr Booth has been pursuing the Council regularly over a long period. This leads us to the view that this has placed a clear burden on the Council and its staff and we understand the Commissioner's view that this request is unlikely to be the end of the matter and that the burden may continue

18. In his grounds of appeal Mr Booth states that if he "*had received the information it would have helped in bringing some sort of closure to the case*". The Commissioner's investigations conclude that the Council has provided Mr Booth with access to the relevant planning files over the years and that it could not offer any further assistance (DN 2 §24). This has failed to satisfy Mr Booth. His original motive was clear. He wanted to find out whether there had been some error in the planning process which enabled his neighbour to obtain a planning permission over what he says is some of his land. This was clearly a genuine motive. Despite pursuing

the matter over 20 years it would appear he has been unable to establish this fact. He continues to pursue the matter as he says to bring “*some sort of closure to the case*”. We find, after all this time, it cannot be a realistic motive to obtain closure through the EIR route. From the evidence the Council has no further information to provide him which would give Mr Booth the closure he seeks.

19. Mr Booth is serious about the purpose of the request. The purpose is to prove that a planning permission or part of it should not have been granted. There may be value if disclosure reveals wrong doing or an error which could be pursued through other legal avenues. However the Council has already provided him with all the information it holds. If there was value then it would already be apparent and Mr Booth would not have to make the request in this case.
20. There is evidence that much time has been taken up by staff trying to satisfy Mr Booth’s planning issue. However there is no evidence that Mr Booth’s requests have been written other than in normal polite language, particularly the request in this case. There is also no evidence that his dealings with staff have been conducted in anything other than a civilised manner. However Mr Booth has been persistent and sent regular requests over a long period of time. This may have annoyed staff but we do not consider that it amounts to harassment and there is no evidence that a member of staff suffered actual stress.

Conclusion on the facts

21. Taking all these matters into account, particularly the burden placed on the Council over many years, we find that the exception under regulation 12(4)(b) is engaged. We now have to consider the public interest test.

Public interest test

22. Regulation 12(4)(b) is subject to a public interest test. Under regulation 12(1)(b) it is expressed as follow

In all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

23. Mr Booth quite rightly says there is a public interest in the Council carrying out its duties properly in relation to planning applications. Not only is there a public interest in accountability but there is also a public interest in openness.
24. The Council does not appear to accept it has made a mistake in granting planning permission. In any case it has conducted at least two reviews and shared its conclusions with Mr Booth (§19). Also there is no evidence presented to us by Mr Booth which shows any wrongdoing. Mr Booth

refers us to the four or ten year rule. It seems to us this is something for another jurisdiction and not appropriate to be considered under EIR.

25. The Council have made available its planning files to Mr Booth so have been open in this case. They have responded to his requests over many years but eventually have said enough is enough.

26. Therefore the strength of the public interest in disclosure in this case is weak.

27. In contrast we have found that the request is manifestly unreasonable. This means that the public interest in maintaining the exception is strong in this case.

28. Therefore we find that the public interest balance favours maintaining the exception.

Overall conclusion

29. For the above reasons we unanimously dismiss the appeal.

Observation

30. We would observe that the wording of the request is framed in such a way that, in effect, it asks the Council to admit it was in error in granting planning permission. As we have indicated above this is not the function of the EIR jurisdiction to determine whether or not there has been an error. As the Commissioner and Council have informed Mr Booth if an error has occurred then he should have pursued this issue through other legal means which had the potential of providing him with a remedy. Unfortunately for him EIR is limited in its scope and cannot provide the closure he desires.

Signed on the original:

Judge John Angel

Date: 14 October 2013