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Information Commissioner's Office

Freedom of Information Act 2000 (Section 50)
Environmental Information Regulations 2004

Decision Notice

Date: 15 March 2011

Public Authority:	**The Environment Agency**
Address:	**Tyneside House Skinnerburn Road Newcastle Business Park Newcastle upon Tyne NE4 7AR**

Summary

The complainants submitted an eight part request for information relating to the way the Environment Agency (the 'EA') had dealt with a complaint they had made about a watercourse. The EA withheld the information under regulation 12(4)(b) (the request was manifestly unreasonable). During the course of the Information Commissioner's investigation, the EA disclosed some information and the complainants withdrew part of their complaint.

The Information Commissioner is satisfied that the EA correctly characterised parts of the request as requests for environmental information, that regulation 12(4)(b) is engaged and that in this case the public interest in maintaining the exception outweighs the public interest in disclosing the information.

He has found procedural breaches of Regulations 11, 14(3) and 14(5) of the EIR and sections 1(1)(b) and 10(1) of the Act. However, he does not require any remedial steps to be taken in respect of these.

The Commissioner's Role

1. This case involves the application of both the Freedom of Information Act (the 'Act') and the Environmental Information Regulations (the 'EIR'). The Information Commissioner (the 'Commissioner') has duties under both pieces of legislation and those duties are explained below.

2. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Act and this Notice sets out his decision.

3. The EIR were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Commissioner. In effect, the enforcement provisions of Part 4 of the Act are imported into the EIR.

Background

4. The Environment Agency (the 'EA') is listed as a public authority in Schedule 1 of the Act. It is also a public authority under the EIR through Regulation 2(2)(b).

5. The EA has statutory responsibilities to deliver the environmental priorities of central government.

6. The complainants are concerned about the alleged destruction of a watercourse and about the lack of related action by the EA and a local authority. They say that their difficulties with this matter go back to 1997. The EA has explained that correspondence has been ongoing since March 2005.

7. The EA's view is that it is not the correct body to deal with the alleged destruction of the watercourse. It has also explained that:

    1. The EA has a general supervisory role relating to all flood defence related matters (Environment Act 1995, section 6(4)).

    2. The EA's responsibility is primarily focused on those rivers that are designated as a main river on the main river map (Water Resources Act 1991).

    3. The watercourse is not a main river – it is an ordinary watercourse, defined as any watercourse that does not form part of a main river (Land Drainage Act 1991 – the 'LDA').

    4. It uses the term 'critical watercourse' to describe those watercourses which if not maintained or improved would have a major consequence for flood risk. Their potential effects mean that they will normally become designated as main rivers in due course.

5. The EA has been provided some powers that relate to ordinary watercourses under the LDA:

   - Section 23 requires that written consent is obtained from the EA should someone wish to erect or alter culverts and/or create certain obstructions;

   - Section 24 provides that the EA has *discretion* to serve a notice requiring action to abate a nuisance caused where the consent has not been obtained; and

   - Section 25 provides both the local authority and the EA the *discretion* to take action where the proper flow of water in an ordinary watercourse is impeded.

8. The crucial word here is 'discretion'. The EA has explained that it uses its discretion in line with its enforcement and prosecution policy, which states that it will act only when the both of the following points have been established:

   1. The local authority has not taken suitable action.

   2. In its view the breach is likely to cause a major environmental impact and/or a risk to life.

9. It has explained to the Commissioner and the complainants that in its view, the impact on the environment with respect to the watercourse concerned is limited, and it has come to the decision that it will not take enforcement action itself. It also explained that it was still open to the local authority to take such action should it wish to and that the complainants should therefore address their concerns to the local authority.

10. The Commissioner is aware that the local authority has issued a notice under section 25 of the LDA in 2005. However, the complainants contend that the Notice was not complied with.

The Request

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11. On 12 April 2010 the complainants asked the EA for eight items of information in accordance with either the Act or the EIR. The request was made in the context of their complaint about the watercourse. They explained that they were concerned about the '*selective retention of records*' and asked for the following information (the Commissioner

has added numbers for clarity and has redacted the names of individuals).

> *(1) 'Has any individual of the Environment Agency corresponded (in any form) with anyone other than [Individual A redacted] at [local authority redacted]? Please supply copies. (We are aware of the (in part disingenuous) letter from [Individual B redacted] to [Individual C redacted] 11.2.2010 therefore not necessary to send copy).*
>
> *(2) Is the Environment Agency withholding information (correspondence in any form) between any individual in the Agency, with anyone other than [Individual A redacted] at [local authority redacted]? Please give regulation for withholding.*
>
> *(3) What is the retention period for keeping correspondence (in any form letters, emails, file notes etc) between the Agency and local authorities?*
>
> *(4) What is the retention period for keeping correspondence (in any form) between the Agency and the public?*
>
> *(5) Copies of our correspondence have been sent back to us. Letter 27th July 2005 to [Individual D redacted] has hand written notes in the corner. Who wrote these notes? Please provide an explanation of their meaning?*
>
> *(6) Taking into account the information provided in our letter [the one dated 27 July 2005]…. A further letter of 22.8.2005 to [Individual E redacted] provided more specific information. What is the recognised procedure to be carried out by an officer when notified an existing culverted watercourse has been removed without consent from the Agency under the Land Drainage Act 1991?*
>
> *(7) What is the Agency's policy relating to Critical Watercourses? At what point does an ordinary watercourse become critical? For example how many homes have to be at risk of flooding, and for how long?*
>
> *(8) What is the Agency's policy on accepting photographic evidence to support a situation [sic] has taken place?'*

12. On 30 April 2010 the EA explained its view that it did not need to answer this request because it was substantially similar to previous requests and was vexatious. It applied Regulation 12(4)(b), as it

believed that the request in its context was manifestly unreasonable. It did not break the request down between environmental and non-environmental information. It did say that it would take a disproportionate amount of resource to respond to requests that were substantially similar to previous requests it had complied with in full. However, it did not say whether it had conducted a public interest test, or what factors it had taken into account if it did. It also did not offer the complainants the opportunity to request an internal review, but said that they should approach the Commissioner directly if they were unhappy with this decision.

The Investigation

Scope of the case

13. On 5 May 2010 the complainants contacted the Commissioner to complain about the way their request for information had been handled. They asked the Commissioner to pay particular attention to the following.

    - Elements (7) and (8) concerned issues that had arisen in February 2010, so could not be said to have been answered previously.
    - The behaviour of EA staff.
    - The inability of the EA to comply with its own publication scheme.
    - The need for accountability, particularly where there are questions about how a particular individual was replaced from their role.

14. On 5 October 2010 the complainants explained that they were prepared to withdraw their complaint about the handling of element (5).

15. On 16 November 2010 the EA explained that it had reconsidered its position in respect of elements (3) and (4) and was prepared to provide the complainants with a full copy of its retention and disposal schedule. The Commissioner therefore regards the substantive aspects of elements (3) and (4) as informally resolved. However, he has agreed to consider the procedural matters that emanated from these elements in this Notice.

16. The scope of this Decision Notice is therefore to determine whether the EA:

- was entitled to rely on Regulation 12(4)(e) to not respond to elements (1), (2), (6), (7) and (8) of the request of 12 April 2010;

- has complied with the procedural provisions of the EIR in respect of elements (1), (2), (6), (7) and (8); and

- has complied with the procedural requirements of the Act in respect of elements (3) and (4).

17. The complainants have also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

18. On 2 September 2010 the Commissioner wrote to the complainants and the EA to confirm receipt of an eligible complaint. He asked the EA to explain why it had withheld information in this case.

19. The EA replied on 9 September 2010, providing its initial arguments and the documentation it had exchanged with the complainants that led to its position.

20. On 29 September 2010 the Commissioner wrote to the complainants. He explained some principles of the Act, discussed the scope of the case and asked why they believed their requests were not manifestly unreasonable. He also explained the EA's initial arguments.

21. The complainants responded on 5 October 2010, withdrawing element (5) of their complaint and saying why they thought the remaining requests were not manifestly unreasonable. On 18 October 2010 the Commissioner wrote to the complainants to confirm that the scope was set.

22. On 19 October 2010 the Commissioner wrote to the EA. He explained that he was not convinced that the information requested for elements (3) and (4) constituted environmental information and he asked it to send him a copy. He also asked the EA to defend its position in light of the arguments he had received from the complainants and his published guidance about the operation of this exception.

23. On 17 November 2010 the EA explained that it had reconsidered its position in respect of elements (3) and (4) and was now prepared to disclose its retention and disposal schedule to the complainants. It also detailed its position in this case. The Commissioner wrote to the

complainants to ask if they were satisfied with the new information that had been provided.

24. On 18 and 23 November 2010 the complainants made clear that they wanted the Information Commissioner to issue a Decision Notice in respect of the remaining information, and to deal with the delays in the provision of the information requested in elements (3) and (4).

Analysis

Substantive procedural matters

Is the requested information environmental information?

25. It has been agreed that items (3) and (4) were not requests for environmental information, so these do not require further consideration in this section.

26. The EIR define what constitutes environmental information in Regulation 2(1)[1]. The Commissioner is required to determine whether the recorded information held in respect of elements (1), (2), (6), (7) and (8) of the request would constitute environmental information.

27. The Commissioner considers that all of this information would fall within the definition given at regulation 2(1)(c) of the EIR:

> *' Information on ….measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures designed to protect those elements.'*

28. The Commissioner also considers that information concerning the EA's actions or inactions in respect of a complaint about alleged damage to watercourses would amount to a measure likely to affect the state of the elements of the environment. This is because the actions would be likely to affect the land and landscape as referred to in regulation 2(1)(a).

29. The Commissioner's duty is therefore to consider elements (1), (2), (6), (7) and (8) entirely under the provisions of the EIR. This is

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[1] A full copy of all the sections of legislation cited in this Decision Notice can be found in its Legal Annex.

because the information is exempt from the provisions of the Act through the exemption found in section 39, which ensures that environmental information is considered exclusively under the EIR.

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

30. Regulation 12(4)(b) states that a public authority may refuse to disclose information if the request is manifestly unreasonable. While the EIR does not define 'manifestly unreasonable' it is the Commissioner's view that a request should be obviously and clearly unreasonable – there should be no doubt. The Commissioner considers that it will apply where it can be demonstrated that a request is vexatious or where compliance would incur unreasonable costs for the public authority or an unreasonable diversion of public resources.

31. Regulation 12(4)(b) has a public interest component. Therefore if the exception is found to be engaged, it will also be necessary to consider whether the public interest in maintaining the exception outweighs that in disclosure. Regulation 12(2) also provides that there is a presumption that favours disclosure.

32. In his Awareness Guidance No 22 *'Vexatious and repeated requests'* the Commissioner gives criteria to help determine whether a request is vexatious, (listed below). Even though the EA has cited regulation 12(4)(b) of the EIR in this particular case, the Commissioner considers that the same criteria can be used.

    1. Would complying with the request impose a significant burden in terms of expense and distraction?
    2. Does the request have the effect of harassing the authority or distressing its staff?
    3. Could the request otherwise fairly be seen to be obsessive?
    4. Is the request designed to cause disruption or annoyance?
    5. Does the request lack any serious purpose or value?

33. It is not necessary for all of the above to apply. However, it is the Commissioner's view that at least two must apply for a request to be considered manifestly unreasonable; the more criterion that apply, the stronger the case will be. He also accepts that arguments put forward by the EA to support its application of this exception, can apply to more than one of the above criteria.

34. In this particular case, the EA has relied on all five criteria and the Commissioner will consider each in turn. He is also entitled to consider the wider context and history of the request. This approach is supported by the consideration of the Information Tribunal (the

'Tribunal') in *Mr J Welsh v the Information Commissioner* [EA/ 2007/0088] (*'Welsh'*) (paragraph 21). This states:

> *'In most cases, the vexatious nature of a request will only emerge after considering the request in its context and background. As part of that context, the identity of the requester and past dealings with the public authority can be taken into account. When considering section 14, the general principles of FOIA that the identity of the requester is irrelevant, and that FOIA is purpose blind, cannot apply. Identity and purpose can be very relevant in determining whether a request is vexatious. It follows that it is possible for a request to be valid if made by one person, but vexatious if made by another; valid if made to one person, vexatious if made to another.'*

35. When considering the context and history of the request, it is necessary to consider the complainants' previous interaction with the EA. Even if the request appears reasonable in isolation, it may be manifestly unreasonable in its context. The EA argues that it should be entitled to maintain its position on this basis. However, the Commissioner notes that it is important to recognise that it is the request and not the requesters which must be manifestly unreasonable for this exception to apply.

36. The Commissioner has also had regard to paragraph 26 of the Tribunal's decision in *Welsh*:

> *' … there is a danger that settling the standard of vexatiousness too high will diminish public respect for the principles of free access to information held by public authorities enshrined in FOIA. There must be a limit to the number of times public authorities can be required to revisit issues that have already been authoritatively determined simply because some piece of as yet undisclosed information can be identified and requested …"*

37. The Tribunal also spoke of the consequences of determining a request vexatious. It pointed out that these are not as serious as those of finding vexatious conduct in other contexts; therefore the threshold for vexatious requests need not be set too high.

Would complying with the request impose a significant burden in terms of expense and distraction?

38. When considering this criterion the Commissioner endorses the Tribunal's approach in *Welsh* (paragraph 27). It stated that whether a request constitutes a significant burden is:

> *"…not just a question of financial resources but also includes issues of diversion and distraction from other work…"*

39. The Commissioner therefore expects a public authority to show that complying with the request would cause a significant burden both in terms of costs **and** diverting staff away from their core functions.

40. The Tribunal in *Gowers v the Information Commissioner & London Borough of Camden* [EA/2007/0114] ('*Gowers*') emphasised that previous requests received may be a relevant factor:

> *'…in considering whether a request is vexatious, the number of previous requests and the demands they place on the public authority's time and resources may be a relevant factor'* (paragraph 70 of its decision).

41. The Commissioner also notes the Tribunal's comments in *DBERR v Information Commissioner* [EA/2008/0096] ('*DBERR*'):

> *"public authorities may be required to accept a greater burden in providing environmental information than other information"* (paragraph 39 of its decision).

These comments were based on the presumption in favour of disclosure provided in the EIR (Regulation 12(2)) and the obligations which apply to the UK via the Aarhus Directive.[2]

42. The complainants have argued that the burden would be negligible in this case as they have directed their requests carefully and believe the information they want would not be difficult to find. The EA has argued that whilst it would not provide an estimate for this particular request, it was crucial to view it in its context. It was reasonable for the previous interaction to mean that this request does impose a significant burden in terms of both expense and distraction.

43. In support of its contention, the EA asked the Commissioner to take the following arguments into account.

    1. The request of 12 April 2010 was a consequence of the complaints about the watercourse. Although the complainants were not satisfied with the EA's position, the EA would not change its view that regulatory action was inappropriate.

[2] The Directive can be viewed at: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Directive&an_doc=2003&nu_doc=4

2. It believed it had provided all the information it had in respect of those central complaints. It had provided the complainants with all of the correspondence it held that it had exchanged with the local authority, plus information generated as a result of a site visit. It therefore believed that the burden of dealing with additional requests was unnecessary in terms of both expense and distraction, not just to the information access team, but to the members of staff who have already dealt with the issue. The complainants have been informed that they have received all the relevant recorded information and that the EA will not respond to communications that raise the same issue. It explained there must be a point where the distraction from its core functions can be stopped.

3. A number of the complainants' requests have been dealt with through the complaints procedure. The EA is required to take such complaints seriously, and as it has no team devoted to complaints handling, investigations can involve several individuals from several teams. It also engages the time of senior members of staff. In addition, the EA has 2.5 full time employees responsible for answering complex requests and they deal with over 46,000 such requests annually. It explained that it only refused (partially or entirely) 90 of those requests over the last calendar year. It therefore needs to use its resources in a manner that enables it to undertake its public functions.

4. The EA did not give the Commissioner an estimate of the amount of time required to answer this request as it has already estimated that it has spent more than 100 hours managing the complainants' previous requests and collating the information required for responses. This does not include the time spent dealing with the substantive complaint. In addition, the members of staff that would have to consider this estimate were the same members of staff who were being protected from the extra work of responding to the request.

5. The EA was satisfied that the complainants were likely to remain unhappy whatever was provided, and that the provision of further information would lead to further correspondence, further requests and, in all likelihood, further complaints. It provided evidence from previous correspondence to support this view.

44. The EA provided the Commissioner with a schedule of previous correspondence exchanged between the complainants and the EA. From this, the Commissioner has determined the following.

- The request constituted at least the 25th communication from the complainant's about the substantive complaint over the last five years (21 of which were sent in the 18 months before the request).

- The communications often contain information requests. The EA has answered at least six of these.

- All the requests generally relate to the complaint about the watercourse and the EA has investigated at least three complaints about this matter already.

- The estimated amount of time ascribed to answering these previous requests was not unrealistic in the circumstances.

45. The Commissioner is satisfied that the arguments raised by the EA (as described in paragraph 43 above), are supported by the evidence he has received.

46. The Commissioner accepts that responding to the request for information of 12 April 2010 would cause a significant burden in terms of expense and distraction. He has taken into account the Tribunal's comments in *DBERR* (outlined in paragraph 41 above) and has concluded that even though public authorities may be required to accept a greater burden in providing environmental information, the burden in this case was still beyond what was reasonable when the request was taken in its context.

47. For all the reasons above, the Commissioner considers that if the EA had responded to this request it would have imposed a significant burden on it in terms of expense and distraction. He therefore finds in favour of the EA in respect of this criteria and places weight on it in his analysis.

Does the request have the effect of harassing the authority or distressing its staff?

48. The complainants contend that there is no evidence of any of their requests harassing the EA or its staff. They believed that the accusations of harassment were unwarranted as the requests were required in order for the truth to be known about the handling of their complaint. The complainants explained that the information requested was mostly factual information that would shed light on the division of responsibility between the local authority and the EA. It would also enable the public to consider whether the EA is complying with its own

policies and inform what further action should be considered in this matter.

49. The EA claimed that the volume of previous correspondence and its nature led to its staff being harassed unnecessarily. It also provided detailed submissions about why it regarded itself to be harassed and its staff to be distressed. The arguments that the Commissioner feels relevant are as follows.

 1. A number of the requests included complaints or comments about members of EA staff, which were thoroughly investigated. Whilst those staff members were exonerated, the uncertainty of verdict through the process has had an unsettling and deeply upsetting effect on those staff members in particular and members of staff in general.

 2. The request itself mentions individuals about whom complaints had been made.

 3. Staff members consider that the complainant's telephone calls have occasionally been abusive and aggressive. Some phone calls lasted more than 30 minutes and it had had to make the Team Leader the single point of contact for correspondence with the complainants.

 4. Staff are aware from previous behaviour that any response sent to the complainants would be likely to lead to further requests for information and complaints about the staff members who responded.

50. The EA has evidenced each of these points. The Commissioner believes that it is important for the effect of the request to be assessed in its context and is satisfied that the distress that has been suffered is real and has had significant effects.

51. The Commissioner appreciates that 'harass' is a strong word and emphasises that it is the effect of the request and not the requester that must be considered. The Commissioner accepts that there is no evidence that it was the intention of the complainants to cause unwarranted distress in this case.

52. However, the Commissioner is satisfied that the request in its context did have the effect of harassing the EA. The Commissioner has considered the Tribunal decision in *Gowers* and the comments in paragraph 53 and 54 of that decision:

> *"…what we do find is that the Appellant often expressed his dissatisfaction with the CCU in a way that would likely have been seen by any reasonable recipient as hostile, provocative and often personal…and amounting to a determined and relentless campaign to obtain any information which he could then use to discredit them….we find that taken in their context, the requests are likely to have been very upsetting to the CCU's staff and that they…are likely to have felt deliberately targeted and victimised…."*

53. The Commissioner is satisfied that the request in its context would have had the effect of harassing the EA and that providing the information requested may have involved EA staff revisiting matters that had previously caused them real distress. He therefore finds in favour of the EA in respect of this factor and he places weight on it in his analysis.

Can the request fairly be seen as obsessive?

54. It is the Commissioner's view that obsessive requests are usually a very strong indication of vexatiousness. Relevant factors include the volume and frequency of correspondence, requests for information the requester has already seen or a clear intention to use a request to reopen issues which have already been debated and considered.

55. The complainants have argued that their requests have not been obsessive. They explained that they have been gradually acquiring pieces of information which can be put together to show that the EA and/or local authority were responsible for the alleged destruction of the watercourse or that the actions that they have taken were incorrect. They also described the behaviour of a named member of staff in the following way:

> *'avoidance of facts, protection of officers in her team… she persists in trying to put closure on our case against the Environment Agency'.*

56. They have also argued that the EA has the power to take action and its decision to take no action may not have been based on all the necessary evidence. The complainants explained that it was correct to develop a full picture of the evidence that could be considered and the policies that applied to be able to scrutinise this decision. This is particularly so in light of the alleged behaviour of members of staff of both the local authority and the EA. They argued that it was not obsessive to request the further information in these circumstances.

57. The EA has explained that it believes that this request forms part of an obsessive campaign from the complainants, for the following reasons.

    1. It has tried wherever possible to assist the complainants in their enquiries.

    2. It has therefore undertaken 100 hours of work before relying on this exception.

    3. The local authority is the correct organisation to address the complainants' concerns in this case, yet they continue to approach the EA.

    4. The complainants could never ultimately obtain satisfaction through this route of complaint.

    5. It has sought to assure the complainants that the EA is not responsible for any wrongdoing in this matter.

    6. The local authority possesses the legal power to take action, if it chooses to do so.

58. The Commissioner has already considered the volumes of correspondence above, and agrees that this contributes to the obsessive nature of the request. He is also satisfied that the complainants have made a substantial amount of previous requests for information (under either the Act or the EIR). For elements (1) and (2), the EA has told the complainants a number of times that it had provided everything that it holds. The requests were still made again and the Commissioner does not find the complainants' reasons for doing so convincing. In addition, he is satisfied that the information that has been requested is unlikely to be required to challenge the EA's decision through the correct channels.

59. The EA has explained that it has considered the substantive issue in a proportionate manner. Both the local authority and the EA have considered the matter and the EA even undertook a site visit to attempt to resolve the complainants' concerns. The complainants' correspondence with the EA has been ongoing for five years (and the issue for at least 12 years) and the complainants are unlikely to be content until all the obstructions are removed and the watercourse restored. This is an action that is in the discretionary powers of both the local authority and the EA. However, the EA has decided not to exercise its discretion, for it does not believe it would be in the public interest.

60. He also considers that the history of the complainants' requests to the EA shows that a response to one request leads to further requests being made. It appears that both sides are wedded to their positions and that there is little prospect of further constructive engagement. On the circumstances of the case, the request could be deemed to be obsessive.

61. While the Commissioner is satisfied that the complainants have genuine concerns and that some of the information requested would provide a useful further level of understanding about the EA's actions. He also considers that, as the EA has considered the matter proportionately, there must come a point when it can finally be closed. The Commissioner has therefore come to the view that the current request can be fairly seen as obsessive. However, he is not placing much weight on this factor in his analysis because he accepts that the arguments were finely balanced.

Is the request designed to cause disruption or annoyance?

62. The EA has argued that the request was designed to cause disruption or annoyance. It asked the Commissioner to consider evidence found in the complainants' request of 7 December 2009, in which they said that they would make no apology for the amount of requests they were making because they were designed *"to 'test' the behaviour of Environment Agency Officers".*

63. It explained that it did not believe that the requests would stop until the complainants had obtained their desired outcome, irrespective of the EA's view about the substantive complaint.

64. It is the Commissioner's view that the evidence provided does not support the contention that the complainants' request was designed to cause disruption and annoyance. He is satisfied that the complainants are generally motivated by a desire to obtain the information they have requested, rather than solely cause disruption and annoyance. The Commissioner has found that this criterion is not satisfied and therefore he places no weight on it in his analysis.

Does the request have serious purpose or value?

65. The complainants argue that their request has a serious purpose and value because they have real concerns about the EA's actions and their requests are targeted to provide accountability in relation to those concerns.

66. The EA has explained that it would hesitate to say that the complainants have no serious purpose to their ongoing requests or that there is no value to them achieving their desired outcome. However, the serious purpose and value of this request has, in its view, been mitigated completely, for it believes it has disclosed all the information that it currently holds that is relevant to their substantive complaint.

67. The Commissioner is satisfied that the request did have a serious purpose in this case. He accepts that at least the elements concerning what constitutes a critical watercourse constitute a new (although related) request and that providing this information would provide further transparency and accountability. The Commissioner also recognises that there is an assumption built into the EIR that disclosure of information on request is in the public interest in order to promote transparency and accountability in relation to the activities of public authorities. He therefore finds that this criterion is not satisfied.

68. The Commissioner has also considered whether the serious purpose of the request has sufficient weight to overcome the other factors. He is not satisfied that sufficient weight can be placed on the serious value identified to make it inappropriate to deem the request vexatious (and therefore manifestly unreasonable) in this case.

Could a reasonable public authority refuse to comply with the request on the grounds that it is manifestly unreasonable?

69. The Commissioner recognises that there is a fine balance between protecting a public authority from manifestly unreasonable applications and the promotion of the transparency in the workings of a public authority.

70. The Commissioner has considered all the evidence presented, including the history and context of the request. He accepts that the complainants have genuine concerns about the handling of their substantive complaint. However, in the circumstances of this case, the Commissioner finds that a reasonable public authority would find the complainants' request of 12 April 2010 manifestly unreasonable.

71. In arriving at this decision, the Commissioner has had regard to the Information Tribunal's decision in *Welsh* noted in paragraph 36 above. He also notes that it is not necessary for a request to satisfy every criteria listed in his guidance (and in paragraph 32 above). In this case, he has found three criteria are satisfied. The Commissioner's decision in this case therefore rests on his views that the request is obsessive and that complying with it would cause a significant burden to, and have the effect of harassing, the EA.

Conclusion

72. As the Commissioner is satisfied that the request is manifestly unreasonable, he is satisfied that Regulation 12(4)(b) is engaged.

The public interest test

73. Regulation 12(1)(b) requires that a public interest test is carried out where regulation 12(4)(b) is cited. The test is whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner also notes Regulation 12(2) which states: *'A public authority shall apply a presumption in favour of disclosure.'*

The public interest factors that favour the disclosure of the information

74. The EA accepts that it must operate with a general presumption of openness. It explained that it has, wherever possible, acted in a transparent way in respect of the complainants' previous requests for information and maintains that it has provided appropriate advice and assistance.

75. It explained that it has provided the complainants with information over a number of years and that it has acted in the public interest in this regard. It explained that it provided all the information that it had, up until the requests become manifestly unreasonable, including providing written explanations when no relevant recorded information was held.

76. The complainants have argued that questions have arisen about the EA's handling of their complaints. They have argued that the provision of the information would assist public understanding by throwing light on the decision making process. It would also be likely to help them understand why actions that affect them have been taken and make an informed challenge possible.

77. In summary, the Commissioner accepts that disclosure would promote transparency. He also notes the Tribunal decision in *DBERR* that there may be a greater burden on public authorities to provide information under the EIR than under the Act.

The public interest factors that favour the maintenance of the exception

78. The EA explained that it considered that the balance of public interest lay in maintaining the exception, for the following reasons.

- The amount of public resources spent dealing with the requests has had a detrimental effect on delivery of its public service objectives.
- There is very limited public debate on its policy on watercourses, which supports its view that the benefits of further accountability do not outweigh the detrimental effects dealing with the requests would have on the delivery of its the public services.
- This is particularly so as it is the local authority that has the power to remedy the substantive complaint.
- The substantive complaint is not a matter of real importance to anyone other than the complainants and any supporters they may have. It is not therefore in the public interest to spend its limited resources on this matter.
- The EA treats its obligations under the EIR seriously. It has partly refused only 90 of 46,000 requests received over a calendar year.
- It is important that it is not prevented from protecting its staff and ensuring their health in their working environment.

The balance

79. Having considered the arguments carefully, the Commissioner accepts that there are compelling arguments in favour of maintaining this exception in this particular case due to the public interest in protecting the integrity of the EIR and ensuring that they are used responsibly. Although public authorities are encouraged to act in a transparent and accountable way which benefits the public as a whole, it is not the intention of the EIR to require public authorities to tolerate harassment of officials by individuals.

80. If the Commissioner were to find such behaviour appropriate, this would seriously undermine the purpose of the EIR. The Commissioner is strongly of the view that public authorities should be able to concentrate their resources on dealing with legitimate requests rather than being distracted by requests where in the circumstances the wider public interest would not be served by the disclosure of information.

81. The Commissioner is satisfied that if the EA was required to respond to this request it would place a significant burden on it in terms of time and expense. It would also distract staff from dealing with other

matters and divert a disproportionate amount of resources from its core business.

82. Considering the volume and nature of previous requests made to the EA, the Commissioner has concluded that it is unlikely that any response to this request would satisfy the complainants and that it is more than likely that any response would lead to further requests for information. These factors lessen any public interest in requiring the EA to respond to this request.

83. He has also considered the Tribunal decision in *Welsh (*described in paragraph 36 above) that stated that the legislation should not be brought into disrepute by setting the threshold for vexatiousness too high (a view that must be extended to manifestly unreasonable requests too).

84. In view of the above, it is the Commissioner's view that in all the circumstances of this case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Therefore, he considers that the request is manifestly unreasonable and finds that the EA has appropriately characterised it as so.

Procedural Requirements

Regulation 11 of the EIR

85. Regulation 11 provides that it should be a right for an individual to seek an internal review when their request for information has been refused by the EA. In this case, the EA provided the complainants with no right to an internal review, telling them to approach the Commissioner directly. This constituted a breach of Regulation 11.

Regulation 14(3) of the EIR

86. Regulation 14(3) requires that any refusal notice issued must explain what was considered to determine that the public interest favoured maintaining the exemption. As the refusal notice did not have any information about the public interest test in it, the EA also breached Regulation 14(3).

Regulation 14(5) of the EIR

87. Regulation 14(5) requires that any refusal notice explains that the applicants have a right to seek an internal review. As the refusal notice did not contain this information, the EA breached Regulation 14(5).

Section 1(1)(b) of the Act

88. The Commissioner told the EA that the information it held for items (3) and (4) could not be said to be Environmental Information. The EA conceded this point and provided the information to the complainants. The failure to provide the information before the Commissioner's intervention was a breach of section 1(1)(b) of the Act.

Section 10(1) of the Act

89. Section 10(1) of the Act requires the EA to comply with section 1(1)(b) in twenty working days (except for some circumstances that are not relevant to this case). The EA did not provide the information for elements (3) and (4) in twenty working days and so breached section 10(1) of the Act.

The Decision

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90. The Commissioner has decided that the EA has appropriately relied on the exception found in Regulation 12(4)(b) to elements (1), (2), (6), (7) and (8) of the original request dated 12 April 2010. It was not therefore required to provide the relevant recorded information that it held in respect of those elements.

91. However, the Commissioner has noted that there were a number of procedural breaches in this case:

    1. The EA breached section 1(1)(b) of the Act, by failing to provide the information that it held for elements (3) and (4);

    2. It breached section 10(1) of the Act by failing to comply with section 1(1)(b) within twenty working days;

    3. It breached Regulation 11 of the EIR by failing to offer the option of conducting an internal review;

    4. It breached Regulation 14(3) by failing to specify that it had conducted a public interest test or state what it had considered to come to this decision; and

    5. It breached Regulation 14(5) by failing to state that the complainants could request an internal review.

Steps required

92. The Commissioner requires no steps to be taken in this case.

Other matters

93. The Commissioner wishes to note that the EA must still treat every new request on its own merits. It is essential that it does not treat the requesters, rather than the requests, as being vexatious or manifestly unreasonable. This Notice only concerns the request dated 12 April 2010.

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Right of Appeal

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94. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

95. 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.

96. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 15th day of March 2011

Signed ……………………………………………………

Faye Spencer
Group Manager
Information Commissioner's Office
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Water Lane
Wilmslow
Cheshire
SK9 5AF

ico. Information Commissioner's Office

Legal Annex

- **Environmental Information Regulations 2004**

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

"the Act" means the Freedom of Information Act 2000(c);

"applicant", in relation to a request for environmental information, means the person who made the request;

"appropriate record authority", in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

"the Commissioner" means the Information Commissioner;

"the Directive" means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

"historical record" has the same meaning as in section 62(1) of the Act;
"public authority" has the meaning given in paragraph (2);

"public record" has the same meaning as in section 84 of the Act;

"responsible authority", in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

"Scottish public authority" means –

(a) a body referred to in section 80(2) of the Act; and

(b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

"transferred public record" has the same meaning as in section 15(4)of the Act; and
"working day" has the same meaning as in section 10(6) of the Act.

Regulation 3 – Application

Regulation 3(1) Subject to paragraphs (3) and (4), these Regulations apply to public authorities.

Regulation 3(2) For the purposes of these Regulations, environmental information is held by a public authority if the information –

(a) is in the authority's possession and has been produced or received by the public authority; or

(b) is held by another person on behalf of the public authority.

Regulation 11 - Representation and reconsideration

Regulation 11(1)

Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

Regulation 11(2)

Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

Regulation 11(3)

The public authority shall on receipt of the representations and free of charge –

(a) consider them and any supporting evidence produced by the applicant; and

(b) decide if it has complied with the requirement.

Regulation 11(4)

A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.

Regulation 11(5)

Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of –

(a) the failure to comply;

(b) the action the authority has decided to take to comply with the requirement; and

(c) the period within which that action is to be taken.

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

(a) an exception to discloser applies under paragraphs (4) or (5); and

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

Regulation 12(2) A public authority shall apply a presumption in favour of disclosure.

Regulation 12(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(a) it does not hold that information when an applicant's request is received;

(b) the request for information is manifestly unreasonable;

(c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;

(d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or

(e) the request involves the disclosure of internal communications.

Regulation 12(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(a) international relations, defence, national security or public safety;

(b) the course of justice, the ability of a person to receive a fair trail or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;

(c) intellectual property rights;

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

(f) the interests of the person who provided the information where that person –

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from the Regulations to disclose it; and
(iii) has not consented to its disclosure; or

(g) the protection of the environment to which the information relates.

Regulation 12 (6) For the purpose of paragraph (1), a public authority may respond to a request by neither confirming or denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

Regulation 12(7) For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

Regulation 12(8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

Regulation 12(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

Regulation 12(10) For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

Regulation 12(11) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.

Regulation 14 - Refusal to disclose information

Regulation 14(1)

If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2)

The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3)

The refusal shall specify the reasons not to disclose the information requested, including –

(a) any exception relied on under regulations 12(4), 12(5) or 13; and

(b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b)or, where these apply, regulations 13(2)(a)(ii) or 13(3).

Regulation 14(4)

If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

Regulation 14(5)

The refusal shall inform the applicant –

(a) that he may make representations to the public authority under regulation 11; and

(b) of the enforcement and appeal provisions of the Act applied by regulation 18.

▪ **Freedom of Information Act 2000**

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a)` to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Section 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Section 1(3) provides that –

"Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

Section 1(4) provides that –

"The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

Section 1(5) provides that –

"A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b)."

Section 1(6) provides that –

"In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny".

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Refusal of Request

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

Environmental information.

Section 39(1) provides that –

"Information is exempt information if the public authority holding it-

(a) is obliged by regulations under section 74 to make the information available to the public in accordance with the regulations, or

(b) would be so obliged but for any exemption contained in the regulations."

Section 39(2) provides that –

"The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)."

Section 39(3) provides that –

"Subsection (1)(a) does not limit the generality of section 21(1)."