

Environmental Information Regulations 2004 (EIR) Decision notice

Date: 4 March 2013

Public Authority: Babergh District Council
Address: Corks Lane
Hadleigh
Ipswich
IP7 6SJ

Decision (including any steps ordered)

1. The complainant has requested information about the monitoring of aircraft. The Commissioner's decision is that the request is manifestly unreasonable and that the public interest test favours maintaining the exception. No further action is required.

Request and response

2. On 15 May 2012, the complainant wrote to Babergh District Council (the Council) and requested information in the following terms:

"I wish to apply for information under the Environmental Information Regulations, relating to monitoring of aircraft movements at [Nayland Airfield] during 1998 and 1999, undertaken by or on behalf of Babergh District Council."
3. The Council responded on 30 May 2012. It refused the request on the grounds that it was manifestly unreasonable, as per regulation 12(4)(b) of the EIR.
4. The Council wrote to the complainant on 4 July 2012 to state that its internal review upheld the original decision.

Scope of the case

5. The Commissioner received correspondence from the complainant on 24 July 2012 complaining about the way his request for information had been handled.

6. The Commissioner considers the scope of the case to be whether the request can be refused on the grounds that it is manifestly unreasonable.

Reasons for decision

Background to decision

7. The request relates to a long-running dispute between the complainant and the Council. This dispute has been detailed in a previous decision by the Commissioner¹ as well as by the First-Tier Tribunal. The background from the First-Tier Tribunal case has been reproduced in Annex A.
8. The Commissioner considers that this description is relevant to this decision. This request also relates to a matter that has been decided at High Court, and the complainant agreed to a Consent Order based on that judgement. The Commissioner also wishes to highlight that the complainant had full legal representation throughout the High Court judgement.
9. The complainant obtained documents, as a result of a disclosure brought about by the Commissioner's decision in case FS50277289, which showed that the Council enquired about having the airfield monitored. His request is for further information about this matter.

Is the information environmental?

10. One document disclosed through the Commissioner's decision FS50277289 was a letter from a member of Council staff to a private investigator. In this letter it states that the Council would be interested having Nayland Airfield monitored to obtain the following information:
 - Time of take-off (or landing) of aircraft
 - Registration mark of aircraft (this will generally be G-(and then four letters)
 - Which "runway" the aircraft took off from, or landed on
 - Which direction the aircraft took off in (i.e. either towards the building or down the slope)

¹ http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fer_0436438.ashx

11. The definition for environmental information is provided in regulation 2 of the EIR. The Commissioner's view is that the information is likely to meet the definition under 2(1)(c). The information is about the monitoring of activities which will affect the elements and factors listed in regulations 2(1)(a) and 2(1)(b).
12. The Commissioner wishes to clarify that he has not seen the withheld information and so cannot be certain that all of the withheld information meets the definition in regulation 2. However, it is reasonable to assume that information relating to monitoring of an airfield would meet this definition.

Regulation 12(4)(b)

13. Regulation 12(4)(b) of the EIR states that:

(4) 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;

14. The Commissioner considers that one of the ways in which a request for information can be deemed manifestly unreasonable under Regulation 12(4)(b) is if it would otherwise be considered vexatious for the purposes of the Freedom of Information Act 2000 (FOIA). The Commissioner notes that in a recent Upper Tribunal decision it was made clear that "in practice there is no material difference between the two tests [to determine if a request can be refused] under section 14(1) [of the FOIA] and regulation 12(4)(b)."²
15. In the Council's submissions it has followed the Commissioner's well-established guidance.³ This states that it is possible to determine whether a request can be refused as vexatious (and therefore manifestly unreasonable) by considering the following questions:
 - Can the request fairly be seen as obsessive?
 - Is the request harassing the authority or causing distress to staff?
 - Would complying with the request impose a significant burden in terms of expense and distraction?

² Craven v Information Commissioner and DECC GIA/786/2012, page 5 paragraph 22

³

[http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/vexatious_and_repeated_requests.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/vexatious_and_repeated_requests.ashx)

- Is the request designed to cause disruption or annoyance?
 - Does the request lack any serious purpose or value?
16. Although the Commissioner will address each of these points where relevant, he will also take into account the Upper Tribunal's decision in *Information Commissioner v Devon CC and Dransfield*.⁴ The judge in this case expressed the view that the guidance could be used as "guidelines not tramlines" and should be used to assist with "structured decision-making".
17. It was made clear in the Upper Tribunal ruling that a decision on whether a request is vexatious depends on the circumstances in which it was made. Thus, the Commissioner will also consider the context and history between the two parties at the time of the request to support his decision.

Arguments for not refusing the request under regulation 12(4)(b)

18. This request was the second made by the complainant to the Council. The Commissioner has reviewed both requests and considers that both are relatively straightforward and could not be considered manifestly unreasonable due to the breadth of their scope. As such, the Commissioner's view is that the request in this decision – when viewed in isolation – cannot be considered to represent a significant burden and so would not add any weight to the Council's decision that the request is manifestly unreasonable.
19. The Commissioner has also reviewed the language and tone of the request to determine whether it can be said to be harassing or likely to cause distress to Council staff. As is clear from the content of the request, there is no evidence of any abusive language or haranguing tone. Furthermore, the Commissioner considers that this request is not harassing.
20. The complainant has expressed the view to the Commissioner that the Council is being "evasive and unaccountable". The complainant is concerned because he only became aware of the possibility of monitoring after the planning inquiry had made its decision. His argument is that as this was not presented as evidence to the inquiry it has not been given proper scrutiny. The complainant also drew the Commissioner's attention to submissions from a former Council

⁴ <http://www.osspsc.gov.uk/judgmentfiles/j3680/GIA%203037%202011-01.doc> page 11, paragraph 42

employee to the planning inquiry. The complainant's view of these submissions is that the Council employee stated that "no flying occurred" on the Eastern Runway⁵ in 1998. The complainant believes this would be contradicted by the disclosure of recorded information about the monitoring of Nayland Airfield.

21. The Commissioner considers that there is merit in a requester wanting transparency in the Council's decision in order to hold it to account. Indeed, this is one of the main objectives of the EIR.
22. The complainant explained further that he is concerned about dishonesty within the Council. He stated this is evidenced by a document disclosed through decision FS50277289, which is from a legal representative of residents close to the airfield. In this letter the usage of the Eastern airstrip is described as "intense and uncontrolled". The complainant states that this was at odds with the evidence given by the Council to the planning inquiry or to the High Court. As such, he feels that it cannot be said that his request can be considered an "unjustified interference" to the Council and must not be refused as manifestly unreasonable.

Arguments for refusing the request under regulation 12(4)(b)

23. The Council argued to the Commissioner that the complainant is linked to a local flying group. At the time of the complainant's second request members of the group had made 22 requests to the Council, all of which related to Nayland Airfield and made after the High Court judgement in 2008. Therefore whilst the complainant has only made 2 requests, the Council argued that he was part of a group which had made 22 requests. As all were related to the same subject, and that the complainant has clear interests in Nayland Airfield, it can be argued that the complainant is contributing to an on-going dispute which represents a significant burden on the Council's resources.
24. As evidence for the complainant's links to the group the Council referred to a letter of May 2011 from the complainant where he refers to the appellant in the aforementioned First-Tier Tribunal – who is a known member of the group – as a "colleague", and explains the assistance the complainant has had from his colleague to try and obtain information which challenges the evidence presented by the Council in the planning inquiry and later relied upon in Court. The Council also provided a link to the flying group's website, where the complainant is listed as the

⁵ Complainant's letter to Council – 12 June 2012

group's contact for enquiries. The Commissioner also notes that this website refers to the group as "dedicated members" of the airfield.

25. The Commissioner is satisfied that there is a clear association between the complainant and the other individuals who have submitted requests to the Council regarding Nayland Airfield. The Commissioner does not consider that the complainant is 'guilty by association' and can be held responsible for the actions of the group. For example, if one member was abusive to Council members of staff this would not be held against other members.
26. However, there must be recognition of the burden that the group as a whole has placed on the Council's resources. It is not reasonable to have a situation where a request could be made from two members of a group and one member is refused as vexatious / manifestly unreasonable but another member is provided the information due solely to the number of requests they have each previously made. This would undermine the reasons for the refusal of the request and make it possible to avoid measures designed to protect Council resources.
27. In order to consider the complainant's argument that disclosure would overturn his view of the Council's stance that "no flying occurred" the Commissioner reviewed the record of the planning inquiry. He notes that in paragraph 6.14 the member of Council staff whose evidence the complainant contests states that:

"I do not dispute the statement made by the Appellant [the complainant in this decision] that aircraft may have taken off and landed in an easterly direction away from the main runway for a period exceeding 10 years. Indeed, from time to time the Council has investigated this use. The letter produced by the Appellant with the appeal written by [Council employee A], my former colleague was one such investigation."

28. It is the Commissioner's view that this shows that the Council's position was not that "no flying occurred". Indeed, it shows that the Council was aware that flying might have occurred and that the complainant was aware of this when he made his comments in the letter of June 2012. As such, this detracts from the argument made that the Council has been dishonest.
29. The Commissioner considers that the most significant argument for refusing the request is that the cause of this dispute between the two parties has already been decided through the High Court. The Council has made it clear it does not wish to revisit matters to which the complainant – who was legally represented throughout – agreed to through a Consent Order. The complainant has the right to apply to Court to vary or discharge the Consent Order at any time. If he

considers that the Council has acted duplicitously or has been unlawful then the matter should be taken up as legal proceedings.

30. The Commissioner's view is that the complainant is seeking to readdress issues in a dispute that has been settled before the High Court where there is a clear appeals procedure and where there has been considerable opportunity to make such an appeal. The Commissioner considers that it can therefore be said that the complainant's request lacks significant value, which adds further weight to the argument that the request can be refused as manifestly unreasonable.
31. The Commissioner has examined the letter from the local resident's legal representative mentioned above. His view is that this does not show evidence of the Council being dishonest. This legal representative was employed by local residents and was not working on behalf of the Council. The views expressed are not necessarily those of the Council and do not conclusively show that there was strong evidence that the Council's position at the planning inquiry was duplicitous. As such, this would diminish the argument that the Council is being dishonest and that the complainant is investigating a wrongdoing.

The Commissioner's decision

32. It is evident that viewed outside of the circumstances the request would not be considered manifestly unreasonable: it is only the second request made by the complainant; the language is appropriate for a request, and there is no evidence that this is designed to harass members of Council staff. The Commissioner has also considered the complainant's stated motive that he has attempted to increase the transparency of the Council. It is the Commissioner's view that these arguments are not without merit and have been considered to have weight.
33. However, the Commissioner's view is that this is outweighed by the arguments for refusing the request. The complainant has clear links to a group which is running a campaign to revisit and challenge a High Court judgement. This campaign has featured a number of requests and has placed a significant burden upon the Council's resources. The Commissioner also considers that the request can be said to lack significant value as the complainant is challenging a High Court judgement in an inappropriate forum.
34. In view of this, the Commissioner's decision is that the exception is engaged and that the request can be considered manifestly unreasonable. However, the Commissioner will now consider the public interest test – as per regulation 12(1)(b) - to determine whether this would favour disclosure of the requested information.

Public interest test

35. When considering the public interest test in EIR decisions, the Commissioner is conscious of regulation 12(2), which states that there is a presumption in favour of disclosure. This is interpreted to mean that if the factors are evenly balanced then the information should be disclosed.
36. As previously mentioned, the complainant has stated that he feels the Council is acting in an unaccountable way. Disclosure of the information would promote transparency and therefore improve the public's knowledge in how the Council makes its decisions.
37. However, as the request is considered manifestly unreasonable there is a strong public interest argument in maintaining the exception. It is in the public interest for the Council to conserve its resources where possible, and it has already been demonstrated that, in context, this request is a significant burden to the Council. When coupled with the factors which detract from the complainant's arguments in favour of complying with the request, there is a strong public interest argument for the exception to be maintained.
38. The Commissioner's decision is that the public interest test favours maintaining the exception. Based on the circumstances and the context provided the Commissioner considers that there is a greater weight which should be given to the argument for the Council to protect its resources as opposed to the arguments for transparency and accountability.

Right of appeal

39. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

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

40. 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.
41. 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

Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex A

Taken from *Bragg v IC & Babergh District Council (EA/2012/0107)*⁶

1. There is a long planning history to Nayland Airfield. It is situated in an area of Outstanding Natural Beauty in the Dedham Vale in Suffolk. There are two airstrips on the site: one known as the main airstrip and the other as the Eastern airstrip. Originally – because the area used for take-off and landing was open farmland – it was difficult to identify the separate areas.
2. The main airstrip was granted planning permission in 1985 (following an appeal and a decision by the Secretary of State) subject to various conditions including the restriction of the number of take-offs to 10 per day and no more than 5 per hour.
3. A further condition prohibited take-offs on Sundays or bank or public holidays. On 17 February 2000 the conditions of the 1985 permission were relaxed so that no aircraft could take off on the site on Christmas Day but Sunday flying was permitted between the hours of 10 AM and 2 PM.
4. In terms of the Eastern airstrip, the landowner applied to the Second Respondent on two occasions for a Certificate of Lawfulness for aircraft to take off and land on it. Those applications – made in 1998 and 2004 – were refused by the Second Respondent (the Council) on the basis that the use of the Eastern airstrip had not been proved and shown to have existed for the required 10 year period preceding the applications.
5. In the absence of an appeal against the 2004 refusal, the Council proceeded to issue an Enforcement Notice under section 172 of the Town and Country Planning Act 1990 [sic] against the landowner on 24 January 2005. The Enforcement Notice required the landowner to cease using that portion of the land for that purpose.
6. The landowner appealed against that Enforcement Notice on the basis that the land in question had been used on or before the 10 year period preceding the Enforcement Notice and was, as a result, immune from enforcement action.

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<http://www.informationtribunal.gov.uk/DBFiles/Decision/i858/20121016%20Decision%20EA20120107.pdf>

7. A planning enquiry took place in November 2006 and the Enforcement Notice was upheld. In April 2007 complaints were received that the main airstrip was being used in breach of the Sunday restrictions and that the Eastern airstrip was being used again. The landlord acknowledged, under caution, that he was using the Eastern airstrip in contravention of the Enforcement Notice and that was confirmed by his log books.
8. Injunction proceedings were commenced by the Council in the High Court and an interim injunction was granted to stop unlawful flying activities. A final injunction was granted by the High Court on 22 April 2008. This was by way of a Consent Order where the landowner agreed to the terms and the issuing of the injunction and had been represented by Counsel and solicitors throughout the proceedings.