

Decision Notice



Decision 020/2011 Mr Garry Calder and East Lothian Council

Whether request was manifestly unreasonable

Reference No: 201001025

Decision Date: 03 February 2011

www.itspublicknowledge.info

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Summary

Mr Calder requested from East Lothian Council (the Council) certain information relating to planning permission in respect of a quarry. The Council informed Mr Calder that some information had been published on its website, and provided a link to the page. Following a review, which concluded that the Council was not obliged to comply with his requests because they were vexatious, Mr Calder remained dissatisfied and applied to the Commissioner for a decision.

There followed an investigation, in the course of which the Council accepted that Mr Calder's information request should have been dealt with under the Environmental Information (Scotland) Regulations 2004 (EIRs). It argued that the request was manifestly unreasonable in terms of regulation 10(4)(b) of the EIRs. The Commissioner did not accept this and required the Council to respond to the request in some other way which was compliant with the EIRs.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions) and 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a) to (c) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request) and 10(1), (2) and (4)(b) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 16 March 2010, Mr Calder wrote to the Council requesting the following information, all relating to the planning permission for a quarry:
 - a) copies of all related correspondence and material in connection with the proposed extension of the permission past its current expiry date;



- b) confirmation of the Council's understanding, involvement and position in relation to the quarry company's intention (as he perceived) to alter its current planning application;
 - c) copies of all related communications between the Council and the quarry company, inclusive of all parties involved with the current planning application.
2. The Council acknowledged receipt of these requests on 18 March 2010, but did not otherwise respond to them.
 3. On 18 April 2010, Mr Calder wrote to the Council to express his dissatisfaction with the delay in responding.
 4. The Council responded on 20 April 2010. It apologised for the delay, advising that staff were working on his requests but that in the meantime some relevant information had been published on the planning pages of its website: a link to these pages was provided.
 5. On 20 April 2010 Mr Calder wrote to the Council, specifically requesting a review of the Council's handling of his requests.
 6. The Council notified Mr Calder of the outcome of its review on 27 April 2010. The Council apologised for the delay in handling the request, confirmed that it held information which fell within the scope of the requests, but stated that this information could not be released because it considered the requests to be vexatious in terms of section 14(1) of FOISA. It provided reasons for this conclusion.
 7. On 18 May 2010 Mr Calder wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
 8. The application was validated by establishing that Mr Calder had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to those requests. The case was then allocated to an investigating officer.

Investigation

9. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked about its interpretation of the requests, its reasons for considering them to be vexatious and whether it should have dealt with the requests under the EIRs.



10. The Council responded on 27 July 2010, confirming that it considered the information to be environmental information and therefore accepting that the request should have been dealt with under the EIRs. It advised that it was relying upon the exemptions in section 39(2) of FOISA and regulation 10(4)(b) of the EIRs, with arguments and evidence in support of its position. These arguments (insofar as relevant) will be considered more fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all the submissions made to him by both Mr Calder and the Council and is satisfied that no matter of relevance has been overlooked.

Section 39(2) of FOISA

12. The Commissioner has set out his thinking on the relationship between FOISA and the EIRs in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹ and need not repeat it in full here.
13. In its submissions to the Commissioner, the Council acknowledged that Mr Calder's requests should have been dealt with under the EIRs and stated that it wished to rely on the exemption in section 39(2) of FOISA in relation to all the information requested. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs.
14. While the Commissioner would not accept unequivocally that planning matters would always fall within the definition of environmental information, he accepts that the information requested by Mr Calder in this case is environmental for the purposes of the EIRs. Given the nature of the development in question, the Commissioner is of the view that information held in relation to the requests would fall within paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on measures affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) of the definition.
15. Whilst the Commissioner is pleased to note that the Council arrived at the same view in the course of the investigation, he must also note that it did not do so (and act accordingly under the EIRs) when dealing with Mr Calder's information request or his requirement for review. In failing to do this, he considers that the Council failed to comply with regulation 5(1) of the EIRs.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>



16. In this case the Commissioner accepts that the Council was entitled to apply the exemption in section 39(2) of FOISA to the withheld information, given his conclusion that it is properly considered to be environmental information. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
17. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. He has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

Regulation 10(4)(b) of the EIRs

18. Regulation 5(1) of the EIRs creates a duty on public authorities to make environmental information available upon request. However, a Scottish public authority may refuse a request to make environmental information available to the extent that the request for information is manifestly unreasonable (regulation 10(4)(b)). The Council submitted that this exception applied to Mr Calder's request. The Council's submissions are summarised below and considered in the Commissioner's findings.
19. In terms of regulation 10(2) of the EIRs, the Scottish public authority applying regulation 10(4)(b) must interpret the exception in a restrictive way and must apply a presumption in favour of disclosure.

The Council's submissions

20. The Council submitted that Mr Calder was attempting to use information requests to achieve his sole aim of having the single-track road outside his home improved and widened: that is, his request was clearly rooted in his underlying complaint about the refusal of the Council to widen the road. The Council highlighted the opening line of Mr Calder's information request: "My home shall be affected by any proposed extension to the quarry past its current licence date of 31st December 2011..."
as indicating that his primary concern was with the road, which also happened to be the road to the quarry. It referred to Mr Calder's long history in attempting to have the road widened.
21. To evidence its submission, the Council supplied correspondence between it and Mr Calder and cited authorities to show the relevance of Mr Calder's history of dealings with it. It cited decisions of the Commissioner (*Decision 092/2010 Mr N and South Lanarkshire Council*²) and of the Information Tribunal and quoted the Commissioner's guidance³:

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2010/201000148.asp>

³ <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2513&SID=2591>



“... an applicant’s identity, and the history of their dealings with a public authority, may be relevant. An authority could reasonably conclude that a particular request represents the continuation of a pattern of behaviour which it has deemed vexatious in another context, and so refuse this request as being vexatious. This will arise most often where an applicant has an ongoing grievance against a public authority.”

22. The Council advised that Mr Calder had complained about the Council many times and bombarded it with questions. It explained that Mr Calder had made two appeals to the Scottish Public Services Ombudsman (SPSO) and allegations of misconduct against various Council employees and Elected Members – including a complaint to the Standards Commission for Scotland. In addition, the Council stated, Mr Calder had written to MPs and MSPs to ask for an independent investigation. This, the Council submitted, meant that it was reasonable for it to conclude that Mr Calder has been conducting a campaign against it using every method available to him. The Council explained that all of Mr Calder’s complaints had been rejected.
23. The Council submitted that it had done all that could reasonably be expected of it to resolve Mr Calder’s problems and, where this proved impossible, to provide detailed explanations to him. Similarly, the Council believed that Mr Calder had always received responses and explanations from it within a reasonable time and that it had engaged with him to the extent of expending a considerable amount of time involving officers from several departments on a regular basis.
24. Making reference to *Decision 092/2010* (see above), the Council submitted that this, and several Information Tribunal decisions, showed considerable similarities to Mr Calder’s case. That is, there were several main aspects upon which these decisions were based that were also met in the case of Mr Calder:
 - the appellant’s aggressive, accusatory, harassing tone in the correspondence
 - the volume of the appellant’s correspondence, which frequently contained lists of questions
 - the fact that the requests were part of a campaign against the Council to achieve his aim by exposing alleged improper or illegal behaviour in the context of evidence
 - the request, viewed as a whole, appeared to be intended simply to reopen issues which had been disputed several times before, and was, in effect, the pursuit of a complaint by alternative means.



25. In respect of the first of these aspects, the Council contended that Mr Calder's tone had progressed throughout his correspondence from fairly reasonable to almost threatening and harassing. The Council claimed that Mr Calder regularly accused Council employees of being arrogant and their behaviour unacceptable, and of lying and making misrepresentations. From the "provocative and accusatory" nature of some of Mr Calder's comments directed at various individuals within the Council, combined with the volume of his correspondence, the Council considered it reasonable to conclude that the effect this request had was to harass Council employees (whether or not that had been his intention). The Council referred to Mr Calder's "personal attacks" against various Council employees and Elected Members, at various levels within the organisation, using terminology designed to cause offence. The Council referred specifically to "regular and consistent" distortion of the name of a particular staff member in correspondence, which it considered deliberately offensive and intended to cause annoyance.
26. In relation to the volume of correspondence, the Council provided a sample of Mr Calder's correspondence to demonstrate the number of individuals in different departments he had "kept engaged for extended periods of time". In this respect, the Council explained that Mr Calder's custom was to submit a long list of questions to an individual, and having received a response would put a new slant on the questions and ask them again. It submitted that there was a history of doing this frequently, to several individuals from different departments at the same time, and that the resulting level of contact between him and various departments of the Council was "indicative of his obsessive approach". It submitted that the burden of compliance with the request had to be viewed in this context.
27. On the third aspect, the Council referred to Mr Calder's unsuccessful complaints and described various allegations accusing individual officers and Elected Members of being corrupt, dishonest, having an arrogant and unacceptable approach, and of imposing "gagging orders" on employees. It considered these to be entirely unacceptable on their own merits and to be further evidence that Mr Calder's request was part of an ongoing campaign and vexatious. It believed his "accusatory and confrontational approach" to have caused considerable distress and to be evidence of an intention to harass.
28. As indicated above, the Council considered Mr Calder's primary motivation to be his underlying complaint about the road, which it considered to have been thoroughly examined and exhaustively answered. It did not consider it likely that the correspondence would cease unless it complied with his demands, and suggested that compliance with his requests would simply trigger further correspondence, all aimed at demonstrating the need to widen the road and imposing an even greater burden on the Council.

The Commissioner's findings



29. There is no definition of “manifestly unreasonable” in the EIRs, or Directive 2003/4/EC, from which they are derived. The Commissioner’s opinion is that “manifestly” implies that a request should be obviously or clearly unreasonable and he notes the opinion of the Information Tribunal in *Dr Kaye Little v Information Commissioner and Welsh Assembly Government (EA/2010/0072)*⁴, which considers regulation 12(4)(b) of the Environmental Information Regulations 2004 (EIR), and states:
- ‘From the ordinary meaning of the words “manifestly unreasonable”, it is clear that the expression means something more than just “unreasonable”. The word “manifestly” imports a quality of obviousness. What is in issue, therefore, is a request that is plainly or clearly unreasonable. It is a more stringent test than simply “unreasonable”.’
30. Whether a request is manifestly unreasonable must depend on the facts of each case. It may 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. In *Decision 024/2010 Mr N and the Scottish Ministers*⁵, the Commissioner stated that he is likely to take into account the same kinds of considerations in deciding whether a request is manifestly unreasonable under the EIRs as he would in reaching a decision as to whether a request is vexatious in terms of section 14(1) of FOISA. It does not follow that a request is only manifestly unreasonable under the EIRs if it is vexatious under FOISA, although in this case the focus of the Council’s submissions is that Mr Calder’s request should be considered vexatious.
32. The Commissioner's general approach is that a request (which may be the latest in a series of requests) is vexatious where it would impose a significant burden on the public authority and:
- it does not have a serious purpose or value; and/or
 - it is designed to cause disruption or annoyance to the public authority; and/or
 - it has the effect of harassing the public authority; and/or
 - it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
33. It is not necessary for all the above criteria to be met but, in general, the more criteria that apply the stronger the case that a request is manifestly unreasonable. Some arguments may naturally fall under more than one heading. Also, although there may be circumstances where the burden of responding alone justifies deeming a request to be manifestly unreasonable, ordinarily the Commissioner will expect one or more of the other listed criteria to be present in addition. In this respect the Commissioner acknowledges *The Aarhus Convention: An Implementation Guide*⁶, which states at page 57:

⁴ [http://www.informationtribunal.gov.uk/DBFiles/Decision/i475/f2010UKFTT_EA20100072_\(GRC\)_20101230.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i475/f2010UKFTT_EA20100072_(GRC)_20101230.pdf)

⁵ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2010/200900461.asp>

⁶ <http://www.unece.org/env/pp/acig.pdf>



'Although the Convention does not give direct guidance on how to define "manifestly unreasonable", it does hold it as a higher standard than the volume and complexity referred to in article 4, paragraph 2. Under that paragraph, the volume and complexity of an information request may justify an extension of the one-month time limit to two months. This implies that volume and complexity alone do not make a request "manifestly unreasonable" as envisioned in paragraph 3(b).'

34. The Commissioner has recognised that, in many cases, the vexatious nature of a request will only emerge after considering the request within its context and background, and in this connection the applicant's past dealings with the public authority can be taken into account. Even if the request appears reasonable in isolation, it may be vexatious if it demonstrates a continual pattern or behaviour or represents a significant burden when considered collectively. In this context, the fact that the request deals with the same broad subject matter as a previous request or requests may be relevant. The Commissioner accepts this would also apply to consideration of whether a request was manifestly unreasonable in terms of regulation 10(4)(b).
35. In considering whether a request is manifestly unreasonable, it is not appropriate to embark on the public interest balancing exercise: that must be undertaken only after it is clear that the exception is engaged.

Significant burden

36. The Council was asked if it had dealt with the request as several information requests, or a single request. The Council replied that although Mr Calder's email of 16 March 2010 requested three separate things, it had looked at the e-mail in its entirety.
37. The Council's review stated that responding to the request would mean investigating inboxes, sent emails and deleted items in the email systems of many people, which it considered to be a significant burden on the staff member who would have to deal with the task.
38. The Commissioner is not satisfied that responding to Mr Calder's request of 16 March 2010 would itself impose a significant burden. He has not been provided with evidence as to the level of burden that would be involved in responding to it. For example, the Council has not explained the time involved, or the cost of fulfilling the request, or the volume of information that would fall within the terms of the request. While, like all Scottish public authorities, the Council is no doubt subject to a considerable volume of other demands on its time and resources, the Commissioner is not persuaded by the submissions he has received that dealing with this particular request would demand a disproportionate amount of the Council's time or divert an unreasonable proportion of its resources away from core operations.



39. In support of its contention that a wider burden could be identified from its past history of dealings with Mr Calder, the Council submitted correspondence involving Mr Calder from 17 February 2009 to 3 June 2010. Within the correspondence, there is evidence of the Council devoting resources to deal with Mr Calder's concerns, including correspondence and meetings. In the sample supplied by the Council, there are approximately 30 pieces of correspondence from Mr Calder in which he asks questions, requests information, invites comment or registers his concern. Not all of these communications contain information requests, but there are often several questions or requests within them. A few communications include 10 or more questions, but these are the minority. The majority comprise a single question or request. There are also examples of correspondence in which Mr Calder contacts the Council to enquire whether one of his communications is being dealt with by the Council, and when he is due a response.
40. The majority of the correspondence relates to the general planning aspects in respect of the quarry (and how the Council has dealt with them), and concern with the road in question and the Council's and quarry's obligations (if any) in respect of that road. There is undoubtedly a degree of repetition in Mr Calder's questions about the road and the Commissioner notes they relate to a narrow range of subjects about which Mr Calder is concerned. When asked, the Council did not supply any evidence that it had dealt with a similar request made by Mr Calder – for example, another information request about communications between it and the quarry company.
41. The Commissioner has studied the correspondence supplied by the Council, which shows how it dealt with Mr Calder's concerns, questions and requests over a period of approximately 4 months: no indication has been provided by the Council of the total period over which it has been in correspondence with Mr Calder on these matters. In the circumstances, while the Commissioner acknowledges that the Council has devoted substantial staff time to Mr Calder, he cannot accept, even taking the evidence of past history into account, that Council has provided him with sufficient evidence that a significant burden has been imposed.
42. As the Commissioner has previously stated, in *Decision 108/2010 Mr Mark Irvine and South Lanarkshire Council*⁷:
- “...his *general* approach to the question of whether a request is vexatious is that he will require a significant burden on the public authority. This does not exclude the possibility that, in any given case, one or more of the other listed criteria may be of such overwhelming significance that it would be appropriate to consider the request vexatious in the absence of a significant burden. In the circumstances, the Commissioner will go on to consider the other submissions made by the Council as to why the request should be treated as vexatious.”
43. While the Commissioner does not accept that the Council has shown a significant burden in this case, he will now go on to consider whether he can, from the evidence and submissions provided by the Council, accept the presence of any of the other criteria listed in paragraph 32 above.

⁷ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2010/201000367.asp>



The request does not have a serious purpose or value

44. The Commissioner's guidance on this issue is clear: public authorities should not reach this conclusion lightly. Even if a public authority thinks a request lacks serious purpose or value, the applicant might, from a subjective and reasonable point of view, have a genuine desire and/or need to obtain the information. Furthermore, the applicant is not obliged to share his/her motives for seeking the information with the public authority. This criterion simply recognises that some requests may be so obviously lacking in serious purpose or value that they can only be seen as vexatious, or – in this context – manifestly unreasonable.
45. The Council argued that Mr Calder's primary issue had always been with the road passing his home, which was also the road to the quarry. In this respect, the Commissioner acknowledges that the Council may be correct: the road in question may be Mr Calder's primary concern. It does not, however, follow that other concerns about the quarry – which Mr Calder may see as affecting the road in question – are also not without serious purpose or value, even if his views on these matters may not be shared by the Council or perhaps by others.
46. The Commissioner has seen nothing in this case to support any assertion that the requests under consideration lack serious purpose or value, while on the other hand Mr Calder's communications with the Council do provide credible arguments as to why the requested information should be considered relevant to him.
47. The Commissioner cannot accept, as he has done in other decisions, that this is an instance of an applicant using a request simply to re-open or reprise a matter addressed in previous correspondence, where the information request appears to have been principally intended to continue an earlier debate with the public authority, one on which the public authority has already provided as complete a response as might reasonably be expected.
48. Based on the submissions provided by the Council, therefore, the Commissioner cannot conclude that the requests made by Mr Calder had no serious purpose or value.

The request is designed to cause disruption or annoyance to the public authority

49. Having looked at the request of 16 March 2010, the Commissioner can see nothing in it that could reasonably be interpreted as having been designed to cause disruption and annoyance.
50. The Council referred to Mr Calder's general style of correspondence: that of posing many questions and responding to the Council's answers with further questions. The Commissioner has studied the correspondence and he does note that there are examples where Mr Calder poses several questions, or asks a series of questions (for example a letter of 15 April 2009, and one of 27 April 2009), immediately in response to correspondence from the Council.



51. However, the Commissioner is not convinced that Mr Calder's style of correspondence was designed to cause disruption or annoyance, rather it seems that these questions stem from a genuine desire by Mr Calder to get answers to his questions and his belief (which may not be shared by the Council) that the Council has not sufficiently answered his questions. This is not to say that the Commissioner would always find it reasonable in the context of regulation 10(4)(b) for a person to ask question upon question of an authority, but in this case the Commissioner does not accept that it was designed to cause disruption or annoyance.
52. The Commissioner has also considered the Council's comments on the terminology used by Mr Calder and the way in which he addresses certain Council staff. While accepting that he has on occasion expressed himself strongly, and perhaps not always accurately, the Commissioner does not consider it reasonable to interpret this, in the context of the communications he has seen, as indicating an intention to cause disruption or annoyance.
53. Also, for the same reasons as noted above in respect of having serious value or purpose, the Commissioner is of the view that the requests could reasonably be considered to have purposes other than to cause disruption or annoyance.

The request has the effect of harassing the public authority

54. The test to be considered by the Commissioner here is whether the requests had the effect of harassing the public authority, not whether the complainant intended them to have a harassing effect. It should also be noted that the test is an objective one: the standard to be applied is whether a reasonable authority would consider the requests to be harassing or distressing. The Commissioner agrees with the Council that the appropriate provision in FOISA, section 14(1), relates to the vexatiousness of a request and not a requester. The same reasoning applies to the term "manifestly unreasonable".
55. As indicated above, the Council submitted that it was reasonable for it to conclude that Mr Calder was conducting a campaign against it and referred to his numerous complaints, internally and to external regulators, MPs and MSPs. It also referred to aspects of Mr Calder's correspondence and detailed what it considered to be:
 - the aggressive, accusatory, harassing tone in the correspondence;
 - the volume of correspondence, which frequently contained lists of questions;
 - the request, viewed as a whole, appears to be intended simply to reopen issues which have been disputed several times before, and is, in effect, the pursuit of a complaint by alternative means.

Certain of these points have been addressed in previous sections of this decision.



56. The Commissioner has noted in a previous decision, in respect of section 14(1) of FOISA, *Decision 208/2010 Mr D and the Accountant in Bankruptcy*⁸, a comment from the Information Tribunal that “the existence of other litigation or complaints instigated by the person making the information request may in some cases be evidence of an aggressive or obsessive approach, but it may equally represent the legitimate use of available remedies to pursue a genuine grievance”. In this particular case, the Commissioner does not accept (on the basis of the submissions and evidence presented to him) that it would be reasonable to conclude that Mr Calder has been pursuing a campaign against the Council. He appears to have pursued all available legitimate avenues with a view to achieving his particular objectives, but the Commissioner is not satisfied that this process has yet assumed the form of a campaign which a reasonable person would consider to have the effect of harassing the Council.
57. The Commissioner has also considered the content and tone of Mr Calder’s communications, in line with the arguments presented by the Council. While accepting (as indicated above) that Mr Calder has on occasion expressed himself strongly, he does not accept that the general tenor of those communications could reasonably be characterised as aggressive, accusatory or harassing. Although it is relevant to consider the impact that the request and associated communications may have on those to whom they are addressed, the Commissioner also considers it important to recognise that public authorities and the individuals representing them must expect to be exposed to an element of robust and persistent questioning, sometimes articulated in fairly critical tones.
58. As the Information Tribunal noted in the case of *Michael Jacobs and the Information Commissioner (EA/2010/0041)*⁹, at paragraph 27, the test of when a dialogue of this kind develops to the stage where it might be said to have become vexatious or manifestly unreasonable will be an objective one, not based on the particular sensitivities of the individual or individuals dealing with the person making the request. The question, therefore, must be whether distress or irritation would be caused to a reasonably calm, professional and resilient officer of a public authority. Applying that assessment, the Commissioner has not found the general tenor of the correspondence to be objectionable or otherwise to constitute harassment.
59. The Council also raised the issue of the volume of correspondence from Mr Calder and the numbers of staff involved in dealing with it. The Commissioner has already considered this concern above under the heading of significant burden. While the Commissioner notes that different staff have required to be involved, it appears that this is because of the varied nature of Mr Calder’s interests and dealings with the Council: the Council has had to address issues relating to roads and planning, together with a formal complaint (which required the involvement of the Chief Executive) and correspondence with Elected Members. In the circumstance, he does not believe the volume, at least at the point of dealing with the request under consideration here, to provide evidence of harassment.

⁸ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2010/201001381.asp>

⁹ [http://www.informationtribunal.gov.uk/DBFiles/Decision/i426/Decision%20&%20PTA%20\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i426/Decision%20&%20PTA%20(w).pdf)



60. The Commissioner therefore does not accept the Council's submission that the requests had the effect of harassing the authority, either by themselves or cumulatively taken with other correspondence received from Mr Calder.

It would be otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate

61. The final test in considering whether a request is vexatious is that it would be otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate. Having considered the submissions he has received from the Council in this case, the Commissioner can identify no other reason for determining the applicant's requests to be manifestly unreasonable or disproportionate.

Was the request manifestly unreasonable?

62. Having looked at Mr Calder's requests, therefore, and having considered the relevant arguments and evidence, the Commissioner is not satisfied that the exception in regulation 10(4)(b) of the EIRs applies to the requests. Having reached this conclusion, he is not required to consider the public interest test in regulation 10(1)(b) of the EIRs.
63. The Commissioner therefore requires to Council to respond to Mr Calder's information requests in accordance with the EIRs. The Council should consider what relevant recorded information it held at the time it received the request of 16 March 2010. Any information held should be made available to Mr Calder, unless the Council considers itself entitled, under any relevant provision of the EIRs, to refuse to do so.
64. The Commissioner appreciates that there is often a thin line between requests exhibiting persistence on the part of the applicant and being vexatious or manifestly unreasonable, and he understands that in some cases this can be a difficult judgement to make (especially where requests are linked to a background issue that is difficult to resolve). He accepts that there must be a limit to the number of times a public authority can be expected to revisit issues relating to a particular grievance. However, in the circumstances of this case, the Commissioner is not persuaded that the Council had reached that point on receiving the requests under consideration here. It does not, of course, follow that it would be inappropriate to reach such a conclusion at some point in the future.

DECISION

The Commissioner finds that East Lothian Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing with Mr Calder's request for information. In particular, in failing to identify the information requested as environmental information (as defined in regulation 2(1)) and deal with the request accordingly under the EIRs, it failed to comply with regulation 5(1) of the EIRs.



The Commissioner also finds that the Council failed to comply with the EIRs (and in particular regulation 5(1)) by withholding information under regulation 10(4)(b) of the EIRs.

The Commissioner therefore requires the Council to respond to Mr Calder in accordance with the requirements of the EIRs (other than in terms of regulation 10(4)(b)) by 24 March 2011.

Appeal

Should either Mr Calder or East Lothian Council wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
03 February 2011



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.

...



The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"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 paragraph (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 paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...



10 Exceptions from duty to make environmental information available–

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that

...

- (b) the request for information is manifestly unreasonable;

...