

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 17 July 2012

Public Authority: Kirklees Council
Address: Civic Centre 3
Market Street
Huddersfield
HD1 2TG

Decision

1. The complainant submitted a number of requests for information relating to the decision to build a Multi-User Games Area on Shaw Cross playing fields at Leeds Road in Dewsbury.
2. The Commissioner's decision is that the council failed to provide the requested information within the statutory time limit, failed to provide advice and assistance and failed to conduct a proper internal review.
3. As the complainant was provided with the requested information during the course of his investigation the Commissioner does not require the public authority to take any steps.

Background

4. The complainant represents a group which is opposed to the council's decision to build a Multi-User Games Area (MUGA) on a playing field in Dewsbury.

5. The planning application for the MUGA was submitted by the council's culture and leisure services department and the application was approved in September 2010¹.
6. Since that time the complainant has made a number of requests for information to the council in relation to this matter. Another decision notice issued by the Commissioner (ICO reference: FER0436503) addresses a further complaint which relates to another request.

Request and Response

7. On 10 October 2010 (request (1)), 30 December 2010 (request (2)) and 12 February 2011 (request (3)) the complainant wrote to council and requested a range of information relating to the Shaw Cross MUGA.
8. The council responded to request (1) on 15 November 2010 and provided the complainant with some information. The council responded to request (2) on 16 February 2011 providing some information, confirmed that some information was not held and, in relation to certain request elements, asked the complainant to provide clarification.
9. The council responded to request (3) on 24 March 2011 and provided the complainant with some information.
10. The complainant requested an internal review on 14 May 2011. On 27 May 2011 the council asked the complainant to confirm which aspects of the handling of the request they wished the council to review. On 4 July 2011 the complainant provided this confirmation and on 9 August 2011 the council issued its review response. The internal review upheld the council's handling of the requests.

Scope of the case

11. The complainant contacted the Commissioner to complain about the way their requests for information had been handled.
-

¹ See the council's website here:

http://www2.kirklees.gov.uk/business/planning/application_search/detail.aspx?id=2010%2f90885

12. The Commissioner agreed with the complainant that his investigation would look at whether the council provided all the requested information it holds.
13. During the course of the investigation the complainant repeatedly raised concerns about the council's conduct and practice in relation to the MUGA which is the focus of the request. The Commissioner has made it clear that such matters are not within his remit as regulator and he has excluded these issues from his investigation.

Reasons for decision

Is it Environmental Information?

14. The Commissioner has considered whether the requests identify environmental information.
15. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is as any information in any 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...'*
16. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
17. In this instance, the Commissioner notes that the request identifies information relating to a determination regarding a planning application.

He has concluded that such information, if held, would be likely to constitute a measure as defined in regulation 2(1)(c) of the EIR.

18. During the course of the investigation the council agreed with the Commissioner that it should have handled the requests under the EIR. The Commissioner has gone on to consider whether the council's handling of the requests complies with the provisions of the EIR.

Has all the relevant information been provided?

19. Regulation 5(1) of the EIR states that "...a public authority that holds environmental information shall make it available on request."
20. Regulation 5(2) of the EIR states "Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."
21. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
22. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any further information which falls within the scope of the request (or was held at the time of the request) beyond that which has been disclosed.
23. To assist in this determination the Commissioner wrote to the council and asked it a range of questions, including questions about searches it had undertaken for the requested information. The Commissioner also presented the council with his initial view that aspects of its responses seemed cursory and did not appear to properly engage with what had been requested.
24. Following the Commissioner's contact, the council undertook a review of all the relevant information held and identified and disclosed to the complainant a substantial volume of additional information. The council also accepted that, whilst it had attempted to address all the questions raised, its responses to some elements of the requests might have appeared disingenuous. The Commissioner notes that the additional disclosures made during the course of his investigation represented an attempt to rectify this.
25. The complainant has highlighted perceived discrepancies between information provided in response to different elements of the requests or

between the disclosed information disclosed and information accessed via previous requests or other media.

26. The Commissioner does not consider that it is ordinarily part of his role to determine whether the facts contained within information held by public authorities are correct or to otherwise comment on the content of disclosed information. Such a consideration would only be relevant in cases where there is an allegation that requested information has been altered after a request has been received or where disclosed information either directly or indirectly identifies further held but undisclosed information.
27. In this instance, an allegation of alteration has not been directly made and the Commissioner considers that the complainant's submissions in this regard are more relevant to their concerns about the council's handling of the substantive issue rather than its responsibilities under the EIR. The Commissioner has advised the complainant of the appropriate remedies available to them should they wish to pursue these matters.
28. The Commissioner also considers that the complainant's submissions in this regard, which broadly assert that the council has not followed due process in relation to the MUGA matter, do not weigh the balance of probabilities in favour of the likelihood of further information being held. As a failure to keep adequate records of decision making is a generally recognised feature of poor practice the Commissioner considers that, in general terms, the complainant's central argument adds credence to a determination that all the relevant held information has been disclosed. However, the Commissioner has reached his determination in this regard having considered all the relevant facts, including submissions from both the complainant and the council.

Conclusions

29. The Commissioner sought the council's explanations in relation to each element identified in the complainant's submissions. However, the Commissioner does not consider it to be proportionate or necessary to provide an analysis of his findings in each instance.
30. The council confirmed that, in conducting its review of the extent of information held it undertook searches of the relevant departments. Searches included the email accounts of the officers involved in the MUGA project and of the electronic and manual filing systems used by these same officers. Search terms used included all references to the following words: MUGA / Sports Court / Consultation / Surveys.

31. The council provided the Commissioner with copies of its Records Management Policy, its Corporate Standards for Retention and Disposal and Retention Schedule 10 – Planning and Land Use. The council confirmed that information is mostly held electronically as part of the relevant planning application (2010/90885), which is available through the council's website. Letters received as a result of the planning consultation period are held in the planning file and paper copies of these are available in the public planning file which is available for viewing at the council's planning office. Where relevant to the requests information contained in these sources has been disclosed to the complainant.
32. In relation to the likelihood of further information being held, the Commissioner has viewed the council's Retention Schedule 10 – Planning and Land Use which confirms that information relating to such planning matters is retained for 15 years. This accords with the council's confirmation that no information falling within the scope of the request has been deleted or destroyed.
33. Having considered the searches undertaken by the council, the relevant statutory obligations regarding information retention, the council's records management policy and the substantial additional information disclosed by the council the Commissioner is satisfied that, on the balance of probabilities, it is likely that no further relevant information is held.
34. In failing to provide the complainant with the requested information within the statutory time for compliance the council breached regulation 5(2) of the EIR.

Regulation 9 – Advice and Assistance

Request (1) – elements 6.1 and 6.6

35. Regulation 9(1) provides that public authorities should provide advice and assistance, so far as it is reasonable to do so, to applicants and prospective applicants.
36. Regulation 9(3) explains that, an authority which conforms to the recommendations of the code of practice issued under regulation 16 of the EIR (the "EIR code") in providing advice and assistance in a specific

instance shall be taken to have complied with regulation 9(1) in that instance².

37. In its response to the above cited parts of the request, the council asked the complainant to provide clarification. However, the council did not advise and assist the applicant in doing this in a manner which confirms to the recommendations of the EIR code.
38. The Commissioner has found that, in its handling of these elements of request (1), the council failed to provide appropriate advice and assistance and breached regulation 9(1) of the EIR.

Regulation 11 – representations and reconsideration

39. Regulation 11 provides applicants with a statutory right to require an authority to conduct a review – an “internal review”, of its handling of a request for information.
40. Regulation 11(4) requires that a public authority receiving a request for internal review shall notify the applicant of its decision in this regard as soon as possible and no later than 40 working days after the date of receipt of the representations.
41. In this instance the complainant requested an internal review on 4 July 2011. The council responded on 9 August 2011; however, this response did not address the representations made by the complainant in respect of all their requests for information.
42. As the council failed to issue a valid internal review decision within the time for compliance the Commissioner has concluded that it breached regulation 11(4). The Commissioner does not require the council to take any steps.

² The EIR code is published here:
http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/detailed_specialist_guides/environmental_information_regulations_code_of_practice.pdf

Right of appeal

43. 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

44. 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.
45. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF