

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 19 September 2013

Public Authority: Epsom & Ewell Borough Council

Address: Town Hall
The Parade
Epsom
Surrey
KT18 5BY

Decision (including any steps ordered)

1. The complainant has requested information relating to planning application 11/00534/FUL. Epsom & Ewell Borough Council provided some information but refused the remainder of the request under regulation 12(4)(a) of the EIR, stating that it did not hold the requested information.
2. The Commissioner's decision is that Epsom & Ewell Borough Council failed to conduct an internal review within the time limit and breached regulation 11(4) of the EIR. but that it correctly confirmed that some of the information was not held, complying with regulation 5(1) and regulation 12(4).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 27 November 2012, the complainant wrote to Epsom & Ewell Borough Council (the "council") and requested information in the following terms:

"All recorded information from the planning department regarding planning application 11/00534/FUL including e-mails from Adele Castle regarding pre-application advice and any other consultations."

5. The council responded on 19 December 2012 and provided the complainant with a scanned copy of information contained on the relevant planning file. In relation to pre-planning and other information specified in the request the council confirmed that this information was not held. It also suggested that, should the information be held, it would be likely to be exempt under section 36 of the Freedom of Information Act 2000 (FOIA).
6. Following an internal review the council wrote to the complainant on 10 March 2013. It stated that it had reconsidered the request under the EIR and re-confirmed that the council did not hold the requested information.

Scope of the case

7. On 18 February 2013 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly confirmed that it did not hold information relating to pre-application advice.
9. During the course of the Commissioner's investigation and, following further searches, the council found and disclosed some further information falling within the scope of the request.

Reasons for decision

Regulation 5 – is the requested information held? / Regulation 12(4) – refusal where information is not held

10. Regulation 5(1) provides that a public authority that holds environmental information should make it available on request.

11. Regulation 12(4) provides that a public authority may refuse to disclose information where it does not hold that information when a request is received.
12. In this case, the council provided the complainant with information from the relevant planning file but stated that the planning department did not hold information relating to pre-application advice or other consultations.
13. The Commissioner has considered whether the council has correctly confirmed that information relating to pre-application advice and other consultations regarding application 11/00534/FUL is not held.
14. 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 ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
15. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
16. In order to assist with this determination the Commissioner asked the council a range of questions which are reproduced along with the associated responses from the council below.

What searches were carried out for information falling within the scope of this request and why would these searches have been likely to retrieve any relevant information?

17. The council confirmed that it had undertaken searches of: the relevant planning officers' mailboxes, the hard copy planning file reference 11/00534/FUL and the electronic planning file in its document management system. The council also stated that it had conducted searches of hard copy "street" files for the surrounding area (hard copy files of miscellaneous correspondence in relation to properties, organised by street/locality).
18. The council confirmed that, should any relevant pre-application communications be held, they would most likely be held in one or other of the above locations.

If searches included electronic data, please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.

19. The council explained that it uses "thin client" devices, which contain no storage media; all information is stored on the council's central servers. It confirmed that none of the individuals involved has a separate laptop computer and stated that any PC or laptop previously used by either of the relevant officers is likely to have been disposed of.

If searches included electronic data, which search terms were used?

20. The council confirmed that the search terms principally used were based on parts of the name and address of the property, specifically – "Joseph", "Church" and "Margaret". Each was searched separately. The council stated that it considered these terms were generic enough to uncover any relevant information.

If the information were held would it be held as manual or electronic records?

21. The council confirmed that, if held, the records could be electronic, hard copy or both.

Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?

22. The council stated that, from its records, it is not possible to say with certainty whether any information within the scope of the request was held and, if so, what that consisted of.
23. The Commissioner directed the council to information obtained by the complainant via a Freedom of Information request to Surrey County Council. This consisted of emails to and from Epsom and Ewell Borough Council in relation to the matters referred to in the request. The Commissioner suggested to the council that this appeared to show that, at least at some point in time, information falling within the scope of the request was held by the council.
24. The council acknowledged that the information obtained by the complainant from another source indicated that some pre-application discussion must have taken place. The council stated that, if held, it could only conclude that the information had been deleted / destroyed. The council confirmed that it had been unable to retrieve any emails from the mailbox of the officer specifically referred to in the request prior to 1 January 2012, and that it had concluded that anything not filed on a specific file (none relevant to this request for information) had been deleted. It stated that, whilst another officer's emails saved in an archive covering the period in question (early 2011) were held, none related to the site referred to in the request for information.

If recorded information was held but is no longer held, when did the council cease to retain this information?

25. The council stated that, without a clear record of what information might have been held, and at what point it was created, it was unable to speculate as to when it might have been destroyed.

Does the council have a record of the document's destruction?

26. The council confirmed that it had no record of the information, therefore, no record of its destruction.

What does the council's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the council describe the way in which it has handled comparable records of a similar age?

27. The council stated that its current policy indicates that such information (pre-application information) ought to be held for 12 months, after which it can be destroyed. It confirmed that, following discussion with the relevant officers, it appears that common practice in reality has changed over time. In practice, pre-application information created at this time covered by the request was often held on the "street" file for longer than 12 months. It was sometimes, where the case officer found it helpful, transferred to the subsequent planning application file. If this was done it would be held indefinitely on the file. The council stated that this did not happen in this instance. A full copy of the planning file was provided to the complainant with its initial response to the request.
28. The council confirmed that, from 4 April 2011, it began charging for pre-application advice and began to create files in relation to each paid enquiry. It stated that there is no record of any paid enquiry involving this site, so it appears that any pre-application advice was created prior to April 2011. The council confirmed that it considered this is consistent with the relevant information the complainant received from Surrey County Council.
29. The council stated that it would be expected that any relevant information which it might have retained would have been destroyed prior to April 2012. It confirmed that, since November 2012, the pre-application procedures have changed again and, in future it ought to be possible to track pre-application matters, and information is likely to be retained in the electronic document management system (currently such information in that system is stored indefinitely, subject to a future decision as to retention periods).

If the information is electronic data which has been deleted, might copies have been made and held in other locations?

30. The council confirmed that, if there was any electronic information, it is not likely that it would be held outside one of the sources referred to in its other responses. Any electronic document which was deleted, could in theory be retrieved from back-up copies for a period of 4 weeks from the date of deletion provided that it had been saved at least one day before deletion (the back-up process is run daily, so a document both created and deleted before that day's process will not be retrievable). The council confirmed that emails deleted by a user might also be available from back-up, but, again, only for a few weeks from the date of deletion. The council stated that it did not believe that any back-up copies of this information was held.

Is there a business purpose for which the requested information should be held? If so what is this purpose?

31. The council confirmed that the information is not necessary for any business purpose. However, it explained that it would (depending on the precise nature) be potentially useful in the context of a subsequent planning application for the site concerned.

Are there any statutory requirements upon the council to retain the requested information?

32. The council confirmed that there are no statutory requirements in relation to the retention of pre-application enquiries.

The complainant's submissions

33. As part of his complaint, the complainant provided the Commissioner with arguments in support of his belief that the council does hold the requested information. The complainant also provided some contextual information.
34. The Commissioner has noted that the planning application identified in the request (11/00534/FUL) relates to St Joseph's Catholic Church (the "church") in St Margaret Drive in Epsom, Surrey. The planning application was approved by the council and this resulted in the formation of 12 car parking spaces, 14 bicycle racks and the widening of an access driveway.
35. The complainant has stated that the road which is the subject of the planning application is a private road. They have stated that they believe that the church has obtained the planning permission in question using false information and without the knowledge of the road owners. The complainant is of the view that the council has colluded with the church to exert pressure upon the road owners to allow the adoption of the road against their wishes. The complainant believes that pressure has also been exerted by a nearby school, St Joseph's Catholic School, which has been using the private road for access.

36. The complainant believes that, given the contentious nature of the matter, prior to the application being submitted, the council would have had pre-application discussions, provided pre-application advice or otherwise discussed the matter internally or externally.

Analysis and conclusions

37. In weighing the balance of probabilities the Commissioner has considered the explanations provided by the council and referred to the complainant's submissions.
38. It is not the Commissioner's role to adjudicate on the substantive matter in this case, i.e., on what basis the planning application was approved, so, whilst he notes the complainant's concerns, he has not factored these into his determination as to whether relevant information is held by the council.
39. The Commissioner considers that it is clear, from the information disclosed to the complainant by Surrey County Council (which contains emails between Surrey and the council regarding this issue) that relevant information would have been held by the council at some point. The Commissioner notes that some of the emails in question were sent or received by the council in November 2011, shortly before the request was submitted.
40. The Commissioner understands why, given the nature of their concerns about the substantive matter, the complainant would be incredulous about the council's confirmation that information is not held. He can also see how the proximity of the dates of the emails disclosed to the complainant by Surrey County Council, which would have been held by the council, would add weight to suspicions that the council has wrongly confirmed that the information is not held.
41. The Commissioner has pursued these points with the council and received explicit assurances that relevant information is not held. In addition to the searches undertaken, as a gesture of goodwill, the council agreed to extend its searches beyond the planning department specified in the request.
42. The council has confirmed to the Commissioner that these additional searches have not located any information falling within the scope of the request. However, it did locate an email chain which was retrieved from a Councillor's "deleted items" folder. This was disclosed to the complainant during the course of the Commissioner's investigation. In any event, the Commissioner considers that the wording of the request, which asks for information held by the "planning department", clearly restricts the scope of any searches required by the council to information held by the planning department. So, the email chain disclosed to the complainant falls outside the scope of the original

request and, in the Commissioner's view, constitutes an informal disclosure which the council was not obliged to make.

43. Whilst the Commissioner is alive to the complainant's concerns he has no material basis on which to challenge the veracity of the council's confirmation that information is not held. The records management code of practice issued under section 46 of the FOIA (also applicable to the EIR) is clear that it is for public authorities to decide what information needs to be retained for its business and auditing purposes. Without direct evidence which shows that relevant information was held by the council at the time the request was received the Commissioner is not in a position to contradict the council's response. Although he does not dispute the strength of the complainant's concerns in this matter he must reach his conclusions on the basis of the available evidence.
44. Having considered the explanations provided by the council and noted the extent of the searches it conducted he has concluded that, on the balance of probabilities, it has truthfully confirmed that the information is not held.
45. The Commissioner finds that, in handling the request, the council complied with regulation 5(1) of the EIR and that, in refusing the request, it correctly applied regulation 12(4).

Regulation 11 – representations and reconsideration

46. Under regulation 11 of the EIR, any public authority receiving representations from a complainant regarding the handling of a request for information should conduct an "internal review". Internal reviews should consist of a reconsideration of the public authority's handling of the request and the outcome of the review should be sent to the complainant as soon as possible and not later than 40 working days after representations were received.
47. In this instance the complainant requested an internal review on 19 December 2012 and the council responded on 10 March 2013.
48. The Commissioner has concluded that the council failed to respond to the request for internal review within the statutory time limit and has, therefore, breached regulation 11(4) of the EIR.

Other matters

49. Although they do not form part of this decision notice the Commissioner would like to note the following matters of concern.

Engagement with the Commissioner's Investigation

50. During his handling of this complaint the Commissioner has experienced repeated delays in obtaining responses from the council. These delays have resulted in his investigation being unnecessarily prolonged. At two points during the Commissioner's investigation, the delays and lack of communication were such that he was forced to consider issuing an Information Notice to compel a response to his enquiries.
51. The Commissioner does not consider that the council's practice in this regard is within the spirit or the letter of the EIR and, in future, he expects it to demonstrate prompt engagement with his investigations.

Records Management

52. The code of practice issued under section 46 of the FOIA (the "section 46 code") contains recommendations for public authorities as to desirable practice in relation to records management¹. As a public authority for the purposes of both the EIR and the FOIA the council should have regard for the recommendations of the section 46 code.
53. Paragraph 8.1 of the section 46 code clarifies that authorities should ensure that adequate records are kept in order to justify or explain past decisions. Whilst he has not reached any conclusions in this case the Commissioner has concerns that the council might not have displayed best practice in this regard in relation to information relating to the pre-planning discussions which form the subject of this request.
54. The Commissioner expects that, in future, the council will ensure that its records management conforms to the recommendations of the section 46 code.

¹ <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section-46-code-of-practice.pdf>

Right of appeal

55. 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

56. 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.
57. 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
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