

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 24 July 2019

Public Authority: Teignbridge District Council
Address: Forde House
Brunel Road
Newton Abbot
Devon
TQ12 4XX

Decision (including any steps ordered)

1. The complainant has requested information about the relative sustainability of three building developments. Teignbridge District Council (TDC) disclosed some information and said that it did not hold the remaining information described in the request.
2. The Commissioner's decision is that, on the balance of probabilities, TDC did not hold any further information falling within the scope of the request.
3. However, by failing to disclose to the complainant all the information it did hold within the 20 working day time for compliance, the Commissioner finds that TDC breached regulation 5(2) of the EIR. And by failing to respond to the complainant's request for an internal review within 40 working days, TDC breached regulation 11(2) of the EIR.
4. The Commissioner requires no steps.

Request and response

5. On 5 August 2018, the complainant wrote to TDC and requested information in the following terms:

"Would you please furnish me with a copy of the records held on the following?

1) Information that identifies why development within Bickington Village is not to be considered sustainable.

2) Information that identifies how proposed development in Howton Road, West of Highweek is to be considered sustainable

3) Information held that identifies how development in Hele Park, West of Mile End is sustainable".

6. TDC responded on 29 August 2018. Citing section 21 (information accessible to applicant by other means) of the FOIA, it said that the requested information was available on its website. It provided web links to its Strategic Housing Land Availability Assessment, its Local Plan and to its searchable planning application database (it disclosed planning application reference numbers for the Hele Park development). It also commented that the word "development" was very broad and suggested that refining the request might subsequently result in the disclosure of more specific information.
7. The complainant submitted a request for an internal review on 31 August 2018 and identified the particular housing developments the request referred to. TDC provided the outcome of the internal review on 22 January 2019. Referring to the clarifying information the complainant had provided, TDC said that it was revising its position with regard to the requested information:

"The information requested is specific to the sites you have referred to. On the basis of the requests you have made and further to my enquiries of the relevant officers, the Council does not hold records within the scope of your request for information, which simply address these sites. The only recorded information identifiable which is relevant to your request is included in the general information contained within the various documents which were referred to in the Council's response to your request."

8. Stating that "...there is no requirement for the Council to create a record specifically to satisfy your request for information", it also cited regulation 12(4)(c) (request formulated in too general a manner) of the EIR.

Scope of the case

9. The complainant initially contacted the Commissioner on 2 December 2018 to complain that he had not received the outcome of the internal review.
10. Subsequently, on receipt of the internal review, the complainant told the Commissioner that he remained dissatisfied, because:

"...the Officers Report of the site (which should contain the information) was blank, but has subsequently been populated and the information provided to a third party, but not to myself. Furthermore, the requested information cannot be accessed by following the links provided, or by extensive and lengthy research of individual planning files appertaining to the request".
11. During the Commissioner's investigation, TDC looked into these specific concerns and, with regard to the officer's report (which fell within scope of the third point of the request) it informed the Commissioner:

"...since making further checks, we have discovered that due to a technical fault, when viewed externally, the links within the system to a number of officer reports had corrupted. It would therefore appear [the complainant]'s concerns about the officer report...were indeed justified, and I am grateful this has been brought to our attention. As a result of this it has been discovered that it wasn't an isolated error and approximately 200 applications were affected."
12. TDC corrected the technical issue and sent a copy of the completed officer's report to the complainant. However, the complainant remained dissatisfied with TDC's overall response, and maintained that it must hold further, relevant information which it had not disclosed. He also made several complaints about TDC's determination of planning applications which did not relate directly to TDC's handling of this request under the EIR and which, consequently, the Commissioner has disregarded.
13. In the internal review, although TDC cited regulation 12(4)(c), its arguments, to the complainant and to the Commissioner, were that it did not hold any further, relevant information beyond that which it had already disclosed to the complainant. In view of this, the Commissioner considers that TDC should in fact have cited regulation 12(4)(a) (information not held) of the EIR. As the Tribunal made clear she is entitled to do in *Bowbrick v Information Commissioner and Nottingham*

City Council [EA/2005/0006]¹, the Commissioner has therefore considered the application of the exception at regulation 12(4)(a) and she has not considered TDC's citing of regulation 12(4)(c) any further.

14. The analysis below considers whether, on the balance of probabilities, TDC held further information which fell within the scope of the request, which was not disclosed to the complainant.

Reasons for decision

Is the information environmental information?

15. TDC cited provisions from both the FOIA and the EIR when responding to the request. The Commissioner has considered which of these was the applicable access regime.
16. Information is 'environmental information', and must be considered for disclosure under the terms of the EIR rather than the FOIA, if it meets the definition set out in regulations 2(1)(a) to 2(1)(f) of the EIR.
17. The Commissioner considers that the information in this case can be classed as environmental information, as defined in regulation 2(1)(c) of the EIR. This says that any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors of the environment listed in regulation 2(1)(a) and 2(1)(b) will be environmental information. One of the elements listed under 2(1)(a) is land.
18. The request is for information relating to the development of land for housing purposes. The Commissioner therefore considers the request relates to a measure as defined in regulation 2(1)(c) of the EIR which will, or would be likely to, affect the elements described in 2(1)(a), namely, land.
19. The Commissioner is satisfied that the request was for environmental information, and that the request fell to be dealt with under the EIR.

¹ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i26/Bowbrick.pdf>

Regulation 5 - Duty to make available environmental information on request

20. Regulation 5(1) of the EIR establishes a duty for public authorities to make environmental information available on request.
21. Regulation 5(2) of the EIR provides that environmental information shall be made available under regulation 5(1) as soon as possible and no later than 20 working days after the date of receipt of a request.
22. The complainant submitted his request for information on 5 August 2018 and TDC responded, disclosing information, on 29 August 2018. However, on 3 June 2019 it disclosed to the complainant a copy of the officer's report from the Hele Park planning file, which it acknowledged he had hitherto been unable to access (as set out in paragraphs 11 and 12, above).
23. By failing to disclose to the complainant all the information it held which fell within the scope of his request, within the 20 working day time for compliance, TDC breached regulation 5(2) of the EIR.

Regulation 11 – Representations and reconsiderations

24. Regulation 11 of the EIR provides that if a requester is dissatisfied with a public authority's response to a request, the requester can ask for a review. Regulation 11(4) provides that a public authority should respond promptly and no later than 40 working days after the date of receipt of the request for review.
25. The complainant requested an internal review on 29 August 2018 and TDC provided the outcome 101 working days later, on 22 January 2019, after the Commissioner intervened. The Commissioner considers that by failing to provide the outcome of the internal review within 40 working days, TDC breached regulation 11(4).
26. The Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function. This aligns with the goal in her draft "Openness by design"² strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity

² <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"³.

Regulation 12(4)(a) – information not held

27. Regulation 12(4)(a) of the EIR provides that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
28. In this case, although TDC has disclosed some information in response to the third part of the request, the complainant believes that it holds further information about the specific developments referred to in the request that it has not disclosed. TDC's position is that it does not.
29. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
30. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.

The complainant's position

31. The complainant has raised grievances to do with TDC's determination of planning applications which extend beyond how it has handled this request for information. He has criticised the clarity and accuracy of the information TDC has published in connection with its Local Plan and believes that it has applied sustainability criteria inconsistently when considering different local development proposals. He has cited, as an example, a particular development proposal which did not receive planning permission, when other, apparently similar developments, did.

³ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

32. With regard to the request, he has argued that TDC is obliged by planning legislation to publish sustainability information about the development proposals it considers, and that he could not find this in the information provided to him, in respect of the developments specified in his request.

TDC's position

33. TDC has explained to the Commissioner that the complainant requested highly specific information in respect of three housing developments. Its position is that it did not hold information which directly matched the first two parts of the request, but that, in an attempt to be helpful, it disclosed links to the nearest information that it did hold (the Strategic Housing Land Availability Assessment and the Local Plan data).
34. In respect of the third part of the request, TDC's position was that the only information it held was an officer's report, which included information about sustainability issues. This report was part of the Hele Park planning file to which it shared a link in its original response to the request (although TDC accepted that the complainant had been unable to access the report because the link was corrupted).
35. In light of TDC's assertion that it held no information except the officer's report, the Commissioner asked TDC a series of detailed questions, aimed at understanding and evaluating its reasons for considering that it did not hold further, relevant information.
36. The Commissioner asked TDC to describe any searches it had undertaken for information falling within the scope of the request. In response, it said that its systems are digital, all information is stored electronically and so no paper records were searched. Its network, known as the "G:Drive", is the storage area where documents and files are held. All council records are held on G:Drive or uploaded to TDC's website (the Planning Portal website is accessible through www.teignbridge.gov.uk and is publicly searchable).
37. Where laptops are used for remote or home working, these connect directly into G:Drive and are not used to store data locally. A search of the council's network would therefore cover everything, including emails and any other correspondence, stored as records.
38. The network was searched for the key words "Bickington Sustainable" "Bickington Sustainability" and "Bickington Development" (Bickington being the general geographical area within which the developments mentioned in the request lay). No information, other than what was disclosed to the complainant, was yielded.
39. The Commissioner asked TDC whether more information might at one time have been held, and subsequently deleted. TDC said that the

information most closely matching that described in the request is still available on its website, and is kept in the public domain in line with planning law requirements. It explained that, as a planning authority, TDC is legally required to publish supporting documents for individual planning applications. It also has to publish the supporting documents that form the evidence for the Local Plan, as part of its consultation and examination process. It is through the Local Plan process that the sustainability of an area is determined and this is then the prime record in that respect. The Local Plan policies subsequently direct development to the most sustainable locations.

40. TDC said that the information likely to be of most relevance to the complainant's request was the section on Villages (page 36 of the Local Plan 2013-2033) and detailed "*assessment of settlement hierarchy*" on the local plan review documents. Clicking on "edit" and "find" in the online document would reveal anything relating to Bickington, or any other area of interest.
41. In response to the complainant's claims that TDC had failed to adequately demonstrate its assessment of the sustainability of particular developments, TDC said that full reasons for granting or refusing planning permission are provided with every application, on its website. It said that if, upon viewing the information, the complainant believed the recorded information fell short of what was required under planning law, and that TDC was failing in its duty as a planning authority, this would be a matter for the Local Government Ombudsman, once TDC's internal complaints procedures had been exhausted.

The Commissioner's conclusion

42. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in paragraphs 29 and 30, above, the Commissioner is required to make a finding on the balance of probabilities.
43. The Commissioner is satisfied that TDC has provided detailed and cogent reasons for believing that it does not hold any further information, and it has pointed to the legal obligations on it to compile certain information relating to development proposals, which it says it has complied with. It has conducted thorough searches using key words which would be likely to return relevant information, if held. The Commissioner accepts that the situation has been complicated by the fact that the complainant was not initially able to access certain information, due to a corrupted web link. She understands why, when this was subsequently provided to someone else, this might have made the complainant suspicious that information was being deliberately withheld from him. However, the

Commissioner has seen no evidence which contradicts TDC's explanation that this was due to a technical fault (and one which affected multiple, similar documents).

44. The Commissioner notes that the wording of the request is highly specific, in that it asks for information showing why development in Bickington Village is not considered sustainable, and why development in two other locations is considered sustainable.
45. TDC's position is that it does not hold information about sustainability at the level specified in the request. It has provided the nearest matching information that it does hold, which addresses developments and proposed developments with wider geographical parameters, of which the developments referred to in the request form part.
46. The Commissioner notes that a public authority is not obliged by the EIR to create information that it does not already hold, in order to respond to a request for information. It is also not the Commissioner's role to make a ruling on whether, if it does not already do so, a public authority should hold certain information. The Commissioner's role is simply to decide whether or not, on the balance of probabilities, the information which has been requested was held at the point the request was received. If the complainant considers that TDC has not complied with its legal obligations in respect of the amount and extent of information it records, then, as TDC has said, that is a matter he should pursue with the Local Government Ombudsman.
47. Having taken all the above into account, the Commissioner is satisfied in this case that TDC has demonstrated that it has reasonable grounds for considering that it does not hold further information falling within the scope of the request and, therefore, that it was entitled to rely on regulation 12(4)(a) of the EIR when responding to the request.
48. Although regulation 12(4)(a) is subject to a public interest test where the exception is engaged, the Commissioner recognises that, in reality, it would be illogical to conduct a public interest test in a case where she has accepted that no information is held.

Other matters

49. In his complaint to the Commissioner, the complainant commented that information was "*...being concealed, with the intention of preventing disclosure, and non-relevant information is being supplied, for the purpose of frustrating the request*".
50. On receipt of the complaint, the case was reviewed by the Commissioner's Criminal Investigations Team with a view to establishing whether an offence under section 77 of the FOIA, or regulation 19 of the EIR, had been committed⁴. The review concluded that there was no evidence that such offences had been committed.

⁴ Section 77 of the FOIA and Regulation 19 of the EIR create an offence, punishable by a fine, where a request for information has been made to a public authority (PA) and the requester would have been entitled (in accordance with section 1 FOIA or section 7 DPA) subject to payment of any fee, to communication of any information requested but either the PA, an employee or officer of the PA, or any person subject to the direction of the PA alters, defaces, blocks, erases, destroys or conceals any record held by the PA, with the intention of preventing the disclosure of all, or any part, of the information to the requester.

Right of appeal

51. 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: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

52. 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.
53. 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

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF