

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 12 June 2020

Public Authority: South Buckinghamshire District Council

Address: Council Offices
Oxford Road
Capswood Business Centre
Denham
Uxbridge
Buckinghamshire
UB9 4LH

Decision (including any steps ordered)

1. The complainant has requested information about noise mitigation measures in relation to a planning application. South Buckinghamshire District Council explained that it did not hold the requested information.
2. The Commissioner's decision is that, on the balance of probabilities, South Buckinghamshire District Council does not hold the requested information. She therefore considers that it has cited regulation 12(4)(a) (information not held) of the EIR appropriately. The Commissioner also considers that South Buckinghamshire District Council has cited regulation 12(4)(c) (requests formulated in too general a manner) of the EIR appropriately. However, the Commissioner considers that in supplying the information outside 20 working days, South Buckinghamshire District Council has breached regulation 5(2) (Duty to make available environmental information on request).
3. The Commissioner does not require South Buckinghamshire District Council to take any steps as a result of this decision.

Request and response

4. On 18 March 2019 the complainant wrote to South Buckinghamshire District Council (the council) and requested the following:

*"Re: Application 08/02055/OUT
Application 11/02035/REM*

We have been trying to get information concerning the noise mitigation measures for the above property applications. Questions were asked of the Planning Dept [name redacted] but a request for clarification made on 17/12/18 remains unanswered so we are appealing to you for information.

There are no copies within the planning permissions online concerning the noise assessment (or recommended updated noise assessment) for the site, nor any mention of the measures to be taken to mitigate noise. Could we please see the above, and any other noise assessments and also the proof of discharge of condition 11?

We also have some other potential breaches of the planning conditions to address, one of which concerns the landscaping - is this something that you would like details on or should this also go to Planning Enforcement? I can provide details if you also wish to see them."

5. On 15 April 2019 the complainant contacted the Commissioner as she had not received any response from the council. The Commissioner contacted the council about this. The council confirmed that it had responded to the request on 21 March 2019 asking for clarification; it resent that response to the complainant on 16 May 2019. The council also provided the Commissioner with a copy of the request for clarification it had sent to the complainant on 21 March 2019.
6. The complainant provided the requested clarification on 21 May 2019 as follows:

"It is also stated that the Acoustic report of March 2003 is valid to the new application lodged on 17/12/08 and certain recommendations are made for the more vulnerable units (with windows directly facing the railway). In a letter from [name redacted], Environmental Health Officer to [name redacted] of Acoustic Air it is stated 'Although the noise source remains a significant issue, the revised proposal and measures you have so far outlined to mitigate the effects of the noise associated with the railway appear to provide significant additional protection for future occupiers of the site'.

*Please provide evidence that these proposed **measures have in fact been tested post construction and comply with national and council standards.**"*

7. On 18 June 2019 the council responded, providing information.
8. Following an internal review the council wrote to the complainant on 16 August 2019. It provided further information, including in relation to noise mitigation, general information about what to do if an individual has concerns about levels of noise.

Scope of the case

9. The complainant contacted the Commissioner on 29 August 2019 to complain about the way her request for information had been handled. She explained that she had still not received the requested information and that an updated noise assessment report should have been submitted in relation to the planning application, but had not been.
10. The complainant also explained that she had asked the council for evidence that an updated report was submitted, that future proofed noise mitigation was used and that the mitigation measures had been tested before being passed as compliant with the appropriate requirements. She explained that referring her to planning documents approved by the council in no way answered her question about how the approved noise mitigation measures have been proven to be implemented and tested, as compliant with national and council policies.
11. Additionally, the complainant explained that the council had confirmed that it does not subcontract out any work in relation to building control. She explained that she considers that the council *"made the conditions relevant to my request and are therefore responsible for ensuring that compliance has taken place."*
12. The complainant also explained that she considered that it was the responsibility of the council to ensure that buildings are completed to national standards applied and contained within the planning permission. She stated that she considered that the council: *"appointed MLM and gave them specific instructions for the site, then checked that the work had been completed before paying MLM for their services."*
13. The complainant asked who specifically within the council was responsible for building regulation compliance. She stated: *"If the building as built has not met the statutory requirements as approved by the council, (in line with planning permission granted by the council in this case) there remains the question of just how compliance is monitored."*
14. The Commissioner will not be considering who is responsible for compliance with building regulations as this was not part of the clarified request.

15. The Commissioner will consider whether the council is correct to state that it does not hold the requested information in relation to the clarified request of 21 May 2019. She will also consider whether the council was correct to request clarification of the original request of 18 March 2019 and the time taken to disclose the information the council did hold.

Reasons for decision

16. The council explained to the Commissioner that dwellings had been built by a building contractor. This contractor engaged the services of MLM, an approved inspector, as governed by the Construction Industry Council, to conduct building control duties on the development. The contractual relationship was therefore between the building contractor and MLM.
17. The council also explained that approved inspectors are in direct competition with its own building control services; the council does not subcontract any work in relation to building control. The council confirmed that it does not have a contract with MLM and did not instruct MLM or any other approved inspector to carry out inspections.
18. Additionally, the council explained that it was MLM as the approved inspector, who signed off the work as being compliant with building regulations; it is the responsibility of the approved inspector to ensure building regulations are complied with when they are engaged on a project. Approved inspectors notify the Building Control department of the council, with an initial notice, to advise they are carrying out building control duties. The approved inspector then submits a completion certificate when the works are compliant with building regulations. The council confirmed that this is the only information it holds.
19. During the Commissioner's investigation, the council disclosed the initial notice and completion certificate to the complainant.
20. The Council confirmed that it does not hold and has never held (other than the information listed above) the requested information or any similar information.

Regulation 5(2) – Duty to make available environmental information on request

21. Regulation 5(1) of the EIR provides a duty for public authorities to make environmental information available on request.

22. Regulation 5(2) of the EIR provides that information should be disclosed within 20 working days after receipt of a request
23. The council disclosed the information it holds during the Commissioner's investigation. The Commissioner considers that it has breached regulation 5(2) as it took longer than 20 working days to disclose this information.

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

24. The council explained that it does not hold information in relation to the clarified request of 21 May 2019.
25. Regulation 12(4)(a) of the EIR provides that a public authority may refuse to disclose information if it does not hold that information when it receives an applicant's request.
26. In cases where a dispute arises over the extent of the recorded information held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments.
27. She will also consider the actions taken by the public authority to check whether the information is held and any reasons offered by it to explain why the information is not held.
28. The Commissioner is required to make a judgement on whether, on the balance of probabilities, the requested information is held or not.
29. The Commissioner asked the council what searches it had carried out. The council explained that it uses an electronic management system, called 'Uniform', to maintain their records, which it searched. It also confirmed that no records or information is held on personal computers, emails or other networked resources. Uniform maintains electronic records against an individual plot/address location.
30. The Commissioner asked what search terms had been used. The council explained that it had used a specific address and found the following electronic information:
 1. Two Initial Notices from MLM
 - a. 1x for 48 flats and basement car park; and
 - b. 1x for residential apartment building containing 18 dwellings.
 2. Completion Certificates for the various plots from MLM.
31. The Commissioner asked whether, if it was held, the requested information would have been held as manual or electronic records. The

council uses an electronic management system, as explained in paragraph 29, and therefore no manual information is held.

32. The Commissioner also asked whether any recorded information ever held within the scope of the request, had been deleted or destroyed. The council confirmed that it had not previously held information about noise assessments, therefore no relevant information had been either deleted or destroyed. The council also confirmed that it was unable to confirm whether MLM inspected whether the noise mitigation measures were properly installed, as it does not hold this information.
33. Furthermore, the Commissioner asked whether there was a business purpose for which the information should be held. The council confirmed that there was no business purpose for it to hold the requested information.
34. The Commissioner also asked whether there were any statutory requirements upon the council to retain the requested information. The council confirmed that there was no statutory requirements for it to hold the requested information.
35. In its internal review, the council provided information about noise mitigation. However, the Commissioner notes this was general information about what to do if a person has an issue with noise and how to complain about this.
36. Taking everything into account, the Commissioner does not consider that there is any evidence that show that the council holds the specifically requested information in the clarified request of 21 May 2019, as set out in paragraph 6.
37. The Commissioner is therefore satisfied that, on the balance of probabilities, the council does not hold any recorded information in relation to clarified request of 21 May 2019. Accordingly, she does not consider that there is a breach of regulation 12(4)(a) of the EIR.
38. Technically, Regulation 12(4)(a) of the EIR is subject to the public interest test. However, the Commissioner considers this is an unnecessary exercise where she has found that a public authority did not hold the requested information at the time of the request. The Commissioner cannot consider the public interest factors for and against disclosure when she has found that there is no recorded information held for potential disclosure.

Regulation 12(4)(c) - requests formulated in too general a manner

39. The complainant also complained about the council asking for clarification regarding her original request of 18 March 2019. As explained above, there was some confusion as the complainant stated that she had not received the request for clarification. The council resent it to her on 16 May 2019. The complainant provided the clarification on 21 May 2019 and council sent it substantive response on 18 June 2019.
40. Regulation 12(4)(c) provides that a public authority may refuse to disclose information if it considers that the request has been formulated in too general a manner. In order for regulation 12(4)(c) to be engaged, a public authority must also comply with regulation 9 (Advice and assistance) of the EIR.
41. Determining whether a request has been formulated in too general a manner will depend on the particular facts of each case. The words "too general" refer to a request that is too unclear or non-specific for the public authority to identify and locate the information requested, or request that is ambiguous and therefore could be interpreted in more than one way.
42. In this case the council asked the complainant for the following clarification:

"Please clarify which part of the site it is that you require information on - please mark on attached location plan. Please also clarify the time frame for the request, and how far back you would like the information to be from."
43. The complainant considers that the council did not need to ask for clarification of the request because it knew exactly what she was looking for. She also explained that the only email it claimed to have sent her was the one that helped them out of non compliance with her request. The complainant was also dissatisfied that the council could treat the clarified request as a new one.
44. The complainant also complained that the council had therefore had a further 20 working days to respond.
45. The council explained to the Commissioner that it had sought clarification on 21 March 2019, in order to proceed with the request for information. It also explained that the original request was too board in nature. It pointed out that it had sought clarification in a timely manner. Furthermore, the council acknowledged that although seeking clarification could potentially cause a delay to the requester, if it had not done so, it might have sent information that was not requested, thereby wasting time and resources.

46. The council also pointed to a decision notice, FER0754834¹ in support of its approach.
47. The Commissioner has considered the original request and the council's explanation regarding requesting clarification of that request. She is satisfied that it was entitled to seek the clarification. However, before she can consider whether regulation 12(4)(c) is engaged, she must consider whether the council has complied with regulation 9 (Advice and assistance) of the EIR.

Regulation 9 – Advice and assistance

48. Regulation 9(1) of the EIR provides that a public authority shall provide advice and assistance as far as it is reasonable for it to do, to both applicants and prospective applicants.
49. In this case, the Commissioner has viewed the council's request for clarification and is satisfied that it identified what clarification was required before it could proceed with the request. The Commissioner therefore considers that the council has complied with regulation 9(1).
50. Regulation 9(2) of the EIR provides that where a public authority decides that a request is formulated in too general a manner it should ask the applicant within 20 working days after receipt of the request, for clarification. The public authority should also assist the applicant if necessary.
51. The original request was dated 18 March 2019 and the council asked for clarification of that request on 21 March 2019. As explained in paragraph 5, there was confusion as the complainant did not receive the the request for clarification initially. The council resent the request for clarification to the complainant on 16 May 2019.
52. The Commissioner notes that the council initially contacted the complainant within 20 working days to request clarification and explained what clarification it required. She considers that the council has complied with regulation 9(2).
53. The complainant was also dissatisfied that the council considered that it had a further 20 working days to comply with her clarified request.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614822/fer0754834.pdf>

54. Regulation 9(4) of the EIR provides that once requested clarification is received by a public authority, it has 20 working days starting from the date after receipt, to respond to the clarified request.
55. The complainant sent her clarification to the council on 21 May 2019 and that it provided its response on 18 June 2019. The Commissioner therefore considers that the council responded within the 20 working days and has complied with regulation 9(4).
56. Taking the above into account, the Commissioner considers that the council has complied with regulation 9.
57. The Commissioner therefore considers that the council was entitled to request clarification of the original request and that regulation 12(4)(c) is engaged.
58. The Commissioner will go on to consider the public interest in relation to regulation 12(4)(c).

Public Interest Test

59. All the exceptions under the EIR are subject to the public interest test.
60. In her guidance on regulation 12(4)(c)² the Commissioner explains that it is difficult to see how a public authority might apply the public interest test, or how it could be in the public interest to provide information without first clarifying what the request is actually for. She acknowledges that clarifying the request will cause some delay for the applicant, but the speed of providing that clarification is in the applicant's hands. The Commissioner notes that in the present case, once the request for clarification had been resent to the applicant, she responded speedily.
61. The Commissioner considers that generally, if a public authority is unsure about the meaning of a request, it is highly likely that the public interest in maintaining the regulation 12(4)(c) exception will outweigh the public interest in disclosing what could easily be the wrong information.

Conclusion

² https://ico.org.uk/media/for-organisations/documents/1619/requests_formulated_in_too_general_a_manner_eir_guidance.pdf

62. Taking all of the above into account, the Commissioner is satisfied that regulation 12(4)(c) has been applied appropriately in this case and that that the public interest in maintaining the exception outweighs the public interest in disclosure.

Right of appeal

63. 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

64. 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.

65. 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

**Laura Tomkinson
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SK9 5AF**