

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 6 May 2020

Public Authority: Ministry of Housing Communities and Local Government

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information held by the Ministry of Housing, Communities and Local Government (the MHCLG) relating to a submission regarding the development of a garden community/village in his area. The MHCLG initially refused the request, applying section 35(1)(a) of FOIA (formulation and development of government policy). However, it subsequently provided information. The complainant believes that further information is held, however.
2. The Commissioner's decision is that the MHCLG has, on a balance of probabilities, provided the complainant with all of the information which it holds falling within the scope of the request. She has however decided that the MHCLG did not comply with the requirements of Regulation 5(2) in that it did not provide the information to the complainant within 20 working days.
3. The Commissioner does not require the MHCLG to take any steps.

Request and response

4. On 7 May 2019, the complainant wrote to the MHCLG and requested information in the following terms:

"I hereby submit a request for information under the Freedom of Information act for the following:

A copy of the application for a Garden Community/Village for Skertingham Darlington Co Durham this application will of [sic] been submitted via MHCLG's DELTA portal by 9 November 2018. I would like the information you send me to show an overview of the planned development at [sic] shows where the following will be on the development:

golf course, new dwellings, access roads, leisure facilities, retail & business units."

5. The MHCLG responded on 18 June 2019. It said that section 35(1)(a) of the FOI Act applies (formulation and development of government policy) and withheld information from disclosure.
6. Following an internal review, the MHCLG wrote to the complainant on 6 August 2019. It maintained its position that the information was exempt under section 35(1)(a) of FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 18 October 2019 to complain about the way his request for information had been handled.
8. His complaint was that the information should have been disclosed to him, and therefore that the MCHLG was not correct to apply section 35(1)(a) to withhold the information.
9. During the course of the Commissioner's investigation the MHCLG said that due to the passage of time it considered that it could now disclose the information, subject to redactions of personal data under section 40(2) of the FOI Act.
10. It therefore disclosed information, including a copy of the application, to the complainant. The Commissioner does not know the exact date when the information was disclosed, however this fell between 17 February 2020 and 28 February 2020. It subsequently disclosed a small amount of further information to the complainant, on 28 February 2020.

11. The Commissioner therefore asked the complainant if he was now satisfied with the MHCLG's response. The complainant responded to say that the information provided does not include an overview plan of the development that would show the positions of housing, roads, schools, retail & business units, new golf course etc, demonstrating how these will affect the local environment.
12. The requestor raised no concerns about the redactions of personal data, and the Commissioner has not therefore considered this information further within this decision notice.
13. The MHCLG however argues that it has now provided all of the information which it holds, subject to the redactions it has made under section 40(2).
14. During the course of the Commissioner's investigation she also wrote to the MHCLG and asked it to consider whether the information is environmental information for the purposes of the EIR. The MHCLG wrote back to the Commissioner and agreed that the information may be environmental information and that it may have initially applied the wrong legislation, however it considers that as it has now disclosed all information other than information withheld under section 40(2) (or Regulation 13 of the EIR) this no longer has a significant affect on the outcome of the request.
15. The Commissioner therefore considers that the remaining question surrounding the complaint is whether all of the information which is held by the MHCLG falling within the scope of the request has now been provided in response to the complainant's request.

Reasons for decision

Is the information environmental information for the purposes of the EIR?

16. The information relates to application information relating to the development of a Garden community/village.
17. Having considered the nature of the information, the Commissioner is satisfied that the information falls within the scope of Regulation 2(c) which includes:

"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;"

18. Regulation 2(a) includes the factors:

"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;"

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

19. The MHCLG argues that it has disclosed all of the information which it holds, subject to the redactions it has made under Regulation 12(3). The complainant argues that that information does not provide him with the level of detail he requires in order to fully understand the implications of the development on the landscape.
20. Following further clarification from the complainant regarding the additional information which he requires, the public authority argues that that it does not hold any information that which specifically shows where the following will be on the development; golf course, new dwellings, access roads, leisure facilities, retail & business units. It also says that it has disclosed all of the information which was submitted to it by the local authority as part of its submission.
21. Regulation 12(4)(a) 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.
22. In effect the Commissioner must consider whether further information is held by the MHCLG which has not been disclosed to him in response to his request for information.
23. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First Tier Tribunal decisions, applies the civil standard of the balance of probabilities.
24. 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 the balance of probabilities.
25. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also

consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, she will consider any other information or explanation offered by the public authority (and/or the complainant) which is relevant to her determination.

26. During the course of her investigation, the Commissioner asked the MHCLG to describe the searches it carried out for information falling within the scope of the request, and the search terms used. She also asked other questions, as is her usual practice, relating to how the it established whether or not it held further information within the scope of the request.
27. The MHCLG clarified that the reason it does not hold all the information requested by the complainant is that when it published the prospectus in August 2018, it also published a pro forma which set out a specific set of questions the bidders were asked to address. The applicants had control of how much information they provided to support their bids.
28. The MHCLG has therefore provided the complainant with the information submitted to it by the local authority, but this does not match the information which the complainant was hoping to obtain regarding the planned development.
29. It said that whilst it had been able to provide the complainant with information falling within the scope of his request, including the application, it does not hold anything that would provide an overview of the planned development that specifically shows the information he mentioned in his request, i.e., where the previously listed developments (para 20) are located.
30. The MHCLG confirmed that it holds all information electronically, and that all the bid information submitted to it was stored and not deleted.
31. It said that the relevant submission for the development were filed in one folder and this folder was reviewed for information falling within the scope of the request. It confirmed that as the information is all held in one electronic folder, it did not need to make further additional searches beyond this.
32. It said that as all information is held within the one folder it did not need to carry out electronic searches using key words etc. The information was already available within one place, and further searches of this nature were not therefore necessary.
33. As regards its records management policy regarding such information, it said that:

"Where held digitally, records are to be deleted by Information Management (IM) in accordance with disposal agreements agreed with business areas. Where no agreement exists, digital records will be considered for deletion once they reach 7 years of age.

Where retention periods have been applied, a report is run at the start of each calendar year to identify any material that has reached the end of its retention period. This material is subsequently deleted. Digital records not marked for review will not be reviewed before being disposed of.

IM will regularly identify any digital 'review' records that have reached the end of their retention period. These records will be first reviewed by IM to see if they are of historical value. Any that are will be transferred to The National Archives or other place of deposit; all that are not will be permanently deleted."

34. As regards the business reasons for holding the information, it confirmed that the relevant local authority determines what information should be provided as a supplement to their application. It said that, for this submission, it was not provided with the level of detail the complainant wants to receive because it was not considered necessary to the application.
35. It said however that the only remaining document it did not consider sending to the complainant is a prospectus document. It said that this was not initially considered for disclosure, as it felt the request was specific to plans and diagrams. It said that much of the information in this brochure provides a high-level overview and that this has already been disclosed to the complainant. It confirmed however that it would be willing to send the complainant a copy of this prospectus should he wish this.

The Commissioner's conclusion

36. The Commissioner has carefully reviewed the submissions of both parties and the arguments put forward.
37. The local authority is responsible for the information which it supplies to the MHCLG as part of its submission. The MHCLG has supplied the complainant with a copy of the application it received. It has also clarified that its pro forma required the submission of some information but did not require the level of detail which the complainant is seeking. It has clarified that the council did not provide it with the level of detail he was hoping to obtain as this was not a necessary of its submission. For its part, the MHCLG has suggested that the complainant may wish to

make a further request to the local authority itself, to determine whether it might hold the level of detail he wishes to obtain.

38. Under the circumstances described the Commissioner believes that the MHCLG has provided a description of having carried out adequate searches in appropriate places to determine whether any further information is held falling within the scope of the complainant's request.
39. The question for the Commissioner to consider is not whether information 'should' be held, but whether relevant information 'is' held.
40. The Commissioner has considered the complainant's suggestions as to further information which might have been provided to him in response to his request. Given the explanation provided by the MHCLG, together with its description of the searches which were carried out however, in the absence of evidence to the contrary, she considers that there is no evidence demonstrating that further information is held falling within the scope of the complainant's request for information.
41. This being the case, the Commissioner's decision is that, on a balance of probabilities, no further information is held by the MHCLG falling within the scope of the complainant's request for information.

Regulation 5(2)

42. Regulation 5(1) provides that a public authority that holds environmental information shall make it available on request. Regulation 5(2) requires that 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.
43. The complainant made his request for information on 7 May 2019. The complainant did not however receive a copy of the information held by the MHCLG until a date between 17 February 2020 and 28 February 2020.
44. The MHCLG did not therefore comply with the requirements of Regulation 5(2) in this instance.

Right of appeal

45. 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

46. 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.
47. 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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