

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

**Decision notice**

**Date:** 9 December 2020

**Public Authority:** Bromsgrove District Council  
**Address:** Parkside  
Market Street  
Bromsgrove  
Worcestershire  
B61 8DA

**Decision (including any steps ordered)**

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1. The complainant requested from Bromsgrove District Council (the Council) information in relation to a specific planning application. The Council advised the complainant that some of the relevant information was available on its planning portal and provided additional correspondence related to the request which was not included on its planning portal. The complainant remained dissatisfied and believed that the Council should be in possession of further information within the scope of his request.
2. The Commissioner's decision is that, on the balance of probabilities, the Council was correct when it stated that it held no further information within the scope of the request. However, the Commissioner found that the Council breached regulation 5(2) of the EIR by failing to provide all information it held within 20 working days.
3. The Commissioner requires no steps to be taken as a result of this decision.

## Background information

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4. On 11 March 2019 the Council's planning department received a planning application for change of use for a specified building from B1 (light industrial) use to B8 (storage and distribution) use, and erection of associated cold storage facilities to the rear of the premises.
5. On 8 November 2019 the Council decided to refuse the planning permission of the above application.
6. On 22 April 2020, the same applicant submitted a new planning application proposing "*change of use from B1 to B8 with detached cold storage building to rear and erection of three metre high timber fence panels to outer perimeter of private service road to, and enclosing rear yard/parking area*". This planning application was validated on 27 May 2020.
7. The Council's planning portal in respect of the second application states the following: "*Application Refused*". This refusal was issued on 26 August 2020.

## Request and response

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8. On 6 July 2020 the complainant wrote an e-mail to the Council with the subject "*20/00479/FUL | Proposed Change of Use from B1 to B8 with detached cold storage building*" and requested information of the following description:

*"Would you please furnish me, with all the paperwork that covers the reasoning that was used to allow the above referenced planning application to be resubmitted."*
9. On 7 July 2020, the Council responded. It stated that all relevant information related to the referenced planning application was available online on the Council's planning portal. It refused to provide the complainant with the same information, citing section 21 of FOIA as its basis for this refusal as it considered that the requested information was already available through other means.
10. Remaining dissatisfied with the response received, on 8 July 2020 the complainant wrote to the Council, explaining the reasons for his dissatisfaction. He stated:

*"I cannot ask for an internal review because you haven't dealt with my inquiry. You have just referred me to a website which doesn't contain*

*the information asked for... I would like to see the paper trail that supports the discretionary decision. If that is not possible please can you state why?"*

11. Public authorities are required to treat any expression of dissatisfaction by the requester as a request for internal review. Therefore, the Council was correct to conduct an internal review following the complainant's email of 8 July 2020.
12. The Council provided the complainant with the outcome of its internal review on 9 July 2020. It offered further explanations on why the resubmitted planning application was different from a previous one. However, it did not change its position in relation to the application of section 21 of FOIA, reiterating that all the information falling within the scope of the information request was accessible through its planning portal.

### **Scope of the case**

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13. The complainant contacted the Commissioner on 17 July 2020 to complain about the way his request for information had been handled.
14. In the course of her investigation, the Commissioner asked the complainant to clarify whether he was unhappy with the application of section 21 of the FOIA or whether he believed that the Council held further information to what was already available through the planning portal. The complainant confirmed that he believed that "*the Council is in possession of more information than it wants to provide.*"
15. During the course of her investigation, the Commissioner asked the Council to revisit the request and to reconsider the applicable access regime in relation to the complainant's request. As the information request in question related to a planning application, the Commissioner suggested that the EIR could be the applicable legislation on this matter.
16. The Council agreed that the request should have been handled under the EIR and revisited the complainant's request. In this process it conducted additional searches that uncovered four additional email threads which were partially redacted and subsequently disclosed to the complainant by the Council.
17. In addition, the Council obtained a summary case record that was held by a Worcestershire Regulatory Services (WRS) officer that was involved in the case. A copy of this document was also disclosed to the complainant. However, as this information was not held by the Council at the time of the request, it falls outside the scope of this investigation.

18. The complainant still remained dissatisfied and asked the Commissioner to continue the investigation and decide on this matter.
19. The following analysis determines whether the Council complied with regulation 5(1) of the EIR, when it stated that it held no further information within the scope of the request beyond what was already disclosed through its planning portal and during the course of this investigation.

## Reasons for decision

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### Is the requested information environmental?

20. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;*
  - (d) *reports on the implementation of environmental legislation;*
  - (e) *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
  - (f) *the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*

21. The Commissioner considers that, as the information requested in this case is related to planning matters, it is highly likely to affect the elements and factors of the environment as defined at regulations 2(1)(a) and 2(1)(b). She is therefore satisfied that the information falls within the definition of environmental information at regulation 2(1)(c) of the EIR.

### **Regulation 5(1) – Duty to make environmental information available on request**

22. Regulation 5(1) of the EIR states that *“a public authority that holds environmental information shall make it available on request.”* This is subject to any exceptions that may apply.
23. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant’s evidence and argument. She will also consider the actions taken by the authority to establish what information within the scope of the request it held, and any other reasons offered by the public authority to explain why further information is not held. She will also consider any reason why it is inherently likely or unlikely that further information is not held.
24. The Commissioner is mindful of the Tribunal’s decision in *Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)* in which it was stated that *“there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority’s records”*. It clarified that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test that the Commissioner has applied in this case.
25. In discussing the application of the balance of probabilities test, the Tribunal stated that, *“We think that its application requires us to consider a number of factors including the quality of the public authority’s initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.”* The Commissioner has therefore taken the above factors into account in determining whether or not further information is held, on the balance of probabilities.

26. As part of her investigation, the Commissioner wrote to the Council requesting submissions in respect of a number of questions relating to the concerns raised by the complainant. The Commissioner's questions were focused on the Council's endeavours in providing the requested information to the complainant, its searches conducted in relation to the complainant's request, and whether any of the information falling within the scope of the requests was deleted or destroyed.
27. The Council initially clarified that the planning application the complainant's request related to involved an application for retrospective planning permission. The Council stated *"Planning permission was refused at the first application, partly because of noise complaints. Plans were made to start enforcement action (because this matter is retrospective), when the applicant had a noise survey done that had a satisfactory outcome, and presented that survey along with a request for a second planning application."*
28. The Council explained that according to the relevant statutory provisions *"A Local Planning Authority (LPA) can decline to deal with an application if:*
- (i) it is not made in the prescribed form;*
  - (ii) the circumstances set out in section 70A of the Town and Country Planning Act 1990 apply (namely, the LPA/Secretary of State has refused a similar application in the previous 2 year period and there has been no significant change in the relevant considerations); or*
  - (iii) it constitutes an overlapping application under section 70B of the Town and Country Planning Act."*
29. The Council stated the second application contained a noise survey suggesting instalment of acoustic fencing to address the reasons behind the refusal of the first application. The Council considered that this constituted a significant change compared to the first application, therefore it was treated as a new application.
30. In relation to the searches conducted when it handled the information request, the Council indicated that as it normally holds all relevant information to a specific planning application in the dedicated case file in its planning portal, it advised the complainant to look there for any information he was interested in. However, following the Commissioner's invitation to revisit the case, the Council conducted further searches and found that four additional email threads were kept in a folder by the Principal Planning Officer. As noted above, this information was subsequently disclosed to the complainant.

31. The Council confirmed that, in accordance with its retention policy, emails are kept on its servers for two years. After this period of time, if not filed separately they are deleted automatically. It added that its Retention and Disposal Schedule for planning matters stipulates that pre-application advice and correspondence that includes emails filed separately shall be kept for five years.
32. The Commissioner has carefully examined the submissions of both parties. She has considered the searches performed by the Council, the information it disclosed, the Council's explanations as to why there is no further information held and the complainant's concerns.
33. Having considered the scope of the request, the Commissioner is satisfied that, although not in a timely manner, the Council carried out the necessary searches to identify all relevant information that was held at the time of the request.
34. The Commissioner appreciates the complainant's concerns, however, she notes that those concerns were more focused on what information the Council should have been recording to demonstrate that the process was in compliance with the relevant planning regulations. In one of his submissions to the Commissioner, the complainant stated:

*"There should be paperwork detailing the whole process, and the public should be able to access it."*
35. The Commissioner's investigations are limited only to information held in recorded form. She cannot make any judgment about the type of information that public authorities *should* record, or whether recorded information is accurate and complete. Similarly, she cannot make a judgment on the performance of a public authority on matters not related to her remit.
36. The Commissioner notes from the complainant's submissions that he was advised by the Council to approach the Local Government and Social Care Ombudsman if he believed that the Council had not complied with its relevant statutory obligations.
37. Based on the above and in the absence of evidence to the contrary, the Commissioner is satisfied that the Council has provided the complainant with all of the relevant information which it held, falling within the scope of the request.
38. Therefore, the Commissioner is of the view that, on the balance of probabilities, the Council did not hold further information within the scope of the request.

### **Regulation 5(2) of the EIR – Time to respond**

39. As explained above, Regulation 5(1) requires a public authority to disclose requested information. Regulation 5(2) of the EIR requires this information to be provided to the requester within 20 working days following receipt of the request.
40. The complainant requested the information on 6 July 2020 and the Council initially stated that all the information held within the scope of the request was available through its planning portal.
41. However, additional information held was provided to the complainant on 5 November 2020, following the Commissioner's investigation letter.
42. This is a period of more than the required 20 working days. Therefore the Commissioner finds that the Council breached regulation 5(2) of the EIR.
43. However, as the Commissioner's conclusion above is that, on the balance of probabilities, the Council has by now disclosed all the information held relevant to the complainant's information request, the Council is not required to take any further step.



## Right of appeal

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44. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

45. 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.
46. 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** .....

**Ben Tomes**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**