

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

Date: 15 October 2021

Public Authority: Shrewsbury Town Council
Address: Riggs Hall
Castle Gates
Shrewsbury
SY1 2AS

Decision (including any steps ordered)

1. The complainant requested from Shrewsbury Town Council, statements considered by an independent investigation commissioned by Shrewsbury Town Council into the way in which it sold public owned land to a private developer. Shrewsbury Town Council refused the request on the grounds the information was not held by itself for its own purposes or by the independent investigator on its behalf
2. The Commissioner's decision is that the requested information is environmental as defined by the EIR and is held by Shrewsbury Town Council under Regulation 3(2) of the EIR.
3. The Commissioner finds that the Council breached Regulations 5(1) and 5(2) by incorrectly applying Regulation 12(4)(a) of the EIR and not disclosing the requested information within 20 working days.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

6. Following a motion unanimously agreed by the Council on 18 May 2020, an independent investigation was commenced into the sale of land on Greenfields Recreation Ground in 2017¹.
7. The investigation followed a Judicial Review and subsequent Public Interest Report from the Town Council's external auditor which identified "serious governance failings" within the Council in regards to it failing to establish the legal status of the land and hence, not publicly advertising their proposal to sell. The Council commissioned the investigation undertaken by *(name redacted)* as it had 'a responsibility to make sure that lessons are identified and actions are taken as a consequence'.

Request and response

8. On 12 September 2020 the complainant wrote to Shrewsbury Town Council (the Council) and requested information in the following terms:

"The Greenfields Community Group had a small group meeting this week and a request was made for (name redacted) to meet the community and I will extend this invitation separately but to also request all of the statements made to the investigation and (name redacted) by all councillors, but specifically those made by (name redacted)

(name redacted)

(name redacted)

(name redacted)

And (name redacted)

(please see this as an FOI request in addition to the above)".
9. The Council responded on 28 September 2020. It stated it was not in a position to release the statements as they were held by *(name redacted)* as an independent investigator appointed by the Council and not held by the Council itself. Accordingly, the FOIA did not apply. The Council added that *(name redacted)* was not willing to release the requested statements. This was because when inviting statements and comments under the terms of reference for individuals, he stressed

¹ <https://www.shrewsburytowncouncil.gov.uk/greenfields-recreation-ground/>

that honesty and transparency were paramount. Had he intended to release the information he would have had to warn potential witnesses that their comments could be released to third parties which would have required their consent. In his view, this would have inhibited their frankness with him in response to the terms of reference.

10. The complainant replied on 9 October 2020 emphasising the information had been requested under the FOIA and stating if it was being refused he would like to know on what grounds. He added that he was not interested in *(name redacted)*'s status and stressed the statements were obtained from public officers in relation to the sale of a public asset.
11. The complainant wrote to the Council again on 9 April 2021 reiterating his request copies of the written and verbal interviews given by councillors and officers to *(name redacted)* for the benefit of his independent investigation.
12. The Council replied on 15 April 2021 stating that the request was a repeated one and as it had already responded stating that it did not hold the information it has nothing further to add.

Scope of the case

13. The complainant contacted the Commissioner on various dates in 2020 and 2021 to complain about the way his request for information had been handled. In particular, he was unhappy with the Council's decision to withhold the information in its entirety on the basis it was held exclusively by *(name redacted)* for the purpose of his independent investigation and not for the Council's own requirements.
14. The Commissioner's investigation will be to firstly determine whether the information is 'environmental' as defined by the EIR and then reach a decision as to whether it is held by the Council, *(name redacted)* on behalf of the Council or by *(name redacted)* for his own purposes.

Reasons for the decision

15. The Commissioner wrote to the Council on 18 May 2021 seeking the following information;
 - a. Whether it held the requested information consisting of statements under Section 1(1)(a) of the FOIA.
 - b. Copies of the requested statements together with any associated emails and correspondence. The reasonable assumption being, in

the absence of any evidence or arguments to the contrary, the statements were held by the Council under the FOIA.

- c. If no longer held, when, why and how the statements were disposed of. Also, details of all the searches and enquiries carried out to identify and locate the statements.
 - d. Details of the terms of reference under which (*name redacted*) was appointed by the Council.
 - e. Clarification as to whether (*name redacted*) was holding the statements on behalf of the Council under Section 3(2)(b) of the FOIA.
16. The Council responded on 16 June 2021 with copies of some of the statements requested with a promise to obtain the outstanding ones as soon as possible. In its response, the Council said it had spoken with (*name redacted*) who was greatly concerned at the prospect of the statements being released publicly. He informed the Council that he had asked all the interviewees to be 'open, honest and transparent' and in his legal position, gave a number of them direct reassurances that whatever they wrote would not be published or subject to an FOIA request. The Council disclosed to the Commissioner the terms of reference for both the investigator and the investigation together with a redacted copy of the contract under which it instructed (*name redacted*) to carry out an independent investigation into the sale of Greenfields Recreation Ground. By way of clarification, the Council confirmed it provided clerical and administrative support for (*name redacted*), controlled access to the information used by him, oversaw the process, decided what information was retained, altered or deleted, dealt with enquiries about the investigation and paid for his services.
 17. On 22 June 2021 the Council disclosed remaining statement to which it said the following statement had been added, 'This account was produced on the basis that there was client privilege and it would not be disclosed'.
 18. The Commissioner responded to the Council on 22 June 2021 noting that five statements in total had been received by (*name redacted*) for the purposes of his investigation. As it was apparent that the Council held these statements, the Commissioner invited it to reconsider its position that they were not held by (*name redacted*) on their behalf under Section 3(2)(a) of the FOIA or more likely Regulation 3(2)(a) of the EIR. She also reiterated her request to the Council for copies of emails or correspondence that accompanied the statements.
 19. The Council replied on 17 August 2021. It confirmed it had sent all of the five 'held statements'. The only two missing were those requested

by (*name redacted*) but never received by him. The Council did not respond to the question as to whether the statements were held by (*name redacted*) on its behalf nor did they provide any emails that accompanied those statements apart from those addressed to the Commissioner.

20. The first question for the Commissioner to determine is whether the requested information is 'environmental' as defined by the EIR.

Is the requested information environmental as defined by the EIR?

21. 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);

22. The Commissioner has viewed the requested information which consists of statements provided to (*name redacted*) for his investigation into the sale of Council owned land to a private company

for residential development. The Commissioner finds this information is a measure affecting or likely to affect the elements of the environment, namely land and landscape, as defined by Regulations 2(1)(a) of the EIR. She is therefore satisfied that the information falls within the definition of environmental information under Regulation 2(1)(c) of the EIR.

Regulation 3(2)(a) of the EIR

23. Regulation 3(2)(a) of the EIR states;

'For the purposes of these regulations, environmental information is held by a public authority if the information –

Is in the authority's possession and has been produced or received by the authority; or

Is held by another person on behalf of the authority.'

24. In this case, the information held by the Council consists of five statements.

25. The Commissioner's guidance on 'information held for the purposes of the EIR² states that 3(2)(a) applies to, *'information that is in the possession of the authority, and either produced or received by it or is held for its own purposes'*.

26. In this case, the information held by the Council consists of five statements. Four from individuals connected with the Council and one from a private individual. These statements have been sent to (*name redacted*) to assist his independent investigation commissioned by the Council.

27. Regulation 3(2)(a) requires the information to be 'produced or received' by the Council. In the present case, it could be argued that three of the five statements have been 'produced' by the Council in that they are authored by councillors or officers in their official capacity. However, of the remaining two statements both are personal views of the Council's handling of a land sale to a private developer.

² https://ico.org.uk/media/for-organisations/documents/1640/information_held_for_the_purposes_of_eir.pdf

28. With regard to information 'received' by the Council, the Commissioner's guidance makes it clear that it must relate to work it undertakes. In this case the information references the Council's activities regarding the sale of land. However, it is also for the benefit of (*name redacted*), who the Council has commissioned to undertake an independent investigation into its activities regarding the land transaction.
29. The Commissioner guidance lists various factors to be considered when assessing the extent to which the requested information is held by the Council for its own purposes under Regulation 3(2)(a) of the EIR. The more of these factors that apply, the more likely it is that the information is held by the public authority for its own purposes.
30. Firstly, does the public authority have access to, use for, or an interest in the information? In this case, it clearly does for the reasons given above. Furthermore, the contract between the Council and (*name redacted*) makes it clear that the Council is 'entitled to all property copyright and other intellectual property rights in the Project Materials'.
31. Secondly, does the authority have a discretion to create, record, file or remove the information? In this case, it probably does not until such time as (*name redacted*) has concluded his investigation and published and distributed his report. The contract between the Council and (*name redacted*) states that 'upon request...and in any event, upon expiration or termination' of the agreement, (*name redacted*) shall deliver to the Council all copies of project material in his custody control or possession. The Council has confirmed with the Commissioner that it decides what information and documentation used by (*name redacted*) is retained, altered or deleted.
32. Next, does the authority provide clerical and administrative support? The Council has informed the Commissioner that it provides support for (*name redacted*) by helping to set up meetings and providing information. However, any work outside this is performed by his own clerical support.
33. Does the authority control access to the information? The Council has informed the Commissioner that it has access to the documentation used by (*name redacted*).
34. Does the Council manage the process in terms of timeliness, reporting and document preparation. The terms of reference³ and contract under

³ <https://www.shrewsburytowncouncil.gov.uk/wp-content/uploads/18.05.2020-Full-Council-Minutes-Areg.pdf>

which the Council commissioned (*name redacted*) would suggest that it does. Under the heading, 'The Investigation' in the contract it states, 'it is planned that the investigation will commence in July 2020 with a view to reporting back in the Autumn. The report will then be published and discussed at a publicly accessible meeting of the Town Council'. The Council has also confirmed with the Commissioner that it is 'overseeing the process'.

35. Does the authority deal with enquiries about the requested information? The Council has confirmed to the Commissioner that it does. Also, the contract under which (*name redacted*) was commissioned specifies that the Council will deal with any requests for information relating to the investigation under the FOIA.
36. Finally, are the costs from holding the information included in the authority's overall budget. The Council has confirmed that the documentation used by (*name redacted*) is covered by its budget.
37. The Commissioner's guidance⁴ makes the point that the above factors are only indicative of whether information is held by a public authority for the purposes of the EIR. In this respect, it is important that authorities do not adopt a formulaic approach when considering the purpose(s) for which the information is held.
38. Taking into account all of the above factors the Commissioner finds that the requested information is held under Regulation 3(2)(a) of the EIR in that it has been either produced or received by the Council and relates to their active involvement in the sale of public land to a private developer to build residential houses. However, to the extent that some or all of the information is not covered by Regulation 3(2)(a) the Commissioner will now look at Regulation 3(2)(b) of the EIR.
39. The Commissioner's interpretation of Regulation 3(2)(b) is that information is held by a public authority under the terms of the EIR if it is held by another person (which means a legal person, and could be an individual or an organisation), for the public authority's own purposes.
40. In this case, the information consists of statements requested and received by (*name redacted*), who is the person commissioned by the

⁴ https://ico.org.uk/media/for-organisations/documents/1640/information_held_for_the_purposes_of_eir.pdf

Council to undertake the independent investigation into the sale its land to a private developer.

41. Under the terms of the agreement between the Council and (*name redacted*), it is stated that upon request...and in any event, upon expiration or termination' of the agreement, (*name redacted*) shall deliver to the Council all copies of project material in his custody control or possession. The Council has confirmed with the Commissioner that it decides what information and documentation used by (*name redacted*) is retained, altered or deleted.
42. The agreement also states that the 'Council shall be entitled to all property copyright and other intellectual property rights in the Project Materials'. 'Project Materials' is defined under the agreement as 'any and all works of authorship and materials developed written or prepared by the Consultant, its employees or agents in relation to the Service (whether individually, collectively or jointly with the Council and on whatever media) including without limitation any and all reports, studies, data, specifications, pre-contractual and contractual documents and all drafts thereof and working papers relating thereto....'
43. The above would suggest the statements requested and received by (*name redacted*) are held by him on behalf of the Council. Furthermore, the agreement between the Council and (*name redacted*) is similar to that of an arrangement between a client and a solicitor. In such a scenario, where a public authority instructs a solicitor to act on its behalf, generally speaking any information held by the solicitor, is held on behalf of the client.
44. The Commissioner's conclusion is that the requested information is held by the Council either for its own purposes under Regulation 3(2)(a) or by (*name redacted*) on its behalf under Regulation 3(2)(b) of the EIR.

Regulation 5 of the EIR – Duty to make available environmental information on request

45. 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.

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

46. 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.

47. The complainant submitted his request on 12 September 2020 and the Council responded on 28 September 2020 by stating it did not hold the requested information. This is provided for under Regulation 12(4)(a) of the EIR which states;

'12(4) For the purposes of paragraph 1(a), 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'

48. As the Council incorrectly applied Regulation 12(4)(a) the Commissioner finds that it breached Regulations 5(1) and 5(2) of the EIR.

Other matters

49. The Commissioner would like to remind the Council of the importance of engaging with her when responding to requests for detailed arguments under the FOIA and EIR, including those relating to the public interest, in support of any information redacted or withheld. The Commissioner would also like to draw the Council's attention to her detailed guidance on the FOIA⁵ and the EIR⁶ on the ICO's website.
50. The Commissioner uses intelligence gathered from individual cases to inform our insight and compliance function. This aligns with the goal in our draft "Openness by design"⁷ strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our "Regulatory Action Policy"⁸.

⁵ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/>

⁶ <https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/>

⁷ https://ico.org.uk/media/about-the-ico/documents/2615190/openness_by_-_design_strategy_201906.pdf

⁸ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/>

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: 0203 936 8963

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

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