

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

Date: 22 February 2022

Public Authority: South Tyneside Council
Address: Town Hall and Civic Offices
Westoe Road
South Shields
Tyne and Wear
NE33 2RL

Decision (including any steps ordered)

1. The complainant requested information, including an enforcement file, relating to a specified planning application. South Tyneside Council (the 'Council') handled the request under the EIR and provided some information with redactions for personal information. It withheld the remainder citing Regulation 12(5)(b) (course of justice). Following its internal review, the Council revised its position; it now said that no enforcement file was held in accordance with Regulation 12(4)(a) and that all information in scope of the request had been provided. The complainant confirmed she was not concerned with the redacted personal information, so the Commissioner has not considered this aspect any further.
2. The Commissioner's decision is that the Council was correct to handle this request under the EIR. He also finds that, on the balance of probabilities, the Council does not hold any further information in scope of the request. However, the Council also breached Regulation 5(2) of the EIR by failing to provide information within 20 working days, and Regulation 11(4) as it failed to provide an internal review within 40 working days.
3. The Commissioner does not require the Council to take any steps to ensure compliance with the legislation.

Background

4. There are references within this decision notice to 'section 106' agreements. The Council has provided the following rationale:

"Section 106 of the Town and Country Planning Act 1990 allows a local planning authority, like the Council, to enter into legally binding agreements or planning obligations with any person with an interest in land in their area for the purpose of restricting or regulating the land's development or use and as part of the granting of planning permission. These agreements are a way of delivering or addressing matters that are necessary to make a development acceptable in planning terms and where planning conditions attached to a planning decision may be insufficient to mitigate the impact of development. They can be used to support the provision of services and infrastructure, such as highways, public open space and recreational facilities, education, health provision or affordable housing, can be used to mitigate the impact of new development and can contain a requirement for financial contribution."

Request and response

5. On 3 December 2020, the complainant wrote to the Council and requested information in the following terms:

"Re: ST/0382/20/FUL

We formally request under the Freedom of Information Act 2000 to be sent a copy of the enforcement file in relation to the above planning application and ALL correspondence between LSH, Siemens Plc & the planning group regarding this matter."

6. The Council responded, late, on 8 March 2021 under the EIR. It provided some information within the scope of the request but refused to provide the remainder. It cited the following exceptions as its basis for doing so:
- Regulation 12(3) – personal data for redactions within the disclosed information, and
 - Regulation 12(5)(b) – the course of justice cited to withhold the requested enforcement file.
7. The complainant requested an internal review on 11 March 2021. In the absence of any substantive reply from the Council, the complainant complained to the Commissioner.

Scope of the case

8. The complainant contacted the Commissioner on 27 May 2021 to complain about the way her request for information had been handled, specifically that the Council had not provided an internal review which is a statutory requirement under the EIR.
9. The Commissioner wrote to the Council on 28 July 2021 to ask it to carry out an internal review.
10. On 3 August 2021, the Council provided its internal review. It revised its position in relation to the enforcement file. It now said that it did not hold an enforcement file and that it had already provided the complainant with copies of all the documents held in scope of the request. Specifically, the Council said:

“No specific file containing documentation relating to action which could be described as enforcing the terms of the S.106 [section 106] agreement exists. By way of explanation, any communications which were generated with the aim of ensuring adherence to the terms of the S.106 agreement are contained in the larger, general file of documents, copies of which have already been supplied to you.

I do apologise for the slightly misleading wording contained in the original response, and hope that the above clarifies matters for you. I also apologise for the delay in responding to your request of the 11th March 2021.”

11. The complainant remained dissatisfied following the internal review, both in terms of the delay and the outcome.
12. On 18 January 2022, the complainant advised the Commissioner that she was not concerned with the redactions for personal information within the disclosed information already provided by the Council. Therefore, the Commissioner has not considered the Council's reliance on Regulation 12(3), which is associated with Regulation 13 of the EIR, any further.
13. Additionally, the complainant submitted the following grounds of complaint:

“...in this particular case, we refute their findings on their change of position and query their motives around this. How can we have a partial response and multiple correspondence/communications with officers of the Council regarding an Enforcement file, to then be told that it doesn't exist and in fact that the information requested makes up part of a

larger, general file? Whether it was part of a general file or not, we know that we have not been sent all of the information requested, and that what they did send was largely made up of repetitive emails. We have email correspondence from the Case Officer within the Planning Group, stating that all complaints/evidence were being added to the Enforcement File, and they were actively encouraging ourselves and other residents to continue submitting information/evidence/concerns in order for it to be added to the Enforcement File as part of their investigations. We are now at a loss as to where all of this information (some of it sensitive and personal in nature) has gone and who may have access to the 'larger general file' that they now speak of. We wanted to see what had built up in the Enforcement file to judge its weight in their decision to take no action over the complaint”.

14. The Commissioner has firstly considered whether the Council was correct to handle the request under the EIR. He has also considered timeliness and whether, on the balance of probabilities, the Council holds any further information beyond that already disclosed.

Reasons for decision

Is the requested information environmental information?

15. Regulation 2(1) of the EIR defines environmental information as any information in any material form 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) and (b) 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)."
16. The Commissioner considers that the phrase "any information...on" should be interpreted broadly. In this case the requested information concerns information associated with a specific planning application.
17. The Council told the Commissioner it considered that the request fell under the EIR because it:
- "...asked for a copy of an enforcement file in relation to a planning application as well as correspondence relating to this matter. The Council considers that information related to enforcement of planning matters meets the scope of regulation 2 1 (a), (b), (c) and (d) of the Environmental Information Regulations".
18. Any information held within the scope of the requests would fall within regulation 2(1)(c) "activities affecting or likely to affect the elements and factors referred to in (a) and (b)". Further, if reports were held on the impact of the planning application on the environment, then it would fall within (d).
19. The Commissioner is satisfied that the requested information would, if held, be environmental information and that the EIR apply.
20. All the exceptions under the EIR are subject to the public interest test, including regulation 12(4)(a). However, the Commissioner can see no practical value in applying the test where information is not held and he does not expect public authorities to do so.

Regulation 5(1): duty to make information available

Regulation 12(4)(a) – information not held at the time of the request

21. Regulation 5(1) of the EIR states that, subject to other provisions, a public authority holding environmental information shall make it available on request.

22. Regulation 12(4)(a) provides an exception from the duty to make information available if the authority does not hold the requested information at the time of the request.
23. In cases where there is a dispute as to the information held by a public authority, the Commissioner will use the civil standard of proof, ie the balance of probabilities. Accordingly his investigation will consider the public authority's reasons for stating that it does not hold the information in question, as well as the extent and reasonableness of any search conducted. The Commissioner will also consider any arguments put forward by the complainant as to why the information is held (as opposed to why it ought to be held).

The complainant's view

24. The complainant's view is set out in paragraph 13 of this notice.

The Council's view

25. In response to the Commissioner's investigation, the Council has explained the following:

"The Council does not hold a specific, separately identifiable planning enforcement file, therefore no searches were carried out for this as it does not exist. A planning enforcement file is only created by the Council when it decides that it is expedient under the public interest test, as set out in national planning policy, to use its formal planning enforcement powers in order to regularise a planning breach.

The complaints that were received alleging a planning breach (i.e. the commencement of work without planning permission and the positioning of the skips, building materials and parking of vehicles within zone B) were received shortly after the council validated a planning application in September 2020 (ref: ST/0382/20/FUL). This application sought permission to refurbish the industrial unit and to create a mezzanine floor. These planning enforcement enquiry complaints were dealt with by the planning case officer for this planning application at the same time as he was considering the planning merits of the proposed development and they were logged as complaints on the Council's planning enforcement enquiry system. It was not deemed necessary to provide a formal response to the alleged planning breaches and as such the complaints were dealt with informally between the planning case officer for the planning application and the applicant and their agent.

Third party comments made in respect of the merits of the planning application were stored on the planning application file

as part of the public record. The planning file is a paper record and the planning enforcement enquiry file is an electronic record stored on the Council's network.

The Council did however carry out searches for correspondence which may have included references to enforcement action, which was provided to the requestor as part of its response. These searches were carried out on the Council's outlook system and on its network."

26. The Council said:

"The planning enforcement enquiry records have been shared, along with the planning application file".

27. In addition, the Council advised that it had provided the complainant with records pertaining to the concerns raised and copies of the emails in scope of the request. It confirmed that no information has been withheld other than the redacted third party personal information within the disclosed information (the latter the complainant is not concerned with).

28. In addition, the Council said:

"Relevant staff have been consulted in respect of the data request. The planning application file (ref: ST/0382/20/FUL) has been made public and the documents held on this file have been provided on request by the planning case officer for this application. The planning case officer co-ordinated the response to the queries that were made regarding both the planning application and the alleged planning breaches, and they coordinated the response to the EIR on behalf of the Development Management team."

29. The Council said it had searched its Outlook (emails) by the email address, the planning application reference number, site address, the applicant's name and address and the name and address of the complainant. It said that the planning application is held on a paper file and stored in South Shields Town Hall under a reference number, with a redacted copy of the completed planning form and supporting information and decision notice held on the Council's website under its public Explorer webpage.

30. It explained that planning enforcement enquiry complaints are stored on the Council's network on a specified database and on its network, and that these systems are not public. It stated that the data may be acquired by searching under address, description of the breach, date, complainant, etcetera.

31. The Council averred:

“A specific and separately identifiable enforcement file is not held as it does not exist. Correspondence is held as electronic records in email format, and paper and electronic records within legal services and planning.”

32. It said that no recorded information in scope of this request has been deleted or destroyed and:

“The requestor was provided with the information held by the Council and advised where the Council did not hold the information requested. No enforcement action was taken because the concerns raised were rectified without the need for formal enforcement, so it does not exist and all records pertaining to the concerns raised have already been disclosed.”

33. In terms of the Council’s records management and retention policy, the Council advised that it retains emails for seven years and that its Legal Services Team retains section 106 agreements permanently and destroys its legal correspondence file relating to the agreement after 12 years from the date of last action, unless there is a continued business need to retain the correspondence file.

34. With regard to whether there are any statutory requirements upon the Council to retain the requested information, the Council replied as follows:

“If a planning enforcement notice had been served, the Council would be required to retain that information in its enforcement register under Article 43 of The Town and Country Planning (Development Management Procedure) (England) Order 2015 and for the purposes of maintaining the Local Land Charges Register. If planning enforcement proceedings were instituted, the requested information would be retained in accordance with the Criminal Procedure and Investigations Act 1996. No enforcement notice has been served. There is no other statutory requirement upon the Council to retain the information.”

The Commissioner’s decision

35. The Commissioner’s remit is to establish whether, on the balance of probabilities, information falling within the scope of the request is held.

36. The Commissioner considers that the Council’s original reference to withholding the “enforcement file” under Regulation 12(5)(d) in its substantive response has been more than “slightly misleading wording” (see the quoted section under paragraph 10 of this notice). The Council’s original response explicitly states that the enforcement file was

being withheld because it would adversely affect “the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature” in accordance with Regulation 12(5)(b) of the EIR. Although this position was revised at internal review, in the Commissioner’s view, this error has understandably caused the complainant confusion and raised doubt that she has been provided with all the requested information in scope of her request.

37. However, the Commissioner is satisfied by the Council’s explanations as to why no enforcement file exists. His decision, on the balance of probabilities, is that no further information is held and that the Council was, therefore, correct to state that it did not hold any further information beyond that already provided to the complainant.
38. He does not require the Council to take any steps in respect of this decision.

Procedural Matters

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

39. Regulation 5(2) of the EIR says that the public authority must make the information available as soon as possible and no later than 20 working days after the date of receipt of the request.
40. In this case, the Council failed to respond in full to the request within 20 working days. The complainant submitted her request for information on 3 December 2020. The Council only provided its substantive response on 8 March 2021.
41. Whilst noting the Council’s explanation that the delay was impacted by having to retrieve emails and redact personal information from the disclosures, the Commissioner does not consider it acceptable that these typical actions when responding to requests incurred a delay of over three months.
42. As such, the Council has breached regulation 5(2) of the EIR.

Regulation 11 – Representations and reconsiderations

43. Regulation 11(1) provides that:

“...an applicant may make representations to a public authority in relation to the applicant’s request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request”.

44. Regulation 11(4) of the EIR requires that where an applicant requests that an authority reviews its response to a request for information under Regulation 11(1) that the authority notifies the applicant of its decision as soon as possible and no later than 40 working days after the date of receipt of the representations.
45. The complainant's original complaint to the Commissioner concerned the then outstanding internal review, which she had requested on 28 July 2021.
46. Following the Commissioner's intervention, the Council provided its internal review outcome on 3 August 2021, 42 working days after receipt. The Commissioner notes that the Council acknowledged "that it should have communicated with the requestor about the delays better and would like to apologise for this."
47. In this case, the Council breached Regulation 11(4) of the EIR.

Other matters

48. The Commissioner has made a record of the delays in this case. He expects the Council to comply with the statutory deadlines when responding to future requests.
49. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. This will align with the goal in his draft "Openness by Design strategy"¹ 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 his "Regulatory Action Policy"².

¹ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

² <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

50. 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

51. 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.

52. 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

Carolyn Howes
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