

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 October 2016

Public Authority: Test Valley Borough Council
Address: Beech Hurst
Weyhill Road
Andover
Hampshire
SP10 3AJ

Decision (including any steps ordered)

1. The complainant requested details of pre-application planning advice in relation to two specific planning applications. Test Valley Borough Council withheld the information under regulation 12(3) (personal data), 13 (personal data) and 12(5)(f) (interests of the person who provided the information) of the EIR. During the Commissioner's investigation, Test Valley Borough Council disclosed the withheld information to the complainant.
2. The Commissioner's decision is that the Test Valley Borough Council has breached regulation 5(1) of the EIR as it did not disclose the information initially when requested. The Commissioner also considers that as it took longer than 20 working days to disclose the requested information, Test Valley Borough Council has also reached regulation 5(2) of the EIR.
3. The Commissioner does not require Test Valley Borough Council to take any steps as a result of this decision.

Request and response

4. On 20 November 2015 the complainant wrote to Test Valley Borough Council (TVBC) and requested information in the following terms:

“Details of the pre-application planning advice in respect of planning applications 15/12761 and 15/02762 for the period 1 May 2015 to November 2015. TVBC document 15/01858PREAPN is relevant. Please note that the subject applications are now in the public domain and there is no identification of commercial caveats or restrictions on disclosure.”

5. TVBC responded on 24 November 2015. It stated that it was withholding the information under:

regulation 12(3) – personal data
regulation 13 – personal data
regulation 12(5)(f) – interests of person who provided the information
sections 40(2) (personal data) and 41 (information provided in confidence) under the Freedom of Information Act 2000.

6. Following an internal review TVBC wrote to the complainant on 23 December 2015. It upheld its original decision.

Scope of the case

7. The complainant contacted the Commissioner on 5 January 2016 to complain about the way his request for information had been handled. He explained that his request for information had been submitted after the application relating to the pre-planning advice had been formally registered and placed in the public domain.
8. During the Commissioner’s investigation, TVBC disclosed the requested information to the complainant. The complainant explained that he still wanted a decision notice as when TVBC made it disclosure to him, it had explained it considered that the requested information was already out in the public domain. He also explained that he considered that TVBC had not complied with its own policies.
9. The Commissioner cannot consider whether TVBC is adhering to its own policies. However, the Commissioner will consider how TVBC dealt with the request including the length of time taken to deal with it.

Reasons for decision

Is the information environmental information?

10. Environmental information is defined in regulation 2(1) of the EIR. The relevant subsections are found in 2(1)(a) to (c) which state that it is 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...”

11. The Commissioner considers that the pre-application advice would fall under regulation 2(1)(c) as a measure which affects land.

Regulation 5 – Duty to make available environmental information on request

12. Regulation 5(1) of the EIR provides that if a public authority holds environmental information it should make it available on request.
13. The Commissioner notes that initially TVBC withheld the information under 12(3) (third party personal data), 13 (third party personal data) and 12(5)(f) (interests of the person who provided the information). However, it withdrew its reliance on these exceptions when it disclosed the requested information.
14. TVBC explained to the Commissioner that it considers that if a planning application is submitted following pre-application discussions and it is substantially the same as a pre-application enquiry, it regards the pre-application enquiry information as being in the public domain.
15. The Commissioner notes TVBC’s explanation regarding planning applications and pre-application enquiries considered as being substantially similar, as explained in paragraph 14. However, she notes that the actual pre-application advice was not already in the public

domain. The Commissioner does not consider that because a planning application is substantially the same as pre-application enquiry information, the publishing of a planning application will automatically be enough to satisfy a request for environmental information. The Commissioner considers this point further in 'Other matters' below.

16. The Commissioner therefore considers that TVBC has breached regulation 5(1) as it did not make the requested environmental information available on request.
17. Regulation 5(2) provides that environmental information should be disclosed as soon as possible and no later than 20 working days after the date of receipt of the request.
18. The Commissioner considers that TVBC has also breached regulation 5(2), as it took longer than 20 working days to disclose the information to the complainant.

Other matters

19. In her guidance "Information in the public domain"¹ the Commissioner considers whether information already in the public domain can be considered as answering a request for information. Paragraphs 7 – 8 state:

"7. A public authority might consider that the existence of relevant information in the public domain means the information should not or need not be disclosed. On the other hand a requester could argue that this means it can and should be disclosed.

8. The fact that relevant information can be found in the public domain does not automatically support either side. Public authorities should always consider the quality and content of the information in the public domain and compare it carefully with the withheld information to determine its relevance in the particular circumstances of the case".

20. As a matter of good practice, the Commissioner also considers that this approach should be explained to the applicant.

¹ <https://ico.org.uk/media/for-organisations/documents/1204/information-in-the-public-domain-foi-eir-guidance.pdf>

Right of appeal

21. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

22. 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.
23. 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

Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF