

Environmental Information Regulations (EIR)

Decision notice

Date: 30 January 2017

Public Authority: Swindon Borough Council

Address: Civic Offices
Euclid Street
Swindon
Wiltshire
SN1 2JH

Decision (including any steps ordered)

1. The complainant has requested information regarding a survey of the drainage system on a specified road. Swindon Borough Council (the Council) originally relied on regulation 12(4)(a) and stated the information was not held. Following the intervention of the Commissioner, the Council widened its interpretation of the scope of the request and disclosed information to the complainant.
2. The Commissioner's decision is that the Council has complied with regulation 5(1) of the EIR and made available all information held falling within the scope of the request. The Commissioner does, however, find the Council breached regulation 5(2) by failing to disclose the information within the statutory time frame.
3. As the Council has disclosed the information held, the Commissioner does not require it to take any remedial steps.

Request and response

4. The complainant is concerned about drainage and the risk of flooding near his property. He has been in correspondence with the Council on this issue for some time.
5. The complainant wrote to the Council on 3 February 2016 and requested information in the following terms:

*"I request you to provide me with the following:
Your survey up to and including the three weeks work attempting to resolve the issue commencing on the 29th September 2014"*

6. The Council responded on 3 March 2016 and denied holding the requested information.
7. The complainant requested an internal review on 9 March 2016. The Council provided the outcome on 7 April 2016 and upheld its original position. The Council stated that it held related information that did not constitute a detailed drainage survey and therefore fell outside the scope of the request. The Council offered to make this information available to the complainant.

Scope of the case

8. The complainant contacted the Commissioner on 19 April 2016 to complain about the handling of his request for information. He set out that he believed the Council did hold information falling within the scope of his request and provided the Commissioner with correspondence related to the issue which led to the request.
9. During the course of the investigation, the Commissioner reviewed the information held by the Council that was offered to the complainant at internal review. The information comprises drawings and sketches of the drainage system at the specified location.
10. The Council explained to the Commissioner that it considered these documents fell outside of the scope of the request as they do not comprise technical surveys of the area and are not the information the complainant was requesting.
11. The Commissioner notes that the request was for "*Your survey*" and did not specify the level of complexity required. The Commissioner considers that, in the absence of a detailed technical survey, the

drawings and sketches held by the Council do fall within the scope of the request.

12. The Council provided the complainant with the information described above on 26 September 2016. The complainant confirmed to the Commissioner that this information did not fulfil his request and he believed the Council held further information relevant to his request.
13. The Commissioner, therefore, considers the scope of the case to be to determine whether, on the balance of probabilities, the Council holds information further to that already disclosed.

Reasons for decision

Access regime

14. The Council's correspondence with the complainant indicated that the request was being handled under the Freedom of Information Act 2000 (the FOIA). However, on receipt of the complaint the Commissioner informed the Council of her view that the requested information was environmental information within the meaning of regulation 2 of the EIR.
15. Regulation 2 of the EIR provides the definition of environmental information for the purposes of the EIR. It defines environmental information as:

"any information in written, visual, aural, electronic or any other 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. As the request is for a survey of a drainage system, the Commissioner considers that, if the information were to exist, it would be information on an administrative measure and would fall within the definition of environmental information under regulation 2(c). Neither the Council nor the complainant has disputed this, therefore the Commissioner has considered the complaint under the EIR rather than the FOIA.

Does the Council hold any further information?

17. Regulation 5(1) of the EIR states:

"Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request."

18. In cases where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, in accordance with a number of First-Tier Tribunal decisions, applies the civil standard of the balance of probabilities.

19. The Council confirmed to the Commissioner that an assessment of the specified location had previously taken place, and that information relating to that assessment had been provided to the complainant. The Council maintained that no information further to that already provided had been recorded.

20. The Council set out to the Commissioner the searches it had undertaken following the complainant's request. It explained that it had approached

officers in the relevant departments¹ who had conducted searches of electronic and paper files. It also confirmed the electronic searches used the address and location details provided by the complainant as search terms.

21. The Council set out to the Commissioner that there is no statutory or business requirement to hold the requested information and explained that the Council does not hold drainage surveys for every area it is responsible for. The Council further explained that if information of this nature was held, it would be retained in its archives until updated by new developments.
22. The Council explained to the Commissioner that if the requested information was held, it would not consider it exempt under the EIR and would be happy to disclose it to the complainant.
23. In support of his position the complainant provided a letter from the Council dated 3 December 2007 which he considers indicates that the Council holds the information requested.

24. The letter states:

"I thank you for finding the time to give my drainage engineers the benefit of your local knowledge with respect to the drainage layout in the area and with this information we should be able to move forward and resolve the ponding issue".

25. The Council confirmed to the Commissioner that it had not restricted its search to a set timeframe, therefore its searches had included information dating back to 2007. The council explained that it had performed a subsequent search, including the file under the reference quoted in the letter, and it had not found any further information falling within the scope of the request.
26. The Council also explained that during its subsequent search, it had contacted other departments that may have received documents as background information, for example, the Council's complaints

¹ Service Manager: Highway Asset Management and Project Delivery, Highways and Transport Delivery
Construction Service Manager: Highways and Transport
Highway Asset Drainage Engineer: Highways Asset Management
Senior Asset Engineer: Transport
Inspection supervisor: Highways Operations

department, its legal department and councillors. None of these identified any further information falling within the scope of the request.

27. The complainant also provided the Commissioner with a letter he had received from a private engineering company dated 17 April 2001. The letter confirms a timeline of contact and works undertaken relating to the matter in dispute.
28. The Council confirmed to the Commissioner that it did not become responsible for the specified road until 2003 and had searched the records passed to it by the previously responsible public authority (the Highways Agency). The Council also confirmed that it had considered information held by third party contractors but it had found no evidence that contractors had been engaged by the Council regarding the matter in dispute. The Council also confirmed that the third party engineering company identified in the letter dated 17 April 2001 had not been contracted to perform work on behalf of the Council.
29. Finally, the complainant explained to the Commissioner that he had witnessed Council officers using camera equipment to assess the specified area and he, therefore, believed that video footage was held.
30. The Council set out to the Commissioner that the equipment allowed live-feed images only and was used to provide the officer with a view of the drain in question during a site visit. The Council explained that the equipment was unable to record images and, therefore, no video footage is held regarding the specified location.

The Commissioner's considerations

31. The Commissioner has reviewed the submissions provided by the Council and the documentation and background provided by the complainant.
32. The Commissioner appreciates that the complainant's dealings with multiple officers across different public authorities has led him to the conclusion that a survey of the specified area must be held by the Council. The complainant provided the Commissioner with extensive correspondence and background which includes the letters detailed at paragraphs 23 and 27 above and a letter written by the complainant, addressed to the Council, which explains that the complainant met with the Head of Highways of the Highways Agency in 1988. This letter indicates the complainant is aware of "*detailed drainage and road layouts*" held by the Highways Agency, which the complainant considers would have been provided to the Council in the transfer of responsibility in 2003.

33. The Commissioner does not consider this information to provide strong evidence that the Council holds information further to that provided to the complainant. The Commissioner considers that the Council cannot be expected to have details of the location or destruction of a document that may have been held by another public authority 25 years before the Council took responsibility for the specified area.
34. The Commissioner is also mindful of the interpretation of the letter from 2007, the contents of which are set out at paragraph 24. The Commissioner considers that the likely interpretation of this letter is that the information referred to is the complainant's local knowledge provided at the time of the site visit and not that of a detailed survey.
35. The Commissioner considers that the Council has conducted adequate searches, which included the information provided to it by the previous public authority, and has provided reasonable explanations for why the information requested is not held. The Commissioner has also considered whether, if the complaint were to be upheld, she could require the Council to take any further steps or conduct fresh searches. However the Commissioner is unable to identify any further action that would be likely to identify information relevant to the request.
36. The Commissioner therefore finds that on the balance of probabilities, the Council does not hold any information falling within the scope of the request that it has not already provided to the complainant.

Time for compliance

37. Regulation 5(2) of the EIR states:

"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."

38. The Commissioner notes that the Council initially claimed that it did not hold any information falling within the scope of the request. If this were the case then the Council ought to have issued a refusal notice citing the exception at regulation 12(4)(a) of the EIR. However, as set out above the Council subsequently accepted that it did hold information that fell within the scope of the request. This means that the Council was not in fact obliged to issue a refusal notice, but ought not to have stated that it did not hold relevant information.
39. The Council in this case interpreted the complainant's request on the basis of its previous correspondence and interaction with him. The Commissioner understands the Council's reasoning for the narrow interpretation of the request, however, she would remind the Council

that the EIR is motive and applicant blind and public authorities should avoid interpreting or narrowing requests based on previous knowledge.

40. The Commissioner has issued guidance² on interpreting requests that states:

"The authority must answer a request based on that the requester has actually asked for, and not on what it thinks they would like, should have asked for or would be of most use to them".

41. The Council did disclose the information subsequently identified to the complainant, but outside the statutory time for compliance. Therefore the Commissioner finds that the Council breached regulation 5(2) of the EIR in the disclosure of this information.

² <https://ico.org.uk/media/for-organisations/documents/1162/interpreting-and-clarifying-a-request-foia-eir-guidance.pdf>

Right of appeal

42. 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

43. 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.
44. 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

Sarah O’Cathain
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