

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

Date: 28 October 2019

Public Authority: Rochdale Metropolitan Borough Council
Address: Number One Riverside
Smith Street
Rochdale
OL16 1XU

Decision (including any steps ordered)

1. The complainant has requested information regarding a planning permission decision notice.
2. The Commissioner's decision is that on the balance of probabilities, Rochdale Metropolitan Borough Council has located all the information held in scope of the request.
3. The Commissioner does not require any steps.

Request and response

4. On 15 March 2018, the complainant wrote to Rochdale Borough Council ('the council') and requested information in the following terms:

"We require more details regarding what we can for now only refer to as 'the 22 July 2016 document'. In particular:

- 1. How do you (or how does anyone within RMBC) know that the handwritten annotations referred to in our letter of 27.04.17 were written prior to the May 2016 decision to discharge?*
- 2. Who wrote those handwritten comments?*
- 3. Why was enforcement action not taken when the development was, according to those annotations, not in accordance with the planning permission?*
- 4. Why was the decision (subsequently as you claim) taken to discharge the conditions, despite the content of the annotations?*
- 5. Please supply copies of all communications electronic or otherwise between the Council and Barratt/CRSL regarding the site between October 2014 and May 2016.*
- 6. Please also supply copies of all internal communications within the Council relating to the development and compliance with/discharge of planning conditions.*
- 7. The Council is welcome to supply the "actual statutory planning file" referred to in your letter as well or instead of any of the information requested above, provided that in totality all of the information requested above is supplied.*

5. The council responded on 12 July 2018. It refused to provide the requested information. It cited the following exception as its basis for doing so: EIR Regulation 12(5)(b) – the course of justice.
6. The complainant requested an internal review on 13 September 2018. The ICO issued a decision notice (ref: FER0754585) on 14 January 2019 which stated that the council had breached regulation 11 of the EIR and instructed the council to carry out an internal review.
7. The council sent the outcome of its internal review on 15 February 2019 in which it revised its position. In relation to the request items the council:
- 1, 2: stated the information is not held, on the basis that the council does not hold any recorded information that answers the questions.

3: stated *"In respect of your question 3 enforcement action by the Council is discretionary and this option was not raised or considered."*

4 – 7: provided the majority of the requested information. Some information was exempted on the basis of the exception at regulation 13 – personal information.

Scope of the case

8. The complainant contacted the Commissioner on 22 May 2019 to complain about the way their request for information had been handled. Specifically that: *"RBC [the council] has refused to supply the information requested at items 1 to 3 inclusive of the EIR request..."* The complainant provided further supporting arguments which are detailed and considered within the main body of this decision notice. The complainant has not raised any issues with the council's response to request items 4 to 7.
9. The Commissioner therefore considers, that the scope of this case is to establish whether, on the balance of probabilities, the council holds any further information in scope of the request items 1, 2 and 3.

Background

10. The document containing the handwritten notes is a planning permission decision notice. The document is signed and dated as 3 October 2014. The document has been annotated with handwritten notes such as *"Info submitted awaiting response"*, *"Goes to the heart"*, *"Info submitted – Insufficient – Not discharged – Not carried out in accordance with – Unauthorised"*. The date on which the annotations were made, or author of the annotations are not recorded on the document.
11. The council's website holds two versions of the document. On the website the hyperlink to the original document (without annotations) is named *"PA PUB Decision Notice 04/10/2014"* and the hyperlink to the annotated version is named *"PA PUB Decision Notice 22/07/2016."*
12. The Council's planning application website records that a decision to discharge the conditions of the planning permission was issued on 11 May 2016.

Reasons for decision

13. 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.
14. 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 check that the information is not held, and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held.
15. 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 the Commissioner applies in this case.
16. 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.

The Complainants view

17. Regarding request item 1 the complainant raises:
 - In the internal review, the council states that it is not prepared to speculate on questions 1 and 2;

- However it is the complainants view that certainty is not a pre-requisite to disclosure: *"If there is ambiguity, that ambiguity is itself capable of being disclosable information"*;
- That whilst the internal review does not address request item 1, a letter from a council solicitor dated 23 January 2018 *"...expresses certainty that the annotations pre-dated the May 2016 decision. How could [the solicitor] have known this prior to [their] 23.01.18 letter whereas RBC is not prepared to speculate in its IR letter?"*
- It is therefore the complainant's view that the internal review does not address how the council knows that the handwritten annotations, mentioned in the solicitor's letter, were written prior to the May 2016 decision to discharge conditions.

18. Regarding request item 2 the complainant raises:

- *"RBC does not say why it is impossible to say who made the annotations;*
- *"Discerning the identity of all potential authors of the annotations would be easy: RBC will know who it employed as enforcement officers over the period concerned and each would have recorded their activities/observations within the file and/or by way of internal correspondence. There must be internal emails and records of internal meetings and attendances;*
- *"To determine who wrote those annotations should therefore only require a process of elimination;*
- *"The few officers concerned will recognise their own handwriting and should be able to discern that of several (if not necessarily all) of their colleagues. Even if each officer only recognises their own handwriting it is difficult to believe that it is "impossible", as RBC claims, to determine who made the annotations."*

19. Regarding request item 3 the complainant raises:

- *"Enforcement action clearly was contemplated by RBC because the annotation "goes to heart" is planning shorthand for anyone considering enforcement action for commencing development in breach of what is known as a "condition precedent";*
- *"Breach of a condition precedent is extremely serious as it means there was no permission to carry out the development at all...;*

- *"...as such, enforcement was clearly in the mind of the author of those annotations, who must be an experienced officer (this is clear simply from the nature of the annotations), meaning RBC's 15.02.19 assertion that enforcement was not raised or considered must be (a) untrue and (b) inconsistent with the annotations"*

20. Regarding request items 1, 2 and 3 the complainant raises:

- *"RBC should provide reasons setting out why the information is not held in recorded form, and what form it is held in if not recorded."*

The Council's response

21. The Commissioner put a number of questions to the council relating to the points made by the complainant. Regarding request item 1 the council:

- Maintains that it has no record of the date the annotations in question were made;
- Advises that the letter referred by the complainant, from the council's solicitor regarding the date of the annotations *"does not express certainty but puts forward a sensible and logical reading of the events."*
- States that *"The three main employees involved in this matter had left the Council by the end of 2016"*;
- States that *"The Council cannot say with any certainty who made the annotation or when. However a clear reading of the file and events make it highly probable that the notated document [which is a copy of the October 2014 Notice] was sometime after its issue and before the issue of the May 2016 Notice."*

22. Regarding request item 2 the council maintains that it has no recorded information concerning the author of the annotations in question. Furthermore that *"no one in planning has been able to identify the handwriting."* It also confirmed that the author of the annotations cannot be identified by an electronic version of the file.

23. Regarding request item 3, the council maintains its position that enforcement action was not considered in respect of this development. It provided further justification, stating:

- *"Any such enforcement action is discretionary and there was no statutory requirement to take action in the circumstances. The Developer provided the Council with information (previously*

disclosed) to enable it to discharge the obligations of planning permission granted by the Decision Notice of October 2014, in May 2016. The Council in issuing the May 2016 Notice was satisfied without doubt that the conditions could be discharged. Therefore enforcement was never considered."

- *The complainant's assertion that "goes to heart" is planning shorthand for anyone considering enforcement action does not alter the position that enforcement action was not considered and not taken.*
 - *Enforcement action is discretionary, the Council's file is silent as to whether enforcement action was considered. The annotations certainly raise the question of non-compliance but the Council's records [disclosed to the complainant] do not consider any formal action.*
 - *In any event the developer had supplied information to the Council [publically available on the website] to start the approval process under the relevant conditions in December 2014. This process was completed in May 2016 with the issue of the May 2016 Notice. It would have therefore been ineffectual and against the public interest to take action whilst the developer was providing information to the Council that was needed to discharge the preconditions"*
24. The council advises that the annotated version of the document does not purport to be a contemporaneous record of 22 July 2016, *"and indeed was placed on the register after the issued Decision Notice discharging conditions of the actual planning permission."* It states that the annotated document *"was uploaded to the online Planning File as part of a housekeeping exercise on 22 July 2016."*
25. The council states that *"The annotations are undated and unsigned and the Council considers this document to be a 'working' document annotated by one of 3 Council employees at that time. Namely, the Chief Planning Officer, Planning Officer and Drainage Officer. These employees left the organisation, by the end of 2016 and are therefore not available for consultation. They were the decision makers and key officers in the development at the time and the Council's Planning Solicitor considers one of these employees to be the author of the annotations."*
26. The Commissioner asked for details of searches undertaken to locate further information in scope of the request. The council advised *"A reading/review of the planning department electronic file on the application has been undertaken, in order to search and identify any*

information held supplementary to the published statutory Planning File. The Council considers this file to be the relevant one and does not consider that any further searches of Council files would be relevant in this case. This exercise has returned no results in respect of the questions concerning the annotations and the Council's Planning Solicitor is clear that the Council does not hold any information which would identify the date or the author of the annotations in question.

27. In answer to the Commissioner's questions about document retention, the council stated: *Any physical working documents would have either been destroyed or uploaded to the planning department electronic file once the matter was concluded. It is Council policy that any such electronic record would be retained for a period of 6 years from date of creation. There is no additional business or statutory requirement to retain further. Any documents considered to form part of the substantive statutory Planning File, would be published as such. In this case, the working document was uploaded to the online planning portal as part of the housekeeping process as distinct from by way of statutory requirement as part of the Planning File and the physical record then destroyed.*
28. It stated, however, that the council *"considers it highly unlikely that information in respect of the date and/or author of the annotations was ever held in recorded form. This is due to the fact that the document in question appears to a working document and the annotations are written by hand as distinct from typed electronically. As indicated, it is Council practice when dealing with a planning application that physical records not forming part of the statutory Planning File would be destroyed once the matter is concluded. In fact the Council is only legally obliged to keep a statutory record of actual Planning Decisions issued, which must be kept ad infinitum."*
29. In respect of request item 3, the council advised that *"the Council's Planning Solicitor is clear from his direct involvement and proximity, in reviewing this planning application, that enforcement action was never considered. He is not able to speculate upon the annotations in question in terms of their significance and asserts that any enforcement considerations in respect of a planning application would be retained on the planning department electronic file and the statutory file which has been released to the Complainant. The Planning Solicitor confirms that there is no information held in this regard (as indicated above a reading/review of the planning department electronic file has been undertaken) and as enforcement was never considered, no information would have been held at any time in this regard."*

Conclusions

30. The Commissioner considers that the EIR does not require public authorities to answer questions generally, only if the answers are held in recorded form. In this case the Commissioner must therefore establish, whether, on the balance of probabilities, the council holds further recorded information that would enable it to answer the questions posed by the complainant.
31. In coming to her decision, the Commissioner has deliberated over the points raised by the complainant, and the responses provided by the council during the course of her investigation.
32. The Commissioner considers that the key points made by the council regarding request item 1 go some way towards answering the issues raised by the complainant. Those being that it holds no record of the period when the annotations were made, and that the date on the hyperlink to the document indicates nothing further than when it was uploaded. Additionally the council has confirmed the basis upon which it holds the view that the document was annotated prior to the issue of the May 2016 notice to discharge the planning conditions.
33. With regard to request item 2, the complainant raises the notion that the council should be able identify all potential authors. Furthermore that it has information available, such as internal emails or records of meetings, which would enable it, through a process of elimination, to discern the author.
34. In responding to the Commissioner, the council has confirmed that the author of the annotations is not recorded. However the council has identified the roles of three council employees, no longer working for the council, who were *likely* to have made the annotations.
35. The complainant also suggested that the author of the annotations could be identified by the handwriting. The Commissioner does not consider knowledge of individual handwriting characteristics to be held information for the purposes of the EIR. Any identification of authorship would require an exercise of judgement to determine whose handwriting it is, to a degree that is not required by the EIR.
36. The council maintains there is no information held in regard of request item 3. In support of this position it has advised that if any planning enforcement actions had been considered, then these would be retained on the planning department electronic file and the statutory file. Both of which have been searched, and released to the complainant.
37. The Commissioner is cognisant of the arguments put forward by the complainant regarding why enforcement action would have been

considered by the author of the annotations. However, the Commissioner has not found there to be any evidence which undermines the council's position that it holds no information in scope of request item 3.

38. As stated previously, in cases such as this, it is seldom possible to prove with absolute certainty that there either isn't any information or anything further to add. The Commissioner has therefore applied the normal civil standard of proof in determining the case, ie she will decide on the balance of probabilities whether the information is held.
39. The Commissioner is satisfied that the council has conducted reasonable and thorough searches for information to answer the questions posed by the complainant. The council has explained why there is no statutory requirements for holding further information in scope of the request, especially in regard to enforcement actions. During the course of the investigation the council has provided a rationale for the time period in which the annotations may have been made (request item 1) and identified the three employees, in terms of their roles, who were likely to make the annotated comments (request item 2).
40. Taking all of the above into account the Commissioner is satisfied that, on the balance of probabilities, no further information in-scope of the request is held by the council.

Right of appeal

41. 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

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

42. 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.
43. 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

Andrew White
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