

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 14 November 2019

Public Authority: East Hampshire District Council
Address: Penns Place
Petersfield
GU31 4EX

Decision (including any steps ordered)

1. The complainant requested information from East Hampshire District Council ("the Council") about a 2008 decision of the Planning Inspector in relation to the terms of a section 106 agreement. The Council considered the request under the EIR.
2. The Commissioner's decision is that the Council, in informing the complainant that it did not hold any further recorded information falling within the scope of the request, as explained in this notice, correctly refused the request under regulation 12(4)(a) of the EIR, and complied with the requirements of regulation 9 – advice and assistance.
3. The Commissioner does not require the Council to take any steps.

Background to the case

4. The Commissioner has seen a large amount of supporting information in this case, which explains the background to the request.
5. The complainant's request, set out subsequently in this notice, relates to a planning matter dating from 2008. In relation to a specific planning application, a deed of obligation under section 106 of the Town and Country Planning Act 1990 ("the section 106 agreement") was entered into between the relevant landowner, the property developers and the Council.

6. The section 106 agreement included covenants for the payment of financial contributions to the Council in relation to the development, relating both to the preservation of open spaces and to improvements to the infrastructure.
7. The complainant became aware that these financial contributions had not been made. In correspondence with the Council, which began in April 2015, he sought to address his concerns as to whether the terms of the section 106 agreement were still enforceable.
8. The planning application was initially refused, but was subsequently granted after an appeal.
9. On granting the appeal, the Planning Inspector referred (in the Other Matters section of the decision)¹ to the contributions payable under the section 106 agreement as follows: *"I have not been provided with adequate supporting information to show that these contributions are necessary to allow the development to proceed, and therefore I give this limited weight"*.
10. The complainant considered that the Planning Inspector may have been referring to a further undertaking provided by the developers (in addition to the section 106 agreement). However, the Commissioner has no evidence that this was the case.
11. In any event, the complainant's request relates to information about the Council's view as to the contributions payable by the developers, in light of the Planning Inspector's comments.

Request and response

12. On 23 March 2019, the complainant wrote to the Council and requested information in the following terms:

"My request under the FOI 2000 Act is for the clarification by the EHDC of the Inspector's decision in respect of the APPELLANTS offer of s106 contributions. This would have been provided at some stage for the Benefit of the Appellant otherwise he would be unaware of any financial commitment to his business."

¹ https://planningpublicaccess.easthants.gov.uk/online-applications/files/4D1B710CD79A54397887607BA50DA4CA/pdf/49751_001-Appeal_Decision_Notice-200693.pdf

13. The Council responded on 10 April 2019. It stated that it did not consider that the request was valid for the purposes of the Freedom of Information Act 2000 ("the FOIA"), since the complainant appeared to be requesting "*legal advice*" rather than information.
14. Following an internal review, the Council wrote to the complainant on 14 May 2019. It offered a general explanation regarding the enforceability of the section 106 agreement. The Council also upheld its position that the request was not valid for the purposes of the FOIA. It added that the complainant had already been provided with its "*interpretation*" of the Planning Inspector's comments on the section 106 agreement, on previous occasions.

Scope of the case

15. The complainant had contacted the Commissioner in February 2019 to complain about his difficulty, in his view, in obtaining information from the Council in the past.
16. Subsequently, he made the request under consideration in this notice. In June 2019, he complained to the Commissioner about the way his request for information had been handled.
17. He considered that the Council would hold information relevant to his request, and questioned whether he had been provided with adequate advice and assistance, in accordance with the relevant legislation.
18. During the course of the investigation, the Council changed its view and proceeded on the basis that the complainant's request for information was valid. The Council also considered that the request should be handled under the EIR, since the information being requested by the complainant would be environmental in nature. It considered whether it held any information relevant to the complainant's request.
19. Both the Council and the complainant have made the Commissioner aware of earlier written communications, on the subject of the section 106 agreement, from the Council to the complainant, which pre-date the request. The Commissioner considers that these would fall within the scope of the request of 23 March 2019. However, as the complainant is already in possession of this correspondence, it does not fall part of the scope of this decision notice.
20. The Council's position is that it does not hold any further relevant information. It therefore wrote to the complainant on 23 October 2019 and refused the request under regulation 12(4)(a) of the EIR –

information not held. The complainant remained dissatisfied with this response.

21. The following analysis considers whether the Council correctly refused the request under regulation 12(4)(a). It also considers whether the Council provided the complainant with adequate advice and assistance under regulation 9 of the EIR.

Reasons for decision

Regulation 2(1) – is the information environmental?

22. Regulation 2(1) of the EIR provides the following definition of environmental information:

"...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..."

23. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.

24. The Commissioner has produced guidance² to assist public authorities and applicants in identifying environmental information. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
25. The Commissioner notes that the requested information, if held, would relate to the section 106 contributions referred to in the terms of the relevant agreement. These contributions related to open spaces and aspects of the local infrastructure.
26. The Commissioner has considered the definition at regulation 2(1). She is satisfied that the information, if held, would relate to measures affecting, or likely to affect, the elements and factors of the environment. She agrees that it would be information "on" these measures and would therefore fall within the definition of environmental information at regulation 2(1)(c) of the EIR. The Commissioner is satisfied that the Council considered the request under the correct access regime.

Regulation 12(4)(a) – information not held

27. Regulation 12(4)(a) states that a public authority may refuse to disclose information to the extent that it does not hold that information when the applicant's request is received.
28. In this case, the complainant has referred the Commissioner to regulation 4 of the EIR, which sets out the obligations on public authorities in relation to the dissemination of environmental information. However, the Commissioner would note that this regulation refers to environmental information "*that [the public authority] holds*". A public authority is not required to create information in response to a request, nor to provide explanations or opinions, unless these are held in recorded form at the date of the request.
29. In cases where there is a dispute over whether further relevant information is held, the Commissioner applies the civil test of the balance of probabilities in making her determination. This test is in line with the approach taken by the Information Rights Tribunal when it has

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https://ico.org.uk/media/fororganisations/documents/1146/eir_what_is_environmental_information.pdf

considered whether information is held in cases which it has considered in the past.

30. The Commissioner has considered the complainant's evidence and arguments. She has also considered the actions taken by the public authority to check whether further information is held, and any other reasons offered by the public authority to explain why it is not held. She has also considered any reason why it is inherently likely or unlikely that further information is held.
31. The complainant, in bringing his complaint, explained to the Commissioner that the outcome of the planning appeal referred to in paragraphs 4 – 9 above had been decided at a hearing. The Commissioner has, indeed, been able to refer to relevant documents³ relating to the appeal hearing, since they are published on the Council's website.
32. The Commissioner notes that the request asked for "*clarification by the [Council] of the Inspector's decision in respect of the appellant's offer of s106 contributions*".
33. The Council considered whether it held further information relating to the Planning Inspector's comments, set out above at paragraph 9.
34. Specifically, the Council considered whether it held further information which clarified its interpretation of the Planning Inspector's comments; that is, clarified its view on whether or not the Inspector had determined, or was implying, that the agreement was not enforceable in respect of the contributions.
35. In view of the wording of the request, it also considered whether it held any information which had provided clarification, at or after the date of the appeal, to the property developers (the appellants) regarding whether or not the payments should be made.
36. The Commissioner is satisfied that the Council correctly identified a single objective reading of the request.
37. The complainant has made the Commissioner aware of a number of factors which caused him to believe that the section 106 agreement is not enforceable.

³ <https://planningpublicaccess.easthants.gov.uk/online-applications/applicationDetails.do?activeTab=documents&keyVal= EHANT DCAPR 211206>

38. In light of these, and in view of the fact that the contributions were never made, the complainant formed the view that the section 106 agreement was rendered unenforceable, possibly in part due to the comments of the Planning Inspector, or due to the actions of the Council. This led him to believe that information may be held by the Council on this point.
39. As previously explained, the Commissioner is aware that certain communications between the Council and the complainant himself would fall within the scope of the request, since the Council has written to the complainant on several occasions from April 2015 onwards, seeking to assure him that, despite the Planning Inspector's comments, this did not, in its view, render the agreement unenforceable. However, this correspondence does not form part of the scope of this notice.
40. The Commissioner is required only to consider whether the Council holds further relevant information. However, in this case, it has been relevant for her to gain an understanding of the various factors, in order to determine whether further information is likely to be held.
41. In considering her decision, the Commissioner is satisfied that the view held by the Council – that the complainant drew an erroneous conclusion from his interpretation of the various factors – is a reasonable one. That is, she agrees that the Planning Inspector's comments were not likely to have been intended to imply that the contributions would not be payable once the application was approved on appeal.
42. Having considered the Planning Inspector's comments for herself, the Commissioner considers that the Planning Inspector was likely merely to be commenting that the section 106 agreement had not been a significant issue in deciding the appeal; rather, it is evident that the appeal focused on other areas: *Character and Appearance*, and *Living Conditions*. It is not apparent to the Commissioner that he was commenting on the enforceability, or otherwise, of the agreement.
43. She is in any event satisfied that the Council itself had, at no time, formed the view that the agreement was unenforceable. She therefore considers that the Council is unlikely to hold any recorded information about this, since it is a view which it does not hold.
44. The Commissioner is satisfied, on the balance of probabilities, that the Council does not hold any further recorded information relating to its interpretation as to whether or not the section 106 agreement is enforceable, to the letters referred to above that were previously provided to the complainant.

45. In view of the wording of the request, which included the complainant's comment that he considers it would have been relevant to the appellants to have been informed about making the section 106 contributions, since it would have an impact on their business, the Commissioner returned to the Council to ask whether any information was held which specifically related to the appellants being informed as to whether or not they should make section 106 contributions.
46. The Council confirmed that it had carried out specific searches for information in respect of this with relevant members of the Planning and Legal teams. No relevant correspondence, nor other information, was located.
47. The Council also provided evidence that it had previously written to the complainant to explain that it would not be requesting the financial contributions from the developers. It provided this explanation alongside its clearly-expressed view that the agreement remained enforceable.
48. The Commissioner considers that the fact that the Council would *not* be writing to the developers does not imply that any information would be held about this matter in recorded form. It may, in fact, imply the opposite.
49. On the balance of probabilities, in view of the searches carried out by the Council and the circumstances of the case, the Commissioner is satisfied that the Council does not hold any further recorded information relevant to the complainant's request.

Regulation 9 – duty to provide advice and assistance

50. Regulation 9 of the EIR states that:

"(1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

(2) Where a public authority decides that an applicant has formulated a request in too general a manner, it shall—

(a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and

(b) assist the applicant in providing those particulars".

51. The Commissioner has first considered whether this duty arose under regulation 9(2) in the circumstances of this case.

52. The Council did not, it appears, consider that the complainant had formulated his request in too general a manner. In regard to the information he was seeking, it offered an explanation that it remained the Council's position that the section 106 agreement was enforceable, and suggested that he may wish to obtain further legal advice on this point.
53. The Commissioner is satisfied that the Council fulfilled its obligation to identify a single, objective reading of the request under consideration in this notice.
54. She does not consider that a duty arose under regulation 9(2) for the Council, on receipt of the request of 23 March 2019, to return to the complainant to obtain more particulars of the request.
55. The Commissioner has also considered regulation 9(3) of the EIR, which states:

"Where a code of practice has been made under regulation 16, and to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case".
56. The relevant code of practice was issued in 2005⁴ ("the Code") and sets out that a public authority should *"be ready to provide advice and assistance... so far as it would be reasonable to expect the authority to do so"*. The Code explains that public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant.
57. The Commissioner has therefore considered whether the Council offered such advice and assistance as was reasonable in the circumstances of this case.
58. In this case, the Commissioner is satisfied that the requirements of the EIR have been met in full by the Council having issued its response which stated that it did not hold any further information. She is therefore satisfied that the Council has complied with regulation 9 of the EIR, and does not require it to take any steps in respect of this matter.

⁴ https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf

Right of appeal

59. 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

60. 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.
61. 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

Ben Tomes
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