

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 29 July 2020

Public Authority: Surrey Heath Borough Council
Address: Surrey Heath House
Knoll Road
Camberley
Surrey
GU15 3HD

Decision (including any steps ordered)

1. The complainant requested from Surrey Heath Borough Council ('SHBC') information relating to a planning application. SHBC initially cited regulation 12(5)(f) (interests of the person who provided the information) to withhold the requested information. It subsequently revised its position, saying that it did not hold the requested information.
2. The Commissioner's decision is that, on the balance of probabilities, SHBC does not hold the requested information.
3. The Commissioner requires no steps as a result of this decision.

Request and response

4. On 7 October 2019, the complainant wrote to SHBC and requested information in the following terms:

"1. Details and copies of all discussions, correspondence and meetings where the Planning Brief related to "Land at Notcutts Nursey [sic] / Woodside Cottage, Bagshot" as approved at the Council's Environment Committee on 13 September 2001 has been mentioned or referenced since its approval.

2. Details and copies of all discussions, correspondence and meetings where the number of houses allocated to the Woodside Cottage,

Chapel Lane, Bagshot site has been mentioned or referenced since the approval of the planning brief as mentioned above."

5. SHBC responded on 8 November 2019. It explained that all information relating to land at Notcutts Nursery was publicly available, and it disclosed the reference number of the relevant planning application. It also provided the complainant with a link to its planning application's web page.
6. SHBC also explained that its Strategic Land Availability Assessment ('SLAA'), which identifies parcels of land and assesses their suitability for development, referenced Woodside Cottage and was available online; SHBC provided the complainant with a link to its previous SLAAs.
7. SHBC also said that it held pre-application advice which it was withholding from disclosure under regulation 12(5) of the EIR, although it did not specify which exception within regulation 12(5) was being relied on. However, it explained that it considered that the disclosure of the information would adversely affect the economic interests of developers who may wish to take up pre application advice, but would not seek to do so if they thought it would be published at a later date.
8. The complainant requested an internal review on 12 November 2019 and SHBC responded, asking for clarification. The complainant provided the following five points as clarification of his request, on 13 December 2019:

"1) Having spoken to the Information Commissioners Office I do not believe that the decision notice that you are relying on to withhold the pre-application advice is relevant on two counts. Firstly the information I am requesting is not relating to Environmental information as defined in the ICO guidance - I am requesting details around the access routes to the site and the numbers of houses on the site. Secondly the decision notice that you are relying on relates to an appeal for disclosure of pre-application advice for an application that had not gone forward to a planning application unlike in this case.

I believe that under both of these tests the pre-application advice that you clearly hold must be disclosed.

2) in terms of the 2001 Planning Brief for Notcutts / Woodside Cottage I am looking for any records of Council meetings, Planning Meetings, Pre-application advice (there have been a number of planning applications on this site), site visit meetings, advice papers, Local Plan and Strategic Land Assessment development meetings and discussions, emails, telephone call records or any other notes that

relate to this planning brief. I cannot believe that since it was adopted in 2001 it has never been referenced in any council documentation!

3) Allocation of housing - in the extant 2000 Local Plan this site is "earmarked" for 14 houses yet in 2016 this had jumped to 40. How has this discussion been arrived at ? Again I cannot believe that they have [sic] been no internal review meetings in relation to the Strategic Land assessments, site reviews, exchanges of correspondence between the council and developers ? I can see no public consultations on the website that relate to this other than the most recent consultation on the draft local plan - there must have been some formal minuted review in the last 20 years that shows how the number of properties the council feel can be accommodated on this site has almost tripled ! This is inextricably linked to the point above about the planning brief as well !

4) Within the Strategic Land Assessment for 2016 it states that "Planning Permission has already been granted on this site" - who granted this permission, when was it granted and what planning application does this refer to ?

5) in terms of the Woodside Cottage site and the Officer Site assessments in 2014, 2016 & 2017 looking at the methodology this requires site surveys, site reviews and assessments to be conducted. These must be documented in more detail than the summary given in the published SLAA document. Who has conducted these and I would request copies of the information that has fed into these reviews."

9. SHBC wrote to the complainant on 17 January 2020 and provided the following responses to the five points raised above:

- 1) It withheld the requested information under regulation 12(5)(f) (interests of the person who provided the information) of the EIR.
- 2) It did not hold the requested information.
- 3) It did not hold the requested information.
- 4) It answered the question.
- 5) It withheld the requested information under regulation 12(5)(f).

Scope of the case

10. The complainant contacted the Commissioner on 17 February 2020 to complain about the way his request for information had been handled.
11. The complainant confirmed to the Commissioner that he was complaining about SHBC's application of regulation 12(5)(f) to questions 1 and 5 of his clarified request of 13 December 2019.
12. However, during the Commissioner's investigation, SHBC withdrew its reliance on regulation 12(5)(f) of the EIR. It said that, having reconsidered the request, it was satisfied that it did not hold the information described in questions 1 and 5 of the clarified request. The EIR provide an exception for such information under regulation 12(4)(a).
13. In order to expedite the case, the complainant has not been advised regarding the late citing of regulation 12(4)(a). The Commissioner does not consider that he is disadvantaged by this as he is able to appeal her decision to the First-tier Tribunal.
14. Therefore, the analysis below considers whether, on the balance of probabilities, SHBC holds the information described in questions 1 and 5 of the complainant's clarified request, dated 13 December 2019.

Reasons for decision

Is the information environmental information?

15. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR rather than the FOIA if it meets the definition set out in regulations 2(1)(a) to 2(1)(f) of the EIR.
16. The Commissioner considers the information in this case can be classed as environmental information, as defined in regulation 2(1)(c) of the EIR. This says that any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors of the environment listed in regulation 2(1)(a) and 2(1)(b) will be environmental information. One of the elements listed under 2(1)(a) is land.
17. The request is for information about a pre planning application for a housing development. The Commissioner considers the request therefore relates to a measure as defined in regulation 2(1)(c) of the EIR which will or would be likely to affect the elements described in 2(1)(a), namely land.

18. The Commissioner is therefore satisfied that the request was for environmental information, and that the request fell to be dealt with under the EIR.

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

19. Regulation 12(4)(a) of the EIR provides that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received. In this case, SHBC has said that it does not hold the information described at points 1 and 5 of the clarified request.
20. When considering whether a public authority does or does not hold recorded information, the Commissioner will apply the civil standard of the balance of probabilities when making a determination. In essence, the Commissioner will determine whether it is likely, or unlikely, that, at the time the request was received, the public authority held information relevant to the request. The Commissioner will consider any evidence or arguments which suggest that the information is held. She will also consider the actions taken by the public authority to check whether the information is 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.
21. For clarity, the Commissioner is not expected to prove categorically whether the information is held. She is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.
22. The Commissioner asked SHBC to explain why it had revised its response, as it had initially confirmed to both the Commissioner and the complainant that it did hold pre-planning advice which fell within the scope of the request.
23. SHBC explained that this was due to an internal mis-communication regarding the interpretation of 'advice'. It said that the information in question had mistakenly been categorised as comprising pre-planning application advice, when in fact it formed part of the developer's formal planning application. SHBC said that it was satisfied that no pre-application advice was provided by SHBC.
24. The Commissioner asked SHBC what searches were carried out for information falling within the scope of the request. SHBC explained that it had reviewed its physical and electronic files, including electronic folders within the Planning Policy and Planning Control Departments, as these are the departments within the council responsible for planning. It also explained that it had carried out a search of all emails; any information held relevant to the requested information was compared

against the information that was already publicly available. The only relevant information that was held and not already in the public domain was legal advice from 2002, and this had been disclosed in the original response to the request.

25. The Commissioner also asked SHBC, if searches included electronic data, to explain whether the searches included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails. SHBC explained that staff do not store information on personal computers. All data was held on networked resources. The Commissioner also asked which search terms were used. SHBC explained that the following terms were used: *'Notcutts'*, *'Woodside Cottage'*, and *'Planning Brief'*.
26. The Commissioner asked whether, if the information was held, it would be held in manual or electronic records. SHBC confirmed that, if held, it may have been held as both manual and electronic records.
27. The Commissioner asked whether any recorded information ever held relevant to the scope of the complainant's request had been deleted or destroyed. SHBC said that it was not aware of any recorded information pertinent to the complainant's request having been destroyed in the time period from 2013 to the present date. However, it said the planning policy officers could not vouch for the period prior to this, as they did not work at the council prior to 2013, although it was believed that no information had been deleted.
28. The Commissioner asked, if information held in electronic form may have been deleted, whether copies might have been made and held in other locations. SHBC explained that all data would have been held on networked resources.
29. The Commissioner also asked what SHBC's formal records management policy says about the retention and deletion of records of this type. SHBC explained that its Planning Policy department currently has no such policy. It confirmed that its Planning Control team has a document destruction policy, but it does not cover pre-application advice. Notwithstanding this, SHBC has handled comparable records of a similar age and nature in a similar way. For sites allocated in a Local Plan, thorough records have historically been held until such time as the site is developed, at which time, many of the records will cease to be relevant and could be destroyed.
30. The Commissioner also asked whether there was a business purpose for which the requested information should be held. SHBC explained that there are planning reasons why information should be held, for example, essential documentation relating to site delivery that is important to justify continued allocation of a site, or items seeking and confirming the

adoption of documents. As such, any relevant information would still be available if it were held.

31. Finally, the Commissioner asked whether there were any statutory requirements upon SHBC to retain the requested information. SHBC confirmed that there were not.

Conclusion

32. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in paragraphs 20 and 21, above, the Commissioner is required to make a finding on the civil standard of the balance of probabilities.
33. In this case, the Commissioner is satisfied that SHBC has demonstrated that it conducted thorough searches which were capable of locating and retrieving any information falling within the scope of points 1 and 5 of the clarified request, if it was held. She is therefore satisfied that, on the balance of probabilities, SHBC does not hold any recorded information in relation to these questions which has not already been provided to the complainant, either directly or via links to information in the public domain. Accordingly, her decision is that SHBC was entitled to cite regulation 12(4)(a) of the EIR to refuse the clarified request.

Right of appeal

34. 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

35. 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.
36. 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

Samantha Bracegirdle
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