

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

Date: 14 October 2021

Public Authority: South Gloucestershire Council
Address: PO Box 1953
Bristol
BS37 0DB

Decision (including any steps ordered)

1. The complainant has requested information about housing allocation decisions made in the West of England (WoE) Joint Spatial Plan (JSP). South Gloucestershire Council (SGC) initially refused the request under regulations 12(4)(d) (Material still in the course of completion) and 12(4)(e) (Internal communications) of the EIR. It later revised its interpretation of the request. It stated that a lot of the information it had previously considered, now fell outside of the scope of the request. It disclosed a series of documents which it considered gave the complainant a clear understanding of why its housing allocation decisions were correctly arrived at.
2. The Commissioner's decision is that when revising its interpretation of the request, SGC failed to read the request objectively. It also failed to undertake adequate searches for information. In doing so, it failed to identify all the information it held falling within the scope of the request. These are breaches of regulation 5(1) of the EIR. By failing to disclose information within 20 working days of the request, SGC breached regulation 5(2) (time for compliance) of the EIR. By failing to conclude the internal review within 40 working days, it breached regulation 11(4) of the EIR.
3. The Commissioner requires SGC to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the request. SGC should interpret the request to be for any and all recorded information it holds

(including, meeting minutes, emails, briefings, notes and other correspondence) on precisely how the allocation of 32,500 homes to SGC was arrived at and agreed between the participants of the JSP.

4. SGC must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The JSP was a formal statutory Local Plan prepared in accordance with the 2012 Town and Country Planning Regulations. It was undertaken as a joint plan prepared by four WoE Unitary Authorities¹ (UAs) to identify housing and infrastructure needs for the region for the period 2016-2036.
6. The JSP was submitted for examination in April 2018. It identified a total housing need of 105,000 homes in the region for the period covered by the plan. Of this, 61,500 homes were covered by existing commitments, leaving a balance of 44,000 homes to be allocated across the four UAs by way of negotiation. Of the overall total of 105,000 homes, SGC was allocated 32,500 homes.
7. The complainant wished to understand how the allocation of the JSP housing need was agreed between the four UAs. It appeared to him that SGC had absorbed an unreasonably high share of that need.
8. He submitted a request for information on 26 August 2018, which asked for information on how formal decisions were made in relation to the JSP, who the decision-makers were on behalf of SGC and the extent to which a particular councillor had been involved in the process. SGC refused that request, on the grounds that it comprised material that was in the course of completion (regulation 12(4)(d) of the EIR).
9. The Inspectors appointed by the Secretary of State wrote to the WoE UAs in August and September 2019. The Inspectors stated that they did not consider that the JSP was sound and they recommended its withdrawal.

¹ Bristol, Bath and North East Somerset, North Somerset and South Gloucestershire

10. On 7 April 2020 the WoE UAs formally confirmed the withdrawal of the JSP. Work is no longer taking place on the JSP and a slightly differently constituted group of authorities has begun working on a new Strategic Development Strategy (SDS).

Request and response

11. On 5 May 2020, as events had clearly moved on, the complainant re-submitted the request he had first made to SGC on 26 August 2018. The request was as follows:

"Information requested

Information to show how the Strategic Development Locations (SDLs) for South Gloucestershire within the JSP were agreed internally, together with the housing supply to be delivered from each within the JSP time-frame, and / or the overall allocation of target housing supply between the LAs by the time of the draft JSP issued in November 2017.

This will include correspondence involving SGC Officers and /or Councillors and also notes of meetings or sub-committees involved in deriving or signing off those proposed SDLs / housing numbers. Within this it is particularly important to understand who the decision-makers were on behalf of SGC, and especially any involvement involving [councillor's name]. To the extent that [councillor's name] was involved in any of those meeting or sub-groups it is requested that the information is as clear as possible as to his role in those discussions and how he contributed and voted.

Period of Interest

In order to simplify the request, I am interested in the process leading to the allocation of 32,500 houses to SGC by the time of the JSP publication document of November 2018. At the time of the Issues and Options paper published in November 2015 the supply for the wider Bristol Housing Market Area (HMA) was 85,000 houses but no allocation between the LAs had been proposed as far as we can see. By the time of November 2017 document this figure had increased to 105,500, primarily due to the addition of the Bath HMA so that the JSP had now widen [sic] to encompass the whole of the four LAs. This figure represented housing supply over and above previous plans amounting to 44,000 in total. It is the allocation of this figure to SGC that effectively makes up the 32,500 proposed overall commitment for SGC (when added to the numbers already committed from the Core Strategy) that I am interested in."

12. SGC responded on 2 June 2020. It refused to disclose the requested information on the grounds that it was exempt under regulation 12(4)(e) (Request involves disclosure of internal communications) of the EIR. It commented that extensive information about its decision making processes had been made available to the complainant while the JSP was under consideration. It also referred him to a report on its website, which detailed the withdrawal of the proposal.
13. The complainant requested an internal review on 4 June 2020.
14. SGC wrote to the complainant on 2 September 2020. It upheld its application of regulation 12(4)(e). It also said that regulation 12(4)(d) still applied in respect of information insofar as it also related to the development of the new SDS.

Scope of the case

15. The complainant contacted the Commissioner on 21 September 2020 to complain about the way his request for information had been handled. He disagreed with the application of the stated exceptions to withhold the requested information. He also disagreed with the suggestion that information collated in connection with the withdrawn JSP would have any bearing on the SDS, which he said was an arrangement between different local authorities and covered by different rules.
16. The Commissioner wrote to SGC on 29 March 2021 and asked it to supply arguments in support of its application of regulations 12(4)(d) and 12(4)(e) of the EIR to refuse the request.
17. In its response, dated 25 June 2021, SGC provided the Commissioner with an extremely detailed explanation of the JSP process, a defence of the decisions made regarding housing allocations and a rebuttal of the complainant's criticisms of those decisions and of the named councillor's involvement. While this information was helpful to the Commissioner's understanding of the wider background to the request, it was not relevant to assessing whether SGC's previous responses to the complainant's request had complied with the obligations imposed by the EIR.
18. However, SGC did say that having revisited the request, it was now employing a revised interpretation of it:

"Clarifying the original EIR Request and matters considers to be in scope

As set out in the original response to [the complainant] of 5th May 2020 we interpreted his request to mean that he wanted the Council

to re-consider its position on withholding the information previously considered exempt in October 2018 – Ref FIDP/011583-18. In summary this related to information as to how formal decisions were made by South Gloucestershire Council in relation to the JSP Towards the Emerging Spatial Strategy published in November 2016 and the JSP Publication Plan published in November 2017, in accord with the Council's Constitution, who the decision-makers were on behalf of the council and any involvement of [councillor's name] particularly in relation to the housing supply to be delivered by each Plan within the JSP timeframe. The Council responded to this request on 2nd June 2020.

Following a request by [the complainant] that the Council re-consider its position on withholding the information, a Review was undertaken in August 2020. This concluded that South Gloucestershire Council considered that regulation 12(4)(e) continued to outweigh the public interest in disclosure for the reasons set out in the council's letter of 2nd June. It also concluded that exception 12(4)(d) was also engaged.

...

Notwithstanding this, as this matter is now subject to an ICO investigation and to ensure the council fully complies with the ICO's questions, guidelines, and procedures for such matters, we have considered whether the complaint by [the complainant] can be resolved by informal means.

In so doing we have reviewed again the revised request from [the complainant] made in his letter of 4th June 2020. In this he states.

'To clarify the confirmation of grounds of the request, my interest here is solely to understand the discussion and negotiations that led to the allocation of 44,000² houses to South Glos in the now defunct JSP. This includes the role that [councillor's name] had in arriving at this target, if any, given that he had previously declared a personal interest in a substantial plot of land submitted for consideration in the Call for Sites, and thereby had a vested interest in seeing this figure as high as possible. The background is our belief that South Glos took an unreasonably high share of the total requirement for the West of England, for which there has been no explanation given.

² In subsequent correspondence with SGC, the complainant confirmed that he was in fact referring to the 32,500 homes

In your letter you frequently make reference to individual SDLs, so I therefore wish to clarify that in this request I am not seeking information about the selection of individual sites, unless it is the case that the process in arriving at the overall target was inextricably linked to the Councils' preference to include or exclude particular locations.'...

Furthermore, I have said I am not seeking any information here on individual SDLs, only on the derivation of South Gloucestershire's share of the total housing supply.

(Underlining by SGC for emphasis)

On further consideration, we have interpreted this revised request to relate to the internal communications and technical work that would enable [the complainant] to understand how South Gloucestershire Council came to determine that 32,500 homes to be an appropriate housing requirement figure for South Gloucestershire as identified in the November 2017 Joint Spatial Plan Publication Document.

For the purposes of this ICO investigated [sic] we have considered all other information about the selection of individual sites and establishing the overall distribution of and which new locations should be identified for development through the JSP technical work and member/ officer discussions to be out of scope, given the clarification provided by [the complainant]. We have also interpreted his request to relate to meetings between officers and members and supporting technical notes, that primarily focused on the matters related to the derivation of South Gloucestershire's share of the total housing supply. As you will see from the papers provided, details are also included on the proposed distribution of growth, this is considered to be relevant as it indicates the council remained consistent in its consideration of how much growth should be provided in South Gloucestershire."

19. On or around 9 July 2021, SGC disclosed the following documents to the complainant, which it told the Commissioner was everything it held which fell within its revised interpretation of the request:

- ICO/001 14th November 2014 Presentation on Planning & Transport strategy going forward
- ICO/002 11th June 2015 PTSE Lead Members Briefing on JSP and Transport Study
- ICO/003 September 2016 Briefing on the JSP
- ICO/004 22nd February 2017 JSP/ JTS Progress Update Briefing

- ICO/005 7th June 2017 ECS Executive Members' High level Briefing Note
 - ICO/006 14th June 2017 Informal Cabinet Meeting Notes of Meeting
 - ICO/007 14th June 2017 Informal Cabinet JSP Briefing
 - ICO/008 26th June 2017 Informal Cabinet JSP Technical Briefing
 - ICO/009 7th July 2017 JSP Informal Cabinet presentation 10th July Challengers – note of meeting
 - ICO/010 21st July 2017 Informal Cabinet JSP Technical Briefing
 - ICO/011 15th August 2017 JSP presentation email
 - ICO/012 17th August 2017 Informal Cabinet JSP Technical Briefing
 - ICO/013 6th September 2017 Informal Cabinet JSP Briefing
 - ICO/014 WoE Housing Requirement technical note
 - ICO/015 11th October 2017 Informal Cabinet JSP Briefing
 - ICO/016 20th October 2017 Policy Advisory Group JSP Briefing
 - ICO/017 23rd October 2017 JSP housing numbers
20. Some of the documents contained redactions which SGC did not explain.
21. On 22 July 2021, the Commissioner asked the complainant whether this disclosure satisfied his request. On 23 July 2021, the complainant told the Commissioner that although the disclosed documents repeatedly referred to SGC's housing allocation of 32,500 homes, there was no meaningful information about how this had been negotiated.

"...they have failed to include almost any of the relevant documentation in relation to that request.

We see that by that time of ICO 003, in September 2016, the Council's commitment to its share of the housing target in question is complete, and the information contained in this document is largely replicated in the published consultation shortly after this date. All of the subsequent documents are after the fact of the conclusion to that negotiation, and the first two documents merely set out an outline of the expected process... there is a complete absence of any documentation in the 16-month window that we now know to be the critical period during which the negotiations were undertaken."

22. The Commissioner has reviewed the disclosed documents and while they set out the overall background framework for the JSP, she agrees with the complainant's assessment that they do not contain information on the discussions and negotiations which led to the allocation of 32,500 homes to SGC. Nor do they contain any correspondence, meeting minutes or other information involving the named councillor. SGC has not said that it does not hold such information or that it is exempt. She considers it evident from the complainant's request and his subsequent correspondence with SGC, that these were matters he fully intended to fall within scope of his request.
23. The Commissioner therefore considers that the complaint is that SGC has failed to provide all of the information falling within the scope of the complainant's request, in accordance with his rights under regulation 5(1) (Duty to make environmental information available on request) of the EIR. If it holds no further information, it has declined to state this, seeming to instead reduce the scope of his request and make its own interpretation as to what will be useful to the complainant. She will also consider the time that SGC took to respond to the request.

Reasons for decision

Regulation 5(1) – Duty to make environmental information available on request

24. 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."

25. Following SGC's disclosure of information to the complainant, on 22 July 2021, the complainant wrote to SGC explaining why the recent disclosure did not address what he had requested:

"In the documents you have sent, the commitment to a contribution of 32,500 is set in stone in document ICO 003, dated September 2016. The only contemporaneous documents that relates [sic] to the negotiation of this commitment are therefore ICO 001, 002 and 003. The other 14 documents are concerned mainly with the need to change the break-down of the categories within this committed figure when it was realised that the knew [sic] development locations would not deliver the level of housing first estimated within the time frame of the JSP, plus a retrospective look at how to justify what had been negotiated."

In ICO 001, dated November 2014, [name redacted] sets out the forthcoming process and states that "some key discussions by members which will need to take place at a WoE level at the end of November and December [2014]" and emphasises that during the forthcoming Planning, Housing and Communities Board (PHCB) meetings "It will be important that they [the negotiating team] are confident that they are reflecting the views of the Council".

Similar sentiments are echoed in ICO 002 which states that "Each UA to undertake its own briefings 'in house' ... to ensure each UA delegation attending the informal PHCB was fully briefed and able to engage ... for South Glos this is proposed to be through the Policy Advisory Group". The attachment to this document also shows a timetable with PHCBs scheduled for December 2015 and the Spring and Autumn of 2016.

We then wait a full 16 months for the next paper, ICO 003 dated September 2016, in which the entire negotiated outcome for each of the four UAs is fully formed and agreed - not just the overall 32,500 for South Gloucestershire, but the allocation for each of the four UAs broken down into the four main categories.

*We therefore have a picture of a series of negotiating meetings taking place between November 2014 and September 2016, each to be preceded with Member's discussions and input. **There must have been briefing papers ahead of each of these, plus an agreed negotiating remit, negotiating team notes of the negotiations themselves, frequent internal discussions within the Council (including and especially internal advisory discussions involving either Officers or elected Members or both), feedback briefings to members and presumably a Council endorsement of the final negotiated position, all of which should be recorded. So where are they?***

...

*The first step to achieving this is to answer my request fully and completely, which means **all** the documentation and internal communications in relation to the negotiations between November 2014 and September 2016. For simplicity, and in order to speed this process up, I am happy to restrict my request to the missing information for that period.*

Given the complete absence of any documentation so far during that key negotiating period, coupled with concerns about the potential personal interests affecting the outcome, I would ask that you make appropriate enquires [sic] and confirm that no private e-mails have been used for Council business by members or officers in any way

connected with these negotiations, directly or indirectly. If you are not able to make such a confirmation please widen the search to include all private e-mails, laptops and mobile devices for any potentially relevant person."

26. On 3 August 2021, the Commissioner wrote to SGC with a series of questions regarding its reasons for believing that it had disclosed all the information it held which fell within scope of the request. The Commissioner's questions were focused on SGC's endeavours in providing the requested information to the complainant, the searches it conducted in relation to the request, and whether any of the information falling within the scope of the request had been deleted or destroyed. The Commissioner had, by that time, received a copy of the complainant's letter to SGC of 22 July 2021, and she also asked SGC to address the complainant's specific points about missing information, when responding to her letter.
27. In its response, SGC repeated much of what it had said in its letter of 25 June 2021, refuting the complainant's criticisms of the allocation decisions made in the JSP and explaining, in general terms, the process by which they were made.
28. It commented again that the complainant had "*redefined his request*" and that SGC had responded to that redefined request with all the information it held which fell within its scope:

"The council considers it has replied fully and completely to the request by [the complainant]. Indeed, it is considered that an extremely detailed reply has been provided that gives considerable background and context to the preparation of the JSP."

29. While it responded to each of the Commissioner's questions, its responses were based on its understanding of "*the redefined request*".

"The council is satisfied that based on the redefined request by [the complainant] that appropriate searches were undertaken and on that basis the documents provided to the ICO on 25th June disclosed all the relevant information in accordance with the scope of this request."

To provide further context to this the council had in place to support the preparation of the JSP a number of meeting forums where officers and members met to review and discuss the progression of the JSP. These meetings comprised: briefings to the Council's committee chairs and spokes, briefings to the Council's Cabinet members with responsibility for planning & transportation, the Council's Informal Cabinet briefings and the Council's Policy Advisory Group meetings. In order to respond to this EIR, the folders where records of the information of those meetings and supporting communications, as they are considered relevant in accord with the redefined scope of

[the complainant's] *EIR request, were accessed and their contents reviewed. Accordingly, information held in these folders provided the relevant information in accordance request made [sic]. The titles and cover pages on the information previously disclosed to both the IOC [sic] and [the complainant] describes the specific meetings."*

30. SGC did not explain why the complainant had not been provided with the information described in his letter of 22 July 2021.
31. Regarding the complainant's request for information showing the involvement of the named councillor, SGC simply referred the Commissioner to its letter of 25 June 2021, in which it had set out its reasons for considering the councillor had acted properly.
32. Regarding the complainant's enquiry about the possibility that relevant information might be held in personal email accounts, SGC said:

"Regarding use of private e-mails for council business all officers are bound by the Code of Conduct for Employees. The Council's IT and Digital Strategy & Acceptable Use Policy stresses that at page 15:- 'Never use personal email accounts to transfer personal data or carry out council business'. The FOI Act and the EIR regulations are for information that is held. To ascertain whether personal email accounts have been used would require that question to be asked and therefore would be creating information which is not what the Act or Regulation is designed for."

Reading requests objectively

33. SGC's response to the complainant was predicated on its understanding of what it repeatedly termed his "*redefined request*". It said that he had redefined the request when making the request for the internal review on 4 June 2020.
34. The Commissioner's guidance on Interpreting and Clarifying requests³ states:
 - *"Public authorities must interpret information requests objectively. They must avoid reading into the request any meanings that are not clear from the wording.*

³ <https://ico.org.uk/media/for-organisations/documents/1162/interpreting-and-clarifying-a-request-foia-eir-guidance.pdf>

- *The authority must answer a request based on what 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.*
 - *Sometimes the requester's correspondence may suggest that other information would be of more use to them. Where this is the case, the authority should offer advice and assistance to help the requester to submit a new request for different information. If the authority finds there is more than one objective reading of the request then it must go back to the requester to ask for further clarification. It should not attempt to guess which interpretation is correct.*
 - *Authorities are not normally obliged to look beyond the wording of the request itself when interpreting its meaning. However, if the requester refers to other correspondence, or provides additional context when making the request, the authority should take this into account if it impacts on the interpretation."*
35. The guidance goes on to clarify that if the request clearly specifies exactly what information or documents the requester wants, the authority will comply by providing this information.
36. Although SGC has repeatedly referred to its own understanding of the request changing as a result of the complainant's internal review request, and of him having "*redefined*" it at that stage, the Commissioner can see little in his letter which changes the objective meaning of the request as it was originally submitted. His internal review request merely summarised his interest as being in understanding how SGC came to be allocated 32,500 homes under the JSP (which he considered to be an unreasonably high share of the housing load). In support of his request to know about the decision makers, he explained he had concerns that one may have had a vested interest in the outcome. He explicitly stated that he wanted to see the negotiations and discussions which led to that figure being agreed (and he has repeated this wish in follow-up correspondence with SGC).
37. SGC interpreted this as a revised request, relating "*...to the internal communications and technical work that would enable [the complainant] to understand how South Gloucestershire Council came to determine that 32,500 homes to be an appropriate housing requirement figure for South Gloucestershire as identified in the November 2017 Joint Spatial Plan Publication Document*".
38. This is not what has been requested (had it been, then the high level briefing documents that were disclosed may well have satisfied his request). SGC's focus here appears to be on demonstrating to the

complainant why 32,500 homes was “appropriate”, when in fact he has asked for information on the discussions and negotiations which resulted on that number of homes being allocated to SGC. This is an important distinction, as his request was intended so that he could assess those discussions, see who was involved in them and ascertain why that figure was agreed.

39. In particular, the Commissioner struggles to see how SGC has identified that information on “... *establishing the overall distribution of and which new locations should be identified for development through the JSP technical work and member/ officer discussions*” falls outside the scope of the request, as the complainant has repeatedly indicated that it is exactly this sort of information he would like to receive.
40. The complainant’s letter of 22 July 2021 clearly sets out what he feels to be omissions in the information he has been provided with, but it has not resulted in SGC considering whether its re-interpretation of the request is correct. The Commissioner considers that this is not in accordance with her guidance, stated above.
41. The Commissioner is also concerned by SGC’s response to the suggestion that it may be necessary to ascertain whether relevant information was held in personal email accounts. When a request for information is received, public authorities should consider **all** locations where relevant information may be held. This may include private email accounts. Because of the way in which some public authorities do business the Commissioner understands that official communications may sometimes be sent using personal email accounts. The EIR will apply to official information held in private email accounts on behalf of a public authority. It may therefore be necessary to request relevant individuals to search private email accounts in particular cases. Doing so would not constitute the creation of new information. Rather, it ensures the gathering of all relevant information for full consideration.
42. The Commissioner’s guidance on official information in private email accounts⁴ sets out the position under the FOIA but she considers the overarching principle to also be true for the EIR.

⁴ https://ico.org.uk/media/for-organisations/documents/1147/official_information_held_in_private_email_accounts.pdf

The Commissioner's conclusion

43. The Commissioner considers that in regarding the request as having been "redefined", SGC did not employ an objective reading of it. In doing so, it has failed to identify and disclose all the information it holds which falls within the scope of the request. Furthermore, she does not consider that it has undertaken appropriate searches in order to ascertain the full scope of information which it holds, which needs to include private email accounts where these may be used for council business.
44. The Commissioner now requires SGC to take the action in paragraph 3, above.

Regulation 5(2)

45. 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".

46. The complainant made his request for information on 5 May 2020. SGC disclosed information on or around 9 July 2021.
47. The Commissioner's decision is therefore that SGC did not comply with the requirements of Regulation 5(2) in that it did not provide all of the information which falls within the scope of the request within 20 working days.

Regulation 11(4)

48. Regulation 11(4) of the EIR provides that where a request for review is received:

"A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations."

49. The complainant requested an internal review of the SGC's decision on 4 June 2020. SGC did not provide its review response to the complainant until 2 September 2020.
50. The Commissioner has therefore decided that SGC did not comply with the requirements of Regulation 11(4) of the EIR.

51. The Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function. This aligns with the goal in her draft "Openness by design"⁵ strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of EIR enforcement activity through targeting systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"⁶.

⁵ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁶ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

52. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

53. 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.

54. 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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