

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 10 November 2022

Public Authority: Hart District Council

Address: Harlington Way

Fleet

GU51 4AE

Decision (including any steps ordered)

1. The complainant has requested information with regards to a specific planning application site. Hart District Council (the council) responded that the information is not held.
2. The Commissioner's decision is that the request was for environmental information and that regulation 12(4)(a) of the EIR is engaged to the request as the information is not held.
3. The Commissioner does not require any steps.

Request and response

4. On 7 February 2022, the complainant made the following information request to the council regarding a specific planning application site:
 - 1) "Crest's initial advice confirming incorrectly that the surface water installation was complete, a copy of the subsequent Engineering report and any HCC comments regarding item 2 of my 1st February 2022 email below, and
 - 2) Thames Water comments regarding the present foul water arrangements, and
 - 3) The result of the further visit to the site to review the boundary treatment circumstances, and
 - 4) The SANG Satisfaction Notice and the notice to Crest following the final inspection in relation to identified snagging works that took place on 15th December 2021, and
 - 5) Crest's undertaking not to allow any further occupations on site until matters are resolved, and
 - 6) Hart DC's communication to Crest regarding the revised drainage layout in Fernhill Lane, see my email dated Mon, 17 Jan 2022 9:18"
5. The council responded on 10 February 2022 stating that the information was not held and upheld this position in its internal review of 9 May 2022.

Scope of the case

6. The complainant contacted the Commissioner to complain that the council had not provided him with the requested information.
7. The scope of the case is for the Commissioner to determine whether or not the information was held at the time of the request.

Reasons for decision

Is the request for environmental information?

8. The Commissioner has first considered whether the requested information would constitute environmental information as defined by regulation 2(1) of the EIR.
9. In this case, the Commissioner's understanding is that the request relates to a drainage system at a specific location.
10. A drainage system would have an affect on the land or landscape. Therefore the Commissioner is satisfied that the request falls under the EIR. Regulation 2(1)(c) with (b) is relevant to the request. The information requested would relate to measures affecting, or likely to affect the elements of the environment.

Regulation 12(4)(a) of the EIR - Information held/ Not held

11. Regulation 5(1) of the EIR requires a public authority that holds environmental information to make it available on request.
12. Regulation 12(4)(a) of the EIR allows a public authority to refuse to provide the requested information if it does not hold it at the time of the request being received.
13. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request).
14. In this case, the council has stated that the requested information is not held.
15. It has told the Commissioner that at the time of the request, relevant IT officer emails and Microsoft SharePoint was searched in order to locate any information.
16. It also told the complainant, in its internal review response, that it is not required to create new information to comply with a request.
17. The council has explained to the Commissioner that with regards to the information requested, there are no requirements for it or its officers to

record or document telephone calls or interactions with colleagues, customers or third parties.

18. The council also used an example with regards to part 4 of the complainant's request stating, "as clauses in the Unilateral Undertaking in the Appeal decision are applicable only to the development site (red line) there is no requirement that the Council issue a Satisfaction Notice on the SANG. Therefore, the document requested does not exist."
19. The council has confirmed to the Commissioner that no relevant recorded information was held at any time and so has not been deleted or destroyed.
20. The complainant raised six points as to why he considered information would be held, which the Commissioner raised with the council. Below are the six points (listed from i to vi) and the council's responses:
 - i. The "Crest initial advice" should be available as Hart's enforcement officer states in Hart Enforcement email 13 January 2022 at 07.38.52 "The developer advises the surface water drainage system has been installed" and if the report is not available, why is there no record of Hart chasing this as stated in Hart Enforcement email 13 Jan 2022 9.15 "I will contact the developers again".
21. The council states this email confirmed what the developer had advised, not that there was a document or confirmation in writing. It has told the Commissioner that it does not record all telephone conversations, virtual meetings and in person discussions.
 - ii. If the Thames Water response is not available, why is there no record of Hart chasing this as stated in Hart Enforcement email 13 Jan 2022 9.15 "I will contact the developers again".
22. The council states this is simply stating that contact would be made to the developers and again advised that it does not record all telephone calls, virtual meetings or in person discussions.
 - iii. Why is there no record of the "further visit to site will take place to review circumstances" see Hart Enforcement email 13 January 2022 at 07.38.52 particularly when this boundary treatment is the subject of a pre-occupation planning condition?
 - iv. The Hart Enforcement email 13 January 2022 at 07.38.52 states "A final inspection in relation to identified snagging works took place on 15th December 2021" yet Hart states there is no record of the final inspection being confirmed and that the Satisfaction

Notice required by clause 15.5 of the attached Section 106 has not been issued despite the SANG now being used by the public.

- v. The Hart Enforcement email 13 Jan 2022 9.15 states "I can confirm Crest Nicholson have undertaken not to allow any further occupations on site" surely such an undertaking was not done verbally or at the very minimum confirmed by Hart afterwards.
23. The council has confirmed to the Commissioner that with regards the above points that IT searches were conducted at the time of the request and that no information was found to be held.
- vi. NS email 07 February 2022 10:12 requests a copy of "Hart DC's communication to Crest regarding the revised drainage layout in Fernhill Lane". The drainage concerned is subject to a planning condition, yet apparently Hart have not queried the change to the approved drainage layout.
24. The council has explained to the Commissioner that the complainant has had previous clarifications sent to him on this point explaining that drainage on Fernhill Lane is outside of the planning application site. As such it is not enforceable under planning control and the council is not required to make enquiries or request action be taken. Fernhill Lane is within Rushmoor Borough Council's administrative boundary. Off-site connections to utilities are covered under legislation; The General Permitted Development Order (England) 2015 and again, the Council has no powers in this respect. So it would not hold this information.
25. Finally, the council has told the Commissioner that the Ombudsman has also informed the complainant, 16 November 2021 that the drainage issue, together with other off-site issues he has raised, is beyond the control of the council and found no fault with the council. The council provided the Commissioner with extracts of this letter, which confirms what the council says.

The Commissioner's finding

26. The Commissioner has considered the above. The council has explained that phone calls, and verbal interactions with other parties were not recorded and so it is not required to ask its officers to create 'new information' in order to satisfy the request.
27. This is correct in that only information that recorded is captured under the EIR and FOIA.
28. The council says it has carried out searches in the relevant places that the requested information, if held, would be found.

29. The Commissioner is satisfied with the council's responses and explanations to his enquires and therefore finds, on the balance of probabilities, that the requested information is not held. Therefore, regulation 12(4)(a) is engaged to this request.

Regulation 12(1)(b) of the EIR - Public Interest Test

30. Regulation 12(1)(b) of the EIR requires a public interest test to be carried out if a request is refused under any of the exemptions set out under regulation 12 of the EIR.
31. However, as no information has been found to be held, the Commissioner can only find that the public interest in maintaining the exemption at 12(4)(a) of the EIR outweighs any public interest in disclosure, simply because there is no information to disclose.

Right of appeal

32. 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

33. 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.
34. 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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