

Environmental Information Regulations 2004 (EIR) Decision notice

Date: 30 September 2015

Public Authority: South Hams District Council **Address:**
Follaton House Plymouth Road
Totnes Devon TQ9 5NE

Decision (including any steps ordered)

1. The complainant has requested information relating to planning permission for a specific address, including any complaints or representations received by South Hams District Council. South Hams District Council has disclosed some information, explained that some information is available on its website and has refused to disclose some of the requested information citing the exceptions at regulation 12(5)(b) – adverse effect to the course of justice and regulation 13 – personal data.
2. The Commissioner's decision is that South Hams District Council has, in accordance with regulation 5(1) disclosed all of the information it holds which has not been excepted but in disclosing some information outside of the statutory time limit, has breached regulation 5(2) of the EIR. He considers that in failing to conduct an internal review within 40 working days it has also breached regulation 11(4) but that it has correctly withheld information in accordance with regulations 12(5)(b) and 13.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 30 October 2014, the complainant wrote to South Hams District Council (the council) and requested information in the following terms:

"I would like to raise a request pursuant to the Freedom of Information Act for copies of documents relating to the entirety of the information you have regarding the planning application for [named address] and any complaints or representations received by the council in that regard. For the avoidance of doubt I am content that certain documents be the subject of redaction but I would like to be informed of the basis and terms of such redaction.

5. On 4 November 2014 the council responded. It explained that the majority of material associated with any planning application is available on the council website. A link was provided. The council further stated that it would check for any other relevant material and would respond to the request within 20 working days.
6. On 14 December 2014 the complainant wrote to the council again and in the absence of any further response, requested an internal review.
7. The council responded on 16 December 2014 stating that 'ALL' correspondence including complaints/comments is published on its website and that the council therefore had considered its response of 4 November 2014 to be a final response.
8. The council further advised that as a result of the complainant's further correspondence it had contacted the planning department to ask if it held any unpublished material (falling within the scope of the request) and that he would hear from the council as soon as possible. He was also advised that his request for an internal review would be forwarded to the appropriate person.
9. The complainant wrote further to the council on 17 December 2014 outlining that he had been expecting a reply following its correspondence dated 4 November 2014. He cited the relevant paragraph of the council's email of 4 November. He further stated that the email could not technically constitute a discharge of FOIA section 1 (the duty to confirm or deny).
10. An email dated 17 December 2014 from the council apologised for any misunderstanding citing, in mitigation, a transformation and restructure. The council reiterated that it had requested further information from planning officers and stated that it would be in touch as soon as possible.
11. The complainant heard nothing further from the council.

Scope of the case

12. The complainant contacted the Commissioner on 2 April 2015 to complain about the way his request for information had been handled. He had heard nothing further from the council since 17 December 2014. His letter stated that he was concerned by the conduct of various parties regarding his planning applications.
13. The Commissioner wrote to the complainant on 7 May 2015 setting out the scope of the investigation in light of the correspondence received by the complainant. At that point the scope of the investigation was to consider if the information falling within the scope of the request was publicly available as stated.
14. The complainant responded and set out his assertion that the information that a local authority puts on its website in relation to a planning application is not all of the information falling within the scope of his request.
15. Having been asked by the Commissioner to consider the case further, the council wrote to the complainant again on 11 May 2015. The council described the correspondence as a response to the internal review request.
16. The council explained that its previous response had only been correct in relation to the planning application and that it did not apply to information relating to complaints.
17. It confirmed that it held information falling within the scope of the request. It disclosed some information and withheld the remainder on the basis of regulations 12(5)(b) and 13 although in relation to the personal information, the council cited regulation 12(3) rather than 13.
18. In light of this further correspondence the Commissioner wrote to the complainant revising the scope of the investigation. This set out that the investigation would consider whether all of the information falling within the scope of the request, which is held by the council but not publicly available, has been disclosed and more specifically the investigation would consider whether the council had correctly applied the exceptions it had cited.
19. The Commissioner considers therefore that the scope of the investigation is to determine whether the council was correct to withhold

information citing regulations 12(5)(b) and 13 and whether it had disclosed all other information in accordance with regulation 5.

Appropriate legislation

20. The Commissioner must first determine whether the request should be considered under the Freedom of Information Act (FOIA) or the Environmental Information Regulations (EIR).

21. Regulation 2 provides the definition of environmental information for the purposes of the Regulations. It defines environmental information as:

"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;

22. The request relates to a planning application regarding the landscaping and visual amenity of a property's grounds. The Commissioner therefore considers that it falls squarely within regulation 2(1)(c) in that it relates to information about measures which impact on the elements of the environment and in this case, particularly the landscape. Accordingly the request falls to be dealt with under the EIR rather than the FOIA.

Reasons for decision

Regulation 5 – Duty to disclose environmental information

23. Regulation 5 of the EIR requires public authorities to provide environmental information within 20 working days of receipt of a request.
24. In this case the complainant asserts that not all of the information has been disclosed.
25. In scenarios where there is some dispute about the amount of information located 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 Information Tribunal decisions, applies the civil standard of the balance of probabilities.
26. In other words, in order to determine such complaints, the Commissioner must decide whether, on the balance of probabilities, a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
27. To assist with this determination, the Commissioner approached the council with a number of standard questions.
28. The council set out in its submissions to the Commissioner that information falling within the scope of the request was held entirely on the council's website, in the enforcement files, in officers' emails and on the council's case management system. The council confirmed that the enforcement file and the planning application file are held in hard copy. The planning application file is posted on the website via the national planning portal.
29. In respect of destroyed or deleted records, the council has confirmed that no records were either destroyed or deleted. A copy of the council's records management policy was provided to the Commissioner.
30. One area which was specifically disputed by the complainant related to information regarding consultations and more specifically the complainant asserted that there must have been consultations with the Highways Agency as its final representations were published.
31. In response to this particular point, the council notes that the Highways Agency was referred to as Devon County Council and that its initial objection was detailed in the officer's report on the website. The website

also sets out the applicant's response to this and the application was subsequently approved. The council has confirmed that there is no other information held in respect of this issue.

32. The complainant also stated that the parish notes available on the internet indicate that it has received regular updates. In its submission to the Commissioner, the council explained that up until the spring of this year the council's normal practice was to send monthly lists of open enforcement cases in each parish to Parish Clerks and Ward members. The council provided the Commissioner with an unredacted copy of these and has subsequently disclosed the information falling within the scope of the request to the complainant.
33. The information redacted from these lists does not fall within the scope of the request as it relates to different enforcement cases.
34. Aside from the relevant information available on its website, the Commissioner accepts that the council has now disclosed to the complainant all of the non-excepted information it holds within the scope of the request albeit that disclosure was outside of the statutory time limit of 20 days. The council has therefore breached regulation 5(2) of EIR in that regard.

Regulation 12(5)(b) – adverse effect on the course of justice

35. Regulation 12(5)(b) states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature.
36. The Commissioner's guidance on regulation 12(5)(b) sets out that there is no definitive list which covers circumstances when a public authority may wish to consider applying the exception but it also cites examples of types of information requests where a public authority may wish to invoke the exception. One of these examples is information about investigations such as those carried out in relation to planning.
37. The council has set out that the withheld information relates to the council's Planning Enforcement responsibilities in relation to the address detailed in the request. These investigations are ongoing.
38. The council has stated in its submissions to the Commissioner that information on planning breaches must be able to be submitted in

confidence in order to encourage members of the public to provide information which may not otherwise come to the attention of the council due to its limited resources and the extent to which random checks on development can be made. The council has argued that the inability to submit details of planning breaches in confidence – which is what this information relates to - will adversely affect its ability to pursue effective enforcement action.

39. The Commissioner accepts that the information has been provided in confidence and that it is current as it relates to ongoing enforcement considerations. He further accepts that disclosure of the requested information would adversely affect the course of justice, specifically, the enforcement activity in this case. However, the Commissioner is also satisfied that there are wider implications in terms of the willingness of individuals to make complaints and therefore the council's ability to pursue enforcement action more generally in planning cases. In this particular case he accepts that in respect of the information withheld under regulation 12(5)(b), the exception is engaged.

Public interest test

40. Under regulation 12(1)(b) an exception can only be sustained if, in all of the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
41. There is no doubt that the information requested is of particular importance to the complainant; it is an issue which is personal to him but which has no wider public significance.
42. The council has not advanced any arguments as to why disclosure of the requested information may be in the public interest.
43. In favour of maintaining the exception, the council has argued that disclosure of information, which in this case has a presumption of confidentiality, would discourage the public from providing information about potential planning breaches. The council has also highlighted that government's planning practice and guidance makes clear that effective enforcement action is in the public interest.
44. The Commissioner's position is that there is a public interest in ensuring that investigations, proceedings and inquiries are not prejudiced by disclosure of information. Whilst he accepts that transparency promotes confidence in public accountability and greater accountability (even to the extent that the council's handling of the FOIA request here is

relevant to its accountability), in this case the investigations are ongoing. In the absence of sufficiently persuasive arguments to the contrary, the public interest lies in ensuring that those investigations can be conducted without any adverse effect on the course of justice. Accordingly the Commissioner finds that the public interest lies in maintaining the exception at regulation 12(5)(b).

Regulation 13 – Personal information

45. Information is exempt from disclosure on the basis of the exception at regulation 13 if it constitutes third party personal data (i.e. the personal data of an individual other than the person making the request) and the conditions in regulation 13 have been met.
46. Amongst other things, the first data protection principle requires that personal data is processed fairly and lawfully. This requires that the individuals to whom the information identifies had some expectation that the information would be disclosed in response to a request or that it was obvious that that would be the case. Alternatively, other factors may render a disclosure of the information fair in spite of the expectations of the individual concerned.
47. The Commissioner has considered the information falling within the exception and notes that it relates to names, addresses, email addresses, and in one instance photographs which the council argues would allow those raising complaints about the planning matter to be identified. He is satisfied that the withheld information is personal information
48. With regard to the photographs, the Commissioner considers that these are held as part of the ongoing enforcement investigations and in that respect it is irrelevant whether or not they constitute personal information as the exception at regulation 12(5)(b) is engaged in respect of the photographs. He will not consider these under regulation /13.
49. Turning to the information which has been disclosed with redactions, it comprises extracts of emails from a council employee to a third party; the third party name and email address has been withheld. It also comprises a letter from the council to an individual who has complained about the planning application. The name and address of the recipient has been withheld.

50. The public authority considers that disclosure of the information would contravene the first data protection principle.

51. The first data protection principle states:

'Personal data shall be processed fairly and lawfully and in particular shall not be processed unless-

At least one of the conditions in schedule 2 [DPA] is met...'

52. In considering whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual (ie the data subject) in terms of what would happen to their personal data and the consequences of disclosing personal data, ie what damage or distress would the data subjects suffer.
- Furthermore, notwithstanding the data subject's reasonable expectations or any damage caused to them, it may still be fair to disclose their personal data if it can be argued that there is an overriding legitimate interest to the public (as opposed to solely private interests) in doing so.

53. The Commissioner will first address the correspondence from the council to the third party. The third party, in this case a legal representative, would have no expectation that their name and email address would be disclosed to a third party let alone to the world at large under the EIR. The legal representative is acting on behalf of a client who has made a complaint about planning. The person making the complaint to the council has a legitimate expectation that their personal information will not be disclosed and it follows therefore that the person acting on their behalf, in a legal capacity, will have that same implicit legitimate expectation. The expectation in this case favours confidentiality and there is nothing to suggest that the legal representative could reasonably expect, in these circumstances, that their personal information would be disclosed.

54. The Commissioner notes that the council has not sought to rely on the exception at regulation 13 to withhold information relating to the details of the council official dealing with the case. He considers this to be correct and demonstrates that the application of the exception has been given due consideration.

55. With regard to the withheld information relating to the letter from the council to the individual making the planning complaint, the Commissioner accepts the council's position that individuals making complaints about planning do so in the expectation of confidentiality. He also recognises the potential consequences of disclosure in the context of planning disputes, in that those who have raised complaints would be identifiable and may be contacted by those who are unhappy with the representations they have made. The Commissioner therefore considers it would be unfair to disclose their personal information to any individual, let alone the world at large via disclosure of those details under the EIR.
56. In respect of the withheld information, the Commissioner accepts that the council was correct to withhold the personal details of third parties and third party addresses/email addresses as to do otherwise in this case would be unfair.
57. In reaching this view the Commissioner was unable to identify an overriding legitimate interest in disclosure. The council has set out that it has disclosed all of the information which would neither adversely affect enforcement nor contravene the data protection principles. It has argued that it has balanced the right of the individual to see complaints about planning breaches with the need to protect personal information in order to maintain effective enforcement.
58. The Commissioner considers that the test of legitimate interest in respect of regulation 13 is, in this case, linked to the public interest test in relation to regulation 12(5)(b).
59. He accepts that disclosure of information by a public authority promotes transparency and engenders a confidence in accountability. However, he accepts too that there is a balance in ensuring that confidentiality is maintained where appropriate.
60. In this particular case the Commissioner accepts that disclosure of information about any individual making a complaint, or any legal representative acting on their behalf, would fall outside of the implicit and legitimate expectation of that individual. As set out at paragraph 43, the Commissioner accepts that the public interest lies in ensuring that investigations, proceedings and inquiries are not prejudiced by disclosure of information. Were personal information disclosed in these particular circumstances, the Commissioner is satisfied that there would be an impact on the course of justice both in this case and more

generally. Specifically, however, there are no factors specific to the circumstances of this case which would justify the disclosure of the personal information such that disclosure would be considered fair.

Other matters

61. It is part of the Commissioner's remit to consider a public authority's handling of a case and, irrespective of his decision, to identify areas where the authority's processes could be improved.
62. The issue of timeliness regarding the substantive response and the internal review has been addressed in the main body of the notice but the Commissioner would note here that the council should seek to implement a system which will ensure that delays such as in this case are not repeated in the future.
63. The Commissioner notes that the complainant's initial complaint sets out his concern that his planning application has not been properly handled. Whilst this is not for the Commissioner to adjudicate upon, he notes that the handling of the request for information may have compounded the complainant's negative opinion of the council. He has considered the complainant's concerns when addressing the balance of the public interest and although relevant to the public interest test, those concerns were not sufficient to tip the balance in favour of disclosing the information and are more appropriately addressed here.
64. The Commissioner would note too that his investigation has been more protracted than normal. He would ask the council to consider the initial investigative letter and in its response, ensure that all questions are fully answered in detail. In this case, the investigation was only able to be concluded following further letters to the council and further responses from the council.
65. It was only through further probing that documents were disclosed and the full request was ultimately able to be addressed for the purposes of this notice.
66. During the course of the investigation, the council has accepted that there have been shortcomings in the handling of this case and has stated that it accepts that there are lessons to be learned. This constructive approach is appreciated by the Commissioner.

Right of appeal

67. 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 123 4504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatorychamber

68. 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.
69. 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

**Alexander Ganotis Group Manager Information Commissioner's
Office Wycliffe House Water Lane Wilmslow Cheshire SK9 5AF**