

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

Decision notice

Date: 16 August 2012

Public Authority: Wealden District Council
Address: Council Offices
Pine Grove
Crowborough
East Sussex
TN6 1DH

Decision (including any steps ordered)

1. The complainant requested correspondence relating to a planning application in Rotherfield. The council initially refused the request on the grounds that section 41 of the FOI Act applied. However in its review it decided that the exemption was applied incorrectly and disclosed all of the information which it said it held to the complainant. The complainant however believes that further information is held.
2. The Commissioner's decision is that Wealden District Council supplied the majority of the information after the internal review. It did however fail to provide one document. The Commissioner notes the council's argument that this referred to a previous planning application and so was not caught within the scope of the request. As it has agreed to disclose a copy of this to the complainant however the Commissioner has not considered this further.
3. The Commissioner notes that the council initially dealt with the request under both FOI and the Regulations, however the information was environmental information and should have been considered for disclosure entirely under the Environmental Information Regulations 2004. Given that the information was subsequently disclosed however the Commissioner's decision is that no further action is required by the council in this respect.

4. The Commissioner has decided however that as the council did not disclose the information until after it had carried out its review the council failed to provide the information within 20 working days as required by Regulation 5(2).
5. The Commissioner has also decided that the council breached Regulation 11(4) in that its review of its initial decision was not provided to the complainant within 40 working days of receiving the request to review its initial decision.

Request and response

6. On 22 May 2011 the complainant wrote to Wealden District Council and requested information in the following terms:

"I would like to make a request for all correspondence relating to a current planning application on the site in Rotherfield, Catts Hill adjoining 'Ormfield' TN6 3NL.

I would wish all correspondence to specifically include papers between ESCC staff and any planning consultants.

Between district and parish planning committees together with Saxon Weald Homes and any planning consultants.

Between district counsellors [names redacted] and parish councillor [name redacted] relating to current planning applications linked to this matter."

7. The council responded to this request however the version provided to the Commissioner by the complainant is not dated. The council's refusal notice stated to the complainant that there had been no planning application at the time that the council received the request, however the information which it did hold was exempt under Regulation 12(5)(f) and section 41 of the FOI Act.
8. Following an internal review the council wrote to the complainant on 21 September 2011. The reviewer stated that having reconsidered the information the council was satisfied that the exemption should not have been applied. It therefore disclosed all of the information which it stated it held to the complainant.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
10. He stated that he did not believe that all of the information had been provided to him, and that he was aware that further documents were held. He also said that the emails which had been provided to him showed that council staff had used personal email accounts during the course of the correspondence and asked the Commissioner to consider whether this was appropriate.
11. The Commissioner considers the complainant has asked the Commissioner to consider whether all of the information has been provided to him, to consider whether the use of personal email accounts was appropriate and to consider whether the council's response was appropriate as a whole.

Reasons for decision

12. Regulation 2 of the EIR provides the definition of environmental information. It states that environmental information is information '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;" and

"(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;"
13. The information is correspondence relating to a potential planning application to develop houses in Rotherfield. As such the Commissioner considers that the information falls within Regulation 2(c) as 'information on' a plan likely to affect the elements of the landscape defined in Regulation 2(a).

Is further information held by the council?

14. The Commissioner notes that the council's refusal notice sought to apply the exemption in section 41 of the FOI Act (information provided in confidence), as well as Regulation 12(5)(f) (information provided voluntarily where the interests of those who supplied it could be adversely affected by its disclosure). In effect however the information all falls within the scope of the Regulations and so the council was incorrect to claim section 41 in this respect.
15. However the council revoked its reliance on both of these exemptions during the review stage and disclosed the information to the complainant.
16. The complainant argues that further information is held, and provided the Commissioner with details of why he thought that that was the case. This included personal knowledge of another piece of correspondence which he thought fell within the scope of the request. He also highlighted a meeting held by the council with a local parish council.
17. In *Bromley v IC (EA/2006/0072)* the then Information Tribunal (now the First-tier tribunal) described the test which the Commissioner must use when considering whether information is held by an authority or not. That test is whether information is held "on a balance of probabilities".
18. The Tribunal indicated that the application of the balance of probabilities test requires the consideration of a number of factors including:

"...the quality of the public authority's initial analysis of the request,

the scope of the search that it decided to make on the basis of that analysis and

the rigour and efficiency with which the search was then conducted..."

(para 13)."
19. The Commissioner wrote to the council and asked it the following questions about the searches which it carried out, its legal obligation to collect such information and about its records management policies. He also asked the council if it had held this information in the past but deleted it at any point.
20. The council responded answering the questions. It explained that there had only been one planning officer dealing with the applications. He had supplied all correspondence on the relevant planning file together with any electronically held emails within his system (as he was the sole case officer). He undertook a manual search of his archive folder for the site

and also carried out an electronic search of the system using the name of the site.

21. It further explained that the reference to another officer in the initial request was erroneous as he had only been involved fleetingly with the site, many months before any planning application had been made (i.e. the planning application which was the focus of the request).
22. As regards its duty to record information it explained that the council has a statutory duty to record minutes of formal committee meetings but not meetings of the nature described by the complainant.
23. It further explained that although it is under a legal duty to hold details in respect of planning applications, in this case no meeting notes were made, and it would not have been under a duty to record meeting notes from a meeting that took place prior to the submission of the planning application.
24. It confirmed that no information had been deleted which would have fallen within the scope of the request.
25. The council also explained that district councillors were consulted to ensure that all relevant correspondence was released as part of the review.
26. It confirmed that there were no minutes held or any notes from the meeting referred to by the complainant between the council and the Parish Council.
27. However it said that did hold an additional letter relating to the first formal consideration of the planning scheme. The council stated that this was not related to the 'current' planning application but was an initial assessment of the site. The council's planning officer stated that he had assumed that the complainant had already been provided with a copy of the letter but as he had not he was happy to provide a copy of it to him. The Commissioner has not therefore considered this further and asks the council to provide this to the complainant.
28. Having considered the councils response the Commissioner is satisfied that on a balance of probabilities no further information is held by the council which falls within the scope of his request.

The use of personal email addresses to correspond

29. The complainant also asked the Commissioner to consider whether it was appropriate for the council to have used personal emails when corresponding about the application. The emails which the council

disclosed to him included correspondence which appeared to include emails from personal email addresses.

30. The Commissioner has published guidance on the use of personal email accounts for official information this which is available at http://www.ico.gov.uk/news/latest_news/2011/~ /media/documents/library/Freedom_of_Information/Detailed_specialist_guides/official_information_held_in_private_email_accounts.ashx.
31. The Commissioner has considered this. The use of personal email accounts purposely to avoid the normal recording of emails by an authority is potentially a criminal offence if the aim is to conceal information or to prevent it from being caught within the scope of requests made under the Regulations. However if personal email accounts are used during the normal course of business, providing that information is properly caught and recorded under the normal reporting and audit functions of the council there are no specific provisions within either the Act or the Regulations to prevent this.
32. The Commissioner is satisfied that there is no evidence that the use of personal email accounts in this case was intended to circumvent or bypass the normal recording functions of the authority. In essence the email accounts appear to have been used during their normal course of business, with no evidence that the intention was to conceal information from normal council recording procedures.
33. The emails also appear to have been properly recorded by the council. The council disclosed the emails to the complainant in response to the request for review and this is clear evidence that its procedures were at least adequate in this respect.
34. Given this, the Commissioner considers that the council's use of personal email accounts was not contrary to the Regulations.

The delay in the council disclosing the information to the complainant

35. Finally the complainant asked the Commissioner to consider the delay between the date of his request and the date that the council disclosed the information to him.
36. The complainant made his request for information on 22 May 2011. The council initially refused to provide the information stating that the exemptions applied. The Commissioner does not know the date that the refusal notice was issued however as his copy of this document is not dated. Nonetheless, the council did not disclose the information to the complainant until 21 September 2011, after it had reviewed its initial decision.

37. Regulation 5(2) requires an authority to respond to the requestor, within 20 working days. In this case, due to the initial refusal of the information the council's response took significantly longer than this.
38. The Commissioner's decision is therefore that the council breached Regulation 5(2).
39. The Commissioner notes that the review process is intended to give public authorities the opportunity to reconsider its response to a request – this is the intention behind the requirement for a review to be carried out.
40. In this case the council therefore acted appropriately in reconsidering and then reversing its position, although the Commissioner notes that it took a significant amount of time for it to carry out that review.
41. However due to the length of time it took to carry out that review the Commissioner's decision is that the council breached regulation 11(4), which requires a review to be carried out and a response issued to the complainant within 40 working days.

Right of appeal

42. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

43. 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.
44. 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

Andrew White
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