

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

Decision notice

Date: 20 November 2013

Public Authority: Northumberland County Council
Address: County Hall
Morpeth
Northumberland
NE61 2EF

Decision (including any steps ordered)

1. The complainant requested information relating to a specific planning application. Although Northumberland County Council (the 'Council') provided him with some information, the complainant's view was that it held more information which it had not disclosed.
2. The Information Commissioner finds that the information requested constitutes environmental information and was correctly considered under the Environmental Information Regulations 2004 (EIR). He has concluded on the balance of probabilities that, other than the information it had already provided to the complainant, the Council did not hold any further information relevant to the request. The Council, however, breached regulations 5(1) and 5(2) of the EIR in failing to make available the information it held within 20 working days of receipt of the request. It also breached regulation 11 of the EIR by failing to provide the internal review outcome within 40 working days, instead taking 421 working days. As all the information held has now been provided to the complainant, the Commissioner does not require the Council to take any steps.

Request and response

3. The complainant wrote to the Council on 6 July 2011 and requested information about a specified planning application in the following terms:

"Please forward copies of e-mails, correspondence, plans etc., relating to the above and dated from January 2009 to the present."

4. The Council acknowledged receipt of the request that same day, confirming that its response would be provided by 2 August 2013.
5. In the absence of any response, the complainant contacted the Council on 29 August 2011 to query the delay. On 30 August the Council apologised for the ongoing delay and set out its process for requesting an internal review. That same day the complainant submitted his request for an internal review.
6. The Council acknowledged receipt of the internal review request advising that the result would be provided by 24 October 2011.
7. The complainant contacted the Council on 26 October 2011 about the overdue internal review, and again on 15 November and 9 December, but the Council still did not provide the result.
8. On or around 27 October 2011 the complainant received some information relating to his request. He contacted the Council on 15 November to advise that the information was incomplete because it did not include any emails or letters relating to the planning application dated after March 2010, clarifying that since he had written to the Council several times after March 2010, he expected such details and any associated internal/external responses to be on file. He reminded the Council of the need to provide all the information requested and of the outstanding internal review outcome.
9. On or around 9 December 2012 the Council provided some additional information to the complainant. Whilst the complainant acknowledged that the Enforcement related files were *"relevant and useful"*, he advised the Council that *"they do not plug the gaps in the material which I believe should have been present in the main file relating to the above case"*. He reiterated his concern that his emails from March 2010 onwards about the planning application should have been on the file and had not been provided.
10. Following a telephone call with the Council in early January 2012, the complainant also attended a meeting at the its offices with the relevant senior managers on 23 February 2012, at which it was agreed that the internal review would be formalised and forwarded by 12 March 2012.
11. The Council, however, failed to provide the complainant with the outcome of the internal review. According to the complainant, the Council admitted at this meeting that it had *"mislaidd the file"*.

Scope of the case

12. The complainant contacted the Commissioner on 5 February 2013 to complain about the way his request for information had been handled. Whilst he confirmed that the Council had forwarded some information, which included material from the Council's Planning Enforcement Officer's files, he advised that the latter was "*not the material requested*". He specifically complained about the Council's failure to conduct an internal review.
13. The Commissioner has first considered whether the requested information is environmental. He has then determined whether the Council handled the internal review in accordance with regulation 11 of the EIR.
14. Having secured the long overdue internal review outcome during his investigation, the Commissioner subsequently considered whether the Council has now provided all the information it holds relevant to the request, based on the civil standard of the balance of probabilities.

Reasons for decision

Regulation 2 - Is the information environmental?

15. Information is environmental if it meets the definition set out in regulation 2 of the EIR. Regulation 2(1)(a) covers the state of the elements of the environment, including water, soil, land and landscape. Regulation 2(1)(c) provides that information is environmental where it is on:

"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 [2(1)](a) and (b) as well as measures or activities designed to protect those elements".
16. In the Commissioner's view this constitutes environmental information under regulation 2(1)(c) as it is on an activity affecting or likely to affect the elements of the environment in 2(1)(a), in particular the land and landscape. As the information is environmental it should have been considered under the EIR. The Council correctly handled the request under the EIR. The remainder of this analysis covers whether the request was handled in accordance with the EIR.

Regulation 11 – Representations and reconsideration (internal review)

17. Regulation 11 of the EIR provides applicants with the right to an internal review of a public authority's response. It is a statutory requirement which must be completed within 40 working days. In this case, no internal review result had been provided at the time the Commissioner commenced his investigation, and the 40 working days limit had been considerably exceeded.
18. The complainant told the Commissioner that he had been informed at the meeting of 23 February 2013, "*Whilst it was acknowledged that the main Planning file has been lost/mislaid, it was agreed that an internal review would still be produced, whilst, at the same time, continued efforts would be made to locate the file*".
19. The Commissioner contacted the Council on 16 April 2013 to request the outstanding internal review result and query the reason for the significant delay. The Council said that it had been having regular meetings with the complainant, with the most recent being in March 2013. At this meeting the Council advised the complainant that, following a change of role for the officer involved, a different officer would now be taking over responsibility for the matter. The Council told the Commissioner that this individual had been absent from work for over a month and it committed to providing the internal review result within ten working days.
20. The Council sent its internal review outcome to the Commissioner on 30 April 2013, having instead allocated it to another officer who was relatively new to the organisation. The Council apologised for the delay in handling the request and review. Having located the missing file, the Council explained that there had been "*significant changes to the structure of the Development Management service since 2009, which has resulted in both staff and office moves also some management and capacity issues [within the team] responsible for the handling of this EIR request*".
21. The Council said that the above issues "*may explain in part why some of the information is not on the file and also partially explains the delays in making the information available*". It set out the steps it intended to take to avoid any repetition which included training all relevant officers to remind them of the need to comply with the timescales set out in the EIR: reminding staff of the need to ensure all correspondence, site and file notes are included on the case file and, in the event that a new case officer is allocated to a case, that a full and detailed handover is provided.

22. Following the review result, the Commissioner contacted the complainant, who was working away, and therefore did not respond until 11 May 2013. He stated:

"Given the failure to provide the Internal Review was persistent (and, I would suggest, wilful) and involved such senior members of the Council's staff, and although I understand that the missing file has now been found, I have still not been furnished with the requested material".

23. The Commissioner spoke to the complainant on 14 May 2013; he confirmed that letters and emails written by him to the Council from 2010, which should be held, had not been disclosed. The Commissioner also contacted the individual who had carried out the internal review to query the information which the complainant considered to be missing from the file; she confirmed that the correspondence had been received by the Council but that she was unable to locate it.

Regulation 5(1) – What recorded information was held?

24. Regulation 5(1) provides a general right of access to environmental information held by public authorities. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to locate information falling within the scope of the request, and its explanations as to why the information is not held. The Commissioner is not expected to prove categorically whether additional information was held. He is only required to make a judgement on whether the information was held "on the balance of probabilities"¹.
25. The Commissioner asked the Council for details of the searches it had undertaken in order to respond to the request. The Council failed to reply within 20 working days and the Commissioner had to remind the Council of the need to respond; it subsequently did so on 1 July 2013.
26. It confirmed that searches of both the relevant paper planning files and email accounts were made, including personal computers, using the search criteria of the complainant's name and the site address. The

¹ This approach is supported by the Information Tribunal's findings in *Linda Bromley and Others/Environment Agency (31 August 2007) EA/2006/0072*.

Council explained that any emails held for more than two years are automatically deleted such that any emails which had not been printed and stored on the file would be lost and no longer retrievable. It commented that *"It is not a statutory requirement to retain copies of all correspondence associated with the application"*.

27. In addition, the Council stated that, having reviewed the file, it appeared that some of the correspondence may have related to the enforcement of the relevant planning conditions. It explained that any correspondence received in connection with an alleged breach of planning enforcement is exempt from disclosure as it may be required for the detection or prevention of a crime. It said, however, that it appeared some of the emails which did relate to planning enforcement matters were made available to the complainant.
28. The Council confirmed that there is a statutory requirement upon it to retain a register of all planning applications such that a copy (paper or digital) of the application form, approved drawings and notice of the decision are all retained.
29. It suggested that the formation of Northumberland County Council, following the Local Government Review initiative which resulted in the amalgamation of six former district Councils with the former County Council and the associated streamlining of staffing structures and IT systems, may provide an explanation as to why some of the complainant's correspondence is missing from the file.
30. At the Commissioner's request, given the significant delays in this case, together with the temporary mislaying of the relevant file, the Council subsequently provided the complainant with a complete copy of the information it held relevant to the request, which the complainant received on 15 July 2013.
31. The complainant confirmed that information was missing from the file as previously outlined in this notice. He commented that, at one stage, it had been suggested that he be given access to the file to identify what material was missing. The Commissioner asked the Council about this and it said that it would meet with the complainant with a view to resolving the issues.
32. However, due to the parties' leave and work commitments, this meeting did not take place until 25 October 2013. The Council took the relevant file and its contents to the meeting to show to the complainant. The Commissioner spoke to the complainant for his views following the meeting which he subsequently submitted in writing.
33. The complainant stated:

"It seems that the material to which I sought access in my original FOI request has either been lost, deleted, or was never placed on file in the first instance. I accept that this is likely to be a case of administrative failure rather than conspiracy."

34. He added:

"I also recognise that whilst this lack of effective record keeping may have taken place against a background of management and staffing re-organisation and site re-location, no system existed to ensure files included a simple index / listing of material contained in them, so there was no obvious way of checking whether the contents were complete or not. I therefore conclude that I am unlikely to be able to gain access to the material sought."

35. The complainant advised that the Council had assured him that all documentation is now scanned on receipt and classified, with an audit check involving a 10% sample regularly undertaken, and that work is also being undertaken to ensure Planning staff appreciate and understand the need for effective record keeping and its direct impact on their work. The complainant stated he accepts the Council officer's professional assurance that these actions are being undertaken, but commented: *"at this stage, against what I perceive as long standing cultural and administrative issues within Planning, this is very much a work in progress"*.

Conclusion

36. The Commissioner's decision is that, on the balance of probabilities, apart from the information disclosed to the complainant, no further information is held that is relevant to the request. He considers that some information sent to the Council by the complainant (specifically, emails and correspondence) was held, but is no longer held. The Council has not been able to provide a definitive explanation as to why it is no longer held, but suggested a possible reason for this as set out in paragraph 29 of this notice. The Commissioner notes that the Council has recognised its poor records management in this case and has taken, and will continue to take, steps to improve this matter.
37. The Council responded to the request significantly outside the 20 working days' time limit (81 working days) and did not provide the internal review outcome until 421 working days after receiving the complainant's request.

Other matters

38. As well as finding above that the Council is in breach of the EIR, the Commissioner has also made a record of the considerable delays in this case. The Council must ensure that there is no repetition of these breaches when handling future requests.
39. The code of practice issued under section 46 of the Act (the "section 46 code") sets out the practices which public authorities should follow in relation to the creation, keeping, management and destruction of their records.
40. During the course of the Commissioner's investigation the Council confirmed that it was unable to either locate certain correspondence about the planning application received from the complainant, or that this correspondence had been destroyed in accordance with a disposal schedule. In addition, for a time, it mislaid the relevant file in this case although later located it. The Commissioner expects that, in future, the Council will ensure that its records are retained in accordance with its own records management policy and that it will have due regard for the recommendations of the section 46 code. The section 46 code is published online at this address:

<http://www.justice.gov.uk/guidance/docs/foi-section-46-code-of-practice.pdf>
41. In addition, following his meeting on 25 October 2013 with relevant officers of the Council, the complainant raised his concerns about the Council's records management issues. The Commissioner has made his Good Practice department aware of these concerns.

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

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