

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 January 2014

Public Authority: New Forest District Council
Address: Appletree Court
Beaulieu Road
Lyndhurst
SO43 7PA

Decision (including any steps ordered)

1. The complainant has requested information relating to the ownership of land referred to in the "Play Provision in Barton on Sea" report. New Forest District Council stated that it did not hold the requested information.
2. The Commissioner's decision is that New Forest District Council:
 - Wrongly handled the request under the FOIA and failed to issue a proper refusal notice, breaching regulation 14 of the EIR.
 - correctly confirmed that it does not hold the requested information and, in doing so, complied with regulation 5 of the EIR.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 5 June 2013, the complainant wrote to New Forest District Council (the "council") and requested information in the following terms:

(In relation to the "Play Provision in Barton on Sea" report)

"(1) The Report clearly refers to conveyancing documents.....where are the conveyancing documents referred to as we require to see them?"

The Report draws the conclusion that the wooded area to the north of Long Meadow is included within the Long Meadow area and, therefore, is open space and is not included in Barton Common.

- (2) *How was this conclusion reached and from what documents was it drawn?*

The maps contained within the Report clearly show the northern boundary moving south on the historic map 1908-10 after a property was built, known as Forge Cottage in Meadow Way, as do all subsequent maps."

- (3) *Why did the authors draw this conclusion and from which documents?*

- (4) *Are these maps accurate?"*

5. The council responded on 25 June 2013. In relation to each element of the request it stated "...the author of the report no longer works for the council and we can add nothing to what is written in the report."
6. Following an internal review (which the complainant submitted on the Commissioner's advice) the council wrote to the complainant on 7 August 2013. It stated that it did not have any further information to give to the complainant.

Scope of the case

7. On 6 July 2013 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that his investigation would consider whether the council handled the request in accordance with the FOIA / EIR and whether it correctly confirmed that the requested information is not held.

Reasons for decision

Is it Environmental Information?

9. In responding to the request the council did not state whether it was being handled under the FOIA or the EIR. The Commissioner has considered whether the request relates to environmental information.
10. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is as any information in any 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...'*
11. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
12. The Commissioner notes that the withheld information relates to planning matters and the ownership of land for potential development. He has considered whether this information can be classed as environmental information, as defined in Regulation 2(1)(a)–(f), and he has concluded that it can for the reasons given below.
13. In this case the subject matter of the withheld information relates to land/landscape and advice which could determine or affect, directly or indirectly, policies or administrative decisions taken by the council.

14. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of Kirkaldie v IC and Thanet District Council (EA/2006/001) ("Kirkaldie").
15. In view of this, the Commissioner has concluded that the request falls to be considered under the EIR.

Regulation 14 – refusal to disclose information

16. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore where the procedural requirements of the two pieces of legislation differ it is inevitable that the council will have failed to comply with the provisions of the EIR.
17. In these circumstances the Commissioner believes that it is appropriate for him to find that the council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and indeed its internal review) failed to cite any exception contained within the EIR because the council actually dealt with the request under FOIA.

Regulation 5 – is the requested information held?

18. Regulation 5(1) provides that a public authority that holds environmental information should make it available on request.
19. In this case the council confirmed that it did not hold any of the information specified in the request. The Commissioner considers that the majority of the first 3 elements of the request are essentially requests for conveyancing documents and other information which formed the basis of the conclusion reached at paragraph 5.1 of the report.
20. In relation to the request at 3), for information about how those drafting the report reached this conclusion and at 4), for confirmation that the maps appearing in the report are "accurate", the Commissioner considers that these take the form of questions or ask the council to express a view. Nevertheless, in writing to the council, the Commissioner asked it to confirm whether information addressing these questions was held.

Relevant facts

21. The complainant disputes the council's position and has submitted that the "Play Provision in Barton on Sea" report, (the "report") finds that a wooded area to the north of Long Meadow in Barton on Sea is included within the open space area known as Long Meadow and is not part of Barton Common. The relevant section of the report (paragraph 5.1) states "...what is certain through inspection of conveyance documents, is that Long Meadow was not part of the Barton Common conveyance, and is **not** covenanted for any particular use through transfer of ownership as the neighbouring land parcel of Barton Common is."¹ The complainant's request broadly seeks evidence which provides the basis for this finding.
22. The council has explained that the report was commissioned by New Milton Town Council to provide it with a foundation on which to make decisions regarding possible play provision facilities for children at Long Meadow. The council confirmed to the Commissioner that Long Meadow is owned by New Milton Town Council ("New Milton") and, drawing on the council's experience of open space matters, New Milton invited it to prepare an appraisal into possible appropriate play sites and to report back on the results of a consultation plan which sought views on the proposal and on how play provision was to be provided.
23. In explaining why it does not know what information was used to reach the report's conclusion, or does not hold any of the requested information, the council's submissions to the Commissioner reiterate the explanation provided to the requester, namely, that the person who drafted the report no longer works for the council.
24. The council has confirmed that it does not know why the report's writer, who worked closely with New Milton District Council, reached the conclusion provided at paragraph 5.1 of the report. It has stated that it does not know what information was relied upon in reaching this conclusion and has asserted that it is likely that this information was held by New Milton, as owner of the land in question. The council confirmed to the Commissioner that it would not, in its own right, be in a position to come to such conclusions, nor does it have any material interest in whether Long Meadow is part of Barton Common.

¹ http://www.newforest.gov.uk/media/adobe/8/j/Long_Meadow_Report_April_2011.pdf

25. The council has explicitly confirmed to the Commissioner that it has conducted additional searches have not revealed the information or conveyancing documents which the complainant is seeking. The council has stated that it has searched the email records of the report's author but that these do not contain any information relating to the question of whether Long Meadow is part of Barton Common.

Conclusions

26. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
27. In other words, in order to determine such complaints the ICO 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).
28. It is not the Commissioner's role to adjudicate on the substantive matter in this case, i.e., whether the conclusion contained in paragraph 5.1 of the report is correct or not, so, whilst he notes the complainant's concerns, he has not factored these into his determination as to whether relevant information is held by the council.
29. The Commissioner understands why, given the nature of their concerns about the substantive matter, the complainant would be sceptical about the council's confirmation that information is not held. Where a decision has been made, it is reasonable to assume that this will be founded on some sort of recorded evidence.
30. However, the Commissioner is mindful that the council's role in the substantive matter is not that of landowner but as creator of the report. Given that the person drafting the report worked in conjunction with the landowner, New Milton, it seems probable that any information relating to the extent of its ownership would, therefore, be held by New Milton.
31. Whilst the Commissioner has been advised by the complainant that the same request has been made to New Milton, he is not in a position to comment on this further within the confines of this section 50 complaint.
32. The Commissioner notes that neither the EIR nor the code of practice issued under section 46 of the FOIA (the "section 46 code"), which is also applicable to the EIR, are not prescriptive about the information which public authorities should record and retain. Part 8 of the section

46 code recommends that authorities should retain sufficient information to explain or justify past actions or decisions, however, it is for authorities to decide what information needs to be kept for business or statutory purposes².

33. The Commissioner is alive to the complainant's concerns about the absence of any relevant information. However, he has balanced this against the council's position, including its role in drafting the report, the fact it is not the relevant landowner and the searches it has conducted. On this basis, he has concluded that, on the balance of probabilities, the council has correctly confirmed that it does not hold the requested information. He, therefore, finds that the council has complied with regulation 5 of the EIR.

² <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section-46-code-of-practice.pdf>

Right of appeal

34. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.
36. 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
Group Manager
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