

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

Decision notice

Date: 13 July 2015

Public Authority: Boston Borough Council
Address: Municipal Buildings
West Street
Boston
Lincolnshire
PE21 8QR

Decision (including any steps ordered)

1. The complainant has requested details of a programme of noise monitoring for a wind farm. Boston Borough Council disclosed some information and confirmed that other information was not held.
2. The Commissioner's decision is that Boston Borough Council has disclosed all the information falling within the scope of the request that it holds and that it has complied with regulation 5(1) of the EIR.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 22 January 2015, the complainant wrote to Boston Borough Council (the "council") and requested information in the following terms:
"I would like to make a FOI request for details of the programme of noise monitoring that was agreed with the Planning Department for Bicker Fen Wind Farm. The programme is mentioned in the planning conditions attached to the consent for the development."
5. The council responded on 18 February 2015. It stated that it was refusing the request, withholding the requested information under the exemption for personal data (section 40(2) of the FOIA).

6. Following an internal review the council wrote to the complainant on 25 March 2015 and confirmed the request was being handled under the EIR. It provided the complainant with information relating to the requested programme of noise monitoring, redacting some personal data from some emails under regulation 13 of the EIR.

Scope of the case

7. On 16 March 2015 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 has correctly confirmed that it does not hold any further information relating to the specified noise monitoring.

Reasons for decision

Regulation 5 – duty to provide environmental information

9. Under regulation 5(1) of the EIR a public authority that holds environmental information shall make it available on request.
10. By way of background, on 15 October 2004, the council issued an application decision notice under the Town and Country Planning Act 1990 (the "notice"). The notice was issued to the developer of Bicker Fen Wind Farm and granted planning permission subject to certain conditions being fulfilled. Condition 10 of the notice stated:

Prior to the operation of the wind farm noise commissioning testing shall be undertaken to determine compliance with the above condition and thereafter a programme of noise monitoring shall be submitted and agreed in writing with the Local Planning Authority."
11. The requester asked for "details of the programme of noise monitoring that was agreed with the Planning Department for Bicker Fen Wind Farm." and the council disclosed a document "Bicker Fen Wind Farm: Compliance Monitoring", submitted by the developer to the council seeking its agreement for a proposed programme of monitoring.
12. The complainant maintains that the council should also hold and disclose details of the monitoring programme itself, as carried out by the developer (or by a contractor on its behalf). The council has stated that it does not hold this information, nor has it ever been in receipt of the information.

13. 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.
14. 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).
15. To assist with this determination the Commissioner approached the council with a number of questions. The council has stated that, aside from the methodology for the programme of noise monitoring that was disclosed to the complainant, it holds no other relevant information and, specifically, no records of the outcomes of the programme of monitoring are held.
16. After repeated queries from the Commissioner in this regard the council has maintained that it holds no record of the developer's response to the monitoring and that it assumes the programme of monitoring was carried out.
17. In order to understand why the council did not hold any information regarding the application of the programme of noise monitoring, the Commissioner asked the council whether it had any statutory obligation or enforcement remit to ascertain whether the Wind Farm carried out noise monitoring (and, therefore, complied with the specific planning condition) and whether, as part of this, the developer was obliged to provide it with monitoring information.
18. The council confirmed that its adopted Planning Enforcement Policy recognises that an authority may undertake enforcement action if there appears to have been a breach of (planning) control and if it is expedient (Section 172 of the 1990 Act). The council stated that this is therefore a discretionary activity which the council is not obliged to follow and as such there is no statutory obligation to pursue enforcement action or to investigate an alleged breach.
19. The complainant has suggested that, whilst the information is not physically held by the council, any noise monitoring would have been carried out by a contractor on behalf of the council. Should this be the case, the complainant has argued that the information would, therefore, be held by a third party on behalf of the council.
20. The Commissioner notes that, under regulation 3(2)(b), information can be considered to be held by a public authority if the information is held

by another person on behalf of the authority. On behalf of in this context might cover, for example, a scenario where a contractor is carrying out work on behalf of a public authority and assisting it in delivering one of its public functions.

21. However, the Commissioner considers that, in this case, the noise monitoring was a planning condition required of the developer and any contractor undertaking the monitoring would have been doing so on behalf of the developer rather than the council.
22. Having considered the complainant's and the council's submissions and that available evidence the Commissioner accepts that the council is not obliged by statute to obtain noise monitoring information from the developer and that any noise monitoring information would not, in this case, be held on behalf of the council. Having accepted these points and considered the council's explanations, the Commissioner has concluded that, on the balance of probabilities, it is likely that the requested noise monitoring information is not held. He, therefore, finds that the council complied with regulation 5(1) of the EIR.

Right of appeal

23. 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@hmcts.gsi.gov.uk

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

24. 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.
25. 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
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF