

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 11 February 2016

**Public Authority:** Cheshire West and Chester Council

**Address:** HQ Building  
Nicholas Street  
Chester  
CH1 2NP

#### **Decision (including any steps ordered)**

---

1. The complainant has requested the contents of two planning files – 2/3/4836 and 2/3/4710, from Cheshire West and Chester Council. The two files relate to the construction of Mill View Primary School in Chester and they date back to the mid-1960s.
2. The Commissioner's decision is that Chester West and Cheshire Council has provided the complainant with all of the recorded information it holds in respect of the two planning files. The Council has therefore complied with Regulation 5(1) of the EIR.
3. The Commissioner has also decided that the Council has acted in contravention of Regulation 11 of the EIR for its failure to conduct a formal internal review in response to the complainant's representations.
4. The Commissioner requires the Council to take no further action in this matter.

#### **Request and response**

---

5. On 30 April 2015, the complainant wrote to the Council to ask that it –  
“...upload the entire contents of planning file 2/3/4836 on to the planning portal / statutory planning register.”
6. The Council was unable to locate the application under the reference which provided by the complainant and asked subsequently asked him to supply the full address of the application.

7. On 5 May, the complainant provided the Council with the address of the application he seeks.
8. On 6 May, the Council confirmed to the complainant that it would order the requested file from its records management team, prior to making it available for viewing or sending it to him by email.
9. On 9 May, the complainant asked the Council for a second planning file under reference 2/3/4710. He pointed out that this is a separate planning application to the one under reference 2/3/4836, and that 2/3/4836 relates to the entrance to Mill View Primary School and not to the school itself. The terms of the complainant's request are:  
  
"Can I also request the following Environmental Information please. Planning file ref. 2/3/4710 is the planning consent for the development of Mill View Primary School. The file is quite separate to 2/3/4836 (which is for the entrance to the school, not the school itself.)"
10. The Council responded to both of the complainant's requests on 14 May. The Council provided information relating to planning application 2/3/4836 but advised him that the information relating to application 2/3/4710 is missing from the Record Management Team's archive.
11. On 14 July, the Council informed the Commissioner that it had declined to carry out an internal review under the EIR, asserting that the matter was dealt with as 'routine business'.
12. Having received the Council's response, the complainant wrote to the Council – also on 14 May, and requested an internal review. The complainant asserted that the information which the Council had sent him in respect of application 2/3/4836 was incomplete, missing the actual planning application. The complainant also asserted that planning file 2/3/4710 was known to exist, having been withdrawn by [a named officer] on 26 November 2014.

### Scope of the case

---

13. The complainant contacted the Commissioner on 16 June 2015 to complain about the way his request for information had been handled. The complainant's grounds for complaint are:
  - The Council has failed to carry out an internal review following his request of 14 May. *Other matters*
  - The Council has blocked his attempts to gain access to the information he seeks and has acted in contravention of planning law –

particularly sections 36(4) and 36(9) of the Town and Country Planning (Development Management Procedure) (England) Order 2010 and its own publication scheme.

- The Council has committed an offence under Regulation 19 of the EIR.
  - The Council has not provided him with the full contents of the 2/3/4836, having failed to supply the original planning application.
  - The complainant disputes the Council's position that planning file 2/3/4710 has been destroyed
14. The Commissioner has investigated whether the Council has complied with its duty under Regulation 5(1) of the EIR, to make the full contents of files 2/3/4836 and 2/3/4710 available to the complainant. He has also considered whether the Council has committed an offence under Regulation 19 of the EIR.
15. It is not within the ambit of the Commissioner's role to determine whether the Council has contravened any of the provisions of the Town and Country Planning (Development Management Procedure) (England) Order 2010.

### **Background information**

16. The Council has advised the Commissioner that the two planning files, 2/3/4836 and 2/3/4710, relate to the same application and that both files are now referred to under reference 2/3/4836:
- File 2/3/4710 covers the application at outline stage and it relates to the use of the site for educational purposes. This application was approved by Cheshire County Council on 12 July 1966.
- File 2/3/4836/4710 covers the detailed planning consent which was approved by Cheshire County Council on 17 January 1967.
17. The Council has confirmed that it holds the planning decision notice and the accompanying plans and drawings for both the outline application and the detailed application stages of the planning process.
18. Additionally, the Council holds the original hard copy file for the detailed stage. The file contains documents which include the decision notice required by the Town and County planning Act 1962. This was the legislation in force in force at the time the approval was granted. The documents held are the site plans, elevation drawings of the proposed school and copies of correspondence between the County Planning Officer and the County Architect. The site plans are entitled Runcorn Newtown: They have been annotated to read Upton-by-Chester, Upton

Park. The County Planning Department's stamp indicates that the plans were received by the Council on 3 November 1966.

## **Reasons for decision**

---

19. Under Regulation 5(1) of the EIR, a public authority holding environmental information is obliged to make that information available on request.
20. Under Regulation 5(2) the Council is required to provide the information as soon as possible and no later than twenty working days from the receipt of the request.
21. Where there is a dispute concerning a public authority's compliance with regulation 5 of the EIR, the Commissioner follows the approach taken by the former Information Tribunal's ruling in EA/2006/0072 (Bromley). In that case, the Tribunal determined that there can seldom be absolute certainty that additional information relevant to the request does not remain undiscovered somewhere within the public authority's records. Therefore, when considering whether a public authority holds any additional information, the normal standard of proof to apply is the civil standard of 'on the balance of probabilities'.
22. The Commissioner's judgement in such cases is based on the complainant's representations and the public authority's submissions concerning the searches it has undertaken.
23. The Commissioner expects the public authority to conduct a reasonable and proportionate search in all cases.
24. In this case, the complainant has referred the Commissioner to several pieces of evidence which, he considers, indicates that the Council might hold the hard copy of file 2/3/4710, contrary to the Council's position that the file was erroneously sent for scanning and subsequently destroyed.

## **How the Council stores its information**

25. Planning records for pre-1974 planning applications are retained as hard-copy documents in the Council's records store at the Beacons in Frodsham.
26. The location of the boxes containing the Council's physical records is recorded on a spreadsheet which is maintained by the Council's Records Management Service. This spreadsheet is cross-referenced against a ledger which is retained electronically by the Council's Planning Service.

27. The ledger records the number of each storage box and also the reference numbers of the files which the box contains.
28. Documents can be requested by email. An email is sent to the Records Management Service which identifies the box number and file number which is to be retrieved by the Records Clerk.
29. When a file is recovered it is delivered by the Records Clerk to the officer who made the request. A document request slip is then inserted to denote that the file has been requested by a named individual.
30. Following its receipt of the complainant's request, the Council's Area Planning Manager identified that the information related to a pre-1974 planning decision. He therefore asked for the relevant planning files to be retrieved from the Council's records store at the Beacons storage facility in Frodsham.
31. The initial request for the file was sent by email to the Council's records keeper on 14 November 2014 and a search of the Paper Records Management Database was subsequently made.
32. The box containing the paper records – box 3655, was recovered from the storage facility and was searched for file 2/3/4836.

### **The Council's searches**

33. The Council searched for file 2/3/4836, but did not search for the original planning application. This was because the original application had not been specifically requested at that time. Nevertheless, the Council assures the Commissioner that any separate planning application related to reference 2/3/4836 would have been contained within that planning file.
34. The Council points out that it covers nine former district council areas and three former borough council. Its searches revealed that there was no consistent approach used for planning applications during the 1960s. Nevertheless, the Council asserts that, had there been a separate planning application, it would have been associated with file 2/3/4836. From the general experience of its Planning Service, the Council believes that it can reasonably expected that all the files transferred to the Council by its predecessor authorities, will be substantially complete and intact.
35. The Council has advised the Commissioner that file 2/3/4836 contained no associated applications and consequently it is unable to confirm whether one ever existed or to explain why an associated application was not found within this file.

36. The Council stresses that File 2/3/4836 concerns the construction of a new primary school in the 1960s and correspondence indicates that there was no separate planning application. There are however, letters written between the County Planning Officer, the Area Planning Officer and the County Architect, supplemented by internal consultation involving officers responsible for the Highways and Sewerage.
37. The Council carried out a search for file 2/3/4710 on 27 November 2014. The Council followed the same procedure as that used for its search for file 2/3/4836, but was unable to find file 2/3/4710 in the box in the expected location.
38. Initially, the Council's searches did not include a search of its electronic data. This was because the Council anticipated that the two files would be held in hard copy at the Beacons storage facility.
39. The discovery that a hard copy of file 2/3/4710 was not held, prompted a search to be made for the Council's digital records for this file. That search resulted in the discovery that only the Planning Decision Notice and site plans were held in respect of 2/3/4710 and consequently the Council carried out an internal investigation.
40. The Council's internal investigation found that, although file 2/3/4710 had been correctly labelled, it had been erroneously sent by Iron Mountain to the digital records contractor responsible for scanning the Council's historic planning records. This occurred during the Council's digital transformation programme which took place between 2010 and 2012.
41. This error explains why the Council now holds only the Planning Decision Notice and the site plan for file 2/3/4710.
42. Planning files for the period before 1974 are rarely required to be accessed. This led the Council to decide that its 1947 – 1974 planning files would be retained and stored in hard copy format.
43. A decision was taken as part of the digital transformation programme to retain only the key documents associated with planning files over twenty years old. The key documents were identified as being appropriate plans and drawings, the decision notice, details of related legal obligations and notices of decisions made by the Secretary of State in cases which have been appealed.
44. All planning files for the period 1974 – 1993 are now held electronically.
45. As a minimum, the Council's electronic records for the period 1974 – 1993 include the appropriate accompanying plans and drawings, the decision notice, any planning conditions attached to the decision, legal

obligations and, where an appeal to the Secretary of State has been made, the appeal decision.

46. Nevertheless, during the Council's digital transformation programme, the contractor did not implement the Council's express instruction to return file 2/3/4710 in full for continued storage. This file no longer exists in hard copy format.
47. The Council was not able to verify what documents were contained in file 2/3/4710, choosing only to comment on the documents which were possibly destroyed. Nevertheless, the Council is satisfied that it holds the key documents for file 2/3/4710 – the site plan and a decision notice. These documents are held electronically. The decision notice contains only one condition relating to the grant of planning permission, and that itself relates to "the submission to and approval by the LPA<sup>1</sup> before development commences, of detailed drawings relating to the siting, design and external appearance of all buildings to be erected on the site together with the means of access thereto".
48. The Commissioner asked the Council whether it has a record of the destruction of file 2/3/4710.
49. The Council confirmed it has no records of that file's destruction. It is able only to rely on its records of when each of its planning files were digitised during 2010-2012, and from these it can only adduce the approximate date when file 2/3/4710 was purged and scanned in error against the Council's express instructions: This was "around February 2011".
50. The Council is also unable to confirm what additional documents may have been contained within file 2/3/4710. The Council is able to confirm that the scanned and retained documents confirm the legal status and any associated planning conditions relating to the site.
51. The Council's Retention Schedule advocates that records of this type, such as planning decisions, should be held permanently, either as paper or electronic copies. Nevertheless, the Council accepts that file 2/3/4710 is no longer held and it further accepts that this file should not have been 'weeded and scanned'. The Council acknowledges that the file should have been retained at its storage facility with all of its original contents in hard copy format.

---

<sup>1</sup> Local Planning Authority

52. The Council's document retention policy for its Planning Service Development Control function was never formally adopted. This policy would have required that, for planning applications made prior to 1 January 1977, only the decision notice and location plan will be retained.<sup>2</sup> Rather than adopting this policy, the Council's Planning Service had regard to appropriate government legislation in force at the time.
53. The Council confirmed that no electronic data has been deleted. It did however accept that, in the case of file 2/3/4710, any documents that were held in hard copy form (other than the site plan and the decision notice) are likely to have been destroyed during the scanning process. The Council was unable to confirm what these documents may have been but can say, on the basis of the documents contained in files for other primary schools applications at that time, documents would likely have been internal correspondence between officers concerning Highways and Sewerage.
54. The Commissioner asked the Council whether the file 2/3/4710 should have been retained and if so, for what reason?
55. The Council informed the Commissioner that the primary purpose for the file to be retained was for the Council to comply with its statutory obligations for records management of planning files and secondly, to provide general access to information for the public.
56. Additionally, the Council said there is no business purpose to be served in retaining extraneous County Council information relating to a school built in the 1960s. The main documents that are required to be retained for planning purposes are the relevant site plan and the approved decision, including any conditions attached to that approval. The separate issue of the Council's ownership of the site is information which is held by the Council's Property Service and ownership of the site is also recorded by the Land Register.
57. The Council advised the Commissioner that it had a duty to comply with relevant legislation in respect of its register of applications.
58. The Town and Country Planning (Development Management Procedure)(England) Order 2010 places an obligation on the Council to

---

<sup>2</sup> There is an exception to this policy for planning applications which concern pre-1977 mineral permissions and applications for sites classed as dormant. In those cases the policy requires that the full file is retained.



retain the information sought by the complainant, although the Council is not clear how the 2010 order can be applied retrospectively in respect of a file dating from the 1960s.

### **The complainant's evidence and assertions**

59. The complainant provided the Commissioner with evidence which he believes does not support the Council's position that the contents of file 2/3/4710 were destroyed.
60. This evidence consists of two scans of pdf documents – '2 3 4720' and '2 3 4710', which purport to show that file 2/3/4710 was scanned. The complainant believes that important metadata has been removed from the scans by way of Adobe Acrobat's Sanitised Document function. The complainant believes that the 'sanitised' data would show when the scans were actually created and acquired.
61. The Council point out that there is no document titled 2 3 4720: the documents are '2 3 4710 decision.pdf' and '2 3 4710 plans.pdf'. The documents were created from a read-only CD View software package which converts the original TIFF or JPG documents into PDF format. The two documents were created in PDF format and were emailed to the complainant's councillor on 27 August 2015. The Councils' Planning Service's Development Management Team only has access to Adobe Acrobat Reader: They do not have access to the sanitise document function. Therefore the removal of metadata would not have been possible within the planning office. The PDF documents sent to the complainant's councillor are exactly the same documents as those titled 0386.tif (the planning decision) and 0388.jpg (the plan).
62. The documents from file 2/3/4710, which were scanned and destroyed, went through "Quality Control" on 3 March 2011. This is confirmed in an 'access database' received from the scanning contractor. An email from the contractor dated 10 December 2015 confirmed the dates of creation for the screenshots for 0386.tif as 7 March 2011 and for 0388.jpg as 23 February 2011. Both documents are read-only files.
63. The Council's external IT provider – CoSocius, has confirmed that the two files 0386.tif and 0388.jpg are identical to those on the DVD and that no changes could have been made to them. CoSocius has used an SHA-256 hash tool<sup>3</sup> to calculate the integrity of the two files. Detailed

---

<sup>3</sup> The SHA (Secure Hash Algorithm) is one of a number of cryptographic hash functions. A cryptographic hash is like a signature for a text or a data file. SHA-256 algorithm generates an almost-unique, fixed size 256-bit (32-byte) hash. Hash is a one way function – it cannot

results of this test show that the scans are exactly the same and have not changed.

64. The complainant has drawn the Commissioner's attention to the Council's most recent inventory of historic planning files held in storage. This is a spreadsheet titled "Planning 11.08.2014". The complainant insists that he was given confirmation that the files listed on the spreadsheet were held by the Council, at least up to 11 August 2014, and that file 2/3/4710 was held in box 3652 at location F86007005.
  65. The Council points out that the contents of file 2/3/4710 have not been completely destroyed. It restated its position that the hard copy file was sent in error for scanning, contrary to the Council's instructions, and only the decision notice and site plan were retained. These are now held electronically.
  66. The hard copy documents were held by the contractor for a short period following scanning and before they were destroyed.
  67. The spreadsheet provided to the Council after the scanning process was completed, shows that file 2/3/4710 should still have been in box 3652 when the complainant made his request. Unfortunately, because the file was scanned in error, this was not the case.
  68. The Council refutes the complainant's assertion regarding the confirmation he received (at paragraph 63). It accepts that the spreadsheet may have shown that file 2/3/4710 should have been located in box 3652, but the person who gave that confirmation would not have known whether that particular file was in a particular box.
  69. The spreadsheet records the pre-1974 hard copy files which had been sent for long-term storage. It records over 28,000 planning records. The Council assures the Commissioner that there was no removal, examination and checking of individual files from the large number of boxes before they were moved from one storage location to another. Nor was there any need to do this.
  70. The Council's officers, who have dealt with the complainant's request, could only rely on the spreadsheet which indicates the locations and contents of the storage boxes. This spreadsheet was an updated version which reflected the transfer of the boxes from one location to another. It
- 

be decrypted back. This makes it suitable for password validation, challenge hash authentication, anti-tamper, digital signatures.

was not an inventory of the files in each box. They could not know what the boxes definitively contained.

71. The complainant does not accept that file 2/3/4710 is 'lost'. He understands, through a council employee, that the file had been retrieved and issued to the Council's Planning Department. The same council employee confirmed that the file was stored in box 3652. The complainant asserts that the document withdrawal slip, completed by another council employee, suggests that the file was located in box 3652 and was retrieved on 26 November 2014.
72. The Council has investigated the complainant's assertion. It questioned its employee about the statement she made to the complainant about the contents of box 3652 having been located and retrieved. The employee reported to her employers that she did not recall having given the complainant that confirmation.
73. When box 3652 was retrieved, the Council's Information Management Assistant found only one planning file – file 2/3/4715. He assumed the complainant had misquoted the file reference and therefore provided file 2/3/4715 to the person within the Council who had asked for it. At that point the Council's requester acknowledged her receipt of file 2/3/4715 and then restated her request for file 2/3/4710.
74. Normally access to planning records is provided at one of the Council's public officers. In this case however, the complainant was given access to the Beacons Storage Facility, where he was allowed to view box 3652 and the adjacent boxes. He found box 3652 to be empty, save for the withdrawal slip for file 2/3/4710. This showed that the file had been requested.
75. The Council fully accepts that the document withdrawal slip was completed and that the withdrawal request was made on 26 November 2014.
76. The Council also accepts that the withdrawal slip provides no detail to suggest that the file which was located, was anything other than file 2/3/4710.
77. The key to understanding what information was actually sent to the Council's requester is contained in an internal email which shows that it was file 2/3/4715 that was dispatched and it was this which led to the restating of the request internally.
78. The complainant's request was made in 2014 and it was only file 2/3/4715 that was found in box 3652 in November 2014. This is because file 2/3/4710 had been erroneously scanned in early 2011. At that point, file 2/3/4710 ceased to exist in hard copy form. From that

point onwards, the only remaining documents associated with 2/3/4710, which are now held by the Council, are the electronic decision notice and the site plan.

### **The Commissioner's considerations and conclusion**

79. The issue of primary importance in this case is the question of whether the Council holds planning file 2/3/4710.
80. It is clear from the representations made by the complainant that he believes the information is held by the Council or the Council has, for some unidentified reason, purposefully, mislaid, deleted or destroyed it.
81. The essence of the Council's position is that the file was sent in error to be scanned as part of the Council's digital transformation project. The result of this error is that only the Decision Notice and the site plan has been retained. Those documents are now only held electronically.
82. It is now for the Commissioner to decide whether, on the balance of probabilities, the Council's position is credible in the face of the assertions and evidence advanced by the complainant.

### **The Commissioner's conclusion and decision**

83. The Commissioner has fully considered the representations made by the Council and by the complainant. The Council's position is simple: The Council does not hold the contents of file 2/3/4710 except for electronic copies of the Planning Decision Notice and the Site Plan.
84. This situation has arisen because two errors occurred: The first error was made by Iron Mountain, when it wrongly sent file 2/3/4710 for scanning. This resulted in the contractor scanning only the decision notice and site plan and then destroying the remaining contents of the file.
85. The second error was made by the Council's Information Management Assistant. This person should not have completed the withdrawal slip for file 2/3/4710 or attached it to any file until the correct file had been found. Nor should he have suggested, in his subsequent emails, that he had sent file 2/3/4710, when in fact he had sent file 2/3/4715.
86. The Commissioner accepts the assertions made by the complainant: On their face, and given the evidence he has supplied, those assertions are suggestive that file 2/3/4710 is held somewhere within the Council.
87. However, the Commissioner cannot definitively determine whether the Council does in fact hold the full contents of file 2/3/4710: He must consider the complainant's evidence against the explanations advanced

by the Council. In the Commissioner's opinion, the Council's explanations effectively rebut the complainant's assertions and explain, to the required standard, why the Council no longer holds the full contents of file 2/3/4710, in hard copy or electronically. The Commissioner considers the Council's representations to be both credible and persuasive.

88. The Commissioner notes that the complainant has also submitted a complaint to the Local Government Ombudsman. That complaint, in part, relates to missing planning files. Having reviewed this case, the Commissioner agrees with the Ombudsman when she says that there is nothing to suggest the Council has deliberately destroyed any files.
89. It is clear to the Commissioner that, on the balance of probabilities, the Council is unlikely to hold any hard copy of file 2/3/4710. In all likelihood the hard copy file has been destroyed.
90. It is also likely that the Council has provided the complainant with all of the information it holds which is contained in file 2/3/4836. Confirmation of this is provided by an email of 3 July 2015, from a council employee to the Council Solicitor, which states, "2/3/4836 has always been with Records Management and the file which we have provided to [the complainant] is the full file of all documents which were in the file."
91. Having given full consideration to all of the above, the Commissioner has therefore decided that the Council has complied with Regulation 5(1) of the EIR.

### **Regulation 19 – offence of altering, defacing, blocking, etc**

92. Under Regulation 19 of the EIR, it is an offence for a public authority to alter, deface, block, erase, destroy or conceal any record it holds, with the intention of preventing the disclosure of all, or any part, of that record, where an applicant has made a request and where he would have been entitled to receive or view that record.
93. The Commissioner has considered the complainant's assertion that the Council has committed the offence provided by Regulation 19. For this offence to have been committed it is necessary to prove, beyond reasonable doubt, that the Council destroyed the any of the contents of files 2/3/4836 and 2/3/4710, with the 'intention' of preventing their disclosure.
94. In this case no such intention can be adduced and therefore the Commissioner considers that it is unlikely that the Council or any of its employees has committed this offence.

95. The Commissioner notes the age of the files in question and the time period during which the file 2/3/4710 was likely to have been scanned and the information it contained destroyed. He is satisfied that these actions were carried out in error and that they took place before the complainant made his requests.

### **Failure to carry out an internal review**

96. It is clear to the Commissioner that the complainant submitted his requests to the Council with the expectation that they were to be dealt with under the provisions of the EIR.

97. When the complainant received the Council's response, the complainant wrote to the Council and requested an internal review. He made representations about, what he considered was, missing information.

98. By making his representations, the complainant was in effect emphasising that his requests were made under the provisions of the EIR.

99. The complainant's representations should have alerted the Council to the requirements of Regulation 11 of the EIR. This regulation requires the Council to consider the complainant's representations and to decide whether it had complied with the provisions of Regulation 5 and the Council should have notified the complainant of its decision within 40 working days.

100. The Commissioner does not accept the Council's position that the complainant's request fell to be dealt with as "routine business". He has therefore decided that the Council has breached Regulation 11 of the EIR.

101. The Commissioner must emphasise to the Council that the provisions of the EIR enhance a person's rights to access publicly held information. By treating the complainant's requests as routine business, the Council was potentially denying the complainant his statutory rights.

## Right of appeal

---

102. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

103. 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.

104. 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**