

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

Decision notice

Date: 13 January 2016

Public Authority: Cheshire West and Chester Council
Address: HQ Building
Nicholas Street
Chester
CH1 2NP

Decision (including any steps ordered)

1. The complainant requested information from the council on where within a particular planning file it states that part of a listed boundary wall could be destroyed. The council initially said that the request was not valid. During the Commissioner's investigation, the council clarified that it did not hold the specific information requested. The Commissioner accepts that on the balance of probabilities this was the case. He has found breaches of 14(2) and 14(3) of the Environmental Information Regulations 2004 ("the EIR") because the council did not refuse the request properly. There are no steps to take.

Request and response

2. On 1 July 2015, the complainant requested information from the council in the following terms:

"Under the Freedom of Information Act, please could you provide me with the following information:

Council employees have informed me that Listed Building Consent 03/0052/LBC gave permission for part of a listed boundary wall on Upper Camden Road, Chester to be demolished (copy available on CQ&C website). It is noted that in the "Officer Report" for 03/0052/LBC

it states "Having regard to the earlier consent, approval is recommended". (copy available on CW&C website). The earlier consent is 96/00364/LBC in which it states "the repair repointing and replacement of brickwork including the boundary wall, gates and piers" (copy available on CW&C website).

Where exactly in 03/0052/LBC does it state part of this listed boundary wall can be destroyed?"

3. The council responded to the request on 2 July 2015. The council said that the complainant had asked a question and had not requested recorded information. It said that the complainant already had the relevant document. It added that the question had already been answered during the planning and complaints process.
4. On 2 July 2015, the complainant requested an internal review. He said that the request was valid because he wanted the council to tell him what information it holds within the document that allows a section of the listed boundary wall to be destroyed.
5. On 2 July 2015, the council replied. It said that it wished to maintain its position. It reproduced its response to an earlier complaint made by the complainant about this matter, which set out the council's position.

Scope of the case

6. The complainant contacted the Commissioner on 3 July 2015 to complain about the way his request for information had been handled. The complainant asked the Commissioner to consider whether the council held the information. For clarity, there was some disagreement between the complainant and the Commissioner about the extent of the information covered by the scope of this particular request, which the Commissioner has discussed in further detail below. The Commissioner explained to the complainant that his investigation must be limited to the terms of the request for information made.

Reasons for decision

Regulation 5(1) and 5(2)

7. Regulation 5(1) of the EIR provides a general right of access to recorded environmental information held by public authorities. Public authorities should make environmental information available within 20 working days unless a valid exception applies in accordance with regulation 5(2).

8. 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 argument. He will also consider the actions taken by the authority to check that the information was not held and he will consider if the authority is able to explain why the information was not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held. He is only required to make a judgement on whether the information was held "on the balance of probabilities".¹
9. Initially, the complainant complained to the Commissioner that he had not been provided with the information he had requested because it was not contained within the document previously provided to him. He wrote that he suspected that the information was not held. As it appeared that the issue may concern a dispute about the interpretation of information within a particular document, the Commissioner highlighted that his role was to consider recorded information held by public authorities and whether that information had been provided. He asked the complainant for clarification. At this point, the complainant said that he wanted to request a copy of a number of drawings and written approvals relating to file references 03/0052/LBC and 96/00364/LBC.
10. The Commissioner informed the complainant that his investigation must necessarily be limited to the terms of the request for information he made and he suggested that the complainant may wish to make a new, broader request for information. The complainant declined, stating that he considered that the council should disclose the information upon which its decision was based. The Commissioner would like to make it clear that in his view the scope of this request does not extend to all of the information the council may have used to make its decision. It extends only to the issue of whether the council held any recorded information within the file 03/0052/LBC that stated that part of the listed wall could be destroyed.
11. When the council responded to this request initially, it said that the request was not valid because it was a question referring to information which the complainant already had. It added that the question had in any event already been answered previously during the planning and complaints process. It is worth exploring the background complaint as this is relevant to the question of whether the information requested was held by the council.

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

12. As part of its internal review, the council reproduced an extract from the council's earlier response to a 'stage 1 complaint' made by the complainant under its corporate complaints policy. This was sent to the complainant on 26 July 2013. It described that the complainant had complained about the removal of a listed wall at the front of a particular site. In the complainant's opinion, the works did not benefit from listed building consent and the council should seek to have the wall reinstated. It described that the complainant had been shown listed building consent documents dating from 1997 (reference 96/00364/LBC) and 2003 (reference 03/00052/LBC). It was explained to the complainant that the two consents were unrelated but that the 1997 consent had been considered to be an important contextual document and that it was still capable of implementation in 2003. It explained that the 1997 consent established the principle of demolishing and rebuilding at least part of the wall. It was also explained that the 1997 consent related to a smaller site area than the 2003 consent, but that it did include part of the boundary wall under dispute.
13. The complaint response further described that the complainant had been shown a plan reference 4200/D26, which was date-stamped 10 September 1997 (the same date as the issue of 96/00364/LBC) and contains two written references to the application number. However, the complainant disputed that the plan related to the listed building consent. Additionally, the complainant also stated that the relevant condition on 09/00364/LBC (number 5) requires the boundary wall to be repaired rather than demolished and rebuilt in a different location. The council said that it had been explained to the complainant that the relevant part of the condition refers to all brickwork on site, which includes the boundary wall, gates and piers but does not relate exclusively to them, and allows for the 'repair, re-pointing and replacement' of the brickwork. The council said that read in conjunction with the disputed plan, which clearly makes reference to 'new boundary wall', it could be deduced from the approved documents that the consent allowed for the demolition and replacement of the wall further back into the site.
14. The council added that it had shown the complainant documents relating to 03/00052/LBC, the plans of which appear to show an identical boundary wall scheme to that approved in 1997 and which make reference to 'reconstructed wall'. It was explained that the plan referred to was date-stamped 28 September 2006, which was after the grant of 03/00052/LBC on 21 May 2003. However, based on the documents available, the council's view was that it was highly likely that the demolition of the whole frontage wall was allowed by the grant of 03/00052/LBC. It had explained that there were no conditions placed on the consent that required the retention of any parts of the boundary wall, or even a condition requiring its reconstruction. The council noted that the complainant did not accept its response.

15. In its response to the Commissioner, the council confirmed that its position was that the requested information was not in fact held. It said that there is no statement in 03/0052/LBC or associated documents which specifically states that part of the listed boundary wall can be destroyed. As described in some detail to the complainant previously, the council had interpreted the situation, using a previous consent as context. The council said that it had undertaken searches to check that 03/0052/LBC and associated documents do not specifically state that part of the listed boundary wall could be destroyed. It confirmed that it had searched all relevant planning records and that no information was missing and nothing had been destroyed or deleted. It said that it had referred to all records that are considered to relate to the building that is the subject of the consent (and its curtilage) when responding to the complaint. It explained that the other plans held relate to the wider Tower Wharf Development (which was the subject of planning permission reference 03/00012/FUL) and are not relevant to the particular matter being disputed by the complainant. It added that all of the planning consents are available online here:
<http://pa.cheshirewestandchester.gov.uk/online-applications/>.
16. Based on the above response, the Commissioner accepts that on the balance of probabilities, the council did not hold the specific recorded information requested. The council concedes that it should have stated that the information was not held rather than stating that the request was not valid, nonetheless, it has subsequently clarified its position and it has been able to provide a detailed explanation of how it made its decision about the boundary wall in this case. The merits of that decision are clearly part of a dispute between the council and the complainant but that is not a matter for the Commissioner. In view of the nature of the council's explanation of how this particular decision was arrived at, it seems particularly unlikely that the information sought (a specific statement that the boundary wall could be demolished) would ever have been held by the council. Indeed, the complainant's original complaint to the Commissioner indicates that it was the complainant's own view that no such statement was held. As noted above, the complainant subsequently indicated that he would like copies of various related documents which he believes the council based its decision on but in the Commissioner's view, that information falls outside of the scope of this request and complaint.

Regulation 14(2) and 14(3)

17. Regulation 14(2) and 14(3) provide that when a public authority wishes to refuse to provide information, it must specify the exception in question within 20 working days.

18. When requested information is not held by a public authority, under the EIR, it should provide a refusal notice citing the exception under regulation 12(4)(a) within 20 working days. As the council did not acknowledge that it had received a valid request until during the Commissioner's investigation and therefore did not cite regulation 12(4)(a), the Commissioner considers that the council breached regulations 14(2) and 14(3) of the EIR.

Right of appeal

19. 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

20. 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.
21. 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

Elizabeth Archer
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF