

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

Decision notice

Date: 16 March 2016

Public Authority: Mid Devon District Council

Address: Phoenix House
Phoenix Lane
Tiverton
Devon
EX16 6PP

Decision (including any steps ordered)

1. The complainant has requested information relating to an enforcement complaint made about a third party. The council provided information however the complainant believes that further information must be held falling within the scope of the request.
2. The Commissioner's decision is that the council was correct to apply Regulation 12(4)(a) to the complaint. However the Commissioner has also decided that the council did not comply with Regulation 5(2) in that it did not respond to the complainant's request within 20 working days.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 14 July 2013 the complainant made the following request for information under the FOIA for:

"We would request the Council, pursuant to the provisions of the Freedom of Information Act, and prior to the planning meeting in August, disclose to us all documents held and produced by the Council in respect of the noise and planning issues, to include case notes, meeting minutes and correspondence save for those that are

determined to be legally privileged."

5. The council did not initially respond to the complainant and further chaser letters were sent in 2014. The complainant then wrote to the Chief Executive of the council on 1 February 2015 to make a complaint that her request had not been responded to. At that point the Chief Executive provided a personal apology and ensured that the council took action to respond to the request from that point. An explanation as to the reasons for the council's failure to respond was also provided.
6. The finally council responded on 22 May 2015 providing information to the complainant. It said that this was all of the information which it holds. It redacted a small amount of information under section 40(2) of FOIA (which the Commissioner considers should have been Regulation 13 of the EIR).
7. The complainant wrote back on 31 May 2015 saying that she considered that further information must be held. She did not however question the small amount of redactions under Section 40(2) and this has not therefore been considered further in this decision notice.
8. Following an internal review the council wrote to the complainant on 28 July 2015. It said that it had found a small amount of further information and also provided this to the complainant. It confirmed however that it had now provided all of the information it held. The complainant however still considers that further information must be held.

Scope of the case

9. The complainant initially contacted the Commissioner on 29 April 2015 to complain about the way her request for information had been handled. Following initial correspondence as outlined above the complainant wrote back to the Commissioner on 25 November 2015 to confirm that she still believes that further information must be held by the council.
10. She also raised issues with the disclosure of a third parties personal data however this is not a matter which is relevant to the investigation as to whether further information is held in this instance.
11. The Commissioner considers that the complaint is that the council has not provided the complainant with a copy of all of the information which it holds which falls within the scope of the request.

Reasons for decision

12. Regulation 12(4)(a) of the EIR provides that:

“For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(a) it does not hold that information when an applicant's request is received;”

13. The complainant outlined a number of questions relating to correspondence which appeared to have no response, and reference to meetings where the outcome was not disclosed to her. She argues that this is evidence that the council has failed to locate all of the information falling within the scope of her request.
14. 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 proof, namely 'a balance of probabilities'.
15. 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).
16. The Commissioner therefore wrote to the council asking it a number of questions relating to the searches it had carried out in order to locate relevant information.
17. The council clarified that it had carried out searches in order to locate the information. It said that it had carried out searches of its line of business application which is called IDOX Uniform for Development Control, Enforcement and Environmental Health ('Uniform'). It had carried out searches of 'Uniform' for the various planning applications and other complaint submissions that had been made on the farm site. It also carried out searches of working files and emails.
18. The council confirmed that no information is held locally on computers. All information is held in network areas such as shared folders or in 'Uniform'.
19. It confirmed that searches were carried out under search terms such as the name of the complainants and the name of the farm in question. It also used relevant 'Uniform' references to search for the information.

20. The council confirmed that if further information was held it could be held as electronic data, with some manual information held for planning applications and environmental health working files.
21. When asked if any information had been held previously but been destroyed as some point in the past the council said that no information had been destroyed insofar as it was aware. It said however that emails from prior to 2012 would have been destroyed but it did not consider that these would fall within the scope of the request. It said that these would be have been deleted during normal administrative 'housekeeping' tasks for ensuring the size of email boxes remained within size limits.
22. Other than the possibility of this, it confirmed that no deletions of data would have occurred as this is a live ongoing planning enforcement case relating to environmental health statutory noise nuisance.
23. The council confirmed that there are statutory requirements to retain investigation, inspection and monitoring information for at least seven years. It said that planning enforcement information is retained for at least 3 years.
24. Finally the council also confirmed that it had asked relevant officers of they were aware of any further information being held. The officers had confirmed that they were not aware of any further information being held.

Conclusions

25. The complainant believes that further information is held based upon her previous correspondence with the council regarding an enforcement matter and on the contents of the information which has already been disclosed to her. She argues that there has been (or should have been) further information held by the council.
26. However the question for the Commissioner is not what information 'should' be held but what information *is* held on a balance of probabilities. In one of its initial responses to the complainant the council officer admitted that further information may have been held in the past, however the question for it was what information was held at the time of the request. As noted above however it has not been able to establish any records of information being deleted as it considers that the files are still live, working files.
27. The Commissioner must to an extent accept the council's response on face value. If however there is evidence that further information should be held then he can question the responses of the authority further.

28. Given that the council initially failed to find all of the information it held and that further information was subsequently located and disclosed on two separate occasions the Commissioner fully understands why the complainant does not trust the council's final response that it has now provided all of the information which it holds. This is compounded by the council's initial failure to respond to requests in any way. The council has accepted that its response fell short of the standards it should meet regarding this point.
29. The council has said that the information is retained in live 'working' files. This does not therefore appear to be a case where archived information may have been mislaid or destroyed over the course of time. It appears to the Commissioner that the reasons for the part disclosures to the complainant previously may relate more to the fact that the information is held within a number of files, mixed between complaints about nuisance and various planning applications made in the past.
30. The Commissioner considers that that partial nature of the disclosures which took place does raise concerns about records management at the council, and in particular its ability to locate information which falls within the scope of requests it receives. Had the complainant not questioned the initial responses to her it is clear that relevant information falling within the scope of the request would not have been located and disclosed, and given the nature of the information requested (i.e. relating to one particular property), this should not have been the case. At the least, the fact that this occurred on two separate occasions raises concerns about the scope and adequacy of the initial searches which the council carried out to locate relevant information.
31. Nevertheless, given the searches which the council has described as having now taken place, the Commissioner's decision is that on a balance of probabilities the council is correct to say that no further information is held.

Right of appeal

32. 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

33. 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.
34. 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
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