

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

Decision notice

Date: 26 July 2016

Public Authority: Waverley Borough Council
Address: The Burys
Godalming
Surrey
GU7 1HR

Decision (including any steps ordered)

1. The complainant has requested information about internal or external legal advice concerning an Environmental Impact Assessment with regard to a particular development (Brightwells). Waverley Borough Council ('the Council') handled the request under the FOIA. It said that all the relevant information it holds is already accessible to the complainant and is therefore exempt from disclosure under section 21(1) of the FOIA. It says that it holds no further information.
2. The Commissioner has decided that the request should have been considered by the Council under the Environmental Information Regulations 2004 and concluded that:
 - under regulation 6(1)(b) the Council is not obliged to provide the relevant information that it holds as this information is already publicly available and easily accessible to the complainant in another form or format; and that
 - with reference to regulation 12(4)(a), at the time of the request the Council held no further relevant information.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 10 August 2015, the complainant wrote to the Council and requested information in the following terms:

"I note that in the Farnham Herald it is advised that that Waverley BC have taken proper legal advice and planning for East Street, please could this advice be placed in the public domain to fulfil the statutory consultation obligation?"

5. The Council responded on 16 September 2015. It provided the complainant with website addresses where legal advice and reports, capable of being published, are published. It said the specific information the complainant had requested was exempt from disclosure under section 42 of the FOIA as it is subject to legal professional privilege.
6. Following an internal review the Council wrote to the complainant on 21 October 2015. It maintained its original position.
7. During the Commissioner's investigation however, the Council reconsidered the complainant's request. It now considered that the complainant's area of interest to be confined to Environmental Impact Assessment information specifically, rather than legal advice about the development generally. The Council withdrew its reliance on section 42. The Council's revised position is that it does not hold specific information on legal advice regarding an Environmental Impact Assessment. It says that all the information that it holds that is within the scope of the complainant's request is exempt from disclosure under section 21 of the FOIA because it is already accessible to the complainant. On 26 April 2016 the Council confirmed to the Commissioner that it had sent a new response to the complainant which confirmed the above position.
8. On 29 April 2016 the complainant contacted the Commissioner. He quoted correspondence he had received from the Council on 18 August 2015 in which the Council said it had "*taken both internal and external legal advice in respect of the Brightwells development*". The complainant confirmed that, with regard to the Brightwells development, he is seeking the Council's legal confirmation that its Environmental Impact Assessment meets statutory requirements. He said that this information – internal and external legal advice – is not published on the Council's website. The complainant also said that, even if it was, the advice would not be accessible to people without the necessary IT skills.

Scope of the case

9. The complainant contacted the Commissioner on 9 November 2015 to complain about the way his request for information had been handled.
10. The Commissioner has considered whether the FOIA was the correct regime under which to handle the request. Following correspondence

with both the complainant and the Council, the Commissioner has then investigated whether the Council correctly applied section 21(1) of the FOIA, or its EIR equivalent – regulation 6(1)(b), to the information that it holds, and whether under section 1(1) of the FOIA or regulation 12(4)(a) it held any further information that is relevant to the complainant's request; namely information (internal and external legal advice) that confirms that the Environmental Impact Assessment in question meets statutory requirements.

11. The Council has withdrawn its reliance on section 42 and so the Commissioner has not included this exemption, or its EIR equivalent, in his investigation.

Reasons for decision

Is the request for environmental information?

12. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR rather than the FOIA if it meets the definition set out in regulation 2(1)(a) to 2(1)(f) of the EIR. The Commissioner considers the information in this case can be classed as environmental information, as defined in regulation 2(1)(c) of the EIR. This says that any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors of the environment listed in regulation 2 will be environmental information. One of the elements listed is land.
13. The request is broadly for information about legal advice concerning an aspect of a planning project. The Commissioner is therefore satisfied that, as the request is for information concerning the use of land, it falls under the EIR and the Council was incorrect to manage the request under the FOIA. The Commissioner notes, however, that, in this particular case, considering the request under the EIR makes no material difference to the outcome of the complaint, which largely concerns whether or not information is held.

Regulation 6(1)(b) – form and format of information

14. Regulation 6(1)(b) of the EIR says that a public authority is not obliged to make information available if the information *"is already publicly*

available and easily accessible to the applicant in another form or format".

15. In the guidance on regulation 6¹, the Commissioner explains that the key questions are whether the information is '*publicly available*' and '*easily accessible to the applicant*'. The regulation allows a public authority to take the individual circumstances of the applicant into account. In effect a distinction is being made between information that is accessible to the particular applicant and information that is available to the general public.
16. The Council says that all the information that it holds that is relevant to the complainant's request is already published on its website. It has provided the complainant with various web links to this information. The Commissioner must assume that the complainant has found this information because the complainant has said that the published information does not include the Environmental Impact Assessment information he is seeking. Furthermore the complainant has not suggested to the Commissioner that he does not have internet access or the necessary IT skills.
17. As discussed, the Commissioner is satisfied that the Council does not hold specific information concerning an Environmental Impact Assessment. However, the Commissioner is satisfied that all the relevant information that it does hold is published on its website and is therefore publicly available. The Commissioner notes that the Council has also provided the complainant with precise directions to the held information (through web links). It appears that this information is easily accessible to the complainant. The Commissioner is therefore satisfied that the Council correctly applied regulation 6(1)(b) to the information that it holds that is within the scope of the complainant's request.
18. The complainant has argued that the Council should make information available to those without internet access by making a hard copy available in Farnham library. With regards to the relevant information about the development in question that the Council holds and which is published on its website, as detailed above, regulation 6(1)(b) says that information must already be accessible to the applicant. In this case that is the complainant. Relevant information is accessible to the complainant on the Council's website and the Council is therefore not

¹ <https://ico.org.uk/media/for-organisations/documents/1204/information-in-the-public-domain-foi-eir-guidance.pdf>

also obliged to make it available to him (and so potentially to others) through a library.

Regulation 12(4)(a) – information not held

19. Regulation 12(4)(a) says that a public authority may refuse to disclose information to the extent that it does not hold the information when an applicant's request is received.
20. The Council maintains that all the information that it holds that is relevant to the complainant's original and clarified request is published on its website and that it holds no further relevant information.
21. The complainant says legal advice concerning any Environmental Impact Assessment is not on the Council's website but its correspondence to him of 18 August 2015 suggests that it must hold such information.
22. The Commissioner drew the Council's attention to its previous correspondence to the complainant and the Council clarified the situation with the relevant members of staff. On 30 June 2016 it confirmed to the Commissioner that it had not sought internal or external legal advice in respect of the specific narrow issue of an Environmental Impact Assessment. No such information is therefore held and was not held at the time it received the complainant's request. The Council confirmed that all the related information is already in the public domain and accessible to the complainant.
23. The Commissioner accepts that the Council has investigated whether it holds further relevant information and he is prepared to accept that it does not, and did not, because the specific legal advice in question was not sought. On the balance of probabilities, the Commissioner is satisfied that the Council did not hold any further information within the scope of the complainant's request at the time it received the request.
24. Regulation 12(4)(a) of the EIR is technically subject to a public interest test but the Commissioner considers conducting a test to be a futile exercise where, as here, he is satisfied, on the balance of probabilities, that the public authority did not hold any further information at the time of the request. Therefore the Commissioner has not gone on to consider the public interest balancing test.

Right of appeal

25. 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

26. 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.
27. 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

Pamela Clements
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SK9 5AF