

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

### **Decision notice**

**Date:** 11 September 2018

**Public Authority:** Hertsmere Borough Council

**Address:** Civic Offices  
Elstree Way  
Borehamwood  
Hertfordshire  
WD6 1WA

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

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1. The complainant has requested various information regarding planning permissions and associated Section 106 Agreements. Hertsmere Borough Council ("the Council") responded by either disclosing held information, advising where the held information was already publicly available and easily accessible, or denying that it was held.
2. The Commissioner's decision is that the Council has complied with regulation 5(1). However, the Council did not comply with the requirements of regulation 5(2) and regulation 11(4).
3. The Commissioner does not require the Council to take any steps.

## Request and response

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4. On 15 August 2017, the complainant requested information in the following terms:

**Question 1:** *"Who owns the land and is therefore responsible for ensuring all the conditions for development, as stated in any planning approval, are met ?"*

*This land is marked as South Surface water attenuation basin, or swale. There is also a north swale on the site. Defined as a Publicly Accessible Area*

*Please provide this detail.*

**Question 2:** *Issue with this Southern border existing wildlife corridor; However this year, spring 2017 and during the bird nesting season, , this southern wildlife corridor along the train track embankment, has just suffered large tree loss with the cutting back of trees within this corridor. (probably by Rail Network company staff) This wildlife corridor is not being protected, but eroded. This corridor has been identified within the Landscape MP(master Plan) diagram. TP-11-1333 Landscape MP JSL 1806 100F (RM).pdf*

*The council needs to address this issue and protect it.*

**Question 3:** *Information request: There is a 5 year site management and maintenance requirement, but it does not stipulate who is responsible for this upkeep? Ie replacement of damaged or dying trees etc.*

*Please provide this detail.*

**Question 4:** *Proof of responsibility as defined within the "Deed of Agreement" dated 28<sup>th</sup> Sept 2010:*

*The attached document; TP\_10\_1036-\_FD93CA85-3E1D-4288-A473-3D8D455BB634\_.pdf-58776 (Deed of Agreement – dated 28<sup>th</sup> Sept 2010) Identified key aspects of this development;*

*4a) Item D – page 1 - Site owner to be Hertfordshire County Council ( the county council) and the Watford Borough Council. This South Attenuation water basin is in the Hertfordshire County council area.*

*4b) Page 4 – "Publicly Assessable Area(PAA)" –NEAP, swales and attenuation area*

*The PAA - NEAP has a 15 year protection, but what about the other PAA items.*

*Why is there no 15 year maintenance plan to protect and manage these PAAs?*

*Action on council to address this detail*

**Question 5:** *Action by the council: What are the Hertsmere Borough council intending to do to manage these open spaces within the Blackwell House site(Queens Acre development) given the above?*

**Question 6:** *Section 6 Landscape Management page 16- A landscape management Plan will be required at the detailed application stage which to provide details of the long term design objectives. The management plan requirement should be dealt as a planning condition. Action by the council: So where is this plan and who is responsible for the upkeep of it?*

**Question 7:** *Section 6 Landscape Management page 16- A landscape management Plan will be required at the detailed application stage which to provide details of the long term design objectives. The management plan requirement should be dealt as a planning condition.*

*Action by the council: But are they protected, and who maintains them?*

**Question 8:** *Section 6 Landscape Management page 16- A landscape management Plan will be required at the detailed application stage which to provide details of the long term design objectives. The management plan requirement should be dealt as a planning condition.*

*Action by the council: Have these PAAs been transferred to the Hertsmere Borough Council?*

**Question 9:** *More importantly section 5.2 –and 5.3 Drawing B08018.03 and .04 - Appendix 1 A3 Drawings and photographs.*

*The provision of;*

*a) cycle path,*

*b) central court yard and*

*c) Landscape amenity,*

*which has not been developed for the residents of Bushey for this development.*

*Action on council to provide details on these three items.*

**Question 10:** *Document – "Statement of Community Involvement"- May 2010 HBC Planning unit stamp dated 8th June 2010- (TP\_10\_1036- \_CA2D858E-DB3C-426D-AB71-768345B7C904\_.pdf-58770.pdf)*

*Appendix 1 - Item 6 – Ecology- "Whilst not a requirement of planning validation, Hertsmere considers that to be on the safe side a bio-diversity and green infrastructure report should be prepared for the site".*

*Action on Council – I cannot locate this intended report. Please provide a copy of this report*

**Question 11:** *Detailed Ecological Survey and Assessment – November 2009 –*

*There is a miss on this report - Void of research on protected newts and butterflies. No mention of activity carried out on both attenuation water basins.*

*Inept description of item 3.2.12 - attenuation water basins and their significance – section 3.2.12 described as "Pit with ivy" – Bulrushes and aquatic plants were not described in this report*

*This report was supposed to be superseded by a further Ecology /biodiversity and green infrastructure report, recommended by Hertsmere Borough Council, in May 2010.*

*No evidence of this report being found. Action on council to provide.*

5. The Council responded on 2 October 2017. It provided individual responses to each of the 11 questions. These responses either disclosed information, advised where the information was publicly accessible, denied the information was held, or sought clarification about the question.
6. On 12 October 2017 the complainant requested the Council to undertake an internal review. He also provided clarification where this was sought.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 8 December 2018 to complain about the way his request for information had been handled, and that no internal review had been undertaken by Council despite this being requested.
8. The Commissioner considers the scope of the case is whether the Council has disclosed all held information that falls within the parameters of the request, and has otherwise complied with its duties under the EIR.
9. As part of the Commissioner's investigation, the Council has been provided with a copy of the complainant's request for an internal review, and asked to consider this when providing its final position. The Council has therefore provided a response that is both an internal review outcome to the complainant, and a submission to the Commissioner.

### **Reasons for decision**

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#### **Regulation 5(1) – Duty to make information available on request**

10. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request. A public authority may make information available on request by either disclosing it to the requestor, or explaining to the requestor how it has made the information publicly available and easily accessible to them (e.g. on a website).
11. Where there is a dispute between the information made available, and the information a requestor believes should be held, the Commissioner follows the lead of a number of First-tier Tribunal (Information Rights) decisions in applying the civil standard of the balance of probabilities.
12. In the circumstances of this case the Commissioner will determine whether, on the balance of probabilities, the Council has complied with regulation 5(1) by making all held information available.

#### Question 1

13. Question 1 requests the current legal owner of specific land. The Council has denied that the information is held, but has referred the complainant to contextual information that is publicly available.
14. The Council has informed the Commissioner that it only holds information about the current legal ownership of land in respect of that which is owned by the Council. This information is contained in an Asset Register. The Asset Register has been consulted in respect of the land specified in the request, but no entry has been found for the specific land.
15. The Council has explained that it does not routinely hold information about the current legal ownership of third party land. If such information is sought at any one time, it will be obtained from the Land Registry. This appears to have been done in 2010, for the purposes of imposing binding planning obligations in a Section 106 Agreement on the then owner of the specific land, Veolia Water Limited. This Section 106 Agreement is publicly available, and the Council understands (from the complainant specifically referring to it in Question 4) that the complainant has already accessed a copy of it.
16. The Council notes that it is not known whether the land is registered or unregistered. However, if the land is registered, information about its current legal owner is publicly available from the Land Registry.

#### *The Commissioner's conclusion*

17. The Commissioner considers that the Council has provided a cogent explanation of the searches it has undertaken in respect of this request, and notes that the Council will not hold responsibility for recording the

current legal owner of third party land. Whilst such information has been sought in the past as part of a Section 106 Agreement, this information is publicly available to the complainant. The Commissioner further notes that should the land be registered, information about the current legal owner can be sought from the Land Registry. Having considered the above factors, it is reasonable for the Commissioner to conclude that no further information is held.

### Question 2

18. Question 2 requests the Council to undertake specific action in respect of tree felling on a railway embankment. The Council has denied that any relevant information is held, but has provided advice about the Council's responsibilities.
19. The Council has informed the Commissioner that it considers this question to be a request for action, rather than recorded information. Notwithstanding this, the Council has explained that it is not aware of any recorded information that would fall within its parameters. The land is not owned by the Council and is not subject to any statutory wildlife designation that the Council oversees, such as a Conservation Area or Tree Protection Orders.

#### *The Commissioner's conclusion*

20. The Commissioner notes that the request appears to seek 'action' rather than recorded information. The Council has advised that it has no responsibility over the railway embankment, and that no recorded information is held as a result. There is no evidence that indicates the Council's position is incorrect, and it is reasonable for the Commissioner to conclude that in the absence of any statutory wildlife designation, the Council will not hold any relevant information.

### Question 3

21. Question 3 requests the identity of the party responsible for the management and maintenance of a site. The Council's has explained that it understands this question relates to planning application TP/10/1036 (which was not disputed by the complainant when requesting an internal review), and has disclosed that the responsibility rests with the current legal owner.
22. The Council has informed the Commissioner that whilst it does not maintain records of the current legal owner of third party land, the duty to comply with the conditions attached to a planning permission still rests with that party. The identity of the current legal owner would only come to be held by the Council in the event of enforcement action.

*The Commissioner's conclusion*

23. The Commissioner has considered the Council's position, and notes that, like Question 1, the Council does not routinely record the current legal owner of third party land. In the absence of any need to record such information, such as for current enforcement action, it is reasonable for the Commissioner to conclude that no further information is held.

Question 4

24. Question 4 requests an explanation of why is there no '15 year maintenance plan' to protect and manage 'publicly accessible areas' ("PAAs"). The Council has denied that any relevant information is held.
25. The Council has informed the Commissioner that this question relates to PAAs that were created as part of a Section 106 Agreement. However, there is no requirement for the Council to have a 15 year maintenance plan (or to hold an explanation of why one has not been created). The Council understands that the complainant may have posed this question based on part of the Section 106 Agreement, which details that, in a specific circumstance, the developer will make a maintenance contribution based on the Council's costs of maintaining the PAAs for 15 years.

*The Commissioner's conclusion*

26. The Commissioner has considered the Council's position, and notes that the question appears to be based on a specific premise (i.e. that the Council must hold either a 15 year maintenance plan, or a written explanation of why this is not so). The Council has provided a cogent explanation of why this premise is incorrect, and why there is no business or statutory need to hold such information. Having considered the above factors, it is reasonable for the Commissioner to conclude that no relevant information is held.

Question 5

27. Question 5 requests information about how the Council intends to manage the PAAs referred to in Question 4. The Council disclosed that once the PAAs are transferred to the Council by the site owner, they will be managed under the Council's general parks and open space management processes.
28. The Council has informed the Commissioner that once the PAAs are transferred to the Council there is no specific provision about how they will be managed, and the PAAs will be added to the Council's Grounds Maintenance Contract with a third party contractor.



*The Commissioner's conclusion*

29. The Commissioner has considered the Council's position, and notes that no specific provision has been made for the management of the PAAs. There is no evidence available to the Commissioner that this is incorrect, and it is reasonable for the Commissioner to conclude that the Council has therefore disclosed that information which addresses the question.

Question 6

30. Question 6 requests information about a 'Landscape Management Plan'. The Council has denied that any relevant information is held.
31. The Council has informed the Commissioner that no condition came to be attached to the planning permission that required the developer to submit such a plan to the Council for approval, nor was this a requirement of the Section 106 Agreement. As such, there is no business or statutory reason for this information to be held by the Council.

*The Commissioner's conclusion*

32. The Commissioner has considered the Council's position, and understands that there is no business or statutory reason for this information to be held by the Council. There is no evidence available to the Commissioner that indicates the Council's position is incorrect. It is therefore reasonable for the Commissioner to conclude that no relevant information is held.

Question 7

33. Question 7 requests the identity of the owner with responsibility for the PAAs. In the Council's response it sought clarification from the complainant, which the complainant provided when asking for an internal review.
34. The Council informed the Commissioner (and the complainant) that the site owner is currently responsible for the PAAs, and that once the PAAs are transferred to the Council, the Council will be responsible for them in accordance with its statutory obligations.

*The Commissioner's conclusion*

35. Having considered what information is clearly sought by the request (i.e. the identity of a party), and the subsequent disclosure, there is no indication to the Commissioner that further information is held.

Question 8



36. Question 8 requests confirmation of whether the PAAs have been transferred to the Council. The Council disclosed that the PAAs have not been transferred to it.

*The Commissioner's conclusion*

37. The Commissioner has considered the Council's response, which the Council has maintained is correct. Having considered what information is sought by the request (i.e. confirmation or denial that sites have been transferred to the Council), and the subsequent disclosure, there is no indication to the Commissioner that further information is held.

Question 9

38. Question 9 requests information about the provision of a cycle path, court yard, and certain landscaping. The Council advised that the requested information was publicly available, and referred the complainant to the relevant documents held on the Council's online planning portal.
39. In respect of the cycle path, the Council has informed the Commissioner that the construction of this is dependent on specific actions (i.e. the granting of specific planning permission by Watford Borough Council, and the site owner's implementation of this). The Council has not been notified that these actions have occurred, and so no additional information, besides that already made publicly available, is held.
40. In respect of the court yard and landscaping, the Council has informed the Commissioner that it is not aware of any failure by the site owner to comply with the approved plans. As such, the Council would not expect to hold further information (e.g. such as relating to planning enforcement) besides that which is already publicly available.

*The Commissioner's conclusion*

41. The Commissioner has considered the Council's position, and understands that there is no business or statutory reason for which it would expect to hold further information besides that already publicly available, particularly in that no concerns have been submitted to the Council which would warrant planning enforcement. There is no evidence available to the Commissioner that indicates the Council's position is incorrect. It is therefore reasonable for the Commissioner to conclude that no further information is held.

Question 10

42. Question 10 requests a 'bio-diversity and green infrastructure report'. The Council advised that the requested information was publicly

available, and noted that the complainant had directly quoted it in Question 2.

43. The Council has informed the Commissioner that the report is publicly available, and that the complainant has directly acknowledged that he has accessed it.

*The Commissioner's conclusion*

44. The Commissioner has considered the Council's position, and recognises that the complainant has acknowledged that he has already accessed the requested information. It is therefore reasonable for the Commissioner to conclude that all relevant information has been made available.

Question 11

45. Question 11 requests a 'biodiversity and green infrastructure report' that the complainant understood was meant to supersede a previous report. The Council denied that any such further report was held, but referred the complainant to the existing report that is publicly available on the online planning portal, and which is listed as being the only existing report in the planning permission decision notice.
46. The Council has informed the Commissioner that the existing report is publicly available, and that whilst the complainant's comments indicate that he believes this report is deficient in certain respects, this is not a matter that the Council can address under the EIR.

*The Commissioner's conclusion*

47. The Commissioner has considered the Council's position, and understands that all relevant planning reports are both publicly available on the online planning portal, and referenced in the planning permission decision notice. There is no evidence available to the Commissioner that suggests a further report is held, and the Commissioner is mindful that the complainant's comments (when asking for an internal review) suggest that his concern is about the content of the information; however, such a matter falls outside the terms of the EIR. Having considered these factors it is reasonable for the Commissioner to conclude that all relevant information has been made available.

**Regulation 5(2) – Time for compliance**

48. Regulation 5(2) states that an information request should be responded to no later than twenty working days after the date of receipt. In this case the Council did not respond to the request within the time for compliance.

49. On this basis the Commissioner must find a breach of regulation 5(2).

### **Regulation 11 – Internal review**

50. Regulation 11(1) provides that an applicant may make representations to a public authority, if he or she considers that the authority has failed to comply with the requirements of the EIR in relation to the request.

51. Regulation 11(3) requires that the public authority consider the complainant's representations, along with any supporting evidence provided by the complainant, and to decide whether it has complied with the requirements of the EIR. Finally, regulation 11(4) requires that the authority notify the applicant of its decision in relation to the applicant's representations no later than forty working days after receipt of those representations.

52. In this case, the Council received the request for an internal review on 12 October 2017. Although the request did not specifically state that an internal review was sought, it clearly expressed dissatisfaction with the Council's response. The Commissioner's guidance on regulation 11 explains to public authorities that "*any correspondence in which the requester has expressed dissatisfaction over the handling of their request should be addressed through the internal review procedure.*"

53. As the Council did not provide its internal review within forty working days, the Commissioner finds that it breached regulation 11(4).

### **Other matters**

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54. The Commissioner reminds the complainant that the Freedom of Information Act 2000 and the Environmental Information Regulations 2004 relate only to the provision of information held in recorded form. Whilst a requestor may phrase their request as a 'question', a public authority is only required to consider what information is held in recorded form that would fall within its parameters.

55. The Commissioner has published guidance for requestors about how to most effectively phrase a request under the FOIA or EIR. In the event of future requests, the complainant may find it beneficial to refer to this guidance, which can be accessed at: <https://ico.org.uk/your-data-matters/official-information/>

## Right of appeal

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56. 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)

57. 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.
58. 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**  
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