

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

### **Decision notice**

**Date:** 7 March 2019

**Public Authority:** Staffordshire County Council

**Address:** 1 Staffordshire Place  
Stafford  
ST16 2DH

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

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1. The complainant requested information relating to surface water drainage matters. The Council denied holding relevant information.
2. The Commissioner's decision is that, on the balance of probabilities, the Council does not hold the requested information. She therefore upholds the Council's application of regulation 12(4)(a) (information not held) of the EIR. She did, however, find a procedural breach of regulation 14 (refusal to disclose information) of the EIR.
3. The Commissioner requires no steps to be taken as a result of this decision.

#### **Request and response**

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4. On 10 August 2018, the complainant wrote to the Council and requested information in the following terms:

*"Please supply all correspondence including calculations, notes of telephone calls, notes taken at meetings, notes of conversations along with minutes of meetings etc relating to surface water drainage matters relating to outline planning application P/2012/00636 and reserved matters application P/2018/00384 both submitted to East Staffordshire Borough Council".*

5. The Council responded on 13 August 2018. It denied holding the requested information.

6. The complainant requested an internal review on 20 August 2018. The Council provided an internal review on 3 October 2018 in which it appeared to maintain its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 21 October 2018 to complain about the way his request for information had been handled.
8. With regard to the planning application matter referred to in his request, he explained that, while the initial recommendation was that the application be refused:

*"A few weeks later this recommendation was changed to permit".*

9. The Commissioner wrote to the complainant at the start of her investigation setting out the scope of her investigation. She explained that the focus of her investigation would be to determine whether the Council held information within the scope of his request.
10. In subsequent correspondence, the complainant provided the Commissioner with further information regarding the reason he submitted his request for information to the Council. He told the Commissioner:

*"To be clear I requested information to enable me to understand what had persuaded [redacted] to change his mind and recommend that the application be permitted and none has been forthcoming".*

11. During the course of the Commissioner's investigation, the Council confirmed its view that it did not hold the requested information.
12. The analysis below considers whether, on the balance of probabilities, the Council held information within the scope of the request at the time the request was made.
13. The Commissioner has also considered the quality of the Council's refusal notice informing the complainant of its decision.

### **Reasons for decision**

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*Is the requested information environmental?*

14. Information is 'environmental information' if it meets the definition set out in regulation 2 of the EIR. If the information satisfies the definition it

must be considered for disclosure under the terms of the EIR rather than the FOIA.

15. The Commissioner has published guidance on regulation 2(1)<sup>1</sup>. That guidance states that the test that public authorities should apply is whether the information is on, or about, something falling within the definitions in regulations 2(1)(a)-(f), and not whether the information directly mentions the environment or any environmental matter.
16. Regulation 2(1) of the EIR defines environmental information as information on:

*"(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

*(b) factors such as substances, energy, noise, radiation or waste...emissions...and other releases into the environment, likely to affect the elements referred to in (a);*

*(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;...".*

17. Information about the state of the elements of the environment, such as water, is environmental information. The information in this case relates to surface water drainage matters. The Commissioner therefore finds that the request is for environmental information and should be considered under the EIR.

#### *Regulation 5 Duty to make available environmental information on request*

18. Regulation 5(1) of the EIR says that a public authority that holds environmental information shall make it available on request.

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<sup>1</sup> [https://ico.org.uk/media/1146/eir\\_what\\_is\\_environmental\\_information.pdf](https://ico.org.uk/media/1146/eir_what_is_environmental_information.pdf)

*Regulation 12 Exceptions to the duty to disclose environmental information*

*Regulation 12(4)(a) EIR*

19. By virtue of regulation 12(4)(a), a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
20. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities.
21. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. In addition she will consider reasons why it is inherently likely or unlikely that information is not held.
22. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
23. The Commissioner recognises that the Council told the complainant that it did not hold the requested information:

*"... as it does not relate to a County Council function".*
24. She also accepts that, having been told that it did not hold the requested information, the complainant told the Council:

*"There will most certainly have been conversations and correspondence between a county council officer and parties interested in the planning applications that I am requesting information on that ESBC [East Staffordshire Borough Council] will not be privy to".*
25. He described the information he was seeking as "detail", advising that such information "will not be publicly available".
26. As is her usual practice in progressing her investigation in a case such as this, the Commissioner asked the Council questions relating to how it established whether or not it held the requested information.
27. In its substantive response to the Commissioner, the Council stated:

*"Please note that this planning application was not Staffordshire County Council's responsibility and we have been [made] aware by East Staffordshire Borough Council that all information is within the public domain".*

28. With regard to the searches it had carried out to check whether information within the scope of the request was held, the Council told the Commissioner:

*"The Flood Risk Management Team are a consultee in relation to local planning applications. Consultation records are saved to the relevant digital case folder. We have been provided with copies of the contents of the folder".*

29. The Council also told the Commissioner:

*"The relevant member of staff acting as case officer for the matter (who has since left the authority) was consulted".*

30. The Council confirmed:

*"We were advised repeatedly that all records in the case folder were either available on the East Staffordshire Borough Council website or related to emails received from, or sent to, the requestor, or are emails to which the requestor is party forwarded by/to the planning authority or parish council".*

31. The Council confirmed that case information is not held locally: rather it is held in the case folder. It also confirmed that, at the time of the request, the Council:

*"... did not hold additional information in either a 'personal system' nor in MS Outlook".*

32. With respect to whether information would be held as manual or electronic records, the Council told the Commissioner information would be held in digital format:

*"As part of our council's 'smart working' strategy paper records if created/received are scanned to digital".*

#### *The Commissioner's view*

33. When the Commissioner receives a complaint that a public authority has not provided any or all of the requested information, it is seldom possible to prove with absolute certainty that there either isn't any information or anything further to add. The Commissioner will apply the normal civil standard of proof in determining the case, ie she will decide on the balance of probabilities whether the information is held.

34. In applying this test the Commissioner will consider:
- the scope, quality, thoroughness and results of the searches; and, or
  - other explanations offered as to why the information is not held.
35. The Commissioner recognises that the complainant is clearly concerned about the matter that is the subject of the request in this case. She acknowledges that the complainant considers that "*there has to be further information somewhere*" explaining why the decision to refuse the application became a decision to approve it.
36. While appreciating the complainant's frustration that the Council did not hold the requested information, the Commissioner is mindful of the comments made by the Information Tribunal in the case of *Johnson / MoJ* (EA2006/0085)<sup>2</sup> that the FOIA:
- "... does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold".*
37. Having considered the searches conducted by the Council and the explanations provided about how it records information, the Commissioner is satisfied, from the evidence she has seen, that the searches conducted have been reasonable and thorough.
38. The Commissioner is also satisfied that it has carried out relevant enquiries to establish whether it holds any recorded information falling within the scope of the complainant's request.
39. Taking all the above into account, the Commissioner finds that, on the balance of probabilities, the Council does not hold recorded information in relation to the complainant's request.
40. Regulation 12(4)(a) is subject to the public interest test but the Commissioner's position is that it is not necessary to consider the public interest as to do so would be illogical. The public interest cannot favour disclosure of information that is not held.
41. In conclusion, she does not consider that there was any evidence of a breach of regulation 5 in relation to such information.
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*Regulation 14 Refusal to disclose information*

42. Regulation 14 of the EIR sets out what a refusal notice should include. Amongst other things, it requires a public authority to inform a complainant, in writing, of the reasons why it is refusing to provide information in response to a request.
43. While the Commissioner accepts that the Council's correspondence of 13 August 2018 contained some of the elements required in a refusal notice, she notes that the complainant needed to ask the Council:

*"Can I clarify are you saying that Staffordshire County Council does not have the information requested or are you refusing to give it to me?"*
44. The Commissioner finds that the Council breached regulation 14(3)(a) of the EIR by failing to cite regulation 12(4)(a) as its basis for refusing the request in its response of 13 August 2018.
45. The Commissioner has published guidance<sup>3</sup> that explains when and how to refuse a request for environmental information. The Commissioner recommends this guidance to Staffordshire County Council and expects future refusal notices issued under the EIR to comply with Regulation 14.

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<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1628/refusing\\_a\\_request\\_under\\_the\\_eir.pdf](https://ico.org.uk/media/for-organisations/documents/1628/refusing_a_request_under_the_eir.pdf)

## Right of appeal

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46. 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)

47. 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.
48. 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 .....**

**Samantha Bracegirdle**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**