

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 September 2019

Public Authority: Stockton-on-Tees Borough Council
Address: PO Box 11
Municipal Buildings
Church Road
Stockton-on-Tees
Cleveland
TS18 1LD

Decision (including any steps ordered)

1. The complainant made a multipart request for information relating to a bid he submitted to purchase some land, several years ago. Stockton-on-Tees Borough Council (SBC) responded to the request, but the complainant remained dissatisfied with the response.
2. The Commissioner's decision is that SBC complied with its obligations in respect of regulation 5(1) (duty to make available environmental information available on request) of the EIR in respect of the majority of the request. However, she found that it failed to comply with this obligation in respect of part (10) of the request. She also found that it breached regulation 5(2) of the EIR by failing to respond to the request within 20 working days.
3. The Commissioner requires SBC to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to part (10), either disclosing the information or issuing a refusal notice which complies with regulation 14 of the EIR.
4. SBC must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The complainant has explained to the Commissioner that his family owned a piece of land which was subject to compulsory purchase in 1968 by Darlington Council, which was at that time the local authority for the area.
6. In 2004, the complainant learnt that the current local authority, SBC, was intending to sell the land, and he believed that it was not following procedures with regard to open and fair bidding for the site.
7. He says that he complained to the Local Government Ombudsman (LGO) about what he considered to be SBC's failure to follow proper procedures. He says that the LGO found in his favour, and that he was invited to bid for the site. However, his bid was not successful and he remained unconvinced that the bidding process was genuinely open and fair, believing that the successful bidder received preferential treatment.

Request and response

8. On 5 February 2018, referring to the sale of the land, the complainant made the following request for information to SBC:

"1. I was asked to put in 2 bids for the [site name redacted], one with a housing element and the other without housing. Is there any record that Maher Development were also asked to submit two similar bids using established pro forma?"

2. Who was present when the Ombudsman visited Stockton to investigate this matter?"

3. Was Land and Property Manager, [name redacted], present and questioned? If not, why not?"

4. Was the Ombudsman made aware that [Land and Property Manager] believed that my bid was by far better than Maher Developments and are there any minutes of the meeting? If not, why not?"

5. Have systems been tightened as directed by the Ombudsman?"

6. Why didn't SBC heed the warning of a senior Planning Officer [name redacted] who sent an email pointing out that Maher's interest in this land was no doubt to cover the recreational element of developing [neighbouring site name redacted] for housing?"

7. Who paid for site security?

8. Who paid for demolition of the school buildings?

9. What was the initial payment?

10. Why was there a delay in receiving the second payment?

11. What was the total amount paid to the [sic] SBC for the acquisition of the site?"

9. SBC responded on 22 March 2018. It answered parts (1), (7) and (8). It said that parts (6) and (10) were not valid requests for information. For parts (2) – (5) it said that no meeting with the LGO took place and referred the complainant to information it said was held on the LGO's website. For parts (9) and (11) it referred the complainant to information it said was held on the Land Registry website.
10. The complainant requested an internal review on 8 June 2018. SBC says that it did not receive that request, and that it remained unaware of it until it received a further copy of it from the complainant, on 5 December 2018.
11. SBC responded on 17 January 2019. For parts (1), (7) and (8), it provided further information (including copies of correspondence to, and the bid submitted by, the successful bidder). It maintained that part (6) was not a valid request, although it responded to the complainant's comments about the information submitted to the LGO. It answered part (10).
12. For parts (2) - (5) of the request, SBC reversed its position, admitting that a meeting had taken place at the request of the LGO, and it disclosed the attendees, but said that it did not hold any meeting minutes. It disclosed information about the changes to its processes in light of the LGO investigation.
13. SBC also answered parts (9) and (11).

Scope of the case

14. The complainant contacted the Commissioner on 10 March 2019 to complain about the way his request for information had been handled, describing its responses as “*evasive and obtuse*”.
15. It was apparent from the complainant’s correspondence that he has a number of grievances about the way SBC handled the sale of the land, not least that he believes he offered more for the land than the successful bidder, but his bid was nevertheless rejected. While she acknowledges that these concerns are genuinely held, the Commissioner explained to the complainant that she could only consider whether SBC complied with the EIR with regard to the way it handled his request for information, and that she could not look at wider matters to do with the sale of the land.
16. At internal review, the complainant commented on SBC’s response to each point of the request, saying that he was attempting to clarify the meaning of the requests. However, the Commissioner considers that in doing so he sought to extend the scope of the requests quite significantly beyond their original wording. She has therefore considered the requests as they were originally posed. If the complainant requires more specific information, he should submit fresh requests for that information. The Commissioner has commented further on the wording of requests in the “Other matters” section at the end of this notice.
17. From the complainant’s correspondence, the only EIR matters for the Commissioner to consider were:
 - whether SBC had complied with its duty under regulation 5(1) (duty to make available environmental information on request) of the EIR in respect of parts (1), (3) and (10) of the request; and
 - the time it took SBC to respond to the request and to conduct the internal review.
18. The Commissioner informed the complainant accordingly and invited him to let her know if he disagreed with the scope of the investigation and he has not done so. However, he did ask that, when investigating the matter, the Commissioner get in touch with the Land and Property Manager referred to in the request (who no longer works for SBC) who he said would be able to provide detailed information about SBC’s handling of the land sale. The Commissioner has not done this because, as detailed above, her investigation is restricted to looking at how SBC handled this request for information, and not the land sale itself,

anything else would fall outside the remit of her jurisdiction under the EIR.

Reasons for decision

Is the information environmental information?

19. 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 regulations 2(1)(a) to 2(1)(f) of the EIR.
20. The Commissioner considers that 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(1)(a) and 2(1)(b) will be environmental information. One of the elements listed under 2(1)(a) is land.
21. The request in this case is for information to do with the sale of a piece of land. The Commissioner considers that the request therefore relates to a measure as defined in regulation 2(1)(c) of the EIR which will or would be likely to affect the elements described in 2(1)(a), namely land.
22. The Commissioner is therefore satisfied that the request was for environmental information, and that the request fell to be dealt with under the EIR.

Regulation 5(2) – time for compliance

23. The EIR state that information should be made available in response to a request as soon as possible and no later than twenty working days after the request was received.
24. In this case, the request was received on 5 February 2018 and a response issued on 22 March 2018, which was 33 working days later. SBC therefore breached regulation 5(2) by failing to respond within the permitted time for compliance.
25. SBC apologised for the delay and explained:

"Many of the officers involved with this land transaction no longer work for the Local Authority or have moved on in terms of job roles. To identify the appropriate people who may have held relevant information and identify, locate and interpret records which were

stored in various locations on site and also at an offsite location, took time. This contributed to the delay in providing a response.”

26. The Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function. This aligns with the goal in her draft “Openness by design”¹ strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her “Regulatory Action Policy”².

Regulation 11(2) – time for conducting internal review

27. The EIR require that where the requester has asked for an internal review, the outcome be provided no later than 40 working days after it was requested.
28. In this case the complainant wrote to SBC expressing dissatisfaction with its response on 8 June 2018 (an action the Commissioner’s guidance³ clarifies should be treated by a public authority as a request for an internal review), but SBC says that it never received that letter. While the Commissioner has no reason to doubt that the complainant sent the letter (which was posted), without evidence that it was received by SBC (such as tracking information or an acknowledgement letter) she is unable to reach a decision on this point.
29. The Commissioner notes that when the letter was subsequently received by SBC on 5 December 2018, it responded on 19 January 2019, which is 29 working days later, and within the timescale specified at regulation 11(2).

Regulation 5(1) – duty to make available environmental information on request

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

¹ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

² <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

³ <https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/refusing-a-request/>

31. The Commissioner has looked at whether SBC complied with this obligation in respect of parts (1), (3) and (10) of the request.

Part (1) of the request

"I was asked to put in 2 bids for the [site name redacted], one with a housing element and the other without housing. Is there any record that Maher Development were also asked to submit two similar bids using established pro forma?"

32. The Commissioner has considered the wording of this part of the request closely. It asked to know whether SBC held a record of something and SBC confirmed that it did. At internal review, it disclosed to the complainant copies of the letter which was sent to both him and the other bidder, dated 28 August 2009. Both letters set out identical criteria for the terms under which bids should be submitted. It also disclosed a copy of the other bidder's bid, which was made in letter form. In doing so, the Commissioner is satisfied that SBC complied with the original request, as it was worded.
33. The complainant's main grievance appears to be his belief that he and the other bidder were not treated equally over the submission of the bids, with the other bidder subsequently having his bid accepted in a different format. However, this part of the request specifically concerned itself with what the bidders were asked to submit, not what was subsequently accepted or why, and therefore the Commissioner cannot consider the concerns the complainant has expressed on this point.
34. The Commissioner therefore finds that SBC complied with its obligation under regulation 5(1) with regard to this part of the request.

Part (3) of the request

"Was Land and Property Manager, [name redacted], present and questioned? If not, why not?"

35. SBC responded that the Land and Property Manager was not at the meeting, but that he did contribute to SBC's response to the LGO's investigation.
36. SBC provided the Commissioner with a copy of an internal memo from the Land and Property Manager to the officer who coordinated responses to LGO enquiries on behalf of SBC. The document itself falls outside the scope of the request, but the Commissioner is satisfied that its content substantiates SBC's statement that he did not attend but did have input into the LGO's investigation.

37. On the question of why the Land and Property Manager was not in attendance, SBC supplied details of the extensive searches of electronic, paper and email records that it had carried out for information pertinent to the request and said that it had disclosed all relevant information it held to the complainant. It answered a series of detailed questions asked by the Commissioner, with the aim of understanding SBC's reasons for believing that it did not hold further, relevant information.
38. 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 the balance of probabilities.
39. 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).
40. In this case, the meeting with the LGO took place in 2010 and SBC explained that there are very few key officials who were involved with the matter who are still employed by it. Few officers worked on personal laptops at this time and so any relevant electronically held information would be held on network servers. Information Asset owners were asked to search for any relevant electronic records supporting the scope of this request (SBC provided the Commissioner with the search terms used to search for further information). Electronic emails relating to this period would have been deleted some time ago, in line with SBC's records management policy (a copy of which it supplied to the Commissioner). With regard to paper records, both on-site and off-site storage facilities were searched.
41. The Commissioner has considered SBC's arguments. She notes that at the time of the request, the information in question, if it ever existed in recorded form, would have been nearly eight years old. She notes that SBC's retention and disposal policy sets a six year retention period for non-sensitive material. Furthermore, when individuals leave its employ, their email accounts are deleted, further suggesting that any electronic information, if it ever existed, has been deleted. Finally, she is satisfied from its account of the manual searches carried out that they were thorough and capable of locating information relevant to the request.
42. On the civil standard of the balance of probabilities, the Commissioner is satisfied that SBC has demonstrated that it does not hold recorded information about the reasons why the Land and Property Manager didn't attend the LGO meeting.

Part (10) of the request

"Why was there a delay in receiving the second payment?"

43. SBC initially refused this part of the request, saying that this was not a valid request for information under the EIR. At internal review, it said that it should have been more helpful when responding to this point. It said that *"The second payment was received in accordance with the terms of transfer and as such were within timescales"*.
44. The Commissioner asked SBC to provide her with copies of all the recorded information it held which it considered fell within scope of this part of the request. SBC has provided the Commissioner with a document which contains information which extends beyond what it disclosed to the complainant. It told the Commissioner, *"...this is third party information it should not be disclosed to the complainant"*. It did not cite any grounds under the EIR for exempting the information from disclosure, nor did it offer any other arguments as to why it had not already been disclosed in response to the request.
45. The Commissioner is satisfied that the document contains information which falls within the scope of the complainant's request. In the absence of any submissions from SBC as to why it should be considered exempt from disclosure under the EIR, the Commissioner does not consider that SBC has complied with regulation 5(1) when responding to part (10) of the request.
46. She therefore requires SBC to take the action specified in paragraph 3, above.

Other matters

47. The EIR facilitate access to recorded information. Public authorities are not required to create new information in order to respond to requests. This has a particular bearing on requests which are framed as questions, which might solicit the public authority's opinion or interpretation of a matter. If that information is not already held at the point the request is received, the public authority is under no obligation under the EIR to create it in order to answer the request.
48. The Commissioner recommends that the complainant bears this in mind with the wording of any future requests for information he makes, and that when doing so, he clearly specifies what recorded information he is interested in receiving.

Right of appeal

49. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

50. 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.
51. 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
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Wycliffe House
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