

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

### **Decision notice**

**Date:** 6 July 2021

**Public Authority:** Wealden District Council  
**Address:** Vicarage Lane  
Hailsham  
BN27 2AX

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

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1. The complainant has requested certain emails held by Wealden District Council (the council) that relate to three separate planning applications.
2. Whilst the council provided some information to the complainant in response to his request, certain additional information was released only after the internal review process was complete.
3. The Commissioner's decision is that the council has, on the balance of probabilities, now provided the complainant with all the information which it holds that is relevant to the request.
4. However, as the council failed to provide all the information within 20 working days, the Commissioner has found there to be a breach of regulation 5(2) of the EIR. Furthermore, as the council failed to provide its internal review response within 40 working days, it has also breached regulation 11(4) of the EIR.
5. The Commissioner does not require the council to take any steps as a result of this decision notice.

## Request and response

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6. On 28 April 2020, the complainant wrote to the council and requested information in the following terms:

*'I am seeking information that relates to three planning applications, specifically email communication between the case officers and [email address for officer at Green Hayes Planning redacted] for the purpose of understanding the dialog/advice/support between the planning department and the planning consultants acting on behalf of the applicant seeking planning permission at Meadow House, London Road, Crowborough.*

*I have supplied below the three planning applications that I am interested in and the respective case officers, however, it may be the case that communication relates between any case officer on any of the three applications and therefore these form part of the request too –*

*WD/2017/1237/O – [name redacted, case officer A]  
WD/2018/2212/O – [name redacted, case officer B]  
WD/2020/0610/F – [name redacted, case officer C]'*

7. The council responded on 27 May 2020, providing the complainant with copies of some information. It advised that any information which identified individuals, including those commenting on the planning application, had been redacted on the basis that it was third party personal data, and was exempt from disclosure under section 40(2) of the Freedom of Information Act 2000 (FOIA).
8. On 31 May 2020, the complainant contacted the council, setting out his concerns about its response to his request. He complained that he had received numerous duplicate emails within the bundle that the council had supplied to him, and that certain information had been redacted. He also advised that he did not believe that all the relevant information had been released; he stated that he was aware of the existence of certain additional emails which he believed should have been provided. On 4 June 2020, the complainant went on to provide the council with details of the date and time of one of these emails.
9. The council dealt with the complainant's correspondence of 31 May 2020, as an internal review request, and provided a response on 11 August 2020.

10. The council confirmed that whilst it had dealt with the request under the EIR, it had incorrectly referred to section 40(2) of the FOIA as its basis for withholding some personal data contained within the emails. It provided the complainant with a revised version of its original response, which now cited the exception at regulation 13(1) of the EIR.
11. The council advised the complainant that the planning department holds central files which contain all the relevant information about any given planning application, and that this would include all communications sent by planning officers. It confirmed that the central planning files were searched following receipt of his request, and that it was '*confident*' that it had identified all the relevant information held. However, the council did add that if the complainant could provide details of any further information which he believed was held, then it would investigate this further.
12. With regard to the issue of the duplication of emails, the council advised that this was due to the way that the information was held, and also because certain communications may have been received by a number of recipients. It confirmed that it provides all emails that are identified in its searches to ensure that it releases all the information relevant to a request.
13. The council also responded to the complainant's concern that certain information had been redacted. It stated that the names of its officers were considered to be personal data which should not be released to '*the world at large*'. In addition, certain sentences within the emails released had been redacted because they contained personal information which was not relevant to the planning matter.
14. On 14 August 2020, the council contacted the complainant again. It confirmed that, following the completion of a search of its archived files, some additional information had been located, which it provided to the complainant.

### **Scope of the case**

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15. The complainant contacted the Commissioner on 18 August 2020, to complain about the way his request for information had been handled. His primary concern is that the council may not have supplied copies of all the information which is relevant to his request.
16. The complainant pointed out that whilst he had provided details of an '*example*' email in his correspondence to the council of 4 June 2020, this had not subsequently been included within the information provided to him on 14 August 2020. He also advised that he was aware of the

existence of further emails which he believed the council should have supplied to him.

17. In the council's original response to the Commissioner's enquiries, it advised that, upon further review, it had been found that a copy of an attachment to an email had not been included within the original bundle of information supplied to the complainant. The council confirmed that it would now forward a copy of this to him.
18. After further discussion with the complainant, the Commissioner contacted the council again, providing full details of four emails (one of which the complainant had referred to in his email to the council of 4 June 2020). These are all the emails which the complainant had identified to be relevant to his request, but which had not yet been provided to him. Whilst this information is available on the planning pages of the council's website, the complainant advised that he wanted this information in an unredacted format.
19. The council then confirmed that it had been able to locate two of the four emails, which it forwarded to the complainant (with some personal data redacted). However, it advised that the remaining two emails were not held on its systems.
20. The complainant contacted the Commissioner again following receipt of the additional information to advise that he remained dissatisfied with the council's handling of his request.
21. The Commissioner would add that whilst the complainant had raised some additional concerns that he had only received 2 of 3 pages of one of the emails, the council has confirmed that this has already been addressed directly with the complainant; it states that it did not send the third page originally as it was blank, but provided a copy of this page upon the complainant's request that it do so.
22. The Commissioner will decide whether, on the balance of probabilities, the council was correct when it advised that it does not hold any further information that is relevant to the complainant's request. She will also make a decision on certain procedural matters, as requested by the complainant.

## Reasons for decision

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### Is the information environmental information?

23. 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.
24. Regulation 2(1)(c) of the EIR 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 listed in regulations 2(1)(a) and 2(1)(b) will be environmental information. One of the elements listed under 2(1)(a) is land.
25. The Commissioner is satisfied that the information requested is on measures that would have an affect on the land and its use, and that it fits squarely into the definition of environmental information set out within regulation 2(1) of the EIR.

### Regulation 5(1) - Duty to make environmental information available on request

26. Regulation 5(1) of the EIR states that '*a public authority that holds environmental information shall make it available on request.*' This is subject to any exceptions that may apply.
27. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to establish what information within the scope of the request it held, and any other reasons offered to explain why further information is not held. She will also consider any reason why it is inherently likely, or unlikely, that further information is not held.
28. 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.

### The complainant's position

29. The complainant states that he has concerns that the systems which the council has in place are '*inadequate and not fit for purpose*', and result in a lack of transparency. He believes that this has led to a failure by the council to provide information not only in this case, but potentially in response to other information requests it has received. By way of

example, he has referred to an open letter to the council which was written by a number of councillors in October 2020, about a planning application for a major development in the area. In this letter the councillors raise concerns about the openness and transparency of the process, stating that despite the submission of a number of information requests, and email enquiries, certain details about the process had still not been released by the council.

30. The complainant states that when he initially identified that there were four emails on the council's website which had not been released, or referred to, by the council in response to his request, he was hesitant to then go on to provide the full details. He indicates that he had lost trust in the council's ability to identify all the information that it might hold that was relevant to his request, and he was concerned that it would simply provide copies of these emails without conducting a thorough search. He indicates that the council's failure to provide him with a copy of the one email he had described in his correspondence of 4 June 2020, further highlights the inadequacy of the systems that it has in place.
31. The complainant argues that if it is the case that the council only carries out a search of the central planning file in response to an information request, an officer may, either in error, or deliberately, fail to upload information onto the planning files. He states that unless the council extends its searches to cover the '*source systems*' such as email accounts, then some information will not be identified in response to information requests. He claims that the processes adopted by the council for dealing with information requests are therefore fundamentally flawed, and that this has meant that he has not received copies of all the information which is held that is relevant to his request.

### **The council's position**

32. The council has advised the Commissioner that it believes that it has now provided all the information which it holds that is relevant to the complainant's request.
33. It states that it cannot account for why the two emails it has recently identified on its systems were not previously located; it has advised that they were retrieved from the archive system, and that as this is integrated into its outlook email application, they should have been identified in the searches that were initially carried out. The council goes on to say that the officer who initially dealt with the request no longer works at the council, so they are unable to establish with any certainty why this information was not originally supplied.

34. The council further stated that over the last year there has been a migration of its old systems to Office 365, and it refers to various synchronisation periods occurring, with teams migrating across at different times. It suggests that this may possibly have had an affect on the original searches which were carried out.
35. The council has also advised that this request was received within weeks of the end of the first lockdown period, and that the impact of the pandemic and resultant lockdown has had major implications for the council and, in particular, the planning department. It has explained that all of its officers were implementing and adapting to new ways of working, and new systems and procedures were being put into place to enable work to continue. It has said that whilst this would be a feat in itself under normal circumstances, it was more so due to the pressure from customers to progress their planning matters as quickly as possible.
36. The council goes on to say that when the country started to open up again towards the end of May 2020, which was also when it responded to the request, the pressures on the planning department were immense.
37. The council concludes by stating that it fully accepts that the difficulties which it has faced over the last year do not excuse the omission of information in its responses to the complainant, and its failure to handle his request appropriately and in accordance with its statutory obligations.
38. The council has also provided some details about its retention policy to explain why certain information was not held. It has confirmed that certain information provided to the complainant was retained on the basis of business need, and in order to support any legal challenges that might arise. It goes on to say that whilst it does also have a statutory obligation to hold information within a planning register (under the Town and Country Planning Act 1990), this does not extend to those two emails which it no longer holds.
39. The council states it accepts that consideration should have been given as to whether there was information relevant to the request within the planning pages of its website. It goes on to confirm that it should have provided a link to where some of the information was already easily accessible to the complainant.



### **The Commissioner's view**

40. Firstly, with regards to the complainant's concern that the council's searches are too restrictive, the council has confirmed to the Commissioner that a centrally (networked) electronic system stores all the documents on the planning application case file. It states that as emails are currently subject to a manual upload, to ensure that all the emails were located and released in response to the request, email accounts were also searched.
41. The council has also confirmed that when conducting the searches, the three planning references quoted by the complainant in his request were searched, together with the case officer emails, and that the search included personal laptops and network resources.
42. It would appear that all parties accept that this request was not handled in accordance with the council's statutory obligations. Indeed, since the onset of the Commissioner's investigation, the council has openly acknowledged and expressed its regret at its failings in this case. It states that *'unfortunately [the complainant's name redacted]'s request seems to be one of those rare occurrences where anything that could have gone wrong did'*, and has said that it was *'very much aware of our short comings in relation to this request'*.
43. The Commissioner appreciates that the complainant may still have doubts as to whether the council has now fully complied with his request. However, further detailed searches (which identified additional information) were conducted at a time when the migration of the council's systems was almost complete. There is no indication that the council's most recent efforts to identify information held relevant to the request were not adequate. Furthermore, as far as the Commissioner can see, there is nothing which would indicate that there is any additional information that is likely to be of any substance which is held by the council.
44. Unfortunately, it cannot be said with any certainty why some information was not originally identified; there appears to be a number of factors which may have caused, or contributed collectively, to the council's failure to locate all the relevant information earlier in the process.
45. However, the Commissioner is satisfied that the council has now taken all reasonable steps to locate information it may hold that is relevant to the request, and that the searches that it has carried out of its archive system, email system and central planning files are reasonable. She therefore concludes that, on the balance of probabilities, the council has



now provided the complainant with all the information held that is relevant to his request.

### **Procedural matters**

46. Regulation 5(1) of the EIR provides a general right of access to recorded environmental information held by public authorities. Public authorities should make environmental information available within 20 working days unless a valid exception applies in accordance with regulation 5(2).
47. Whilst the council has now provided the relevant information, its failure to do so within the prescribed timescales represents a breach of regulation 5(2) of the EIR.
48. Regulation 11(4) of the EIR requires a public authority to complete its internal review as soon as possible, and no later than 40 working days after the internal review is requested.
49. The complainant requested an internal review on 31 May 2020, but as the council did not provide a response until 11 August 2020, the Commissioner finds that the council has also breached regulation 11(4) EIR.

### **Other matters**

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50. The complainant did not raise any specific concerns with the Commissioner about the council's decision to apply regulation 13 of the EIR to information that it had withheld in its original responses to him (on the basis that it was personal data).
51. However, the Commissioner believes that it is necessary to make comment about the redactions which the council has made to the emails which it recently provided to the complainant; it had confirmed that it had redacted all personal data contained within the emails on the basis that disclosure would not comply with the Data Protection Act 2018.
52. The Commissioner would, in most instances, be open to consideration of the arguments put forward by a public authority in relation to the redaction of personal data where it consists of council officers' names and email addresses. However, in this instance, she does not accept that the names and email addresses which have been redacted are subject to the exception at regulation 13 of the EIR. This is because they are already publicly accessible by virtue of the fact that such information has already been published and is still available on the planning pages of the council's website.

53. However, as this information is already in the possession of the complainant, she does not intend to ask the council to use what she appreciates are likely to already be restricted resources, to provide information which is not only easily accessible, but also already in the complainant's possession.
54. The complainant also asked the Commissioner to consider his concerns that the council's processes for dealing with information requests are not adequate.
55. The Commissioner has taken into account the details of the other planning case referenced by the complainant in support of his claims. She regards it to be pertinent to note that the council did issue a response to the open letter sent by the councillors in that case, stating that it believed that it had complied with its statutory obligations in relation to the release of information about the planning matter.
56. With regards to this specific case, there appear to be a number of factors that may have contributed to the council's failure to identify all the relevant information. These factors do not necessarily indicate a more widespread failing in the way that the council deals with information requests. It should also be noted that the council has confirmed that it is currently undertaking a standard review of the processes in place for planning information as it relates to the FOIA, and the EIR.
57. When broader concerns are raised about a public authority's general information rights practices, the Commissioner will not always take action in response to that one case. She will often use the intelligence gathered from a number of individual cases (such as this case) to inform the ICO's insight and compliance function. This will align with the goal in the ICO's Openness by Design Strategy<sup>1</sup> to improve standards of accountability, openness and transparency in a digital age. It is the Commissioner's aim to increase the impact of FOIA enforcement activity through targeting of systematic non-compliance, consistent with the approaches set out in the ICO's Regulatory Action Policy.<sup>2</sup>

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<sup>1</sup> [https://ico.org.uk/media/about-the-ico/documents/2615190/openness\\_by\\_design\\_strategy\\_201906.pdf](https://ico.org.uk/media/about-the-ico/documents/2615190/openness_by_design_strategy_201906.pdf)

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

## Right of appeal

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58. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

59. 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.
60. 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 .....**

**Ben Tomes**  
**Group Manager**  
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