

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

Date: 15 November 2021

Public Authority: Conwy County Borough Council

Address: info-gov.unit@conwy.gov.uk

Decision (including any steps ordered)

1. The complainant requested various information in relation to planning application 0/44248 'Hafotty Ucha Wind Farm Repowering' from Conwy County Borough Council (the Council). The Council provided some information, but withheld one document in reliance on section 42 (legal professional privilege) of the FOIA. During the course of the Commissioner's investigation, the Council disclosed the remaining document, however the complainant was not satisfied that all information falling within the scope of her request had been identified.
2. Although the Council should have considered this request under the EIR, the Commissioner's decision is that it has now complied with the requirements of regulation 5(1) (making information available on request) in that it identified all the information it held falling within the scope of the request. However, in failing to provide the information within the timescales stipulated the Council has breached regulation 5(2) EIR.
3. As all relevant information has now been provided to the complainant, the Commissioner does not require the Council to take any steps.

Request and response

4. On 8 September 2020, the complainant wrote to Conwy County Borough Council and requested the following information in respect of Planning Application number 0/44248- 'Hafotty Ucha Wind Farm Repowering' – approved with conditions 27 July 2020:

"Information Request 1"

All associated and subsequent communication between Conwy CBC departments (received/issued responses -internal/external) to/from and regarding the following:

Mr Dick Bowdler – (Conwy CBC) – Acoustic Consultant.

- Conwy CBC – Fee/Cost of Commission- Mr Dick Bowdler – Acoustic Consultant.
- Conwy CBC – Consultation (extent of remit) – Mr Dick Bowdler – Acoustic Consultant.
- Conwy CBC – Commission and Consultation (applicable dates/duration/time period) – [named individual 1) – Acoustic Consultant.

Re.

(a) *Planning Application no: 0/44248 – "Hafotty Ucha Wind Farm Repowering"*

(b) *0/44248 -m10/04/2018.*

[Named individual one] – "Hafforty Ucha Wind Farm Repowering" – Review of the Noise Section of the Application (Conwy CBC) – 6/04/2018.

(c) *Conwy CBC – Noise Nuisance Complaints (submitted historic/current – attributable to existing/proposed 0/44248 site).*

(d) *[Named individual one] – Comments on Hayes McKenzie Partnership (HMP) Compliance Measurement Schemes ref: W525 (Conwy CBC) – 22/07/2018.*

(e) *0/44248 – document no: 2894187 – 10/04/2018.*

Appendix – Noise Conditions – page 15 – Table 1, 2, 3.

Planning Conditions (as proposed by [named individual one] – 6/04/2018).

(f) *0/44248- document no:2893978 – 10/04/2018.*

Planning conditions (as proposed by [named individual one] – 9/04/2018).

(g) *0/44248 – document no:*

Planning Conditions (as attached, decision notice – 29/7/20).

Information Request 2.

All associated and subsequent communication between Conwy CBC departments (received/issued responses – internal/external) to/from and regarding the following:

[Named individual one] – (Conwy CBC) – Acoustic Consultant .

Conwy CBC – Commissioned Consultation Reports.

Re.

(a) *Planning Application no: 0/44248 – "Hafotty Ucha Wind Farm Repowering"*

(b) *0/44248 -m10/04/2018.*

[Named individual one] – "Hafforty Ucha Wind Farm Repowering" – Review of the Noise Section of the Application (Conwy CBC) – 6/04/2018.

(c) *Conwy CBC – Noise Nuisance Complaints (submitted historic/current – attributable to existing/proposed 0/44248 site).*

(d) *[Named individual one] – Comments on Hayes McKenzie Partnership (HMP) Compliance Measurement Schemes ref: W525 (Conwy CBC) – 22/07/2018.*

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(g) *0/44248 – document no:*

Planning Conditions (as attached, decision notice – 29/7/20).

Information Request 3

All associated and subsequent communication between Conwy CBC departments (received/issued responses – internal/external) to/from and regarding the following:

[Named individual two, Tegni Ltd. – Applicant/Developer.

Axis – (Applicant/Developer) – Agent.

Hayes McKenzie Partnership Ltd – (Applicant/Developer) – Acoustic Consultant.

Other associated and/or named person(s) acting on behalf of any of the above noted.

Re.

(a) *Planning Application no: 0/44248 – "Hafotty Ucha WinFarm Repowering"*

(b) *0/44248 -m10/04/2018.*

[Named individual one] – "Hafforty Ucha Wind Farm Repowering" – Review of the Noise Section of the Application (Conwy CBC) – 6/04/2018.

(c) *Conwy CBC – Noise Nuisance Complaints (submitted historic/current – attributable to existing/proposed 0/44248 site).*

(d) *[Named individual one] – Comments on Hayes McKenzie Partnership (HMP) Compliance Measurement Schemes ref: W525 (Conwy CBC) – 22/07/2018.*

(e) *0/44248 – document no: 2894187 – 10/04/2018.*

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Planning Conditions (as proposed by [named individual one] – 6/04/2018).

(f) *0/44248- document no:2893978 – 10/04/2018.*

Planning conditions (as proposed by [named individual one] – 9/04/2018).

(g) *0/44248 – document no:*

Planning Conditions (as attached, decision notice – 29/7/20).

Information request 4.

Planning Application no: 0/44248 – "Hafotty Ucha Wind Farm Repowering"

Approved with Conditions – 29/07/2020.

From and including the above noted 0/44248 – date of issue of Decision Notice.

All associated and subsequent communication between Conwy CBC departments (received/issued responses – internal/external) and the following:

[Named individual one] – (Conwy CBC) – Acoustic Consultant

[Named individual two, Tegni Ltd. – Applicant/Developer.

Axis – (Applicant/Developer) – Agent.

Hayes McKenzie Partnership Ltd – (Applicant/Developer) – Acoustic Consultant.

Other associated and/or named person(s) acting on behalf of any of the above noted.”

5. The Council responded on 18 December 2020. It provided much of the information but confirmed that it was withholding the remaining information on the basis of section 42 of the FOIA.
6. Following an internal review the Council wrote to the complainant on 15 February 2021. It accepted that its procedural handling of the request had been outside of the specified timescales, and confirmed that it had not deemed the provision of advice and assistance under section 16 FOIA as necessary as the request was very clear regarding the information being sought. It did not accept the complainant’s comments that it had not provided all information captured by the request or her comments regarding the exemption specified and its public interest test. It did however confirm that although it had originally withheld a total of four documents, it had now decided that three of the four could be disclosed.

Scope of the case

7. The complainant originally contacted the Commissioner on 17 November 2020 in respect of her request, and the case was accepted as valid on 16 May 2021 when the complainant forwarded the response and internal review documentation from the Council.
8. The complainant sent a detailed list of complaints in respect of the Council’s handling of her request which can be summarised as follows:
 - The Council’s procedural handling of her request, particularly in respect of timescales.
 - That she was initially unable to access the information because the Council had not granted her required permissions.

- The Council has not forwarded all relevant information falling within the scope of her request.
 - The complainant is not satisfied with the Council's reliance on the exemption specified or its public interest test assessment.
9. During the course of the Commissioner's investigation, the Council disclosed the final document it had been withholding on the basis of Legal Professional Privilege (LPP), and identified some further emails as relevant to the request which it also disclosed. The Commissioner has not therefore considered the Council's application of LPP and the scope of the Commissioner's investigation has focussed on whether the request has been considered under the appropriate legislation, and whether the Council has complied with its obligations under regulation 5 of the EIR.

Reasons for decision

The appropriate legislation

10. The Commissioner has first considered whether the information is environmental in accordance with the definition given in regulation 2(1) of the EIR:

"any information in written, visual, aural, electronic or any other material form 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, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment 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..."

The Commissioner considers that the information in question relates to planning consent which falls within the scope of 'measures' defined by

regulation 2(1)(c). The request should therefore be considered under the EIR.

Regulation 5 – Duty to make available environmental information on request

11. Regulation 5(1) of the EIR provides a general right of access to environmental information held by public authorities. In cases where a dispute arises over the extent of the recorded information held by a public authority at the time of the request, the Commissioner is mindful of the former Information Tribunal's ruling in EA/2006/0072 (Bromley) that there can seldom be absolute certainty that information relevant to the request does not remain undiscovered somewhere within the public authority's records.
12. 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 Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
13. The Commissioner's judgement in such cases is based on the complainant's arguments and the public authority's submissions and where relevant, details of any searches undertaken. The Commissioner expects the public authority to conduct a reasonable and proportionate search in all cases.
14. In this particular case, the complainant has argued that the information she has received consists mainly of additions to repeated email conversation strands, containing minimal relevant information, and in correspondence to the Commissioner dated 15 August 2021, the complainant specified a number of documents she believes that the Council holds which would fall within the scope of her request.
15. The Commissioner contacted the Council asking for further information in relation to these specific documents and for details and evidence of its more general search.
16. The Council provided an explanation regarding its record keeping in respect of planning applications and informed the Commissioner that it uploads the applications and representations onto its 'Planning explorer' webpage, whilst documents relating to the application and general informal email discussions are stored on its back office information system (Civica). It confirmed that in this instance, those emails were provided in response to the request, however information stored on its Planning explorer website was not included as it was already publicly accessible information.

17. The Council further stated that the emails were extracted from its Civica system, and the lead officer's corporate email account and uploaded into a shared folder for other team members to view. Other team members were then required to check their corporate email accounts against the shared folder and were able to upload additional emails. It added that all correspondence received from, or sent to the necessary parties would have been conducted by email.
18. The Council added that having reviewed its records, it has discovered that three emails had been missed from its original search which have since been forwarded to the complainant.
19. In respect of telephone conversations and informal internal meetings the Council confirmed that these are not documented therefore it does not hold a written record of these discussions.

The Commissioner has considered the complainant's concerns, the explanation of the Council's record keeping in relation to planning applications, and details of its subsequent search. Based on the above, she is satisfied that on the balance of probabilities that the Council has provided all information it holds relevant to the complainant's request, and has therefore complied with its obligations under regulation 5(1) of the EIR.

Regulation 5(2) – timescales for responding to request

20. Regulation 5(2) of the EIR states that a public authority must make information available no later than 20 working days after the date of receipt of the request.
21. In this particular case, the Commissioner notes that the request was submitted on 8 September 2020 yet the response was not sent until 18 December 2020.
22. The Commissioner also notes that the Council disclosed additional information to the complainant during the course of her investigation, some of which it had originally refused on the basis of an exemption/exception, and some it had failed to identify at the time of the request. Based on the above paragraphs, the Commissioner has recorded a breach of regulation 5(2) of the EIR.

Right of appeal

23. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

24. 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.
25. 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

**Catherine Dickenson
Senior Case Officer
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Wycliffe House
Water Lane
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