

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 15 September 2022

Public Authority: Waverley Borough Council
Address: The Burys
Godalming
Surrey
GU7 1HR

Decision (including any steps ordered)

1. The complainant requested from Waverley Borough Council ("the Council") information relating to the use of a private road by developers, against a Planning Inspector's instructions. The Council provided some information but denied that the further information was held.
2. The Commissioner's decision is that on the balance of probabilities, the Council does not hold any further information, and therefore it complied with the requirements of Regulation 5(1).
3. He has, however, decided that the Council did not comply with the requirements of Regulation 5(2) in that it did not respond to the request within 20 working days.
4. The Commissioner does not require the Council to take any steps.

Request and response

5. On 20 June 2021 the complainant made the following request for information under the FOIA for:

"We are therefore requesting documents and information from within Waverley Planning Department relating to the provision of one or more permissions for the use of construction vehicles in [name of road redacted]. We are additionally requesting documents showing the reasoning behind the decision to contradict the Inspector's instruction.

Documents should include communications both between members of Waverley Planning Department and with other relevant parties.

Documents in this context should include: letters, emails, SMS texts, WhatsApp and similar communications, and notes made from conversations in person or by phone.

The period for this search should be from 23 February 2021 to the date of this request."

6. The Council responded on 17 August 2021 and disclosed approximately 450 pages of information. It redacted personal data from the information under Regulation 13 (personal data of third parties). It also confirmed that no WhatsApp or text messages were held falling within the scope of the request (Regulation 12(4)(a)).
7. The complainant submitted a request for review on 22 August 2021. He highlighted that the Council's response did not mention his request regarding letters, or notes made after conversations in person or by phone. He also listed a number of other items referred to in the information disclosed, and from his own personal knowledge of the contacts which had taken place, which had not been disclosed in response to his request. He also argued that the 450 pages contained a large number of duplicated pages, and that the information could have been disclosed in less than 100 pages.
8. The Council provided the outcome of its review on 31 October 2021. It maintained its position that no further information is held falling within the scope of the request. It noted that there had been correspondence in relation to the discharge of conditions following the Planning Inspector's decision, but that this information is all publicly available on the Council's online planning portal.

Scope of the case

9. The complainant contacted the Commissioner on 14 October 2021 to complain about the way his request for information had been handled.
10. The Commissioner notes that the complainant's request for review related to whether further information is held. The complainant did not ask the Council to review the redactions of personal data under Regulation 13(1).
11. The scope of this case, and of the following analysis, is therefore whether the Council is likely, on the balance of probabilities, to hold further information falling within the scope of the request for information for the purposes of Regulation 5(1).

Reasons for decision

Background to the case

12. The complainant's request relates to a private road which leads to an area which was under development. The complainant argues that the road is completely unsuited to heavy construction traffic.
13. In a planning appeal, the Planning Inspector stated that the road should not be used by construction traffic to and from the area of the development.
14. The complainant argues that, after a period of approximately six weeks, it became clear that the developer was using the road to some extent, and that the Council had agreed to this.
15. The Council argued that the Planning Inspector's decision did not include a condition that the road should not be used for construction traffic. The Planning Inspectorate, however, states that the conditions allowed the Council to include this.
16. The complainant's request was therefore intended to create transparency over why the council decided not to apply or enforce the Planning Inspector's instruction.

Regulation 12(4)(a) – information held / not held

17. Regulation 5(1) of the EIR requires a public authority that holds environmental information to make it available on request.

18. Regulation 12(4)(a) of the EIR allows a public authority to refuse to provide the requested information if it does not hold it at the time that the request is received.
19. Where there is some dispute between the amount of information identified 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 First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request).
20. In other words, in order to determine such complaints, the ICO must decide whether on the balance of probabilities a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request).

The complainant's position

21. The complainant argues that the Council holds further information. He argues that he has received proof from other sources that other information is held by the Council.
22. He also argues that "it seems inconceivable that there should have been no emails whatsoever between the developer and Planning senior staff, or the Case Officer, for approaching six weeks, and no internal email discussion between officers at all on the merits or otherwise of reversing the Planning Inspector's instruction."
23. For instance, he argues that a disclosure of an email chain via the Council's planning portal demonstrated that information is held which fell within the scope of his request, but which was not disclosed to in response to his request for information.
24. He argues that:

"It seems clear to us that having made the early decision to allow heavy vehicles via [name of road redacted] Waverley Planning would have quite correctly consulted Surrey Highways for their opinion. As a further example of emails that we believe to be missing we would therefore have expected to see an initial approach from Waverley to Surrey Highways, other information provided as necessary, and a subsequent report from the Highways Officer in return. None of this email or letter traffic was included in the material released to us, despite it being completely relevant to our requests for information on construction traffic decisions and permissions.

Using the non-redacted information in the thread mentioned above we subsequently contacted the Surrey Highways Officer directly. He confirmed that he had performed a site survey on the public roads concerned, and also stated very clearly that he did not have jurisdiction over [name of road redacted], as it is a private non-adopted road. None of this information was released to us or other residents, and the Highways Officer's report, despite several requests, has not been released to us either, despite (again) its clear relevance to our requests”

The Council's position

25. The Council argues that it has carried out appropriate searches to locate any information it holds which falls within the scope of the request.
26. It said that searches were targeted to relevant officers in the planning service, and were conducted of its electronic planning case system. It said that manual searches of individuals' email/outlook system were conducted using the date parameters referred to by the requestor; 23 February 2021 to 20 June 2021.
27. Relevant managers were asked to conduct searches of the email accounts of specific officers where they had left the service by the time of the request, before these accounts were deleted in compliance with the Council's document retention policy.
28. It said that there are no WhatsApp type messages or SMS messages held, and that this would be an unusual method of discussion of formal business for the Council.
29. It confirmed that internal discussions were via e-mail. No written notes are therefore held by it. The Council said that it uses a logon system which ensure that access, even when remotely, is entirely via the network system rather than any separate local systems.
30. It said that whilst it is possible that information could potentially be held locally on personal computer systems this would not be in line with the Council's recommended working practices and would be highly irregular.
31. It described the search terms it had used to carry out electronic searches of its systems.
32. Finally, it said that there are no file notes of discussions in person/by telephone – the emails and documents provided to the requestor represent the material which is held within the scope of the request, and which has been provided. It acknowledged that this was unclear from its initial response to the request for information.

The Commissioner's conclusion

33. The Commissioner has considered the Council's position, in conjunction with the request.
34. Whilst the Commissioner understands the complainant's concerns, the Council did clarify that, in its opinion, the Planning Inspector failed to include the restriction as a condition, and so no conditions were being broken by the road being used by the developer for construction traffic. The Council has also disclosed some information, and clarified that other information is available on its website.
35. The Council has confirmed to the Commissioner that, beyond this, it has carried out adequate and appropriate searches of its records, but it has not been able to locate any further information falling within the scope of the complainant's request.
36. There is no contradictory evidence available to the Commissioner that indicates the Council's position is wrong.
37. On this basis the Commissioner has concluded that, on the balance of probabilities, the requested information is not held.

Regulation 5(2)

38. The complainant made the request for information on 20 June 2021. The Council did not provide its response until 17 August 2021. This falls outside of the 20 working days to respond required by Regulation 5(2).
39. The Commissioner has therefore decided that the Council did not comply with the requirements of Regulation 5(2).

Right of appeal

40. 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

41. 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.
42. 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

Ian Walley
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