

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

Decision notice

Date: 23 May 2022

Public Authority: Derby City Council
Address: Council House
Corporation Street
Derby
DE1 2FS

Decision (including any steps ordered)

1. The complainant has requested from Derby City Council (the council) the inspection records for the Copper Building at One Friargate Square, Agard Street, Derby, relating to the planning department/building control's approval of a change of use planning application in 2015. They also requested records relating to the absence of a fire escape during a particular timeframe. The council provided some information and stated that it held no further information. The complainant does not accept that no further information is held by the council.
2. The Commissioner's decision is that, on the balance of probability, the council does not hold any further information and therefore it has complied with regulation 5(1) of the EIR. However, he has also decided that the council breached regulation 5(2) of the EIR by providing some of the requested information beyond the legislative timeframe.
3. The Commissioner does not require the council to take any further steps.

Request and response

4. On 4 February 2021 the complainant asked for information from the council as follows:

“Please provide sight of all inspection records for the Copper Building at One Friargate Square. Agard Street, Derby, related to the planning department / building control's approval of a change of use planning application in 2015.

Please provide all records related to the absence of a fire escape at the six storey Copper Building at One Friargate Square. Agard Street, Derby, from the building's initial completion until September 2018.”

5. On 4 March 2021 the council responded to say that it could not meet the statutory timeframe for compliance.
6. The complainant asked for an internal review to be carried out on 6 April 2021.
7. On the same day the council acknowledged the review request.
8. The council responded on 27 April 2021, stating that it held no information after 2014 in relation to part one of the request. It provided some information regarding part two of the request but had redacted information it said was exempt by virtue of section 40(2) – third party personal information.
9. The complainant told the council that the review it provided on the same day was in response to the wrong request but the council replied to say that it was correct.
10. On 20 May 2021 the complainant told the council that they expected more information.
11. The complainant provided a reference number on 11 June 2021 for the fire safety ‘final certificate’ document that they believed they should have received. This led to further information (the final certificate) being provided by the council on 15 June 2021, some of which was redacted because it was personal information.
12. On 17 June 2021 the complainant queried the response stating that it was contradictory and asking about the final certificate. The council responded to say that it had attached the certificate in its earlier response. On 21 June 2021, the complainant said it had not been

attached. The council replied to say the certificate was the fourth attachment and had been sent.

13. The complainant replied on 25 June 2021 stating that there were significant differences between the version they had been sent and other versions they had seen. They raised other matters the complainant considered to be serious. The complainant suggested that there might be further information held that needed to be provided and reiterated part two of this request.
14. On the same day the council acknowledged the complainant's comments.
15. On 13 July 2021 the complainant requested an internal review regarding information they believed to be outstanding:

"In addition, I believe that the council is in possession of records related to the review(s) carried out immediately following the Grenfell Tower fire of June 2017."

16. The council acknowledged the review request on the same day, stating that it was the third internal review request. The council advised the complainant that Grenfell Tower related to residential properties and that the Copper Building is a commercial property, and not covered by Grenfell issues.
 17. The complainant clarified certain points on 27 July 2021:
- "...my request would include sight of records of instances of fraudulent, altered, or amended, building control final certificates since 2017."
18. On 2 August 2021 the council asked for further clarification:

"Is the information you want whether the Copper Building at One Friargate Square, Agard Street, was part of the review carried out? Please clarify what specific 'records relating to the reviews carried out' do you mean? For example, do you mean a list of residential blocks inspected for external cladding/fire safety issues? "

19. Clarification was provided by the complainant on 6 August 2021.
20. Although this email was acknowledged, the council subsequently sent four holding emails concerning a delay to the internal review.
21. On 9 November 2021 another internal review was provided where the council maintained that it did not hold any information regarding part

one of the request. Regarding part two of the request, three new pieces of information were attached, in addition to those already provided. Some third party personal information was again redacted.

22. The review also considered what had been requested on 13 July 2021:

“I believe that this includes other documents related to the final certificate, to include an initial notice dated 07.07.15 that had within it a description of works.”

23. The council provided some further information with redactions made for third party personal data. The council stated that some information was 'not held', specifically information relating to Grenfell Tower or any evidence of the fraudulent alteration of certificates.

24. The complainant requested a review on 9 December 2021. On the same day the council asked for clarification.

25. The complainant responded on 12 January 2022 to say that the request to clarify was not legible. The council sent a different version later on the same day.

26. On 11 February 2022 a fourth review was carried out that stated that no further information was held but acknowledged the breach regarding the council's initial response because it had been late.

Scope of the case

27. The complainant contacted the Commissioner on 19 May 2021 to complain about the way their request for information had been handled.

28. On 16 March 2022 the complainant spoke to the Commissioner and explained that information should have been directly held in 2015 by the council itself. It wasn't until 2017 that Derbyshire Building Control Partnership (DBCP) held relevant information on behalf of the council. In other words, they believed that there should be two 'final certificate' docs, from 2015 and 2017.

29. Although the council withheld some personal information from its response to part two of the request, the complainant did not wish the Commissioner to investigate this. As no other information has been withheld, the Commissioner considers the scope of this case to be whether all the information falling within the scope of the information request has been provided to the complainant. The Commissioner will also consider any procedural matters that may have arisen.

Reasons for decision

Is the information environmental information for the purposes of the EIR?

30. Regulation 2(1) of the EIR defines environmental information as any information in any 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;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)'

31. The requested information relates to fire safety. This is clearly an environmental matter as it affects the state of human health and safety regarding a built structure (regulation 2(1)(f)) as they may be affected through the elements referred to in regulation 2(1)(c) of the EIR.
32. The council accepts that it had processed the complainant's request under the wrong legislation which should have been the EIR.

Regulation 5(1) – general right of access to information held by public authorities

33. Regulation 5(1) of the EIR says that a public authority that holds environmental information must make it available on request.
34. In cases such as this where there is some dispute as to whether information falling within the scope of the request is held, the Commissioner is not expected to prove categorically whether the information is held. He is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities, following the lead of a number of Information Tribunal decisions.
35. In deciding where the balance of probabilities lies, the Commissioner will consider the evidence and arguments of the complainant. He will also consider the searches carried out by the council and any other relevant factor.

The complainant's view

36. The complainant wrote to the Commissioner on 15 March 2022 to explain that they believed that they had evidence that contradicted the 'record not held' position of the council. The complainant explained that DBCP which was established in 2017 has an office in the council building.
37. On 7 April 2022 the complainant wrote again to the Commissioner to say that they had checked their notes and those notes contained references to at least two missing documents that would be in possession of the council:
 - A 'completion certificate' which (according to a building control consultant) should be a documented list of items outstanding following the issuing of a 'Final certificate (partial)' on 8 August 2015. The complainant argues that there is documentary evidence showing that the University of Derby went out to tender for the construction of a fire escape (December 2015). According to the complainant, this was cancelled in 2016 and removed from the portal as a public record. It is inconceivable, in their view, that the council planning control was not in the loop concerning this.
38. The complainant states that a full 'Initial Notice' (DBY/15/08895/IN) for a fire escape was confirmed to him in a phone call to DBCP but that it could not be released without the permission of the council. There would be one for 2015 and 2017. Only an initial summary is published.

39. The complainant has queried -

- What happened to a seven year retention schedule for email accounts.
- Any records created after public questions on the Copper Building fire escape asked at full council chamber meetings.
- Records of internal council review post-Grenfell Towers fire (June 2017) on building control fire safety for this building.

40. The Commissioner wrote to the council on 15 March 2022 and asked a series of questions to ascertain exactly what searches had been carried out by the council in order to assess the adequacy of those searches.

41. He also asked some specific questions about the email account for the previous Head of Service when they left the council in 2017. The Commissioner asked whether this email account was archived or deleted beyond recovery and when this had occurred. He also asked if this was in line with the council's retention policy.

42. The council had stated that it provided a 'final certificate' to the complainant. The Commissioner reiterated the complainant's statement that they hold different versions from other sources and asked the council if it held any other versions.

43. He asked if the council holds a planning application to build a fire escape or if it ever held one.

The council's view

44. The email account for the previous Head of Service was deleted on 1 June 2017. The email account was not able to be recovered as the council only keeps 12 months of backups. This is in line with the council's retention policy.

45. The council has clearly stated that it does not hold any other versions of the 'Final version' that had been provided. It explained that final certificates had been issued by an independent approved inspector. Consent had to be obtained to provide these. Final certificates are not placed on the eplanning pages of the planning portal. Eplanning does not hold inspection records. The council explained that, in general, planning permission is granted and then inspections made by building control to ensure adherence to the building regulations.

46. Planning applications that are relevant to the request are on the planning portal which is publicly available. The council states that this

was confirmed to the requester in the internal review in February 2022. The council argues that this information was not requested in the original EIR request but was available to the complainant in any case as it is in the public domain. Although the council provided search results for the planning portal to the Commissioner, it did not accept that this formed part of the request. As mentioned earlier, the planning portal does not hold "inspection records". Any inspection records held were provided to the complainant on 27 April 2021.

47. In response to the Commissioner's more general queries, the council explained what searches had been carried out. The council itemises them as follows:

- Physical archived files in storage.
- Review of archived plans.
- Electronic searches of data management software on the council network and on the DBCP's network.
- Online planning portal files.
- Email.

48. The council explained that planning is a reactive regulatory function and does not require or need a fire escape. However, if an application was received it would be published on the online planning portal. If any planning application is subject to planning control committee the reports are also published there. All information relating to any planning application are submitted by applicants through the online planning portal and saved locally by the council onto the network. Any information held, is held there.

49. The council's building control function was transferred to the DBCP on 1 June 2017. The council transferred live and historic data across to the Partnership data management system and searches were conducted within that system using the address given in the request. The council conducted physical file searches and electronic searches thoroughly over a number of hours. Inspections and documents are recorded and stored in DBCP's data management software which is central to their day-to-day operations. These searches should have retrieved the requested information if it is held and had been inputted correctly. Further searches were carried out on a former historic network drive using certain search terms.

50. In response to the questions the Commissioner asked about searches, the council stated that it had made extensive physical and electronic searches. Most of the records are held electronically. All planning officers searched their email accounts as well as shared networks that fell within the scope of the request. These searches have been carried out on a number of occasions and the team has searched against relevant search terms including "fire escape" and "Agard". There were no returns within the scope of the request.
51. When the search was conducted at the time of the initial request, the council retrieved an archive box file from storage. The box contained plans but no inspection records for the request. The box was checked by the manager of the DBCP. DBCP's search was limited to an electronic search of their data management software which is networked. The council's search was limited to a networked storage location which was used before the transfer of the building control function to DBCP in 2017. It explains that there are no email accounts to search as the building control service is no longer with the council and all staff email accounts have been deleted.
52. The council provided its search terms in response to the Commissioner's queries and the results of that search:
- "Fire Escape" – references were found but were not within scope.
 - "Fire" – large number of results mainly school fire risk assessments.
 - "Agard Street" – eight results but nothing falling within scope.
 - "Copper Building" – no information held falling within scope.
 - "Copper" – no results.
 - "University" – no information held falling within scope.
 - "Friar Gate Square" – no information held falling within scope.
 - "Ford Street" – no information held falling within scope.

These searches were conducted of the emails, shared network and online portal. The council confirmed that information is not held locally on personal computers in the council. On the network drive only, the council searched for "Final certificates" on 23 March 2022 but nothing relevant to the request was held.

53. The council provided all its search results to the Commissioner. It stated that none mention a fire escape explicitly but one does refer [in the 'title'] to Fire Escape [Stair] Section (drawing no: (21) 001 rev: P1¹) in

¹ [\(21\) 001 \(derby.gov.uk\)](https://www.derby.gov.uk)

the decision notice and can be interrogated from the listing which is on the web file: Document Application Submission Details – Stair Section 02/06/2015.

54. The Commissioner had asked the council if information falling within the scope of the request had ever been deleted or destroyed. The council responded by stating, not to its knowledge.
55. He asked the council about its formal records management policy regarding the retention and deletion of records of this type. The council responded by explaining that planning records are public documents and can be traced back to 1947. More specifically, the council has a formal records management retention policy for building control. DBCP retain most records for 15 years in line with the Building Control Performance Standards. The council's document retention schedule will be updated to say that "final certificates" will be held for 15 years, rather than the current ten years. There is no business purpose to retain this information. The Commissioner asked the council if there were any statutory requirements to retain this information. The council stated that there were none in planning. There is a statute of limitations of six years for enforcement and legal action (Limitation Act 1980). Documents are retained in line with the 'Building Control Performance Standards' (January 2017).
56. Finally, the council stated that no similar information is held and that it had provided the complainant with advice and assistance on 12 January 2022 in the fourth internal review clarification email. In the fourth internal review response on 11 February 2022 the council also suggested that the complainant contact the Derbyshire Fire & Rescue Service for some of the requested information or visit the planning portal.

The Commissioner's view

57. The Commissioner does not intend to consider whether any information held on the planning portal would fall within scope. Any information held on the planning portal is, in any case, publicly available and therefore technically exempt.
58. The Commissioner acknowledges the complainant's views and detailed knowledge in this matter and that they have provided reasons why they believe that this information is held. However, the searches the council has carried out are, by now, extensive. The search terms used are appropriate and the Commissioner accepts that these should have returned any information falling within scope of the request. The fact that an email account is not recoverable is not unusual after several

years if it is in line with the council's retention period. This would appear to be the case here.

59. The Commissioner makes his decision based on the balance of probability and a civil standard of proof. Making decisions about what information a public authority should hold is beyond the Commissioner's remit. It may well be that the council held information that it no longer holds and the reason why it no longer holds it is in line with its retention policy. Therefore, on the balance of probability, the Commissioner accepts that the council holds no further information than has already been provided to the complainant.

Regulation 5(2)

60. Regulation 5(2) of the EIR says that the authority must make the information available as soon as possible and no later than 20 working days after the date of receipt of the request.
61. The complainant submitted their request on 4 February 2021. The council was unable to meet the statutory timeframe and did not provide a response to it until 27 April 2021. The council later provided further information on 15 June 2021 and 9 November 2021. The council therefore breached regulation 5(2) of the EIR.

Right of appeal

62. 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

63. 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.

64. 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

Janine Gregory
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