

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 25 January 2023

Public Authority: Hastings Borough Council
Address: Hastings Town Hall
Queens Square
Hastings
TN34 1TL

Decision (including any steps ordered)

1. The complainant has requested information relating to planning applications for Hasting Harbour Quarter (the Harbour).
2. The Commissioner's decision is that on the balance of probabilities, Hastings Borough Council (the Council) has not disclosed all the information it holds relating to the development of the Harbour.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Conduct new searches for the two questions in the last paragraph of the request. The Council should then either issue a new response or provide an adequate refusal notice.
4. The public authority 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 25 September 2022, the complainant wrote to the Council and requested information in the following terms:

“Please list all planning application numbers that are associated with the application to build a marina at Hastings which was known as Hastings Harbour Quarter.

Please also list all planning application numbers of any planning applications that are connected in any way to the above.

Please can you answer this question or point me to the planning application number that will yield this information. The Question; The main reason why the application was refused?

or

The main reason why the development did not go ahead?”

6. The Council responded on 28 September 2022. It advised that it held information within the scope of the request and provided a website link to the complainant. The Council then went onto advise that if no application is found on the website, it means no application has been made. In terms of this request the Council advised no application has been made.
7. Following an internal review the Council wrote to the complainant on 20 October 2022. It stated that did not hold information relating to a planning application for Hastings Marina/Harbour Quarter.

Scope of the case

8. The complainant contacted the Commissioner on 24 October 2022 to complain about the way his request for information had been handled.
9. The Commissioner considers whether, on the balance of probabilities, the Council holds information within the scope of the request.

Reasons for decision

Regulation 12(4)(a) –Information not held

10. Regulation 5 of the EIR requires that a public authority that holds environmental information shall make it available on request. This is subject to any exclusions or exceptions that may apply.
11. Regulation 12(4)(a) of the EIR says that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant’s request is received.

12. In scenarios such as this, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities.
13. For clarity, 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.
14. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. He will also consider, where applicable, the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, he will consider any other information or explanation offered by the public authority which is relevant to his determination.
15. The Commissioner's role is not to consider whether a public authority should hold information that has been requested but whether, on the balance of probabilities, it does or does not hold it.
16. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that the public authority holds no further relevant information.

The complainant's position

17. The complainant referred the Commissioner to a previous request to the Council, in which they were advised that a planning officer had left with all documents on a personal laptop. The complainant advised that the answer to their request might be in one of those documents.
18. The complainant also provided the Council with a Cabinet Report which outlined potential new development within the Harbour.
19. The complainant further explained that the Council avoids revealing whether it holds information concerning why the development did not proceed.

The Council's position

20. The Council maintained its position that it did not hold the requested information, it advised that as there was no application on the planning portal, no application had been made.
21. In its response to the Commissioner, the Council advised that no searches were necessary for the information, as all information on applications made to the Council are held on it's website's planning portal.
22. The Council explained that all planning applications are held electronically and publicly. The Council advised it is required by law for local authorities to hold a public register of all applications made to the local authority, both live and determined applications. The Council concluded that if a planning application was made it would be visible in the public realm.

The Commissioner's decision

23. The Commissioner has concluded from the above reasoning that, on the balance of probabilities, the Council does not hold any information regarding a planning application for Hasting Harbour Quarter.
24. The Commissioner has also decided that, on the balance of probabilities, adequate searches have not taken place for the last two questions in the request.
25. The wording of the request is important, as it is for information relating to the planning applications for the Hastings Harbour Quarter development **or** the main reason why the development did not go ahead. The Commissioner notes that the Council has treated this element of the request as though both options are the same but they are not.
26. The Commissioner has viewed the complainant's previous request and Cabinets agenda report provided by the complainant. The Cabinet's Agenda report¹ clearly advises the purpose of the report was "to seek authority to work with Hastings Harbour Quarter... to develop a strategic outline case for potential development of a harbour."
27. In the Council's response to the previous request, the Council does advise that there were documents relating to a proposed development in

¹ [\(Public Pack\)Agenda Document for Cabinet, 11/09/2017 18:00 \(moderngov.co.uk\)](#)

the Hasting Harbour Quarter. However, it no longer had access to these documents. The Commissioner is not satisfied that even if the Council no longer had access to these documents, that the latter part of the request could not be answered or an adequate refusal notice could not have been provided to the complainant.

28. The Commissioner requires the Council to conduct a fresh search into the latter parts of the request which requests the following "The main reason why the application was refused?" and "The main reason why the development did not go ahead?", the Council should conduct fresh searches into the requests.
29. The Council should ensure they identify any records pertaining to the development of the Harbour, if the Council is satisfied after this new search that no further information is held, it should clearly explain the reasoning for this.

Right of appeal

30. 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

31. 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.
32. 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 Fletcher
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Wycliffe House
Water Lane
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