

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

Date: 10 April 2024

Public Authority: Adur District Council

Address: data.protection@adur-worthing.gov.uk

Decision (including any steps ordered)

1. The complainant has requested information relating to a proposed beach café in Shoreham-by-Sea. Adur District Council (the "council") initially responded to the request under the FOIA but it subsequently, at the Commissioner's direction, issued a new response which withheld information under the exceptions for material in the course of completion (regulation 12(4)(d)), the course of justice (regulation 12(5)(b)) and commercial confidentiality (regulation 12(5)(e)).
2. The Commissioner's decision is that the council's response, in failing to properly identify relevant information held, does not comply with the requirement for a public authority that holds environmental information to make it available on request and that the council has, therefore, breached regulation 5(1) of the EIR.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the request which identifies and discloses information falling within the scope of the request or issue a fresh refusal indicating the exceptions under the EIR the council is relying on to withhold this information.
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 the Act and may be dealt with as a contempt of court.

Background

5. The request relates to the proposed development of a site on the Shoreham beachfront. A summary of the background to this was published on the developer's website:

"The redevelopment of the Shoreham toilet block has been a strategic priority for Adur & Worthing Council to significantly upgrade the quality of the facilities and provide a brand new, high quality and well managed community and cafe space on the Shoreham beachfront. Adur District Council put the site out for tender in spring 2017. After the announcement of BeachBox Developments Ltd (BDL) as the preferred developer, A&W and BDL agreed the leasing terms in March 2019. Planning permission for the scheme was granted in October 2019."¹

6. The planning permission associated with the development subsequently lapsed and the development has not gone ahead. The complainant has requested information about the background to this.
7. The Commissioner notes that, in addition to the request under consideration in this notice, the complainant had submitted another request to the council for other information relating to these matters. That request was handled under the council reference FOI 20203553. For the avoidance of doubt, this decision notice is concerned with the request handled under the council reference FOI 20762047.

Request and response

8. On 22 December 2022, the complainant wrote to Adur District Council (the "council") and requested the following information:

"1 Has the council held negotiations with the Boxpark organisation regarding the issue of any payment being made to them by the council,

2 has payment been made to Boxpark by way of compensation for or as a contribution towards their losses on the Beachbox development project or is the council planning to make such a payment?"

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<http://www.shorehambeachbox.co.uk/#:~:text=Adur%20District%20Council%20put%20the,was%20granted%20in%20October%202019.>

If the answer to any of these questions is yes then the details and the amount of money involved is in my view something I and other residents have a right to know.

If you can answer in the negative to all of these questions, then that is also information that local residents themselves need to be informed of.”

9. The council responded on 19 January 2023 and confirmed that it was refusing to provide the requested information, citing the exemption for commercial interests in section 43 of the FOIA.
10. There followed subsequent correspondence between the complainant and the council in which the complainant clarified the specific information that was being sought.
11. On 19 June 2023 the complainant asked the council to carry out an internal review.
12. The council elected to treat the internal review request as a new request and issued a response to this on 29 June 2023. The council confirmed that it was relying on the FOIA exemptions for commercial interests (section 43) and legal professional privilege (section 42) to refuse the request.

Scope of the case

13. On 20 November 2023 the Commissioner confirmed to the complainant that he had accepted their complaint for investigation.
14. In view of the passage of time since the original request, the Commissioner made initial attempts to resolve the matter informally, inviting the council to disclose relevant information, including that generated after the date of the request. The council subsequently addressed queries raised by the complainant via the Commissioner and disclosed a copy of the 2019 lease agreement between the council (as landlord) and the developer.
15. In view of the nature of the request, which related to a proposed development, it also occurred to the Commissioner that the information was environmental in nature. He, therefore, invited the council to reconsider the request under the EIR and to issue a new response to the complainant.
16. On 21 February 2024 the council issued a new response to the complainant under the EIR. This confirmed that it was relying on the exceptions for material in the course of completion (regulation

12(4)(d)), the course of justice (regulation 12(5)(b)) and commercial confidentiality (regulation 12(5)(e)) to withhold the requested information.

17. Following the Commissioner's attempts to resolve the matter informally, the complainant confirmed that they wished the Commissioner to issue a formal decision notice setting out his conclusions about the council's handling of their request.

Reasons for decision

Is the requested information environmental?

18. Regulation 2(1) of the EIR defines environmental information as being information 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)...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);

19. As the requested information relates to decisions regarding a proposed development, the Commissioner is satisfied that it constitutes a measure under regulation 2(1)(c) and that the request falls to be considered under the EIR.

Regulation 5 – duty to provide environmental information

20. Regulation 5(1) of the EIR states:

“Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.”

21. Regulation 5(2) states:

“(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.”

22. As part of his investigation the Commissioner asked the council to provide submissions regarding its position in relation to the request under the EIR. He also asked the council to provide the information which was being withheld under the EIR exceptions cited 12(4)(d), 12(5)(b) and regulation 12(5)(e).

23. Having considered the withheld information the Commissioner considers that the council has failed to accurately identify information falling within the scope of the request, with much of the information falling outside the timeframe of the request.

24. In view of this the Commissioner has concluded that the council has failed to properly consider the request and respond in accordance with regulation 5(1). He, therefore, requires the council to issue a new response to the request which correctly identifies the information in scope and discloses this to the complainant. Where the council is withholding information it should cite the exceptions it is relying on and explain why they apply in a refusal notice.

Regulation 14 – refusal to disclose information

25. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore, where the procedural requirements of the two pieces of legislation differ, it is inevitable that the council will have failed to comply with the provisions of the EIR.

26. In these circumstances the Commissioner believes that it is appropriate to find that the council breached regulation 14(1) of EIR which requires a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and indeed its internal review) failed to cite any exception contained within the EIR as the council actually dealt with the request under FOIA.

Other matters

27. Although they do not form part of this decision notice the Commissioner would like to note the following matters of concern.

General approach to request handling

28. The code of practice issued under regulation 16 of the EIR (the "EIR code") sets out recommended practice for authorities in the handling of requests for environmental information.

29. Part I of the EIR code states:

"All communications to a public authority, including those not in writing and those transmitted by electronic means, potentially amount to a request for information within the meaning of the EIR, and if they do they must be dealt with in accordance with the provisions of the EIR. It is therefore essential that everyone working in a public authority who deals with correspondence, or who otherwise may be required to provide information, is familiar with the requirements of the EIR and this Code in addition to the FOIA and the other Codes of Practice issued under its provisions, and takes account of any relevant guidance on good practice issued by the Commissioner. Authorities should also ensure that proper training is provided."²

30. During his handling of this complaint it occurred to the Commissioner that the council might not properly understand its responsibilities under the EIR, particularly in respect of the duty to proactively make environmental information available as set out in regulation 4 and in relation to the duty to apply a presumption in favour of disclosure as provided by regulation 12(2).

31. Whilst he has not reached any conclusions in these matters in his decision, based on his engagement with the council, he has concerns that it might not have provided staff with adequate training as set out in the EIR code. The Commissioner recommends that the council should ensure that staff at all levels are given adequate training and are made aware of their responsibilities in relation to requests made under both the FOIA and the EIR

² https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf

Right of appeal

32. 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

33. 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.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Christopher Williams
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