

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

Decision notice

Date: 16 June 2014

Public Authority: Dover District Council
Address: Council Offices
White Cliffs Business Park
Whitfield
Dover
CT16 3PJ

Decision (including any steps ordered)

1. The complainant submitted requests to Dover District Council (the Council) seeking access to two planning files. The Council explained that she had previously viewed these files at its offices, albeit that this could be arranged again. The complainant argued that the Council held further information concerning these files than she had previously been able to view. During the course of the Commissioner's investigation, the Council disclosed one further document to the complainant. The complainant maintained that the Council still held further information falling within the scope of her requests. However, the Commissioner has concluded that on the balance of probabilities the Council does not hold any further information falling within the scope of her requests beyond that previously disclosed to her or which she has been able to inspect at the Council's offices.

Request and response

2. The complainant submitted the following request to the Council on 10 September 2013:

'I would like to be given access to the full file, including legal advice, relating to [planning file number] 11/00273. I make this request under the Environmental Information Regulations 2004 and the Freedom of Information Act 2000.'

3. She subsequently submitted the following request to the Council on 23 September 2013:

'I would like to request access to all files relating to [planning file number] 91/00777 under EIR 2004.'

4. The Council responded to both requests on 2 October 2013 and explained that it understood that the complainant had already viewed the two planning files in its offices and this could be arranged again. In respect of the legal advice, the Council explained that it considered this to be exempt from disclosure on the basis of regulation 12(5)(b) of the EIR.
5. The complainant contacted the Council on 3 October 2013 and explained that she wished to see the parts of both files that were not publically available. She noted that when she went into the Council to view 11/00273 the file came up as 'classified and sensitive' and when she tried to view 91/00777 although one file was 'public', two remaining files were classified as 'sensitive' and were not available for public viewing. She also challenged the Council's application of regulation 12(5)(b).
6. The Council responded on 4 October 2013. In respect of planning file 11/00273, it explained:

'I have discussed the points you have raised with our Planning Department and understand that when you came in to view the files the customer services representative showed you the planning back office system in error. This is not viewable to the public as information shown on it could be misinterpreted. I am advised the information relating to planning file 11/00273 that was marked as sensitive relates to comments on the planning application submitted via the website. This information already exists within the publicly available Planning file and website and therefore relates to data that you would have already viewed. The documents are classified as 'sensitive' as they already appear as 'public' within the planning application file and website. Classifying them as sensitive ensures they do not appear twice on the website which could cause confusion. I am happy to provide copies of these should you wish to see them again.'

7. In relation to planning file 91/00777, the Council explained that:

'I was not aware of the two entries classed as 'sensitive' in relation to this application and apologise this was not included within my original response. I have been provided with copies of both entries and it would appear the majority of the information is already contained within the planning file you have viewed,

however some of it relates to complaints. I attach copies of these entries for your information. Please note that any information not within the public domain and containing personal information has been redacted so as not to breach the Data Protection Act. In addition any handwritten complaint received has been typed up as an individual's handwriting could possibly identify that individual and would therefore be classed as personal data.'

8. The Council subsequently informed her of the outcome of the internal review regarding regulation 12(5)(b); the review concluded that the exception had been applied correctly.

Scope of the case

9. The complainant contacted the Commissioner on 2 December 2013. She asked the Commissioner to consider the following points of complaint:
10. Firstly, she disputed the Council's decision to withhold the legal advice contained in file 11/00273 on the basis of regulation 12(5)(b).
11. Secondly, she believed that the Council held more information in both planning files (ie 11/00273 and 91/00777) beyond that which had previously been shown to her when she had inspected the files and/or was available on the Council's website. In essence, the complainant believed that the Council held some 'secret' files regarding planning files 11/00273 and 91/00777 which, to date, she has not been able to access.
12. During the course of the Commissioner's investigation it was established that in response to the request regarding file 11/00273 the Council had only sought to apply regulation 12(5)(b) to two emails. Furthermore, it transpired that these emails were in fact already in the complainant's possession as she had viewed these previously at the Council's offices and had been provided with photocopies of these documents. Consequently, the Council confirmed that regulation 12(5)(b) should not have been cited as basis to withhold these two documents. In essence, then this first point of complaint was resolved during the Commissioner's investigation as the complainant accepted that she had been provided with the two emails that he Council had sought to withhold on the basis of regulation 12(5)(b).
13. With regard to the second point of complaint, during the course of the Commissioner's investigation the complainant was provided with a further document concerning file 11/00273 which had now been located by the Council. However, the complainant remains of the view that the Council holds further information regarding both planning files that has

not been provided to her. She has provided submissions to support this position and these are considered below.

Reasons for decision

Regulation 12(4)(a)

14. Regulation 12(4)(a) provides that a public authority may refuse to disclose information in circumstances where it does not hold the requested information.
15. In scenarios such as this where there is some dispute between the amount of information located by a public authority and the amount of information that a requestor 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.
16. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information, or in this case holds any further information, which falls within the scope of the request.
17. In applying this test the Commissioner will consider:
 - The scope, quality, thoroughness and results of the searches; and/or
 - Other explanations offered as to why information is not held, or why no further information is held.

The complainant's position

18. In order to support her view that the Council held further information concerning each planning file, the complainant highlighted a number of discrepancies and apparent omissions within the files. She emphasised that these were simply illustrative examples to support her view that the Council must hold further information that had not been provided to her rather than an exhaustive list of the information which she considered to be missing.
19. These examples were as follows:
 - a) With regard to file 91/00777, as noted above, she explained that she had obviously been able to view the public version of this file online. Furthermore, when viewing this file in the Council's offices she had inadvertently been shown two files that were marked as 'sensitive'. Although the Council subsequently provided copies of

these files to the complainant – with handwritten original documents retyped - she argued that the amount of information provided to her did not match the amount of information she had been able to inadvertently view on the Council's own computer. Specifically she explained that:

'when the file was opened it came up with a hand written page in the centre of the screen and around it on each side of the screen were at least 2 pages per side, forming a frame. Presumably to be able to read them, you would have clicked on one and it would appear in the middle.

The hand written letter from the member of the public had been typed and redacted in order to send it to me and therefore fitted on just 1 page, but in it's original form of 2 pages with 2 pages of memos, it still does not make up the amount of pages I saw.'

- b) With regard to file 11/00273, she referred to an undated and unattributed internal memo that was included in documents disclosed. She highlighted that this memo is headed 'Land at Bay View, Kingsdown – DOV/11/275' and although this was the wrong reference number the memo was for this file. Furthermore, she explained that the memo included the following request for someone to check a file note:

'Evidence of the septic tank being filled in? – I recall a file note from [Mr L] advising that he had been on site and watched it being filled in. Could you check the file and my recollection [of] this?'

The complainant explained that this file note was not contained on any version of the planning files she had either viewed or been provided with copies of.

- c) Also in relation to file 11/00273, the complainant explained that she had a copy of an email from a planning officer to a Council solicitor dated 13 April 2012 stating that 'details of the cladding to this barn were granted prior to it being built in around 2011'. She explained that she had not seen any details of this submission regarding the cladding in either copies of the planning files she had viewed or been provided with.
- d) The complainant also argued that it seemed unlikely that such a complex planning case which took three years to determine would only contain one piece of legal advice (ie one of the documents that

the Council had previously sought to withhold on the basis of regulation 12(5)(b)). Furthermore, she highlighted that the version of the file she had been able to access contained a number of references to further legal advice having been received and provided in relation to this matter but there was no evidence of such advice on the files she had been able to access.

The Council's position

20. In the circumstances of this case as the complainant had inspected (and copied) some of the requested information and also viewed some of the information online, it was not necessarily straightforward for the Commissioner to establish which information the complainant had previously accessed or not. Therefore, the Commissioner asked the Council to provide him with what it considered to be a complete copy of each planning file.

21. The Commissioner also asked the Council to respond to a series of questions, the details of these and the Council's response to each are recorded below:

- What searches have the Council previously undertaken to locate information falling within the scope of the complainant's requests (ie the information which comprises planning applications 11/00273 and 91/00777)?

All information relating to planning applications is stored centrally and is held either electronically or in hard copy planning files under the relevant planning application.

- Why would these searches have been likely to locate all information relevant to these requests (and by inference, all information relevant to each file?)

Because all the information is held centrally.

- Is it the case that the Council stores all information associated with a particular planning file in one central location, eg is the information physically stored in one paper file and/or is the information placed on the same electronic record?

Information is held in a central location within the Planning Department.

- Or is it the case that information associated with one particular planning file likely to be stored in a number of different locations, be it different physical locations or different electronic locations?

Information is held in a central location within the Planning Department.

- Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?

Nothing has been destroyed.

- If recorded information was held but is no longer held, when did the Council cease to retain this information?

N/A.

- Does the Council have a record of the document's destruction?

N/A.

22. Having considered the Council's response to these questions, and having taken into account the specific examples of 'missing documents', the Commissioner contacted the Council again to seek further clarification in relation to the examples cited at b) and c).
23. In response, the Council explained that it had considered again whether information concerning the approval of the planning condition in respect of the cladding would actually be recorded. It now explained that a note of such approval would usually be made, even if it was a basic note on its 'planning database'. The Council explained that such a note would not normally be something that would be printed off and put on the relevant planning file as it did not form part of the public consultation and details of the conditions of the were already incorporated into the planning application. The Council explained that having searched the planning database in light of example c) it had located a letter sent to the applicant in which the approval was given for the cladding. The Council subsequently provided this information to the complainant.
24. As a result of this development the Commissioner asked the Council to undertake a further search of its planning database to ensure that no further information relating to either planning application was stored on it. In response the Council explained that it was an oversight that a copy of the information regarding approval for the cladding had not been previously disclosed and that it was highly unlikely that information such as this would be held on the database only and not on the relevant planning file itself. Furthermore, the Council explained that it had checked the database and as far as it could ascertain, it did not hold any information beyond that which had previously been provided.

25. With regard to point b) the Council explained that the memo in question would appear to have been created by a Ms H who was the relevant case officer at the time. However, the Council explained that Ms H was currently on a period of extended leave and therefore it was unable to discuss the content of this memo with her. It also explained that Mr L who is referenced in the memo was no longer employed by the Council. Consequently, the Council suggested that although this memo suggested that a file note regarding the filling in of the septic tank existed, given that it was not contained on the planning files themselves or the planning database, it could only surmise that no such file note in fact existed. By way of further explanation the Council explained that the planners work in an open plan office, close to one and another and it could be that Ms H heard a comment from Mr L about witnessing the septic tank being filled in and the recollection of seeing such a note – as suggested in the memo – was incorrect. The Council emphasised that the author of the file note did appear to question their own recollection as to whether such a file note actually existed.

The Commissioner's position

26. Having considered the submissions of both parties the Commissioner has concluded that the Council does not, on the balance of probabilities, hold any further information falling within the scope of the complainant's requests. The Commissioner's basis for reaching this conclusion are as follows:
27. The Council's planning application files are stored centrally and – with the exception of the aforementioned 'planning database' – act as the repository for all information concerning a particular application. Therefore, in the Commissioner's view by disclosing a particular planning file, the Council will, in all likelihood, have disclosed all information it holds concerning a particular planning application.
28. In terms of the 'planning database' it is clearly regrettable that the Council did not consider searching this when it first responded to these requests. However, the Commissioner is satisfied that this database has now been satisfactorily searched in order to locate any information relevant to the planning files that has not already been provided to the complainant.
29. With regard to the specific examples of information which the complainant highlighted as missing, as explained above the information concerning point c) has now been located and disclosed.
30. With regard to point a) the Commissioner has reviewed the copy of the redacted/typed up version of the information from file 91/00777 which the complainant was provided with and compared this to the original

version of file which he received from the Council. There is, as the complainant suggested, a slight discrepancy between the number of pages contained in each version; that is to say the unredacted version of the planning file contains more pages than the complainant had been provided with.

31. However, in the Commissioner's opinion this is explained by two reasons: Firstly, where the handwritten letters have been typed up and provided to the complainant the text has been condensed into fewer pages in the version of the file provided to her. Secondly, there is a complete page of information that has been withheld from the complainant. However, this page simply consists of a list of names (presumably local residents) and their contact telephone numbers. The Commissioner accepts that this information is likely to be the individuals' personal data and exempt from disclosure under the EIR.
32. With regard to point b), the Commissioner notes that searches by the Council of both the relevant planning files and the planning database have failed to locate the missing file note. Furthermore, the Commissioner believes that it is important to consider the nature of the reference to the file note by the author of the memo, ie:

'Evidence of the septic tank being filled in? – I recall a file note from [Mr L] advising that he had been on site and watched it being filled in. Could you check the file and my recollection [of] this?'

33. In light of the searches taken, in the Commissioner's opinion it is reasonable to conclude that the author of the memo was mistaken and that no such file note actually existed.
34. With regard to point of complaint d), the Commissioner is not unsympathetic to the complainant's line of argument that further legal advice would be held by the Council in relation to 11/00273. However, the Council has provided the Commissioner with a full copy of the relevant planning file and there is no advice of further legal advice contained in this. Given that all information concerning planning files is meant to be stored centrally on the relevant planning file – and in light of the searches it has now undertaken of its planning database - the Commissioner must conclude that on the balance of probabilities the Council does not hold any further legal advice beyond that previously disclosed.
35. For the same reasons, the Commissioner has concluded that the Council does not hold any other further information – ie beyond the specific examples cited by the complainant - falling within the scope of the requests.

Reference: FER0522830

Right of appeal

36. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. 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.
38. 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

Alexander Ganotis
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