

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 September 2015

Public Authority: Bristol City Council

Address: City Hall
College Green
Bristol
BS1 5TR

Decision (including any steps ordered)

1. The complainant has requested information with regards to the Ashton Vale green. Bristol City Council (the council), after a refinement of the request, relied on section 40(5)(b)(i) of the Freedom of Information Act (the FOIA) to neither confirm nor deny holding some information for part of the request and advised that it held no information to the remaining parts.
2. Following an internal review the council located some information and provided this to the complainant. It also considered the request to fall under the EIR and amended its neither confirm nor deny refusal to regulation 13(5) of the EIR instead of section 40(5)(b)(i) of the FOIA. The complainant has asked the Commissioner to consider whether the council was correct to neither confirm nor deny part of his request and whether any further information is held to the remaining part of his request.
3. The Commissioner's decision is that the information requested fell under the EIR, as environmental information, and he found that the council was correct to neither confirm nor deny holding the information to the part of the request under regulation 13(5) of the EIR. He also determined that no further information is held to the remaining parts of the request.
4. The Commissioner does not require the council to take any steps.

Request and response

5. On 12 December 2014, the complainant wrote to the council and requested information in the following terms:

"Under the Freedom of Information Act I would like to request the following information:

1, Please provide all email and letter correspondence between named individuals (see below) at Bristol City Council and Vence LLP and associated companies since 1 January 2011.

2, Please provide all email and letter correspondence between named individuals (see below) at Bristol City Council and [name redacted] which pertains to the Ashton Vale town green, any legal challenge over this or any incidents of harassment or intimidation since 1 January 2011.

3, Please provide all email and letter correspondence between named individuals (see below) at Bristol City Council and any representatives of Bristol City Football Club or [name redacted] relating to the Ashton Vale town green, any legal challenge over this or any incidents of harassment or intimidation since 1 January 2011.

Named individuals: [name redacted] or other legal officers in his department

4, I would like to see any emails, correspondence, legal advice or notes made by [name redacted] or any other council legal officer relating to the meeting about Ashton Vale (a PROW meeting) on 16 June 2011. I would like this to include anything about Ashton Vale in the period from a month before and a month after the meeting. This should include correspondence made with councillors or members of the public about this matter."

6. On the 6 January 2015, the council explained to the complainant that due to the time of year and the amount and complexity of information requested it would not be able to provide a full response within 20 working days and needed an additional 20 working days to complete its response. This being by the 6 February 2015, but would respond earlier if able.
7. On the 16 January 2015, the council sought clarification from the complainant about the request asking:

"Your request asks for information (emails and letters between the Council and named individuals) dating from June 2011 with no end date. I am just checking that you are expecting information from that time to when your latest requested [sic] was submitted i.e. December 2014.

You will note that this will result in a large quantity of documents that may not be relevant to your request. As you are clear about the time frame for the PROWG meeting and have called for information a month before and a month after the meeting had you also intended a shorter time frame for the rest of your request? I would appreciate it if you could clarify – there are some 4 large case files to continue searching through and I don't want to waste time looking at documents that aren't relevant."

8. The council responded on the 5 February 2015. It noted in its response, regarding the clarification quoted in paragraph 7 above, that it had confirmed with the complainant that with regards to parts 1, 2 and 3 of the request the council only needs to search a month before and a month after, taking this to mean a month before and a month after the PROWG meeting on the 16 June 2011, as the complainant had advised that he was particularly interested in the legal advice given at the meeting and correspondence around that time.
9. The council advised the complainant that as the named officer and the other legal officers, from that time, no longer work for the council and the officer's email accounts are deleted shortly after they leave, only emails and correspondence which were saved to the council's legal case management system will have been retained.
10. In response to each part of the request, the council told the complainant that it held no information to parts 1 and 3 of the request.
11. For part 2 of the request, the council refused to neither confirm nor deny whether it holds any correspondence about the individual identified, relying on section 40(5)(b)(i) of the FOIA to do so.
12. For part 4 of the request the council advised that it has been unable to locate the actual advice given. It did manage to locate an email stating that the advice given to two of its legal officers was in fact given in November 2010 – This date falling outside the scope of the complainant's request. The only information it could locate relevant to this part of the request was details which were provided to another FOIA request. This being advice given prior to the PROWG meeting on the 16 June 2011. It provided a copy of this information to the complainant.

13. On the 6 February 2015 the complainant asked the council if it could confirm whether all the emails sent/ received by the former head of legal services had been deleted and whether the council has any kind of archive or backup policy for these accounts at all.
14. The council treated this as a request for an internal review and provided its response on 2 March 2015. It maintained its original response but also instead considered that regulation 13(5)(a) of the EIR was engaged to part 2 of the request, the EIR equivalent to section 40(5)(b)(i) of the FOIA.
15. Lastly it located two further emails dated 13 and 18 May 2011 and provided the complainant with copies of these.

Scope of the case

16. The complainant contacted the Commissioner on the 13 March 2015 to consider the council's response to neither confirm nor deny holding some of the requested information and to consider whether it holds any other information.
17. The Commissioner considers the scope of the case is to firstly determine whether the information is environmental. Following this, he will assess whether the council is able to rely on either section 40(5)(b)(i) of the FOIA or regulation 13(5) of EIR to neither confirm nor deny holding the information to part 2 of the complainant's request – whichever is determined to be the appropriate regime.
18. He will then go on to consider whether any further information is held by the council.
19. The scope of the Commissioner's investigations will be based on the date parameters set out in the refined request, as highlighted in paragraph 8 of this decision notice.

Background information

20. The council has provided the Commissioner with some background information to this case to add some context to the request.
21. It has advised the Commissioner that planning permission was granted for a new football stadium several years ago on land at Aston Vale. To prevent development, a group of residents set up a campaign group to have the land in question registered as a town and village green.

22. In 2010 a council appointed inquiry was opened and led by an inspector who favoured the objector's case. Subsequently, the council was provided with further evidence from the Environment Agency confirming that part of the land in question, the north, had still been used as land fill within the prescribed 20 year period.
23. Then at the meeting of the Public Rights of Way and Village Greens Committee in June 2011 the council decided that only part of the land should be registered as a town and village green, the south. This decision prompted the objectors to file a judicial review.
24. Following failed mediation attempts the parties finally agreed to the land owner registering, voluntarily, the land to the south as a town and village green. The land to the north remains both unregistered and undeveloped. The judicial review case was then discontinued by agreement with both parties.

Reasons for decision

Is the information environmental information?

25. Regulation 2(1) of the EIR define environmental information as, among others, information on:
 - (a) *"The states 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) *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"*
26. The council has explained to the Commissioner that the information sought, arose from an application to register land as a town and village green made in response to a planning application.
27. On this, the Commissioner is satisfied that the request should be dealt with under the EIR as the information relates to planning activities "affecting or likely to affect" elements or factors described in 2(1)(a) of the EIR.

Regulation 13(5) of EIR – neither confirm nor deny holding information to part 2 of the request

28. Regulation 13 sub sections generally apply to personal data held by a public authority and considered exempt from disclosure. Regulation 13(5) of the EIR further excludes a public authority from neither confirming nor denying whether it holds information if to do so would reveal personal data of an individual and contravene any of the data protection principles.

Would confirming or denying whether the information is held constitute personal data?

29. Personal data is defined by the DPA as information which relates to a living individual who can be identified from that data or from that data along with any other information in the possession or is likely to come into the possession of the data controller.

30. The Commissioner is satisfied that to confirm or deny if the council holds any email or letter correspondence, to part 2 of the request, would constitute the personal data of the named individual in that part of the request.

Would confirming or denying whether the requested information is held contravene any of the data protection principles?

31. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and potential consequences of disclosure against the legitimate public interest in confirming or denying if the requested information is held or not.

32. [Paragraphs 32 to 40 of this decision notice have been placed into a confidential annex, which will be provided to the council only, due to the nature of the neither confirm nor deny case analysis that the Commissioner has had to consider which could in itself reveal personal data of the individual]

Balancing the rights and freedoms of the data subject with the legitimate interest in disclosure.

41. The complainant considers that there is an overriding public interest in the council releasing the requested information, if held. He reasons that significant sums of money was spent attempting to fight a town green application at Ashton Vale and show the thinking behind a meeting

which saw the compromise deal that meant only half the land was registered as a town green.

42. The council has told the Commissioner that the Town and Village Green application and the judicial review took place in full view of the public and included a public inquiry. The strategic director made the recommendation that only half the site should be registered, which is the decision that prompted the judicial review. Subsequently a compromise was reached between the applicants and the objectors that allowed for an alternative registration. The council does not therefore consider there to be any public interest in confirming or denying holding the information requested for part 2 of the request.
43. The Commissioner is of the view that there is also going to be some public interest in knowing what information is held by a public authority when it comes to planning matters. Knowing this may better inform the public and also encourage further engagement in the processes involved. However, the Commissioner recognises that, when it comes to personal data of individuals, there is an expectation that a public authority will be mindful to the consequences that could result in the release or even, as in this case, confirmation as to whether such information is held or not. He also sees that the application and judicial review, taking place in view of the public, goes some way to satisfy the valid public interest in this case.
44. [Paragraphs 44 and 45 of this decision notice have been placed into a confidential annex, which will be provided to the council only, due to the nature of the neither confirm nor deny case analysis that the Commissioner has had to consider could in itself reveal personal data of the individual]
46. On consideration of the above, the Commissioner's decision is that the council was correct to neither confirm nor deny holding the information requested in part 2 of the complainant's request.

Regulation 5(1) of the EIR – Information held/ not held

47. Regulation 5(1) of the EIR provides that a public authority that holds environmental information shall make it available on request, subject to any exclusion's.
48. 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, applies the civil standard of the balance of probabilities to decide whether the council holds any

further information which falls within the copes of the request (or was held at the time of the request).

49. The Commissioner has asked the council to explain what types of searches and checks it has carried out in order to determine that it holds no further information in relation to this request.
50. The council has explained to the Commissioner that the information would be held on its legal services case management system, in addition it holds paper files in its archives. The electronic case management system holds five separate files on the Aston Vale judicial review together with associated matters including FOI enquiries, the Town and Village Green application and the planning and costs files relating to Ashton Vale.
51. The council has stated to the Commissioner that the searches carried out took in excess of 40 hours of officer time. Officers still employed by the council at the time of the request were contacted and asked to search their emails and relevant folders for information relating to the request.
52. For those officers that no longer work for the council, who are those mentioned in the request, the email accounts and contents are no longer accessible as the account is deleted once the officer leaves the employment of the council.
53. More specifically, the advice from the head of legal at the time was not found. The council consider it is likely that he did not save his advice to the council's system, so when his email account was deleted, on leaving the council's employment, the advice would have been deleted albeit inadvertently.
54. During the council's internal review of this request, it has told the Commissioner that all paper records were examined to see if a paper copy could be located. A cage containing 8 boxes of material was requested from its archives, and it was determined it would take at least a further two days to review this information so the council invited the complainant to refine his request and it was agreed to look at material held a month before and a month after PROWG, which was on 16 June 2011.
55. The complainant has also raised with the Commissioner, the following about the council:

"...they have also told me that emails from former legal head [name redacted] have be deleted despite my previous requests to read his legal advise issued at the time. I find this greatly

worrying as they were fully aware that there was a previous request to see this."

56. The council has advised that it is unable to give a definitive date as to when any information may have been deleted or destroyed relevant to the request. However it can speculate that the advice may have been deleted around the time of its Head of Legal's departure, in 2013, in accordance with its retention policies on emails.
57. It has advised that its policy on retention and deleting of records for any records concerning planning and land related issues should be retained for a period of 12 years. Emails which have a lasting value would be expected to be removed to a documents management system and the originator of the email or other document is primarily responsible for identifying, removing or otherwise copying the document on to the system in order for it to be retained.
58. The council has also told the Commissioner that it contacted the individual, who was Head of Legal at the time, to ask whether he still held a copy of the requested information. This is how it was able to provide the complainant with the further information it did following the internal review. The council has stated that it holds no further information.
59. It does however consider it worth noting that the main substantive advice was given some seven months prior to the PROWG meeting of 16 June 2011 and so would have fallen outside both the original and revised scopes of the request. It has also be determined, from speaking with relevant officers and the then Head of Legal that some advice was provided verbally.
60. The Commissioner on reviewing the above responses from the council on the way it has tried to locate any further information and the reasons as to why some information is not or was no longer held at the time of the request, due to individuals leaving the council, them possibly not saving certain documents or emails to its case management systems, verbal advice being given and other information being held outside of the scope of the request, the Commissioner accepts that on the balance of probabilities no further information is held by the council falling within the scope of the request.

Right of appeal

61. 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@hmcts.gsi.gov.uk

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

62. 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.
63. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF