

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 14 February 2017

Public Authority: Ryedale District Council
Address: Ryedale House
Old Malton Road
Malton
North Yorkshire
YO17 7HH

Decision (including any steps ordered)

1. The complainant has requested copies of correspondence between Ryedale District Council ("the council") and several third parties, relating to fracking in the local area. The council initially responded that it did not hold any relevant information. Following the Commissioner's intervention, the council reviewed the matter and found a small amount of information which it disclosed to the complainant. It stated that it did not hold any further information which fell within the scope of the request.
2. In failing to disclose at the time of the request information that it did hold, the council breached regulation 5(2) of the EIR.
3. The Commissioner also decided that the council does hold further information which falls within the scope of the request, which it has not yet disclosed to the complainant.
4. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant or cite a valid EIR exception under which it may be withheld, the email shown in a confidential annex to this decision notice.

5. The council 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

6. In August 2015 Third Energy UK Gas Limited submitted a fracking mineral planning application to North Yorkshire County Council ("NYCC").
7. The proposed fracking site fell within the council's oversight and NYCC, in its capacity as the relevant mineral planning authority, was obliged to consult the council on the planning application.
8. The council issued its response in March 2016, which was to recommend to NYCC that it refuse the application. However, the Commissioner understands that NYCC subsequently allowed the planning application.

Request and response

9. On 19 July 2016, the complainant wrote to the council and requested information in the following terms:

"Please can you provide me with a copy of all correspondence between Ryedale DC's councillors, chief executives and senior management and the following organisations and individuals;

Third Energy, INEOS, Cuadrilla and Kevin Hollinrake MP.

By correspondence we would seem to include all meetings, events, telephone calls, emails, letters, faxes, text messages, phone logs, memos, internal reports, meeting invites, meeting agendas, meeting minutes, meeting handouts, power point presentations, PDF, email attachments, photos, maps, diagrams and the like.

Please can you limit your search to between the following date range - November 2015 to present day.

Subject - is onshore oil and gas"

10. The council responded on 4 August 2016. It stated that it did not hold any information which fell within the scope of the request.

11. Following an internal review the council wrote to the complainant on 22 August 2016. It maintained its position that it did not hold any relevant information.

Scope of the case

12. The complainant contacted the Commissioner on 5 September 2016 to complain about the way his request for information had been handled. He considered that the matter was of local significance and that the council must hold some information which was relevant to the request. He also suspected that individual councillors held relevant information and voiced the opinion that this too should be accessible under the EIR.
13. Although the request does not overtly refer to the planning application to conduct fracking, it specifies as its subject "onshore oil and gas". The Commissioner understands that fracking is a means of extracting onshore oil and gas. Furthermore, the complainant referred to the planning application to conduct fracking in his complaint to the Commissioner and it is clear from that, and from the parties named in the request and the timescale covered by it, that it is correspondence regarding this planning application that is at the heart of his request.
14. The Commissioner has considered in this decision notice the council's failure to identify relevant information when responding to the request. She has also examined its assertion that it does not hold any further information which falls within the scope of the request.

Reasons for decision

Regulation 2

15. The Commissioner has firstly considered whether the information requested by the complainant is environmental information as defined by the EIR.
16. The term "environmental information" is defined in regulation 2 of the EIR. Under regulation 2(1)(c), it includes:

"measures (including administrative measure), 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 these elements".

17. The complainant has requested copies of correspondence between the council and four parties linked to an application to carry out fracking in the local area.
18. The Commissioner considers fracking to be an activity which is likely to affect the elements and factors referred to in subsections (a) and (b) of regulation 2(1) (for example, the land and landscape). The Commissioner is therefore satisfied that the information is environmental information within the meaning of regulation 2(1)(c) of the EIR.

Regulation 5 – duty to make environmental information available on request

19. Regulation 5 of the EIR provides that, on receipt of a request for information, a public authority must respond promptly and no later than twenty working days after the date it receives the request.
20. At the time of the request and at the internal review, the council maintained that it held no relevant information. After the Commissioner intervened, it identified a small amount of information which it considered was relevant to the request and disclosed it to the complainant. The Commissioner further identified, during the investigation, more information which fell within the scope of the request and which had not been disclosed.
21. Since it has not identified and disclosed information to the complainant within the twenty working day limit set out above, the Commissioner considers that the council has breached regulation 5 of the EIR.

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

22. Regulation 12(4)(a) provides:

“For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that-

(a) it does not hold that information when an applicant’s request is received;”

23. In cases where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner - following the lead of a number of First-tier Tribunal decisions - applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely or unlikely that at the time the request was received the public authority held relevant information.

24. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to check whether the information was held and any other reasons offered by the public authority to explain why the information was not held. She will also further consider any reason why it is inherently likely or unlikely that information was not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held, she is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.

The complainant's position

25. The complainant considered that, in view of the local significance of the matter, the council must hold more information which fell within the scope of the request than it had identified. The complainant also questioned whether local councillors held information in their email accounts which should be accessible under the EIR. He supplied to the Commissioner a copy of an email obtained from another public authority, which referred to a meeting between the council and Kevin Hollinrake MP in which:

"...Mr Hollinrake claims that he has meet with RDC and has discussed the Third Energy planning application at Kirby Misperton.

This in my opinion demonstrates that the correspondence between the RDC councillors and Mr Hollinrake is in fact 'council business' and should be released under a FOI / EIR request in the usual manner."

26. With this in mind, the Commissioner asked the council to explain its reasons for considering that it did not hold any further relevant information. She asked a series of detailed questions aimed at establishing the likelihood of it holding any more information and any specific reasons that it had for believing that it did not hold more information, including the specific point about the meeting with Mr Hollinrake in February 2016.

The council's position

27. The council's stated position after the Commissioner's intervention is that it had disclosed to the complainant the only information it held which fell within the scope of his request. It acknowledged that the complainant believed that it must hold more information, but it said that this was not the case.
28. Firstly, it explained that the planning application had been submitted by Third Energy UK Gas Limited to NYCC, a completely separate legal entity from the council, in August 2015. As the Mineral Planning Authority for the application, NYCC was legally required to consult the

council on the proposal and it did so in late August 2015, providing the council with a link to NYCC's planning portal where all relevant documents for consideration could be viewed¹. The council explained that it did not (and never had) hold this information and that all information in connection with determining the application was supplied by Third Energy to NYCC.

29. During the consultation period, it was determined that more information was needed from Third Energy, in order for consultees to reach an informed view on the application. NYCC requested this information and the council's consultation response, which was tabled for discussion at its District Planning Committee meetings on 10 November 2015 and then 1 December 2015, was put on hold pending the receipt by NYCC of the further information.
30. The information was subsequently received by NYCC and posted to its planning portal, and the council's response was finally considered at its District Planning Committee meeting of 15 March 2016. The outcome was that the council should recommend to NYCC that the application be refused.
31. The council explained to the Commissioner what searches it had conducted to identify any relevant information it held. It had identified key members of staff around whom the search should focus. These were, the Chief Executive, the Head of Planning and Housing and the Environmental Health Manager. These officers had a detailed working knowledge of the planning application and were well placed to know what information had been received by the council regarding the matter. It described the searches which were conducted for correspondence outlined in the request and stated that initially none was found. However, during the Commissioner's investigation a further "quality control" search was conducted and an email exchange between the council and Third Energy was located. The emails addressed the timescale for Third Energy providing the further information that NYCC had requested, referred to in paragraph 29 above.
32. The council acknowledged that these emails should have been disclosed to the complainant and considered it regrettable that they were overlooked, but observed that their content related only to administrative matters (the timescale by which it could expect to be in

¹<https://onlineplanningregister.northyorks.gov.uk/register/PlanAppDisp.aspx?recno=9761>

a position to respond), and was not about the content of the planning application or its consultation response.

Information held by councillors

33. As set out in paragraph 25, the complainant believed that councillors had met with Kevin Hollinrake MP to discuss the planning application, and that any recorded information relating to this constituted council business which should be considered accessible under the EIR.

34. Firstly, the council set out its policy with regard to information held by councillors. It referred the Commissioner to her guidance on the issue² and quoted from paragraph 8:

"Local authorities are public authorities for the purposes of the EIR, but individual elected members are not. Therefore, information held by councillors for their own purposes will not be covered by the EIR, but information they hold on behalf of, or as part of, a local authority will be. Whereas information created or received by a councillor and held on a local authority's premises or computer system will be held by the authority under the EIR, if it relates to the functions of the authority (for example in the councillor's capacity as a cabinet member of the authority), it will not be held for the purposes of the EIR if it was produced by the councillor for private or political purposes and the authority is just providing storage, office space or computing facilities. This is because the authority is not holding the information to any extent for its own purposes".

35. The council showed that it understood this distinction and said it was satisfied that it did not hold any relevant information by virtue of information held by councillors acting as members of the council.

36. It said that the council does not have any access to or control over councillors' emails. The Council Solicitor had made specific enquiries of councillors who sat on the District Council Planning Committee (including the councillor whose ward the proposed development would fall in) to ascertain if they held any information which fell within the scope of the request. He was satisfied from their responses that they did not.

² https://ico.org.uk/media/for-organisations/documents/1640/information_held_for_the_purposes_of_eir.pdf

37. Turning to the complainant's specific concern, that a meeting had taken place between councillors and Kevin Hollinrake, the council acknowledged that a meeting had taken place with Kevin Hollinrake on 12 February 2016. However, it said that the meeting had been between Mr Hollinrake and the council's Chief Executive, Janet Waggott. A councillor had been in attendance at the meeting, but no note of the meeting was taken (it said both the Chief Executive and her personal assistance had confirmed this). However, it did have a copy of the agenda, which it supplied to the ICO.
38. The Commissioner notes that while the agenda itself did not contain any information which fell within the scope of the request, a brief email from Mr Hollinrake to the council the day before the meeting, did contain information which fell within the scope of the request. This will be considered in the Commissioner's conclusion, below.

Commissioner's conclusion

39. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the requested information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in paragraphs 23 and 24, above, the Commissioner is required to make a finding on the balance of probabilities.
40. Aside from the information identified and disclosed during the investigation, the council says it holds no information which falls within the scope of the request. To determine the credibility of this claim, consideration must firstly be given to the wording of the request. The request does not ask for internal correspondence regarding the application or for the council's own deliberations on the planning application, matters which it would be reasonable to assume the council did hold information about. Instead, the request is for correspondence between the council and the four named parties, between November 2015 and 19 July 2016, the period during which the planning application was under consideration.
41. The council's position is that it holds no correspondence because it was merely a consultee in the planning application process. The planning application was submitted to NYCC, and it was NYCC which administered the application process and to whom any correspondence regarding it, from the parties identified in the request, would have been addressed. The council's own response was shaped using documents made available to it by NYCC, via NYCC's online planning portal.

42. The Commissioner considers this a credible explanation for why, aside from what was identified during the investigation, the council holds no further information falling within the scope of the request and is satisfied that the "quality control" searches have, in all likelihood, identified the remaining information falling within the scope of the request.
43. The Commissioner is satisfied that the council has demonstrated a genuine understanding of the circumstances in which information held in councillors' email accounts is held by them on behalf of the council, and that it has taken adequate steps to ascertain that no such information is so held with regard to the request in this case.
44. While the complainant believed the meeting with Kevin Hollinrake to have taken place with councillors, the council has clarified that it was principally with the Chief Executive, and has provided assurances, from the highest level, that no note of the meeting is held.
45. However, the Commissioner notes that as part of the evidence submitted on this point, the council provided her with a copy of an email from Kevin Hollinrake which does appear to fall within scope of the request and which has not been disclosed to the complainant. That email, and the Commissioner's reasons for considering that it falls within the scope of the request, are set out in a confidential annex to this decision notice. The Commissioner now requires the council to take the steps set out at paragraph 4 with regard to this email.
46. That information aside, the Commissioner considers that, on the balance of probabilities, the council does not hold any further information which falls within the scope of the request.

Right of appeal

47. 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

48. 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.
49. 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

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF