

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

Date: 3 September 2018

Public Authority: Rother District Council
Address: Town Hall
London Road
Bexhill-on-Sea
East Sussex
TN39 3JX

Decision (including any steps ordered)

1. The complainant requested information relating to several parcels of land close to his house and also for recordings of conversations held by the Parks department.
2. The Commissioner's decision is that Rother District Council ("the Council") has provided everything that it holds in relation to both requests. However, it failed to recognise the complainant's request for an internal review as such and therefore did not complete that internal review within 40 working days, thus breaching Regulation 11(4) of the Environmental Information Regulations ("the EIR").
3. The Commissioner does not require the Council to take any further steps.

Background

4. The request relates to an application for a development of 30 homes. Rother District Council refused the request (despite Planning officers recommending approval) on 23 August 2017, but the request was "live" at the time the complainant made his request.

Request and response

Request 1

5. On 12 May 2017, the complainant requested information in the following terms:

"I would like all the documentation surrounding Sites NE1, NE5 and NE11, to include Rother District Council meeting minutes where the sites are mentioned between January 2006 and May 12 2017, Rother District Council Cabinet meeting minutes where the sites are mentioned between January 2006 and May 12 2017, Rother District Council Public Consultation meeting minutes where the sites are mentioned between January 2006 and May 12 2017, Rother District Council Meeting minutes with all the utilities where the discussion of infrastructure in the village of Netherfield was undertaken between January 2006 and May 12 2017."

6. On 12 June 2017, the Council responded to the Request. It disclosed some information and withheld some personal data.

Request 2

7. On 16 May 2017, the complainant submitted a further request:

"I request therefore that you provide a copy of the recorded conversation between Rebecca or any other member of staff [from the Parks Department] and any resident of Netherfield, between January 2012 and 16 May 2017 concerning any matter relating to sites NE1, NE5a and NE11 under the Freedom of Information Act 2000 c36 Part 1 Section 1."

8. On 9 June 2017, the Council responded to Request 2. It provided the complainant with a number of pieces of correspondence, some of which related to complaints he himself had made to the Council. It withheld some personal data citing section 40 of the Freedom of Information Act.

Internal Review

9. The complainant wrote to the Council on 19 July 2017 and expressed his dissatisfaction with the responses he had received to his requests.
10. After receiving no response, the complainant contacted the Commissioner on 26 August 2017. As no internal review had been carried out at that point, the Commissioner wrote to the Council on 9 November 2017 asking it to conduct one.

11. The Council completed its internal review on 13 December 2017. The review covered both requests. It released some additional documents and stated that it did not hold any further information.

Scope of the case

12. Following the intervention described above, the complainant contacted the Commissioner again on 2 January 2018 to complain about the way his request for information had been handled.
13. The Commissioner has considered whether further information to that disclosed to the complainant as described above is held by the Council.

Reasons for decision

Procedural matters

Is the requested information environmental?

14. 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;*
15. The Commissioner notes that the information relates to the use of land for redevelopment. As such it is information on “measures” affecting (or likely to affect) the elements of the environment and the Commissioner has therefore assessed this case under the EIR.

Internal review/Reconsideration

16. Regulation 11 of the EIR states that:

- (1) *Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.*
- (2) *Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.*
- (3) *The public authority shall on receipt of the representations and free of charge—*
 - (a) *consider them and any supporting evidence produced by the applicant; and*
 - (b) *decide if it has complied with the requirement.*
- (4) *A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.*
- (5) *Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of—*
 - (a) *the failure to comply;*
 - (b) *the action the authority has decided to take to comply with the requirement; and*
 - (c) *the period within which that action is to be taken.*

17. The complainant wrote to the Council on 19 July 2017, replying to the two responses he had received. His email began "May I say how disappointed I am with the response I have received from Rother District Council regarding my request" and it was signed off "I trust you will look into this matter today."

18. Whilst it did not explicitly mention an internal review, the complainant's correspondence of 19 July was a clear expression of dissatisfaction with the responses he had received from the Council. The Commissioner's Code of Practice¹, issued under Section 45 of the Freedom of Information Act and covered by Regulation 16(1) of the EIR states at Paragraph 38:

"Any written reply from the applicant (including one transmitted by electronic means) expressing dissatisfaction with an authority's response to a request for information should be treated as a complaint...These communications should be handled in accordance with the authority's complaints procedure, even if, in the case of a request for information under the general rights of access, the applicant does not expressly state his or her desire for the authority to review its decision or its handling of the application."

19. The Commissioner considers that the complainant made a request for an internal review (or reconsideration under Regulation 11 of the EIR) on 19 July 2018. As the Council failed to inform the complainant of the outcome of that review within 40 working days, it therefore breached Regulation 11(4) of the EIR.

Is further information held?

The complainant's view

20. The complainant is of the opinion that the volume of information that has been provided to him is substantially smaller than that which he believes would be expected of a planning application of such size.
21. The complainant is concerned that the recommendation, of planning officers, to approve the application was "pre-determined" – in that officers and the developer had already agreed the details so that the application would be a mere formality. The Council disputes this.
22. The complainant has also pointed to several documents which refer to discussions, consultations or meetings which appear to have taken place and asked why no records appear to exist.
23. For example, the Council's Core Strategy Documentation on Suitable and Developable Sites mentions consultation with both the Darvel Down Residents' Association and Battle Town Council and the developer's own

¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/235286/0033.pdf

publicity material refers to “*extensive discussions* with Rother district Council” [emphasis added].

The Council's view

24. The Council's view is that it has disclosed all the information which it holds (and which is not already in the public domain) to the complainant.
25. The Council has stated that it has performed searches of its electronic planning records as well as manual searches of a number of relevant paper files relating to the site or the area. It is not aware of any documents having been deleted or destroyed and notes that it keeps electronic files indefinitely.
26. The Council has also stated that it has interviewed all the relevant officers who are still employed by the Council – although it notes that the Principal Planning Officer at the time has since left the authority.
27. The Council further notes that Pre-Application meetings are not ordinarily recorded or minuted, and were not in this case. The record of the meeting is normally a letter or email post-meeting or enquiry – and that a copy of this correspondence has been provided to the complainant.
28. Finally, the Council has pointed out that many developers take the first meeting with the Council and then have very little further interaction before submitting their application.
29. During the course of the Commissioner's investigation, the Council located some additional information which it said had been mis-filed. This has now been provided to the complainant.

The Commissioner's view

30. The Commissioner's view is that it is unlikely that further information is held by the Council in relation to this request.
31. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, she will consider any reason why it is inherently likely or unlikely that information is not held.

32. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
33. Whilst the Commissioner has some concerns about the searches which the Council initially carried out (which she has set out in other matters), she is now satisfied that, on the balance of probabilities, no further information is held.
34. The Commissioner accepts the Council's reasoning regarding the practice of pre-application planning advice as explaining why the paper trail is not more extensive.
35. Whilst the Commissioner notes the publicity materials supplied by the developer of the site stating that "extensive" discussions had taken place with the Council and with Battle Town Council. The word "extensive" in this context is likely to be highly subjective rather than relating to some benchmark as to the extent of the discussions. In addition some of the "extensive" discussions would have been between the developer and a different public authority – which would therefore fall outside the scope of this request.
36. Although the course of her investigation has resulted in several further tranches of information being disclosed to the complainant which should have been disclosed from the outset, the Commissioner is satisfied, for the reasons given above, that the Council has now complied with its Regulation 5(1) duty.

Other matters

37. The Commissioner has serious concerns about the way in which the Council went about conducting its searches.
38. As part of its initial response, the Council released a small amount of information to the complainant. At the internal review stage it released some further email chains. When the Commissioner began her formal investigation a large tranche of new information was disclosed. Finally, after the Commissioner reviewed the new information and highlighted some inconsistencies, the Council released a fourth tranche of information.
39. Whilst the Commissioner always encourages public authorities to carry out further checks investigating whether further information is held, the volume of information which has been released from the internal review stage onwards gives her cause for concern. It is her view that most, if

not all, of the information should have been identified when the request was first made.

40. The Council has accepted that its handling of this request has been less than desirable and has indicated that it is seeking to improve the co-ordination between its various departments when carrying out searches. The Commissioner is keen to see this carried through so as to avoid her having to issue similar notices in future.
41. The complainant in this case is keen for the Commissioner to determine the veracity of a statement given to him by the Council which said that no development was planned for a specific site. The Commissioner declines to do so as this is not her role. The Commissioner, under the FOIA and the EIR, is only required to determine whether the Council has provided the information it holds or refused the request correctly. She has no remit in relation to the accuracy of the information that is held.

Right of appeal

42. 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

43. 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.
44. 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

Ben Tomes
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF