

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

Date: 26 June 2018

Public Authority: Norfolk County Council
Address: County Hall
Martineau Lane
Norwich
NR1 2DQ

Decision (including any steps ordered)

1. The complainant has requested information relating to planning decisions which relate to a public footpath. He also requested information relating to a complaint which he made to the council. The council provided the majority of the information, however it withheld one document as it said that it was personal data relating to a third party under Regulation 13(1) and confirmed that it holds no further information falling within the scope of the request. The complainant considers that the council must hold further information.
2. The Commissioner's decision is that the document withheld under Regulation 13(1) was in fact personal data belonging to the applicant and therefore exempt under Regulation 5(3). She has also decided that on the balance of probabilities the council was correct to state that it holds no further information.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 20 April 2017 the complainant made the following request for information under the FOIA for:

"I am determined to have all the relevant facts made available before proceeding further, therefore I am requesting under Freedom of Information Act for all information pertaining to the Footpath all of which is within the boundary of land owned by [REDACTED].

This includes all communications including telephone communication; emails; drawings; statements; reports; investigations; complaints; proposals; planning submissions; notices and all money transactions associated with this footpath.

This includes what you refer to as being a dispute over this property, the information you say is in the public domain, and the source of this information. Very recently I have been subjected to harassment with the veiled threat of more to come from an employee known only as [REDACTED] and I also wish to know exactly the 'authoritative information' his boss provided to him and from what source he obtained it. The names of these two employees is very relevant to this FOI request."

5. The council responded on 15 June 2017. It provided some information however it withheld information under Regulation 13(1) (personal data) and/or Regulation 5(3) (personal data of the applicant).
6. There followed further correspondence between the parties in which the complainant laid out issues he had with the council's response and asked for an internal review to be carried out. Essentially, the complainant believes that further information must be held as he holds some copies of correspondence between the council and himself which was not disclosed to him by the council in response to his request.
7. On 21 July 2017 the council wrote to the complainant stating that it was going to consider his request for review. The writer stated within that email:

"To assist me, please could you write to me to confirm the following:

1. Please could you detail what information you consider to be missing? I appreciate you refer to information that is missing in the body of your letter, however, I am not clear if you are referring here to the Public Inquiry and /or other matters.

2. *Please could you identify what information you consider to be false and it what way it is false?*
3. *The scope of this Internal Review is to consider if the Council has complied with the Freedom of Information Act 2000 and the Environmental Information Regulations 2004. A substantial part of your letter of the 30th June relates to matters outside the scope of this, although I appreciate you may have given this as background information. I need to be clear that this review will only consider, in effect, whether the Council has supplied the correct information. I do not know if you have done this already, but do you wish the remainder of the matters in your letter (that is those matters beyond whether or not the Council has supplied the correct information) to be considered as a complaint?"*
8. There followed further correspondence between the parties after which the council wrote to the complainant on 25 August 2017 providing its response to his request for review. The council maintained its initial position that all information which it holds falling within the scope of the request has been disclosed to him.

Scope of the case

9. The complainant initially contacted the Commissioner on 26 June 2017 to complain about the way his request for information had been handled. He argued that he has evidence that further information must be held by the council falling within the scope of his request.
10. During the course of the Commissioner's investigation the council did find more information which it had initially overlooked. It disclosed this to the complainant in May 2018 under the provisions of the Data Protection Act 1998 (the DPA).
11. The complainant however still believes that further information must be held by the council and said that he has evidence that this is the case. The Commissioner therefore asked the complainant to provide her with examples of this evidence, which the complainant did in May 2018.
12. The Commissioner considers that the complaint is that further information is held by the council which was not disclosed to the complainant in response to his request.

Reasons for decision

Background to the complaint

13. The complainant owns a property with a footpath running through it which he argues was previously little used, but which became much busier with the development of further houses, and later, a Tesco store nearby in 2002. It was initially arranged for the footpath to be upgraded to allow for greater footfall and to make the path safer, however for various reasons this has not yet occurred.
14. The complainant believes that he is being blamed for not allowing the footpath from being upgraded, which he argues is not the case. He has also previously been angered as he argues that the council has, on a number of occasions, sought to make changes to his property without first consulting with him and/or without reference to his ownership of the land which the footpath crosses. This situation has been ongoing for a number of years.
15. An incident occurred in 2017 between the complainant and an employee of the council. This ultimately led to the complainant making his request for information in order to prove his version of events. The council provided some information in response to the request however it argues that it holds no further information beyond that which it provided to him. The complainant believes that further information must be held due to previous correspondence he has had with the council over the years relating to the footpath. He has provided evidence to the Commissioner to demonstrate why he believes this to be the case.

Regulation 5(1)

16. Regulation 5(1) of the Act states that:

"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."

17. The Commissioner has considered whether council has complied with Regulation 5(1) and whether it was correct to say that no further information is held. Regulation 12(4)(a) provides the exception to the obligation to disclose information where no information is held.
18. During the course of the Commissioner's investigation, on 4 April 2018, the council was asked the following questions to determine whether further information is held relevant to the scope of the complainant's request:

- a) The council has applied regulation 13(1) to withhold information. Have entire documents been withheld under this exception, and if so, might this explain why [the complainant] believes that not all of the information which the council holds has been disclosed to him?
- b) What searches have been carried out to check no information was held within the scope of the request and why would these searches have been likely to retrieve any relevant information?
- c) Please describe thoroughly any searches of relevant paper/electronic records and include details of any staff consultations.
- d) If searches included electronic data, which search terms were used and please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.
- e) If no or inadequate searches were done at the time, please rectify this now and let me know what you have done.
- f) If the information were held would it be held as manual or electronic records?
- g) Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?
- h) If recorded information was held but is no longer held, when did the council cease to retain this information?
- i) Does the council have a record of the document's destruction?
- j) What does the council's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the council describe the way in which it has handled comparable records of a similar age?
- k) If the information is electronic data which has been deleted, might copies have been made and held in other locations?
- l) Is there a business purpose for which the requested information should be held? If so what is this purpose?
- m) Are there any statutory requirements upon the council to retain the requested information?

19. The Commissioner also asked the council to confirm whether it had read the scope of the complainant's request narrowly or not. This was on the basis that the central concern for the complainant initially was a complaint he had made to the council which he believes had not been considered properly by it. The complaint was made in 2017.
20. The council firstly clarified that it did not narrow the request. It also clarified that whilst some of the information was personal data belonging to the complainant, for the purposes of ease it had not drawn a distinction between this information when disclosing it to the complainant. It said that its response to the complainant had informed the complainant that that information was exempt under Regulation 5(3) of the EIR but was being provided to him under the subject access provisions of the DPA.
21. Further information was also provided during the course of the Commissioner's investigation, also under the subject access provisions of the DPA.
22. The council clarified the Commissioner that 2 full pages of information had been withheld under Regulation 13(1), and that other parts of documents had been redacted. The latter were mainly the names of staff or members of the public engaged in correspondence with the council. This information is considered further below.
23. The council said that it had carried out searches of relevant and archived files regarding planning applications relating to the relevant Tesco development, and all information relating to related planning conditions and obligations insofar as they relate to highways and transport matters. It also said that it had searched records relating to the complainant's complaint regarding harassment. It confirmed that these searches should have returned all relevant information, but some files were missed initially during the searches due to a flood in a basement. The additional material had now been found and disclosed to the complainant.
24. It confirmed that the Principal Engineer (Major and Estate Development) from the Community and Environmental Services Department, and the Corporate Complaints Team were consulted and although some records were initially missed for the reasons mentioned above they have now provided all of the records held.
25. It confirmed that all electronic records relating to planning applications/maintenance areas, including emails and documents, are stored in files on the server and not on individual officers' computers. Searches of these electronic files were undertaken and the files were

reviewed in their entirety, rather than searching for key words, to ensure that nothing was missed.

26. It confirmed that the information would be held as a mixture of electronic and manual data.
27. It said that electronic files are held on the council server and are not stored in any other location.
28. It said that the design team would have held records relating to the proposed improvements to the footpath but these were subject to a retention period of 7 years. These were therefore destroyed in 2016 after the 7 year period had passed. It does not however hold a record of the destruction of these documents.
29. It said that complaints files are retained for a period of 6 years.
30. It also confirmed that there is a statutory requirement to retain planning applications which contain a legal agreement in perpetuity.
31. Complaints files are therefore retained for 6 years, design files are retained for 7 years, and files containing legal agreements are retained in perpetuity.
32. Following the council's response and the further information which was provided to the complainant, the complainant contacted the Commissioner stating that he had evidence that further information must still be held by the council. The Commissioner therefore asked the complainant to provide him with some of that evidence in order that she could demonstrate to the council that further information must have been held and ask it to consider whether information may be held elsewhere within its files.
33. The complainant therefore provided with examples of correspondence which he had had with the council over the relevant period of time. The Commissioner notes from this that the correspondence which he provided related to a period between 2003 and 2009.
34. The complainant also stated: "*Surely both of these authorities cannot have lost or destroyed such information that was exchanged between [name redacted] Head of Planning Broadland District Council and [name redacted] Norfolk County Council Highways regarding Planning Applications [redacted] (that were combined into one Application) for which there was a call-in and Local Public Inquiry presided over by [name redacted] between 11-13 February 2003. I was involved in conversations relating to this footpath with both [name redacted] and [name redacted] just prior to this Inquiry and conspicuously both [name*

redacted] and [name redacted] were absent from it. In fact the Inspector commented on the fact that no one from NCC was present throughout this Inquiry. I have evidence that they both liaised on this footpath but not what they discussed and planned in conjunction with Tesco.

35. The Commissioner observes that these refer to matters dating back to 2003. The Commissioner notes the council's statement on its retention period was that planning files that contain legal agreements are retained in perpetuity, complaints files are retained for 6 years, and design files are retained for 7 years. The matters and correspondence referred to by the complainant relate to a period of time which exceeds 7 years and so it is likely that this correspondence would have been deleted in accordance with the council's records management policy by the time of his request on 20 April 2017. The council itself confirmed that information held by its design team was deleted in 2016, although it does not hold a record of precisely what the information was.
36. The Commissioner recognises that as being a matter of some importance to the complainant he appears to have expected that information held on these matters would be retained. However, given the council's confirmation that information has been destroyed in line with its records management procedures, and given the retention schedules it has provided to the Commissioner, it seems clear to her that the information which the complainant believes is held by the council has, in all likelihood, been destroyed.

Conclusions

37. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)* in which it was stated that "*there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records*". It clarified in that case that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is the test the Commissioner will apply in this case.
38. In discussing the application of the balance of probabilities test, the Tribunal stated that, "*We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the*

existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed." The Commissioner has therefore taken the above factors into account in determining whether or not the requested information is held on the balance of probabilities.

39. The Commissioner is also mindful of the case of *Ames v the Information Commissioner and the Cabinet Office (EA/2007/0110)*. In this case Mr Ames had requested information relating to the September 2002 "Iraq's Weapons of Mass Destruction" dossier. The Tribunal stated that the Iraq dossier was *"...on any view an extremely important document and we would have expected, or hoped for, some audit trail revealing who had drafted what..."* However, the Tribunal stated that the evidence of the Cabinet Office was such that it could nonetheless conclude that it did not *"...think that it is so inherently unlikely that there is no such audit trail that we would be forced to conclude that there is one..."*. Therefore the Commissioner is mindful that even where a person might reasonably expect that information should be held, this does not necessitate that information is held.
40. In coming to a conclusion in this case, the Commissioner has considered what information she would expect the council to hold and whether there is any evidence that the information was ever held. The evidence suggests that information was held by the council in the past, however, it has now been destroyed in accordance with its records management policies.
41. On a balance of probabilities therefore, the Commissioner's decision is that the council was correct to state that no further information is held by the council.

Regulation 13(1)

42. The council withheld 1 document, consisting of 2 pages, in its entirety under Regulation 13(1), and also redacted the names of some council officers and members of the public from other documents which it disclosed. The complainant did not raise a complaint with the Commissioner regarding the redaction of identities from documents but as part of his complaint that not all of the information was provided to him in response to his request the Commissioner has considered the application of the Regulation 13 to the document which the council withheld in its entirety.

43. Regulation 13(1) provides that:

To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

44. Regulation 13(2) provides that:

The first condition is –

(a) in a case where the information falls within any paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –

(1) any of the data protection principles; or

(2) section 10 of the Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(a) (which relates to manual data held by public authorities) were disregarded.

45. Regulation 5(1) provides that a public authority that holds environmental information shall make it available on request. However Regulation 5(3) provides that *"To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data"*.

46. In essence therefore, the duty to comply with Regulation 5(1) and provide information in response to a request under the EIR is disapplied by virtue of Regulation 5(3) where the personal data concerned relates to the applicant for that information. Where the requested information is personal data belonging to the applicant, the authority does not need to consider it for disclosure under the EIR, but should instead consider for disclosure under the provisions of the DPA.

47. The document which was withheld relates to a personnel matter regarding a complaint made against an employee of the council. The focus of the document also relates to the complainant's property and to his interaction with a council officer.
48. As such, the Commissioner is satisfied that the information is personal data relating to both the complainant and to a council officer. The personal data of the two parties is indivisibly intertwined and cannot be separated.
49. The Commissioner has therefore decided that as the document is personal data relating to the complainant, it is exempt from disclosure under the EIR under Regulation 5(3). The council should however consider whether it is under an obligation to disclose the information to the complainant under The Data Protection Act 2018. In doing so, it will also need to consider the rights and protections provided by the DPA to the third party.
50. The Commissioner is not able to consider whether the information could be disclosed to the complainant under the DPA within this decision notice. The council said that in order to be less bureaucratic in its response to the complainant it did not distinguish between the complainant's personal data and information disclosed under the EIR. Insofar as the majority of information is concerned this approach has not raised any specific issues in this case. However, as regards this particular document it is necessary for the council to provide a specific response under the DPA in order to fully comply with its obligations under that Act.
51. The Commissioner will therefore write to both parties, separate to this decision notice, asking the council to consider the document for disclosure under the complainant's subject access rights under the complainant's access rights under the DPA 2018, (given that the response to the request would be provided after the implementation of this Act in May 2018).
52. The Commissioner's decision is therefore that the information was exempt from disclosure under the EIR under Regulation 5(3).

Right of appeal

53. 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

54. 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.
55. 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

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