

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 18 June 2020

Public Authority: Somerset West and Taunton Council

Address: Deane House
Belvedere Road
Taunton
Somerset
TA1 1HE

Decision (including any steps ordered)

1. The complainant has requested information about, and relating to, a specific planning application. Somerset West and Taunton Council ('SWTC') disclosed all the information it said that it held which fell within the scope of the request.
2. The Commissioner's decision is that on the balance of probabilities, SWTC has disclosed to the complainant all the information it holds which fell within the scope of his request.
3. However, the Commissioner finds that SWTC breached regulation 5(2) of the EIR by failing to disclose the information it held within 20 working days and it breached regulation 11(4) of the EIR by failing to conduct an internal review within 40 working days.
4. The Commissioner does not require SWTC to take any steps.

Background

5. SWTC came into existence on 1 April 2019, replacing Taunton Deane Borough Council and West Somerset Council. The information which is the subject of this request relates to a planning application made to, and planning decisions made by, the former Taunton Deane Borough Council ('TDBC').

Request and response

6. On 1 July 2019, the complainant wrote to SWTC and requested information in the following terms¹:

"This request is for Planning information for planning application [reference number] at [address] (part retention of works already undertaken)

1. Under the Environmental Information Regulations, please disclose all TDBC pre-planning recorded information and all advice given to the applicants (or their agents) for the planning application [reference number] ie communications, emails, meeting notes, phone notes etc.

2. Please also disclose the names and roles of all Committee members, Council Officer(s) involved (incl any elected Councillors) in the pre-application stage for the planning application [reference number].

3. As this development has been the subject of a planning enforcement referral, please disclose all recorded information ie communications, emails, meeting notes, phone notes etc for any pre-planning discussions between TDBC Planning Officer(s) and TDBC Planning Enforcement Officer(s) for this application [reference number].

4. Please disclose recorded information between TDBC Planning Officers and Environmental protection for planning application [reference number] ie communications, emails, meeting notes, phone notes etc, including relevant dates.

5. Please disclose all TDBC recorded information and all the advice given to the applicants (or their agents) during the planning consultation period for planning application [reference number] ie communications, emails, meeting notes, phone notes etc including dates.

6. Please disclose all TDBC recorded information and all advice given to the applicants (or their agents) after [date] (Conditional

¹ Information which might identify the complainant or other individuals has been redacted by the Commissioner

Approval) but prior to the committee meeting for planning application [reference number] ie communications, emails, meeting notes, phone notes etc including dates.

7. Please disclose all TDBC recorded information and all advice given to the Planning committee prior to the committee meeting dated for planning application [reference number] ie communications, emails, meeting notes, phone notes etc including dates.

8. Please disclose the "Letters from four landowners in the [location] area" cited in the case officers report and recommendation, as only one was published on the website.

9. Please provide a copy of the landscaping scheme that were [sic] submitted, including any changes that was [sic] approved by TDBC including any correspondence to the applicants (or their agents) including the dates.

The term "information" is defined in section 84 of the FOI Act as meaning "information recorded in any form".

We are seeking "any" information in any form on the matters described in our request. For the avoidance of doubt, this would include, without being limited to, any record of any meeting, conversation or discussion on these matters, any reference to them in any email or other communication as well as any assessment, analysis, briefing, opinion or other forms of recorded information on them. In other words, "any information".

7. Following the Commissioner's intervention, on 3 September 2019, SWTC responded to each point of the request, as follows:

1. It refused to disclose any information, saying "*The Pre-application advice is confidential/commercially sensitive relating to an individual and therefore we cannot release to third parties*". It did not cite any grounds under the EIR for withholding the information.

2. It disclosed the planning officer's name and said it didn't "*believe*" that any committee members or councillors were involved in the decision.

3. It refused to disclose information about live enforcement matters, but did not cite any grounds under the EIR for withholding the information.

4. It said a consultation letter had been sent to TDBC's Environmental Health department on 28 March 2018, but no response had been received.
 5. It disclosed a response from the planning applicants, dated 28 May 2018, to questions raised by the planning officer on 16 May 2018, and summarised several other instances of contact.
 6. It disclosed a copy of an email dated 30 July 2018 sent to the applicants' agent following the decision by the Chair of the Planning Committee.
 7. It said no information was held; the officers who attended the Chair briefing had not taken a note, and had subsequently left the council.
 8. It disclosed the requested information.
 9. It said no information was held as no landscaping scheme had been submitted.
8. The complainant requested an internal review on 16 September 2019, enclosing a table of further information which he believed SWTC held but had not disclosed.
 9. SWTC responded on 10 December 2019, as follows:
 1. It disclosed the pre-application advice.
 2. It confirmed that its previous response was correct.
 3. It disclosed copies of enforcement paperwork, with redactions for personal data.
 4. It confirmed its original response.
 5. Referring to the email sent by TDBC on 16 May 2018, SWTC said it no longer held a copy. It disclosed a copy of the email dated 26 May 2018 and said that it had now disclosed all information held at the date of the original request.
 6. Referring to the email of 30 July 2018, SWTC confirmed it did not hold a date stamped copy. It said it did not hold any further recorded information but it provided a free text explanation of the circumstances surrounding the sending of the email, and the sending of other emails the complainant had queried. It said that the email was sent following consultation with a senior officer, who was also responsible for briefing the Chair of the Planning Committee. It said that he had since left the council, and his email account had been deleted.

7. It disclosed information in response to questions the complainant asked in the internal review, and provided a free text explanation of the work of the Planning Committee. It confirmed that it did not hold the specific information described in the original request.
8. Original response not challenged by complainant.
9. Original response not challenged by complainant.
10. In respect of the remaining questions in the table of further information, SWTC either disclosed information, said it was not held or asked the complainant to clarify what he meant.

Scope of the case

11. The complainant contacted the Commissioner on 16 December 2019 to complain about the way his request for information had been handled. During correspondence with the Commissioner, he asked for further time to draft a detailed submission in support of his complaint, which was received by the Commissioner on 9 March 2020.
12. The complainant said that he did not believe that SWTC had disclosed all the information it held, because it had disclosed information at the internal review which he considered should have been disclosed in its response to his original request. He therefore had no confidence in its assurances that all information had been provided. He also considered it unsatisfactory that he had been required to chase a response to both his request, and the internal review. He said he was given conflicting advice as to how his request had been dealt with, and was also told, at one point, that the internal review had been closed, prior to any response being issued. Taken together, he felt that this indicated that SWTC was deliberately trying to prevent him from having information to which he considered he was entitled. He was also concerned that the email account of a former member of staff who had had input into the planning decision had been deleted, as the matter remained live.
13. The complainant suggested that when responding to his request, SWTC may have deliberately concealed information from disclosure, which is an offence under regulation 19 (offence of altering records with intent to prevent disclosure) of the EIR. The Commissioner's Criminal Investigations Team has considered this allegation and has judged that there is insufficient evidence to substantiate this claim.
14. The analysis below therefore considers whether, on the balance of probabilities, SWTC has disclosed to the complainant all the information it held which fell within the scope of the request. She has also

considered the time SWTC took to respond to the request and to complete the internal review.

Reasons for decision

Is the information environmental information?

15. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR rather than the FOIA if it meets the definition set out in regulations 2(1)(a) to 2(1)(f) of the EIR.
16. The Commissioner considers the information in this case can be classed as environmental information, as defined in regulation 2(1)(c) of the EIR. This says that any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors of the environment listed in regulation 2(1)(a) and 2(1)(b) will be environmental information. One of the elements listed under 2(1)(a) is land.
17. The request is for information about a planning application relating to agricultural outbuildings. The Commissioner considers the request therefore relates to a measure as defined in regulation 2(1)(c) of the EIR which will or would be likely to affect the elements described in 2(1)(a), namely land.
18. The Commissioner is therefore satisfied that the request was for environmental information, and that the request fell to be dealt with under the EIR.

Regulation 5(2) – duty to make environmental information available on request

19. Regulation 5(1) of the EIR provides that a public authority that holds environmental information shall make it available on request. Regulation 5(2) requires that information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.
20. The complainant submitted his request for information on 1 July 2019. SWTC did not provide its response to the request until 3 September 2019, 45 working days later, following a request by the Commissioner to respond. Furthermore, when conducting the internal review, and also during the Commissioner's investigation, it identified more information that should have been disclosed.

21. Therefore, in failing to disclose information that had been requested from it, and which it held, within 20 working days, SWTC breached regulation 5(2) of the EIR.
22. SWTC's attention is drawn to the importance of establishing precisely what information is held as the starting point for dealing with any request for information under the EIR. Should the Commissioner receive further complaints which suggests this is a problem, she may revisit this case.
23. The Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function. This aligns with the goal in her draft "Openness by design"² strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of EIR enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"³.

Regulation 11 – representations and reconsideration

24. Regulation 11(4) of the EIR states that once a public authority has received a request for an internal review it must respond as soon as possible and no later than 40 working days after it receives the internal review request.
25. In this case, the internal review was requested on 16 September 2019, and SWTC did not provide the outcome until 10 December 2019, 61 working days later. Therefore, in failing to carry out an internal review within 40 working days, SWTC breached regulation 11(4) of the EIR.
26. As noted in paragraph 23, above, the Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function, and both of these procedural breaches will be logged.

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

27. Regulation 12(4)(a) of the EIR provides that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.

² <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

³ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

28. In this case, the complainant believes that SWTC holds further information about the planning application which is the focus of his request. SWTC's position is that it does not.
29. In cases where there is some dispute about 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 when making a determination. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
30. 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 is held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held.
31. 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 proof of the balance of probabilities.

The complainant's position

32. The complainant explained that the request pertained to a planning application for a neighbouring property, which he believed had been mishandled by TDBC. He believed TDBC had failed to follow its own planning application process and that, had it done so, the application would have been refused. He explained that his property is detrimentally affected by the development and believes the decision to approve it was made on the basis of an inaccurate assessment as to its impact.
33. The complainant believed that SWTC has realised that serious mistakes were made in the handling of the planning application, and that it was now engaged in a 'cover up'. He has made a complaint about the handling of the planning application to the Local Government Ombudsman ('LGO'), and this information request was an attempt to gather further evidence in support of that complaint.
34. The Commissioner asked the complainant to set out his grounds for believing that not all the information SWTC held had been disclosed in response to his request, including any specific items of information he believed had been withheld.
35. The complainant articulated a general belief that the request had not been handled properly (as set out in paragraph 12, above) and

highlighted the following information, which he believed was missing from the responses sent to him:

"Enforcement information for [name of planning applicants]

... we have not received any letters email or correspondence that were sent to [applicants] regarding [address], that must have been sent as the planning application was as a result of enforcement action.

Emails from [TDBC planning officer]

There have been no emails released to us from and to [TDBC planning officer] regarding the Pre-Application consultation, regarding [address] and the application [reference number] to and from the applicants, their agent, [names of agent and TDBC officers].

Emails from [former TDBC officer]

Numerous FOI questions request communications and email information, and from the few emails that have been released to us, it is clear that [former TDBC officer] was involved in this (ongoing) planning matter taking a decisive stance. We believe that there is relevant information regarding this planning application that we originally requested contained in his email account not excluding emails to and from the councils solicitor, to and from any member of the committee including the chair, from and to the case officers [TDBC planning officer and case officer] and any emails to and from the applicants or their agent and the represented party [agent].

Email with visible time stamp sent on the 16 May 2018

Following the first FOI we requested that this email be released to us as per our original FOI request. We are very concerned that this is not available in its original form, as stated to us by the council "We no longer hold the email sent on the 16th May 2018 and therefore we are unable to send this to you." Please can this be recovered as this is regarding a live ongoing planning matter.

Email that has been cropped dated 30 July

The email sent 30 July in an uncropped form with the date shown electronically and not handwritten in.

No answer to question

We requested any emails correspondence from the applicants or their agent or from persons acting on their behalf following the email sent on the 30 July

Chair briefing

We have had a response that "No information is available. The Officers who attended the Chair briefing no longer work for Council. No minutes of the meeting were taken." We believe that this is poor record keeping not having this information on a live ongoing planning matter.

Missing conversation records

There is no information released to us of a conversation that took place between the Case officer and the applicants and [name of agent redacted]. How did the case officer know to contact [name redacted] who was acting on their behalf? Planning information will not be released to a third party without it being clarified from the applicants that it was appropriate to do so".

SWTC's position

36. As is her custom, the Commissioner asked SWTC a series of detailed questions about its handling of the request, with a view to evaluating its claim that it had disclosed all the information it held which fell within the request's scope.
37. SWTC explained that, in preparing its response to the Commissioner's enquiries, it had conducted another search for information and had located a further three letters which fell within the scope of the request, and which had not previously been disclosed. It had therefore disclosed them to the complainant. Following this disclosure, it was satisfied that it had identified and disclosed all the information it held which was covered by the request.
38. Describing the steps it had taken to locate relevant information, SWTC explained that planning information is held in a combination of manual and electronic format. It described the contents of planning files, as follows:

"The Councils Document Retention Policy has been put together and states 'Council Planning application and planning case files held within the planning team databases, microfiche and scanned records, including the application, publicity and consultation documents and responses, processing documents and background information, committee report, statutory notices, legal agreements and decision notices'".
39. It said that searches of all electronic and paper records were carried out for information falling within the scope of this request and all information located was disclosed to the complainant. Searches included planning files, emails and network drives and were carried out by

officers in the Planning Team, using the names of the parties listed in the case plus the associated planning reference numbers as search terms.

40. On the question of whether SWTC might have held any information relevant to the scope of the complainant's request which had subsequently been deleted or destroyed, it explained that the email account of a former member of staff mentioned in the complainant's request was deleted one month following his departure from SWTC. It said this was a routine action, completed prior to the complainant's request for information being received.
41. SWTC also said that its record keeping was compliant with the statutory requirements of the Town & Country Planning Act 1990.
42. Commenting generally, SWTC said that it accepted that it could have handled the request differently. In particular, it said:

"The information held should have been sent to [the complainant] without the need for the request for an internal review. However, in respect of some of the questions asked by [the complainant], it was not clear what information they were requesting and in my response to them on the 10th December 2019, I asked them for more information. No information or further correspondence has been forthcoming from [the complainant]."

43. SWTC then addressed the complainant's individual concerns about missing information, point by point.

Enforcement information for the property in question

44. As explained in paragraph 37, SWTC had recently located some further information which it had now disclosed to the complainant.

Emails between TDBC's planning officer and other named TDBC officers

45. Having conducted extensive searches, SWTC said it was satisfied that it had disclosed all relevant information and that it held no further emails between these officers and the applicants. It commented that the complainant's statement was incorrect, as a copy of the pre-application letter sent by the planning officer to the applicant was disclosed in document 1 of the internal review bundle (the Commissioner has verified this was the case).
46. It added:

"... information relating to this application is publicly available on the SWT planning portal and [the complainant has] also been sent any

other correspondence in the 15 email attachments sent to them on 10th December 2019."

Emails from the former TDBC officer

47. SWTC said that an email chain between the named officer and another party was disclosed in document 8 of the internal review bundle (the Commissioner has verified this was the case).
48. It said the former officer left SWTC in March 2019. In accordance with the council's practice in relation to document retention, an officer's email account is left open for one month before it is deleted. The email account was therefore deleted prior to receipt of the complainant's EIR request, which was dated 1 July 2019.

Email with visible time stamp sent on the 16 May 2018

49. SWTC said that it had disclosed to the complainant the only information it held with regard to the email.

Email that has been cropped dated 30 July

50. SWTC said that it had disclosed to the complainant the only information it held with regard to the email.

No answer to question

51. SWTC said that the complainant had been sent a significant amount of information in response to the internal review, across 15 PDF documents. This included all the correspondence it held from the planning applicants' agents.

Chair briefing

52. SWTC explained that when a Committee Chairman's briefing takes place this is a verbal update and notes are not taken. It reiterated that the complainant was provided with all correspondence between the Chair of the Planning Committee and officers in response to the internal review. It clarified that it does not hold anything in addition to this.

Missing conversation records

53. SWTC said that it does not keep records of verbal conversations and so does not hold this information. All information relating to email correspondence between the applicants' representative and the planning officer were sent to the complainant with the internal review. This included an email chain in document 15 in which the applicants' representative introduced himself, saying that he was emailing on behalf of the applicants, who did not have a computer. The Commissioner has verified this was the case.

The Commissioner's conclusion

54. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the 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 29 - 31, above, the Commissioner is required to make a finding on the civil standard of the balance of probabilities.
55. The complainant clearly believes that SWTC has not handled his request in accordance with the EIR and that it has attempted to conceal information. He finds it suspicious that further information was disclosed at the time of the internal review, and believes that this is indicative of SWTC deliberately trying to avoid disclosure when initially responding to the request.
56. As explained in paragraph 13, the Commissioner's Criminal Investigations Team has determined that there is insufficient evidence to substantiate this claim. Furthermore, one of the purposes of an internal review is for a public authority to consider whether it has identified all the information it holds which might fall within the scope of the request. The Commissioner's guidance on internal reviews⁴ specifically comments that:

"The review procedure should involve a thorough reexamination of the original decision and handling of the request"

and

"It should be genuinely possible to have a previous decision amended or reversed".

57. While it does not negate that the original handling of a request might have been deficient, where reconsideration results in further information being identified and disclosed, the Commissioner considers this to be a positive, and desirable, outcome of an internal review.
58. In addition, the Commissioner notes that in the internal review request, the complainant asked additional questions and requested information which wasn't covered by the scope of the original request (for example, for information about the enforcement action taken against the applicants, and also for information which post-dated his request). The

⁴ https://ico.org.uk/media/for-organisations/documents/1613/internal_reviews_under_the_eir.pdf

information SWTC disclosed in the internal review response therefore included information which fell outside of the scope of the original request.

59. The Commissioner has no doubt that the complainant's request was made in pursuit of a matter about which he feels strongly, and which he is taking forward through proper, formal channels, with the LGO. She considers that, overall, he has been put to not inconsiderable trouble to obtain a complete response to his request. Nevertheless, while he may find it frustrating that he has not received the information he was expecting, the Commissioner is satisfied that SWTC has provided a detailed and cogent explanation of the searches it has conducted and why they would be likely to locate any further information, if it was held. With regard to the deleted email account, she is satisfied that its deletion took place well in advance of the request being received. Any information held by the former case officer which pertained in any significant way to the planning application should have been copied by him to the planning file, in line with SWTC's records management policy.
60. The complainant has cited numerous email exchanges between various parties which he would expect SWTC to hold. SWTC's response is simply that it has disclosed all the information that it does hold, and that it does not hold the particular exchanges described by the complainant.
61. On the question of whether SWTC *should* hold certain information which it says it does not, when dealing with a complaint to her under the EIR, it is not the Commissioner's role to make a ruling on how a public authority deploys its resources, on how it chooses to hold its information, or on the strength of its business reasons for holding information in the way that it does as opposed to any other way. Rather, in a case such as this, the Commissioner's role is simply to decide whether or not the requested information is held by the public authority. On that point, the Information Tribunal in the case of *Johnson / MoJ* (EA2006/0085)¹ has commented that the FOIA:

"... does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold".
62. The Commissioner considers the same to be the case for the EIR.
63. Having taken all the above into account, SWTC has demonstrated to the Commissioner's satisfaction that, on the civil standard of the balance of probabilities, it has disclosed to the complainant all the information it holds which falls within the scope of the request.

Right of appeal

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

65. 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.
66. 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
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