

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 4 August 2020

Public Authority: Babergh District Council & Mid Suffolk District Council

Address: Endeavour House
8 Russell Road
Ipswich
IP1 2BX

Decision (including any steps ordered)

1. The complainant has requested evidence held by the council which led to an assessment of land being changed in the *Babergh and Mid Suffolk Draft Strategic Housing and Employment Land Availability Assessment (SHELAA)*. The council argues that no information is held relating to the change.
2. The Commissioner's decision is that, on a balance of probabilities the council is correct to state that it holds no further information falling within the scope of the complainant's request. Regulation 12(4)(a) therefore applies.
3. The Commissioner does not require the council to take any steps.

Request and response

4. Following previous correspondence, on 13 September 2019 the complainant wrote to the council and requested information in the following terms:

"You have previously informed us via a FOI request that there is no evidence to support the desktop assessment of the SHELAA, but now you state:

"the Strategic Housing and Employment Land Availability Assessment are based on 'evidence that has been presented to us' and professional judgement".

Could I please have a copy of this evidence, if it exists? I would've thought it would have been available to me as part of my FOI request?"

5. The council responded on 26th September 2019. No information was provided, however it said that:

"...specific evidence that led to the assumption in the Babergh and Mid Suffolk Draft Strategic Housing and Employment Land Availability Assessment (SHELAA) for the site on Land west of [details identifying address redacted].

The evidence requested included professional ecological survey of the site and the Highways report, why no possible mitigation or compensation could be achieved and who's professional opinion was gathered..."

6. On request, it carried out an internal review. It said that:

"Our e-mail of 30th August 2019 appears to have been misinterpreted as when we said 'evidence that has been presented to us', we were referring to the SHELAA as a whole. In the case of the site you mention, we did not have evidence submitted to us as per our previous reply. Professional judgement refers to the judgement applied by professional planners in producing the SHELAA document. Therefore, our response is as per that provided to you on 23rd August 2019."

7. In its response of 23 August 2019, it had initially replied to the request stating:

"We hold no further information regarding your request and have nothing further to add to this enquiry having already responded."

8. Following a further review on 10 December 2019 the council said:

"The change was due to an editorial and consistency check across all of the sites assessed in Babergh and Mid Suffolk to be consistent with the Strategic Housing and Economic Land Availability Assessment methodology..."

9. It did not provide any information evidencing or supporting this response to the complainant, maintaining that no further information was held which could respond to her request.

Scope of the case

10. The complainant contacted the Commissioner 18 December 2019 to complain about the way her request for information had been handled.

11. She considers that the council had significantly changed the assessment details of a piece of land, but it can provide no evidence of why this has been done.

12. Her wider argument is that the council should be able to demonstrate that it has:

- considered her comments,
- holds, and that it provides, evidence of why its assessment was changed.
- the council should be able to clarify what the 'levelling' it described entailed.
- that the council should be able to demonstrate the 'who, when and 'why' (i.e., the documents that lead to the changes)
- explain why the council does not clarify that this levelling takes place in the information it provides on the methodology of assessments.
- that the council should be able to demonstrate that it has assessed the site fairly.

13. The Commissioner is not able to consider the council's decision as regarding the assessment in the SHELAA. The complaint she is able to consider is whether the council holds any further information falling within the scope of the complainant's request for information.

Reasons for decision

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

14. The council argues that it has disclosed all of the information which it holds falling within the scope of the request for information. It argues that the change to the SHELAA was based upon a desktop reassessment, and that no further evidence or information was submitted which led to those changes. The complainant disputes that this can be the case and argues that there should be some record of why the change to the assessment was made.
15. The Commissioner understands that the change to the entry within the SHELAA does not amend the final recommendation for the site. The complainant argues that the wording and emphasis have been changed and she considers that this significantly affects her interests in the land.
16. Regulation 12(4)(a) 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.
17. In effect the Commissioner must consider whether further information is held by the council which has not been disclosed to the complainant in response to his request for information.
18. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that 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.
19. 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.
20. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, she will consider any other information or explanation offered by the public authority (and/or the complainant) which is relevant to her determination.

21. During the course of her investigation, the Commissioner asked the council to describe the searches it carried out for information falling within the scope of the request, and the search terms used. She also asked other questions, as is her usual practice, relating to how the it established whether or not it held further information within the scope of the request.
22. The council said that officers have searched all relevant information sources including retained e-mail files in their Outlook accounts, retained files on their personal OneDrive storage and in common drive areas held on shared servers.
23. It added that discussions have also been held with the officers responsible for producing the SHELAA. The SHELAA is produced using professional judgement and any information that has been submitted to the Council.
24. It said that the complainant argues that she has had an informal meeting with a Suffolk County Council Highways engineer, but no written evidence in the form of a meeting note agreed by both parties (the complainant and Suffolk County Council) has ever been presented to the Council. In the absence of this information, professional judgement was used. It argues that its searches would have found all information held on this matter if any further evidence had been received.
25. It said that the only formal evidence the Council have received is a Land Registry document dated 22nd January 2015 that is attached to the complainant's site submission, which it received on 26th July 2016.
26. It said that searches were widely carried out in all possible locations described above to determine if any further evidence had been received and could therefore be considered. For electronic files search terms included, typically, the complainants name, site reference number and site addresses. No further information was located.
27. It considered that the complainant would have had the choice to submit the evidence the planning officers requested either manually or electronically. It confirmed that the information submitted with the site submission on 26th July 2016 had been scanned and that it is held electronically.
28. It confirmed that no information has been destroyed or deleted, and that the information which is held has been published in the SHELAA documents.

29. It said that if information was held, then it would be held until the Local Plan was adopted, and the information was no longer required. It argues however that no further information is held.

The Commissioner's conclusion

30. The Commissioner has carefully reviewed the submissions of both parties and the arguments put forward.
31. The complainant has provided further arguments as to why she considers that further information should be held. Primarily she is concerned with why the council changed the assessment if there was no evidence to support any change, and how, and why, the council have reached a decision to do this given this lack of further evidence.
32. She argues that the council has significantly changed the assessment of a piece of land she owns and can provide no evidence of why this has been done. She considers that the council's reaction to her request for review was to suggest that levelling has taken place, but she considers that this response was due to it holding no evidence which could demonstrate why it made changes to the entry within the SHELAA. She further argues that there had been no mention of a levelling process in the assessment methodology or in their initial response to her FOI request, and no evidence of this levelling has been supplied as part of the council's response to her internal review. She believes that this is unacceptable as a reason without evidence, and the changes that have been made to the assessment take no account of information that she gave to the council. She therefore argues that an element of predetermination may have taken place. She argues that if there is no evidence demonstrating why the change was made to the entry then she assumes that the assessment should remain the same.
33. The council argues that it holds no further information which would clarify to the complainant why the change in the land's designation occurred. It provided to the Commissioner several emails which demonstrated it outlining to the complainant the evidence it could take into account in assessing the land, and periods when that information could be submitted (i.e., the periods of time during which consultation periods were being run). The Commissioner is aware from this correspondence that the parties were engaged in discussions surrounding the SHELAA entry over a period of time. During the discussions the council asked the complainant to submit specific evidence to it in writing, whilst the complainant wanted to discuss her concerns in a meeting with council officers.

34. The council argues that its reassessment was based a purely desk-based decision, taking into account the evidence already available in the SHELAA. It further argues that it had received no further information from the complainant's which it could take into account. The complainant however suggested to the Commissioner that the council had failed take into account her comments.
35. The council has described the searches which were carried out. Its response also appears to clarify that where the complainant has asked for its evidence, no additional information had been submitted that is not already available to the complainant, and no further information is held. Essentially therefore it appears that the SHELAA document was reconsidered, an amendment made to the relevant entry, but this was based purely on officer judgement taking into account the information provided in the SHELAA, but no record has been made of the reasons why the changes were made.
36. Whether or not the Council's decision regarding the land designation change is correct is not a matter which the Commissioner is able to consider. Additionally, the argument that no records are held demonstrating its processes and an audit trail over the reasons for the amendment of the SHELAA entry is also not a matter which the Commissioner is able to consider further. She is only able to ask the council to demonstrate why it considers that it holds no further information pertaining to the request, and to describe the searches which it carried out to determine this.
37. If the complainant believes that the council's lack of records over the issue demonstrates an error in judgement, or that it demonstrates evidence of maladministration, then she is able to seek legal advice as to what avenues may exist to challenge the councils decision, such as making a complaint to the Local Government Ombudsman, if she has not already done so.
38. The question for the Commissioner to consider is not whether information 'should' be held, but whether relevant information 'is' held. Given the council's responses, the Commissioner considers that the council has provided a description of having carried out adequate searches in appropriate places to determine whether any further information is held falling within the scope of the complainant's request.
39. Given the explanation provided by the council, and in the absence of evidence to the contrary, she considers that there is no evidence that further information is held falling within the scope of the complainant's request for information.

40. This being the case, the Commissioner's decision is that, on a balance of probabilities, no further information is held by the council falling within the scope of the complainant's requests for information.

Right of appeal

41. 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

42. 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.
43. 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
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