

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

Date: 23 April 2020

Public Authority: North Lincolnshire Council
Address: Civic Centre
Ashby Road
Scunthorpe
South Humberside
DB16 1AB

Decision (including any steps ordered)

1. The complainant requested from North Lincolnshire Council (the Council) information in relation to a planning application. The Council provided some information and stated that it did not hold the remainder.
2. The Commissioner's decision is that the Council has:
 - a. on the balance of probabilities, disclosed all the information it held within the scope of the request, at the time it was submitted;
 - b. breached regulation 5(2) of the EIR by failing to provide information it held within 20 working days; and
 - c. breached regulation 11 of the EIR by failing to conduct an internal review within 40 working days.
3. The Commissioner does not require the Council to take any step as a result of this decision notice.

Request and response

4. On 23 May 2019, the complainant wrote to the Council and requested information in the following terms:

"Any hard copy and/or data communications and records which are NOT visible to me on the planning website and which make reference to, or are in any way connected with, my planning application PA/2019/192. To include, specifically but not exclusively;

- 1. Any direct or indirect communication between NLC Ecology Department and/or [name redacted] and [name redacted] Ecology during June 2018 and/or April or May 2019.*
 - 2. Any direct or indirect communications between the NLC Planning Department and/or [name redacted] and the Barnetby Parish Council during 2019.*
 - 3. Any direct or indirect communications between the NLC Planning Dept. and/or [name redacted] and the NLC Ecology Department and/or [name redacted] during 2019. To include specifically but not exclusively the communication from NLC Planning and/or [name redacted] that initiated the "Response Attached" email from [name redacted] at [email address redacted] address at 22:18 on the 7th May 2019.*
 - 4. Any direct or indirect communications within the Planning Department/Group during April and/or May 2019.*
 - 5. Any direct or indirect communications or submissions which were considered during, or influenced, the planning process with particular but not exclusive reference to the four objections from two people referred to in the PA/2019/192 decision.*
 - 6. Any contemporaneous notes, summaries, or other records of meetings and conversations."*
5. On 21 June 2019 the Council responded. It provided the complainant with information which was considered to be held within the scope of Part 2 and Part 6 of the request and it stated that no information was held falling within the scope of Part 1, Part 3, Part 4 and Part 5 of the request.
6. The complainant expressed his dissatisfaction with the amount of information received in correspondence between him and a Council officer. This communication took place on 24 June 2019 and was considered by the Council as a request for internal review.
7. On 12 August 2019 the complainant contacted the Planning Inspectorate (PI) in relation to the Council's questionnaire response and supporting information for his planning appeal. The PI confirmed to the complainant

that it received the Council's questionnaire and supporting documents. The PI on the same day advised the Council to share these documents with the complainant.

8. On 13 August 2019 the Council sent an email to the complainant with 24 documents attached. The majority of the information disclosed on this occasion fell outside of the scope of the complainant's request as it was created after the request was submitted. However, it included an email which fell within the scope of part 2 of the information request, and four letters previously removed from the Council's planning portal which are considered to be within the scope of the request's preamble as it sought any communication related to the planning application in question. These four letters were not included in the Council's initial response, as they were removed from the planning portal at the complainant's request and it was assumed the complainant had a copy of the letters.
9. Following the Commissioner's involvement, the Council provided the complainant with the outcome of its internal review on 19 December 2019. It stated that "*upon investigation it was found that all information in scope of the request was provided and that where it was stated that information is not held this is correct.*" The Council also stated that the request should have been considered under the EIR instead of the FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 4 September 2019 to complain about the way his request for information had been handled. The complainant's concerns were focused on the amount of information received in different phases of the handling of his request, which has led him to believe that there is further information held to what was already disclosed.
11. The following analysis will determine whether the Council complied with:
 - a. Regulation 5(1) of the EIR, when it stated that it held no further information within the scope of the request beyond what was already disclosed;
 - b. Regulation 5(2) of the EIR, in relation to the timing of its response to the complainant's information request; and
 - c. Regulation 11 of the EIR, in relation to the time it took to conduct the internal review.

Reasons for decision

Is the requested information environmental?

12. 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;*
 - (d) *reports on the implementation of environmental legislation;*
 - (e) *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
 - (f) *the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*
13. The Commissioner considers that any information within the scope of the request that the Council held would be information relating to planning matters. She believes that it would be likely to be information about "measures" affecting the elements of the environment, and therefore would be environmental information under regulation 2(1)(c). Whilst this does not affect whether further information is held, for procedural reasons, the Commissioner has therefore assessed this case under the EIR.

Regulation 5(1) – Duty to make environmental information available on request

14. Regulation 5(1) of the EIR states that "*a public authority that holds environmental information shall make it available on request.*" This is subject to any exceptions that may apply.
15. 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 argument. 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. She will also consider any reason why it is inherently likely or unlikely that information is not held.
16. 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 that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test that the Commissioner has applied in this case.
17. 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 further information is held, on the balance of probabilities.
18. As part of her investigation, the Commissioner wrote to Council requesting submissions in respect of a number of questions relating to the allegations raised by the complainant. The Commissioner's questions were focused on the Council's endeavours in providing the requested information to the complainant, its searches conducted in relation to the

complainant's request, and whether any of the information falling within the scope of the requests was deleted or destroyed.

19. In its response to the Commissioner's investigation letter, the Council with the purpose of providing a clearer picture, summarised a chronological background of events which preceded the complainant's information request. The Council stated that the complainant submitted a planning application in January 2019 which was refused with a decision of 15 May 2019 by the Council in its capacity as a planning authority. Subsequently, in July 2019 the complainant submitted an appeal to the PI against the Council's decision. This appeal was dismissed on 8 October 2019.
20. The Council explained that when it provided its initial response to the complainant's request it *"did not include details of the appeal, because this information was not held at the point of the request."*
21. However, as noted above in paragraphs 7 and 8 of this decision notice, when the Council was informed that the complainant had not received a copy the complete documentation submitted to the PI by the Council, it furnished the complainant with copies of all information submitted to the PI, part of which fell within the scope of the request.
22. The Council also explained that during the course of the appeal process it was informed by the PI that *"an email from the Barnetby Parish Council on 6th May 2019 had not been published. To rectify the matter the council published this missing email and the Planning Inspectorate attached a copy in an email to the complainant."*
23. The Council confirmed that all necessary searches to identify the information requested were carried out. It explained that upon receiving a planning application a unique referencing number is given to the application and all documents, including consultation responses have this number assigned to them.
24. In the process of handling the complainant's request, the Council searched using the planning application reference number and the address associated with the planning application. It stated that these searches were carried out in the data file and in the generic planning email account. *"In addition, the planning case officer and ecologist were asked to check whether they had any relevant information not yet saved in the data file, and both confirmed they had nothing."*
25. The Council explained that it does not hold planning application information in paper form, with any paper information received being scanned on receipt. It confirmed that all information would be held as an electronic record.

26. The Council assured the Commissioner that no information within the scope of the request has been deleted or destroyed and all recorded information is still held by the Council. It added that its records management policy¹ says that *"records must be held for at least as long as the minimum retention period and that a review will then take place to see if the record should be retained longer."*
27. Whilst the Council stated that it is not aware of any statutory requirements to retain the requested information, it confirmed that it retains all the relevant information in the casefile for business purpose in accordance with its records management policy.
28. In conclusion the Council confirmed that all the information held within the scope of the request was made available to the complainant.

The Commissioner's view

29. The Commissioner has examined the submissions of both parties. She has considered the searches performed by the Council, the information it disclosed, the Council's explanations as to why there is no further information held and the complainant's concerns.
30. Having considered the scope of the request, the Commissioner is satisfied that, although not in a timely fashion as demonstrated by some information within the scope of the request not being disclosed until 13 August 2019, the Council carried out necessary searches to identify the requested information that was held at the time of the request.
31. The Commissioner appreciates the complainant's concerns, however, in the absence of evidence to the contrary, the Commissioner is satisfied that the Council has provided the complainant with all of the relevant information which it held, falling within the scope of the request.
32. Therefore, the Commissioner is of the view that, on the balance of probabilities, the Council did not hold further information within the scope of the request.

Regulation 5(2) of the EIR – Time to respond

33. As explained above, Regulation 5(1) requires a public authority to provide information it holds when requested. Regulation 5(2) of the EIR

¹ <https://www.northlincs.gov.uk/your-council/about-your-council/information-and-performance/information-governance/records-management/>

requires this information to be provided to the requestor within 20 working days following receipt of the request.

34. The complainant requested the information on 23 May 2019 and the Council provided part of the information held on 21 June 2019. Additional information held was provided to the complainant on 12 August 2019, following the involvement of the PI.
35. This is a period of more than two months and as such it is outside of the required 20 working days. Therefore, the Commissioner finds that the Council breached regulation 5(2) of the EIR.

Regulation 11 – Internal review

36. Regulation 11 of the EIR states that:

"(1) An applicant may make representations to a public authority in relation to their request for environmental information if it appears to the applicant that the authority has failed to comply with the requirements of the Regulations.

(2) Those representations need to be made in writing no later than 40 working days after the date which the applicant believes the public authority 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) no later than 40 working days of the date of receipt of the representations."

37. The Commissioner notes that the complainant wrote to the Council on 24 June 2019, clearly stating that he was not satisfied with the amount of information received and presented his arguments as to why he thought there should be further information held within the scope of his request. On the same day, the Council acknowledged receipt and provided an anticipated deadline within which it would respond.
38. As explained above in paragraph 9 following the Commissioner's involvement, the Council provided the complainant with the outcome of its internal review on 19 December 2019.

39. By failing to carry out an internal review within the statutory time limit of 40 working days, the Commissioner finds that the Council breached regulation 11 of the EIR.

Right of appeal

40. 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

41. 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.
42. 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
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