

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

Date: 20 February 2020

Public Authority: Arun District Council
Address: Arun Civic Centre
Maltravers Road
Littlehampton
West Sussex
BN17 5LF

Decision (including any steps ordered)

1. The complainant has requested information regarding the construction of a dropped curb access.
2. The Commissioner's decision is that on the balance of probabilities, Arun District Council has located all the information held in scope of the request. However, it breached Regulation 5(2) in failing to respond to the request within 20 working days.
3. The Commissioner does not require any steps.

Request and response

4. On 20 May 2019, the complainant wrote to Arun District Council ('the council') and requested information in the following terms:

"We write with reference to the northern most access to the A29, on the site known as 'Land West of Fontwell Avenue'.

[1] We wish to receive a copy of the Google map of 2009 showing the dropped kerb access to this site and the photo taken by the Planning Officers who visited the site on 16.1.14. You have quoted this evidence in your response to an earlier Freedom of Information request which we made on 30.10.2018.

We make this request under the Freedom of Information Act 2010.

We also make a Subject Access Request

[2] We would also like to see any other evidence you have relating to the construction of a dropped kerb access to the A29, at this point."

5. The council responded on 6 June 2019, it provided information in scope of [1]. However, the council interpreted [2] as a Subject Access Request ('SAR') and therefore did not provide a response in terms of the FOIA or EIR.

6. The complainant requested a review of [2] on 17 June 2019, they provided further background to the request:

"... You have 'decided' that it has been in place for so long, that established right of access has been allowed. The photographs sent in response to the first part of our request, clearly show that no access was possible for a considerable length of time until Planning Permission for housing was sought. Our property and lives have been adversely effected by this access (which we have communicated to you on many occasions) and therefore we have the right to see any evidence relating to the access, which have allowed you to come to the conclusion that it has established use."

7. The council responded on the 19 June 2019, it stated it had responded to [1] and continued to treat [2] as a SAR, and requested further clarification.

8. The complainant provided further clarification on 19 June 2019, stating:

"We are happy to make further Freedom of Information Requests as necessary and do so here.

We wish to know what evidence the Council has used, in order to decide that the northern access on land known as [redacted] has established use. As this is a Planning matter and open to Public View we are entitled to see a paper copy of this evidence.

We make this request under the Freedom of Information Act 2010."

9. On 20 June 2019 the council responded and confirmed that it would investigate what information was available for [2] through FOIA / EIR as well as a SAR.
10. On 10 July 2019 the council provided a response to request item [2].

Scope of the case

11. The complainant contacted the Commissioner on 28 August 2019 to complain about the way their request for information had been handled. Specifically, it is the complainant's position that the council have prevaricated in providing responses, and *"they finally provided the wrong information on 10 July 2019, long after the legal time to challenge the permission to build had passed."*
12. The purpose of the legislation is to provide the public with the right of access to information held by public authorities, within a specified time period, where it is not subject to any exemptions. The regulations do not provide a means by which the Commissioner can test whether the information provided is right or wrong. However, she is able to make a judgement on whether an authority holds any further information, using the civil standard of the balance of probabilities. The Commissioner advised the complainant on this point, who confirmed the scope to be whether further information is held in relation to [2].
13. The Commissioner therefore considers that the scope of this case is to establish whether, on the balance of probabilities, the council holds any further information in scope of the request item [2]. She will also consider whether the council complied with the requirements of regulation 5(2) in the time it took to respond to the complainant.

Reasons for decision

Regulation 2(1) - Environmental Information

14. Information is 'environmental information' if it meets the definition set out in regulation 2 of the EIR. If the information satisfies the definition

in regulation 2 it must be considered for disclosure under the terms of the EIR rather than the FOIA.

15. Regulation 2(1) of the EIR defines environmental information as 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...emissions...and other releases into the environment, likely to affect the elements 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) and (b) as well as measures or activities designed to protect those elements;..."
16. The information in this case relates to any information held that gives permission for the build of a dropped curb. As such it is information regarding measures (plans, activities) likely to affect the state of the elements in the environment (the use of the land).
17. The Commissioner therefore finds that the information is environmental information and should be considered under the EIR.

Regulation 5(1)

18. 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.
19. 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.
20. 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 the Commissioner applies in this case.

21. 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.

The Complainants view

22. The complainant provided background to the requests which relate to a building plot adjacent to their house: *"...the plot, although having permission to build two houses, does not appear to have permission to access the A29, to enter or exit the site. ADC [the council] have admitted (in a previous FOI Request) that no formal permission exists and said that it had established use. Our further requests, asked to see the evidence that the entrance has established use, because we have lived in our house for over 35 years and know that there has never been an access in the position specified."*
23. The complainant stated to the Commissioner:
- *"The Council have NEVER given the information requested.*
 - *The Council provided paperwork which was a copy of all previous planning applications on their web site... it was NOT the evidence asked for. The paperwork provided showed only that THERE WAS NO ESTABLISHED USE."*
24. The complainant responded directly to the council disputing that disclosures had answered request item [2], they stated:

- *"All the Planning Applications were REFUSED because of the access proposed, except for one, (AL/25/55) which was never implemented.*
 - *Your own notes confirm, that this permission (AL/25/55) for a new road inside the field was never implemented and has therefore expired.*
 - *Additionally, your own research notes signed [redacted] of AL/22/63 and AL/9/67 says, the plan looks wrong because an entrance adjacent to our house and a road across the field is not shown.*
 - *Any photographs returned with this response were all taken after the Applicant moved onto the field in 2017 and consequently show nothing in terms of established use."*
25. It is the complainant's view that the council have deliberately wasted time in responding to their requests in order to avoid a legal challenge.

The Council's response

26. The Commissioner asked the council to advise how the information provided to the complainant constitutes evidence of established use, as per the fundamental meaning of the request. It responded:
- *"According to the Town and Country Planning Act 1990, "means of access" includes any means of access, whether private or public, for vehicles or for foot passengers, and includes a street." Furthermore, the dictionary definition of a means of access is the "way to enter or exit a place." It is the Council's view that a means of access is still a means of access even if it is blocked by something which is temporary in nature and can be moved out of the way.*
 - *Section 171B of the Town and Country Planning Act 1990 states that: "Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed." Therefore, if an access had been in place on the ground for at least four years then it would not be possible to take enforcement action or require that a planning application be submitted to formalise that access. It is the Council's view that this applies in this case as it is clear from the evidence that the access has been in place for at least four years.*
 - *The evidence provided to the complainant thus far entirely consists of:*

(a) photographs taken at the site during application site visits;

(b) photographs taken from Google Streetview;

(c) aerial photographs obtained from Google Earth; and

(d) copies of items either submitted with (such as drawings, applications forms) or provided in response to (such as letters from third parties) previous planning applications on the site.

- *In respect of (a) and (b) these variously show a dropped crossing at the site, evidence of vehicles accessing the site, rough track access and on some of them, a metal gate of vehicle width. In respect of (c), on close inspection these show a gap in the boundary of the site adjacent to the road, evidence of worn out grass at this point (potentially indicating erosion by tyres) and on one of the photos, vehicle tracks in the field.*
 - *In respect of (d), all of the documents that were sent stated or showed that there was already an access from the site onto the A29. This package of information included drawings annotated to say "existing access", objection letters where the writer referred to there being an existing access, copies of decision notices and application forms which refer to an existing access.*
 - *The evidence available shows that at the time of the planning officer's first visit on 16 January 2014, the access had been present for at least four years and was consequently lawful by virtue of the passage of time."*
27. The Commissioner asked for details of searches it had undertaken to locate any further information in scope of the request. The council advised that searches were carried out of: *"Council held planning application records available on microfiche, Case officer (planning and compliance) site visit photos, Google Earth & Google Streetview photographs available on the public world wide web."* It stated that *"all of these sources of information were considered highly likely to provide evidence to demonstrate that there was already an access into the site from the road."*
28. The council confirmed that no information relevant to the request had been destroyed, it stated *"The Council does not destroy microfiche records, or electronic photographs as these are required to aid future work. Prior to destroying hard copy planning and compliance files, these are scanned and saved electronically on the Council's networked storage system."*

29. The council advised *that "All information submitted as part of a planning application and the outcome of the application are kept indefinitely as they form part of the planning history relating to a property or piece of land...Information on planning compliance/enforcement files is kept permanently."* The council confirmed that this is documented in the relevant privacy notice and retention schedules for the council.

Conclusion

30. As previously stated, the regulations do not provide any means by which the Commissioner can test the accuracy of released information. However, she is able to make a judgement on whether an authority holds any further information, which is in scope of a request, using the civil standard of the balance of probabilities.
31. In trying to make that judgment, she has asked the council how its response answered the core purpose of request item [2], which, essentially, is for the evidence the council used in order to decide that an access has established use. The Commissioner is satisfied that council have provided an explanation of why it considers that the information provided answers that question.
32. This decision notice contains considerable further information from the perspective of both the complainant and the council on the point of whether established use has been evidenced. It is recorded for completeness. However, as is recognised the complainant, further debate on this issue is appropriately addressed via other means, such as the Local Government and Social Care Ombudsman.
33. The Commissioner is mindful of the purpose of the EIR, in that it gives the public the right of access to recorded information that is held by a public authority. It is not concerned with what information a public authority 'should' hold, only those records that 'are' held. The Commissioner must therefore conclude whether the council is likely to be holding further recorded relevant information beyond that which has already been disclosed.
34. The Commissioner has not found there to be any evidence which undermines the council's position that it has provided all of the information it holds that it considers is relevant to this request.
35. Taking all of the above into account the Commissioner is satisfied that, on the balance of probabilities, no further information in-scope of the request is held by the council.

Regulation 5(2)

36. Regulation 5(2) of the EIR provides that in response to information requests under the EIR, information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
37. The complainant made their request for information on 20 May 2019. Having mistaken the request as a subject access request initially the council eventually responded on 10 July 2019 which is later than the statutory 20 working days.
38. The Commissioner therefore concludes that the council failed to comply with the requirements of Regulation 5(2) in the time it took to respond to the complainant's request for information. As the response has been provided no further action is required.

Right of appeal

39. 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

40. 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.
41. 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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