

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

Date: 24 May 2021

Public Authority: Blackburn with Darwen Borough Council
Address: Town Hall
Blackburn
Lancashire
BB1 7DY

Decision (including any steps ordered)

1. The complainant has requested information about an initial contact made to the council regarding a development.
2. The Commissioner's decision is that, on the balance of probabilities, Blackburn with Darwen Borough Council do not hold any information in scope of the request.
3. The Commissioner does not require any steps.

Request and response

4. On 16 August 2020 the complainant wrote to Blackburn with Darwen Borough Council ('the council') and requested information in the following terms:

"1. Who made initial contact regarding this development and the proposals?"

2. Why are government targets being exceeded in this case with this not being on land targeted for housing?"

3. Who will benefit from this development?"

4. What will the financial benefit be to the council should this development be approved?"

5. In this case, I have been made aware of Local Plan Part 2, which includes the development of the whole of [redacted]. I would like to know why this not made completely transparent to the public?"

5. The council responded on 21 August 2020 answering questions 2 to 5. However, it withheld information in relation to question 1, stating:

"There have been numerous enquiries received by the Council in relation to the [redacted] site since it was identified for future development in the Council's Local Plan, which was adopted in 2015. Pre-application enquiries are commercially sensitive and therefore the Council is required to maintain confidentiality."

6. The complainant requested an internal review on 23 August 2021.
7. The council provided the outcome of an internal review on 26 August 2020 in which it revised its position to refuse to provide information in scope of question 1 on the basis of regulation 12(5)(f), (interests of the information provider).
8. On the 26 April 2021, during the course of the Commissioner's investigation, the council again revised its response to state that no information is held within the scope of question 1.

Scope of the case

9. The complainant contacted the Commissioner on 26 August 2020 to complain about the way the request for information had been handled.

Specifically, that the council was withholding information on the basis of regulation 12(5)(f).

10. During the investigation, the council was unable to provide the withheld information to the Commissioner for review. It explained that a phone call had been held, therefore the information was known to the council, however, nothing had been recorded that would answer the request.
11. The council therefore wrote to the complainant on 26 April 2021 with a revised response to the request. It stated that no information was held in scope of the request question 1.
12. The complainant advised the Commissioner that they remained dissatisfied, specifically disputing the position that there was no information in scope of the request.
13. Therefore, the Commissioner considers the scope of this case is to establish whether, on the balance of probabilities, the council holds information that would answer question 1.

Reasons for decision

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 arguments. 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 the Commissioner applies 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.

The complainants view

18. The complainant disputes the council's position that it does not hold any information in scope of question 1.
19. The complainant considers the public should have confidence that the council is abiding by its own policies in regard to its regulatory planning powers.
20. The complainant believes that the council instigated a development of the site which was in contravention of council policy.
21. The complainant is dissatisfied that the council will not disclose who the conversations were with. The complainant states that the information would enable a complaint to be raised with the Local Government Ombudsmen ('the LGO').

The council's response

22. The council states that, as one of the landowners for the site, it was contacted informally by a potential developer.
23. It advises that the contact was an informal verbal discussion which had not been recorded.
24. The council advised the complainant that it is known who made the initial contact and which officer was party to the discussion, however the information was simply not recorded.
25. The council advised that the initial response given to request question 1 was incorrect, being in reference to the confidential nature and content of the conversation. It advised that it should have stated the information

is not held in any recorded form therefore it is not held for the purposes of the EIR.

26. Although the EIR does not require an authority to answer direct questions rather than requests for recorded information, the Tribunal has decided that if recorded information is held which can respond to a question then that information should be considered for disclosure to the requestor. The Commissioner therefore asked the council further questions to establish whether any information was held that would identify who made the initial contact with the council regarding the development and proposals.
27. The Commissioner asked what searches had been carried out for information falling within the scope of the request. The council advised it had asked the '*Service Lead*' and the '*Service Director*' which officer had held the conversation with the 3rd party. The identified officer then confirmed that the discussion and pre-planning advice relating to the site was conducted entirely over the telephone.
28. The council advised that no searches for recorded information were carried out because the officer holding the conversation confirmed that nothing had been recorded. The council also verified that this included consideration of whether there would be any locally held notes and information.
29. The council advised that the contact and nature of the discussion would not have been registered on a casework system or call logging system.
30. The council advised that it has no statutory or business purposes for recording the requested information. Full details of all meetings and conversations relating to planning applications are retained once a formal application has been made. No formal record is required for pre-planning advice, such conversations are confidential and therefore this is considered normal practice.
31. The council confirmed that no information in scope of the request had been deleted.
32. The Commissioner asked whether there is any similar information that may assist the complainant. The council stated that an approved outline planning application has been submitted by an agent on behalf of the landowners of the site (being the council and two other private landowners). It advised, however, that the complainant is already aware of the information, having commented on the application via the council's planning portal.

Conclusion

33. As previously discussed in this decision notice, the EIR do not require public authorities to answer direct questions nor create recorded information in order to respond to a request. The information legislation is limited to providing the public with the right to access information that is recorded.
34. It is therefore for the Commissioner to decide whether or not, on the balance of probabilities, the council holds any recorded information which would answer the request. In coming to a conclusion, the Commissioner has considered the complainants view and the council's response.
35. The overriding factor in this case is that the council officer, involved in the initial contact, states that no details of that discussion were recorded either in note form or on any system. Furthermore, the council has confirmed that it does not log such conversations and there is no statutory requirement to record details of pre-application discussions and advice given. It also confirmed that no information in scope of the request had been deleted.
36. The views expressed by the complainant relay the importance of the information to them. However, unfortunately for the complainant, the Commissioners assessment can only be in terms of whether or not the information is recorded.
37. The Commissioner considers that the council has provided a reasonable explanation regarding why the information requested does not exist. Furthermore, it is not appropriate for the Commissioner to make a judgement over whether the council followed its due process in terms of holding recorded information in relation to the initial contact, therefore the council's arguments are accepted.
38. Having considered the council's responses, and in the absence of any tangible evidence to the contrary, the Commissioner is satisfied that, on the balance of probabilities, the council does not hold any information in scope of question 1.
39. The Commissioner therefore considers that the council complied with its obligations under regulation 5(1) of the EIR.
40. No steps are required.

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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