

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 18 January 2022

Public Authority: Wiltshire Council

Address: County Hall
Bythesea Road
Trowbridge
Wiltshire
BA14 8JN

Decision (including any steps ordered)

1. The complainant requested information about how the council determined that planning conditions had been met by the applicant on a specific planning application. The Council said that it does not hold any information falling within the scope of the request.
2. The Commissioner's decision is that, on a balance of probabilities, the Council does not hold the requested information.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 19 December 2020, the complainant wrote to the council and requested information in the following terms:

"Planning approval [planning reference number redacted by the ICO]

*Copy of the two documents listed in para (3) of the approval
Copy of the scheme submitted and written approval of the planning authority*

Details listed in para (5)."

5. The two documents in question are a copy of the scheme submitted by the applicant, and written approval of the planning authority to that scheme.
6. The council responded on 20 January 2021. It said that it does not hold any information falling within the scope of the request for information. To be helpful, it provided some associated information, and it also clarified that all of the information which it holds is available from the planning portal section of its website.
7. Following an internal review, the council wrote to the complainant on 9 February 2021. It maintained its position that it does not hold any relevant information.

Scope of the case

8. The complainant contacted the Commissioner on 15 February 2021 to complain about the way her request for information had been handled. She considers that the council should hold the information which she has requested.
9. She argues that the requested information relates to a condition attached to a full planning approval.
10. Condition (3) states that:

"Before development is brought into use a scheme to upgrade, drain, and made good the track shall be submitted to and approved in writing by the local planning authority."

11. The complainant also refers to paragraph (5), which states that:

"No development shall take place until details of the treatment of all the boundaries of the site have been submitted to and approved in writing by the Local Planning Authority."
12. The complainant clarified to the Commissioner that her complaint was on the basis that she has not received the information she requested from the council.
13. The complainant believes that it is vitally important that these documents are found in order that she is able to establish who is responsible for flooding which is occurring on her property. She argues that the council says that it does not hold this information, however she considers that it should.
14. The scope of this case, and of the following analysis, is whether, on a balance of probabilities, the council holds the requested information.

Reasons for decision

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

15. Regulation 5(1) of the EIR provides that, subject to the exemptions within the Regulations, a public authority that holds environmental information shall make it available on request. This is subject to any exclusions or exemptions that may apply.
16. 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.
17. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
18. In other words, in order to determine such complaints, the ICO must decide whether, on the balance of probabilities, a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request).

The council's arguments

19. The council argues that the information was not created by it as Wiltshire Council. The information refers to a planning application made to its predecessor, Salisbury District Council (SDC), in December 2000. In 2009 SDC was amalgamated with four other district councils to create the unitary authority of Wiltshire Council. Wiltshire Council then took over responsibility for the records of the five precursor councils.
20. SDC undertook a scanning process to convert all of their planning case files into electronic files. The files relating to the relevant planning application were scanned during the move, in 2009, by a private company commissioned by SDC, and the hard copies of the documents were then destroyed. As per standard practice, all records relating to the discharge of conditions should have been added to the main application file.
21. The planning application was approved in 2001, and includes the conditions relevant to this request.
22. All documents held by the council that relate to this planning application are published on the council's planning portal available at www.wiltshire.gov.uk. This consists of 157 pages of documentation and 35 photographs. These documents consist of the application, objections to the application and correspondence between the Planning Department and the applicant regarding the planning conditions together with correspondence with the objectors.
23. The council said that the complainant is aware that all records are published as both SDC and Wiltshire council informed her of this.
24. The council said that in response to the request it did provide some information from its records which it considered may help the complainant to understand what had occurred. This included a letter from SDC to the planning applicant which set out that it was satisfied that condition 5 of the planning permission had been satisfied. It said that this letter also detailed the proposed boundary treatment.
25. It said that the documents also included an SDC enforcement compliance monitoring sheet dated 22 August 2003 which indicates, via a tick box, that planning condition 3 has been met, and an SDC planning enforcement site visit record dated 1 July 2002. A handwritten note states 'N/T of Condition 3 being agreed'. It assumed that 'N/T' is the authors shorthand for 'no trace'.

26. Several documents referred to condition 3, but none are a 'scheme' submitted by the planning applicant. Whilst no written approval could be located, a letter was found to the complainant, dated 28 August 2003, which states *"As far as this Department is concerned all these conditions have been complied with"*.
27. It also holds a letter from the applicant to SDC planning department confirming that the track had been upgraded, but no details were included as to how this had occurred. The council concluded that this was not therefore a copy of a 'scheme' for the purposes of the request.
28. The records also contain a letter from the Planning Department to the planning applicant dated 21 January 2003, which states;

"The materials you propose for the upgrading of the track namely road scalping is acceptable to the Local Planning Authority. Condition 3 of the above permission will be discharged once development has been carried out using the materials hereby approved."
29. The council argues that this is not a 'scheme' for how condition 3 is to be met; *"it is a passing reference to a material that may be used in upgrading the track but it does not say how it is to be used. Nor is it written authorisation to say the condition has been discharged, it is an indication that on completion the condition will be discharged."*
30. It said that it has digitised the files using text recognition software, and searches using the terms 'conditions', 'scheme', 'track', 'upgrading' and '3' were conducted. It also read through all of the 157 pages of the PDFs. No record of the planning applicants' proposed scheme were found, nor any explicit written authority from the planning authority to the applicant.
31. The council said that separate searches were conducted by staff at both its main planning offices and its Salisbury offices. All records relevant to the application were searched, as well as broader searches relating to the property in general.
32. It said that *"Particular care was taken when searching documents dated between July 2002 and August 2003 as that date range covers the two documents previously provided to [the complainant] in response to her original request which indicated that no trace could be found of Condition 3 being agreed (SDC planning enforcement site visit record dated 1 July 2002) and the SDC enforcement compliance monitoring sheet dated 22 August 2003 which indicates, via a tick box, that planning condition 3 has been met."* No further information was located.
33. The council concluded, therefore, that on a balance of probabilities the information is not held.

The Commissioner's conclusion

34. The Commissioner has considered the Council's position, in conjunction with the request.
35. Whilst it is recognised by the Commissioner that it is important to the complainant to establish whether the planning conditions were met, the council has explained that that information was created by Salisbury District Council, and that the application was approved 20 years ago, prior to the council being amalgamated with others in to Wiltshire Council.
36. It has explained the management of records created by SDC prior to the amalgamation, and has described the searches it has carried out, and where, and why it has carried out searches in those areas. These searches suggest that no other information is held beyond that which is already available from the council's website.
37. It has also clarified, in detail, the information which it has found, and explained why that information does not fall within the scope of the request for information.
38. In conclusion, the council has therefore clarified to the Commissioner that it has carried out adequate searches in the appropriate areas of its records, but it has not been able to locate the relevant documentation.
39. There is no contradictory evidence available to the Commissioner that indicates the Council's position is wrong.
40. On this basis the Commissioner has concluded that, on the balance of probabilities, the requested information is not held.

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: 0203 936 8963

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

Ian Walley
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