

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 2 May 2023

Public Authority: Bedford Borough Council
Address: Bedford Hall
Cauldwell Street
Bedford
MK42 9AP

Decision (including any steps ordered)

1. The complainant requested various information in respect of a planning application for air conditioning units. The Council provided the link to the online planning portal and stated that it holds no further information. The complainant is not satisfied that the Council has provided all information it holds, particularly in respect of a noise report. The Council has confirmed that it does not hold this information. The Commissioner's decision is that the Council has complied with its obligations under regulation 12(4)(a) of the EIR. The Commissioner does not require further steps

Request and response

2. On 27 July 2022, the complainant wrote to the Council and requested the following information in respect of a planning application for air conditioning units, reference number 20/02745/s73a:

"...all environmental information that it holds, used or relied upon in processing and determining the above application."

3. Following a query from the Council, the complainant confirmed that it should include any environmental information in any material including (but not limited to) the following:
 - Emails
 - Drawings
 - Sound recordings
 - CCTV recordings
 - Hard copies of letters and other documents.
4. The public authority responded on 5 August 2022. It confirmed that the information used to determine the application is published online and provided a link to the relevant information. It added that it does not hold any additional data on any other site. It further stated that how it came to its decision and what was material to the decision is published online in the fully detailed Officer's Report which is included in the decision notice document.
5. Following an internal review the Council wrote to the complainant on 29 November 2022. It stated that it was satisfied with its original response and holds no further information.

Scope of the case

6. The complainant contacted the Commissioner on 16 November 2022 to complain about the way their request for information had been handled. They were not satisfied that they had received all relevant information falling within the scope of their request.
7. The Commissioner considers that the scope of his investigation is to consider whether the Council has complied with its obligations under regulation 12(4)(a) (information not held at the time the applicant's request was received) of the EIR.

Reasons for decision

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

8. Regulation 5 of the EIR requires that a public authority that holds environmental information shall make it available on request. This is subject to any exclusions or exceptions that may apply.

9. Regulation 12(4)(a) of the EIR says 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.
10. In scenarios where there is some dispute between whether the public authority holds relevant information, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
11. In other words, in order to determine such complaints, the Commissioner must decide whether, on the balance of probabilities, a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
12. As background to this complaint, the Commissioner notes that in August 2020 two external air conditioning units (ACU's) were installed on the outside of the complainant's neighbouring property without planning permission. Following a complaint submitted to the Council by the complainant, the Council contacted the owner of the property in October 2020 to inform them that they must submit a retrospective planning application.
13. On receipt of the application, the Council consulted the parish council, its Environmental Health (EH) department, the complainant and some of the applicant's neighbours about the application.
14. EH highlighted that the application did not contain any information regarding background noise levels in the applicant's residential area, which is required to assess the impact of the ACU's on the neighbouring properties. The applicant subsequently submitted a noise assessment report on 15 January 2021.
15. The complainant believes that two noise reports were submitted as part of the retrospective application based on correspondence from the Council's Chief Executive to the Local Government and Social Care Ombudsman (LGSCO) in relation to a complaint they raised about the matter which states that:

"The first draft of the noise report submitted by the applicant was rejected, after the Council's EHO raised objections as background noise levels were not known."
16. Later in this same correspondence, the Chief Executive confirmed that:

"A noise report had been submitted to the Case Officer on 15 January 2021, which was the last day for determining the application, and the

Officer considered it appropriate to have this assessed by consulting the EHO and neighbours.”

17. The complainant has stated that there is only one noise report available on the Council’s website and wants to see the original report.
18. However, the Council has confirmed to the Commissioner that there was only ever one noise report submitted as there was no initial report submitted with the application in December 2020, but a series of photographs of the air conditioning units, which included a manufacturing specification for the units which provided some data.
19. The Council added that the original comments from the Environmental Health Officer (EHO) on 4 December 2020 refer to:

“noise data included in the application that shows that each unit externally could emit up to 63dB, which when you consider both units could be in operation at the same time would rise to 66dB”.
20. The Council stated that this is possibly where the complainant assumed that a noise report was submitted with the original plans / documents and what the complainant has referred to as ‘report 1’.
21. The Council further confirmed that a noise report was subsequently submitted following the comments of the EHO and received on 15 January 2021.
22. The Commissioner has viewed the information submitted with the application in late 2020 and can confirm there is no noise report. He has also considered the chronology of the application outlined in the draft decision notice issued by the LGSCO and notes that although reference is made to receipt of the retrospective planning application, there is no specific reference to a noise assessment report at this time. It is only later in its draft decision that the LGSCO states:

“On 15 January ...submitted the noise assessment report to the Council.”
23. The Commissioner understands why the complainant would have anticipated that there would be two reports, particularly when taking the comments from the Council’s Chief Executive and reproduced in paragraph 15 of this notice into consideration. However, based on the explanation provided by the Council, the planning application documents submitted in December 2020, and the chronology of the application as detailed in the draft LGSCO report, the Commissioner accepts the Council’s position that only noise assessment report was submitted by the applicant.

24. As the request was also for all emails and hard copy communications, the Commissioner has also considered whether the Council is likely to hold any other relevant information falling within the scope of the request in addition to that already provided to the complainant.
25. The Commissioner notes that in its original response to the request dated 5 August 2022, the Council informed the complainant that:

“How we came to our decision and what was material to the decision is published online in the fully detailed Officers Report which is included in the decision notice document for the application.

All information used by Environmental Health in the assessment of the Planning application was the information provided by the applicant that is available online.”
26. On 29 November 2022 the Council issued a very detailed internal review addressing each aspect of the request and providing links to various information and policies used in the decision to approve the retrospective planning application. The Commissioner considers that based on the balance of probabilities, the Council has provided all relevant information that it holds and has therefore complied with regulation 12(4)(a) of the EIR.
27. As no additional information within the scope of the request was held at the time of the request, the Commissioner can only find that the public interest in maintaining the exception at 12(4)(a) of the EIR outweighs any public interest in disclosure, simply because there was no information to disclose at that time.

Right of appeal

28. 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

29. 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.
30. 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

**Catherine Dickenson
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF**

