

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 03 December 2014

Public Authority: Rotherham Metropolitan Borough Council
Address: Riverside House
Main Street
Rotherham
S60 1AE

Decision (including any steps ordered)

1. The complainant requested information about potential development plans in relation to land currently used as a recreation ground. During the Commissioner's investigation, the Council confirmed that, contrary to its earlier responses, it does not hold information within the scope of the request.
2. The Commissioner's decision is that he is satisfied that, on the balance of probabilities, the requested information was not held at the time of the request.
3. However, he has determined that, in its handling of this request, the Council breached regulation 14(2) by not providing a refusal notice citing regulation 12(4)(a) within 20 working days of receipt of the request.

Request and response

4. On 30 September 2013 the complainant wrote to the Council and requested information in the following terms:

"Birkdale Recreation Ground at Dinnington

Given that Taylor Wimpey have published plans (via RMBC's Sites and Policies Consultation portal) to build on this land. Could we ask for some information under the FOI, as follows:-

*(a) on what date did RMBC agree to sell land to Taylor Wimpey
(b) can RMBC supply us with all documentation on discussions
regarding potential developments between developers and RMBC in
relation to this site".*

5. The Council responded on 16 October 2013. With respect to (a), it said:

"The Council has not agreed to sell the land in question to Taylor Wimpey".

With respect to (b) it refused to provide the requested information. It cited FOIA exemptions as its basis for doing so - section 40 (personal information), section 41 (information provided in confidence) and section 43 (commercial interests).

6. The complainant requested a review of the Council's response to part (b) of the request - its decision not to disclose details of any correspondence between the Council and potential developers. In requesting the review, the complainant asked whether the withheld information could be redacted.
7. Following an internal review of its handling of part (b) of the request, the Council wrote to the complainant on 7 March 2014. Taking into account the complainant's comment about redaction, the Council upheld its position with regard to each of the FOIA exemptions previously cited.

Scope of the case

8. The complainant contacted the Commissioner on 25 June 2014 to complain about the way his request for information had been handled.
9. In correspondence with the Commissioner, the complainant advised him that the land in question is recreational ground which is publicly owned property.
10. During the course of the Commissioner's investigation, the Council reconsidered its response to part (b) of the request. It wrote to the complainant advising that it considered that the requested information was exempt from disclosure under the Environmental Information Regulations 2004 (EIR). It confirmed that it relied on regulations 13 (personal data) and 12(5)(f) (adverse effect to the interests of the person who provided the information) to withhold the information within the scope of part (b) of the request.

11. It was not until after this had occurred that the Commissioner was provided with a copy of the information being withheld by the Council in relation to part (b) of the request.
12. Having received its substantive response, together with a copy of the small amount of information it had been considering in this case, the Commissioner sought clarification from the Council, in particular about the scope of the request and the nature of the withheld information.
13. The Council responded, advising that, having reconsidered the matter, it did not hold any relevant information relating to the Birkdale Recreation Ground.
14. Having been told about the Council's revised response to his request for information, the complainant confirmed that he wished the Commissioner to continue with his investigation.
15. In light of the above, the scope of the Commissioner's investigation covered whether the Council handled part (b) of the request in accordance with the EIR. Specifically, he has considered whether it holds the information sought by the complainant.

Reasons for decision

16. The Commissioner has first considered which access regime – FOIA or EIR - applies in this case.

Is the information environmental?

17. Environmental information is defined within regulation 2(1) of the EIR as follows:

"any information in written, visual, aural, electronic or any other material form on –

(a) the state of the environment, such as air and atmosphere, water, soil, land and landscape and natural sites including wetlands...

(b) factors, such as substances, energy, noise, radiation or waste, emissions...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...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...".

18. The Commissioner considers that the requested information falls under the scope of regulation 2(1)(c). The information at issue relates to the possible development of land. This will have an impact upon the elements referred to in regulation 2(1)(a). The Commissioner therefore considers that the Council was correct to reconsider this request under the EIR.

Regulation 12(4) - information not held

19. Regulation 12(4) states that a public authority may refuse to disclose information to the extent that:
 - (a) it does not hold information when an applicant's request is received.
20. In this case, the Council has said that the requested information is not held. The complainant disputes this and has explained why he considers that the Council does hold relevant information.
21. In considering cases such as this, the Commissioner, in accordance with a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. To reach a decision on this the Commissioner has considered the context of the case, the nature of the requested information, the authority's responses, the arguments provided by the complainant and any evidence to suggest that the information in question is held.
22. To assist with his determination the Commissioner asked the Council to explain, for example, about the searches it had carried out for information falling within the scope of the request. He also asked whether any recorded information relevant to the scope of the complainant's request had ever been held but had been deleted or destroyed.
23. In its substantive response, the Council explained the searches that had been conducted and whom it consulted in the public authority about this matter. It also confirmed that no formal meetings have been held in respect of discussions relating to the site in question and therefore no minutes are recorded.
24. The Commissioner has also considered the complainant's submissions. Whilst appreciating the complainant's frustration in this case, having considered the Council's responses to his questions – and having established that it was searching for information within the scope of the request – the Commissioner considers the nature of the searches conducted and explanations given to be reasonable. Accordingly, on the basis of the evidence provided to him, the Commissioner is satisfied that

on the balance of probabilities the Council does not hold the requested information.

The public interest test

25. Like all exceptions under the EIR regulation 12(4)(a) is subject to the public interest test. However, the Commissioner can see no practical value in applying the test where information is not held and he does not expect public authorities to do so.

Regulation 14 – refusal to disclose information

26. The Commissioner has found that although the Council originally considered this request under FOIA it is the EIR that actually apply to the requested information. In these circumstances the Commissioner considers that it is appropriate for him to find that the Council breached regulation 14(1) of the EIR. This requires that a public authority which refuses a request for information should specify, within 20 working days, the exceptions upon which it is relying. As the Council's refusal notice was issued under the FOIA, it therefore failed to cite any exception contained within the EIR.

Other matters

27. The Commissioner is disappointed to note the protracted handling of the request in this case which, in his view, arose from the apparent difficulty the Council had in establishing the correct access regime and whether it held information within the scope of the request.
28. Reading the correspondence on this case and taking into account the wording - including the title - of the request, the Commissioner considers that the request and how it should be handled was clear from the outset.
29. Furthermore, the Commissioner is mindful that the Council, having received the request for internal review, had the opportunity to reconsider its handling of the request, not only with respect to the information within the scope of the request, but also with respect to the relevant access regime.
30. However, in this case, not only did the Council fail to identify the correct access regime to apply, it also considered information that falls outside the scope of the request. As a result it did not respond to the request based on what was actually asked for.

31. The Commissioner expects that the Council will take steps to address the issues which this case has highlighted to it. However, should a pattern of non-compliance emerge, he will consider what action it is appropriate to take.

Right of appeal

32. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

33. 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.
34. 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

Jon Manners
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