

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

Date: 28 June 2018

Public Authority: Bournemouth Borough Council
Address: Town Hall
Bourne Avenue
Bournemouth
BH2 6DY

Decision (including any steps ordered)

1. The complainant has submitted two requests for recorded information to Bournemouth Borough Council. Both of the complainant's requests relate to a particular measurement which was used by the Local planning Authority to determine two planning applications: 7-2009-23997 and 7-2016-23997-B.
2. The Commissioner's decision is that Bournemouth Borough Council has complied with Regulation 5(1) of the EIR by informing the complainant that the information he seeks is not held by the Council.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. The complainant wrote to Bournemouth Borough Council on 31 May 2017 (and again on 21 June 2017) to ask for information in respect of planning applications 7-2009-23997 and 7-2016-23997-B. The terms of the complainants request are:
 - "1. Please confirm if the method of measurement used in 2009 to support your Council's claim to a distance of 400m taken from O.S. MasterMap took account of the accuracy of data published by O.S.
 2. If GIS software was used to measure the distance of 400m, please confirm is the software was programmed to allow for the accuracy data

published by O.S. when creating the mapping evidence provided in support of your reason for refusal of planning permission.”

5. Receipt of the complainant’s request was acknowledged on 21 June.
6. On 21 July, the complainant wrote to the Council to draw its attention to its failure to respond to his request within the twenty working day compliance period required by the FOIA and EIR.
7. On 26 July, the complainant wrote to the Council about his information request. In his letter, the complainant refuted the Council’s suggestion that he take this matter up with Natural England directly. He asserted that natural England is not a professional mapping body and its staff are not trained in the use of O.S. data. The complainant argued that;

“As Bournemouth Council chose not to hold professionally drawn mapping of a distance of 400 metres from the Protected Area and chose instead to rely on mapping services provided by Natural England to determine the location of the proposed development site, this is a matter between Bournemouth Council and Natural England and not the Applicant and Natural England.”
8. The complainant explained that he required confirmation as to whether the Council had applied an O.S. Accuracy Statement when it constructed the overlay to the O.S. MasterMap which was presented as evidence in support of the claim that the proposed development was within the 400 metres of a Protected Area. The complainant made clear that he requires this information in order to verify the legality of the mapping evidence relied on by the Local Planning Authority.
9. Due to the Council’s failure to provide him with the information he had requested, the complainant asked the Council to conduct an internal review.
10. On 5 August, the complainant wrote to the Council again about his request for information. The complainant’s letter noted the information contained in the Council’s email of 31 May and he advised the Council that the information does not refer to, or relate to his request for information of 31 May. The complainant asserted that, “If there are no staff within your Council with sufficient knowledge on how your mapping evidence was created, your Council needs to obtain the information requested from your mapping provider...”
11. The complainant’s letter went on to say that, “Although [a named council officer] seeks to direct me to obtain the information from your mapping provider myself, this approach is misguided as the Planning Authority is responsible for the Refusal Notice and the supply of evidence in support where the Planning Authority has relied on evidence

not attached to the Refusal Notice and not available to the Applicant in the public domain.

12. The complainant argued that the Council cannot rely on "information not held" to withhold information relating to evidence used in support of the LPA's refusal of planning permission. He asserted that a planning applicant is entitled to clarification of evidence where such clarification is not in the public domain.
13. On 16 August, the Council wrote to the complainant about his information request. In respect of the complainant's request for 'confirmation as to whether O.S. Accuracy Statement was applied when constructing the overlay to O.S. MasterMap presented as evidence on 20009...' The Council's response was, "we do not hold a record of an O.S. Accuracy Statement being applied for in respect of the 400m of a Protected Area".
14. On 17 August, the complainant wrote to the Council to request "a copy of the mapping evidence relied on to assess the location of the proposed development site [application 7-2016-23997-B] as outside of 400m of a Protected Area".
15. The Council acknowledged its receipt of the complainant's new request on 21 August.
16. On 24 August, the complainant wrote to the Council to complain about its on-going failure to provide the information he had asked for on 31 May and again on 21 June. The complainant's email contained the following statement:

"Where a planning applicant requires fundamental clarifying information relating to a quoted reason for refusal of planning permission, section 34(10) of the Planning Act requires you to provide it in order that a planning applicant can fully assess the options open to them."
17. On 6 September, the Council wrote to the complainant to provide a formal response to your request. In respect of item 1 of the complainant's initial request, the Council stated, "As the mapping was supplied by Natural England to the local planning authority we do not hold the information or records to provide an answer to this question"; and in respect of item 2, the Council stated that, "GIS software was not used to calculate the 400m".
18. The Council advised the complainant that the information he seeks is likely to be held by Natural England and it further advised him that, with his permission, the Council would transfer his request.
19. On 13 September, the Council responded to the complainant's request of 17 August. The Council provided the complainant with the mapping

evidence used in evidence for application 7-2016-23997-B. This information was contained in a document entitled 'Turbary and Kinson Commons, draft consultation area: residential impacts' dated June 2016 and it was produced by English Nature.

20. On 19 September, the complainant wrote to the Council to complain about its response to his information request. The complainant asserted that the information disclosed to him had failed to assess the location of the proposed development as outside of 400m from a protected area. He stated that, "if you do not hold the information requested please confirm how the Council assessed the location of the proposed development site against your 2015/20 Dorset heathlands DPD".
21. On 21 September, the complainant asked the Council to conduct an internal review.
22. On 22 November 2017, following an internal review of its handling of the complainant's request of 17 August, the Council sent the complainant its final decision. The Council's reviewer stated:

"I have received confirmation that the case officers involved used the buffer zone defined by the Natural England map and the Supplementary Planning Document (SPD) that explains how to interpret this (previously supplied and publically available on the website but for ease of reference can be located here:

<https://www.bournemouth.gov.uk/planningbuilding/PlanningPolicy/Planning-Guidance/HeathlandsPolicy.aspx>).

Scope of the case

23. The complainant initially contacted the Commissioner 28 July 2017 to complain about the way his request for information had been handled.
24. The Commissioner determined that the focus of her investigation would be to determine whether Bournemouth Borough Council has handled the complainant's requests of 31 May and 17 August in accordance with the EIR. Specifically, the Commissioner set out to determine what information was held by the Council at the time the complainant submitted his requests.

Background information

25. The Council has provided the Commissioner with the following information to provide context to its handling of the complainant's request.

26. The complainant first submitted a planning application to The Borough Planning Authority in January 2009. The planning application was for the erection of a bungalow and formation of vehicular access at [address redacted].
27. The planning application and supporting documentation, including the Decision Notice refusing the application can be viewed on the Council's website.
28. The planning application was refused in part because the location of the proposed development site which was within 400 metres of a designated site of Special Scientific Interest (SSSI), a Special Protection Area (SPA), a Special Area of Conservation (SAC) and a Ramsar¹ site.
29. The Planning Authority considered that further residential development in the location would add to the effects of urban development on heathland features of special interest and this would adversely affect the integrity of the sites and so contrary to Policies 3.13 and 3.14 of the District Wide Local Plan that were current at the time of the application.
30. The complainant did not appeal against the refusal of the 2009 planning application.
31. Following various public consultations in October 2006, December 2010, February 2012 and January 2015, the Local Planning Authorities in south east Dorset produced an updated planning framework to manage pressures on sensitive heathlands resulting from development. This is known as the Dorset Heathlands Planning Framework 2015 -2020.²
32. The updated planning framework resulted in a revision of the approach to residential development within 400m of the Dorset Heathlands SPA, Ramsar and Dorset Heaths SAC.
33. Appendix C of the Dorset Heathlands Planning Framework 2015-2020 sets out advice to officers and applicants on the consideration of proposals in this area.

¹ The Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat is an international treaty for the conservation and sustainable use of wetlands. It is named after the city of Ramsar in Iran where the Convention was signed in 1971. It is also known as the Convention on Wetlands.

² https://www.dorsetforyou.gov.uk/media/219362/Dorset-Heathlands-Planning-Framework-2015-2020-SPD/pdf/Dorset_Heathlands_Planning_Framework_2015-2020_SPD_Jan2016.pdf

34. Prior to the updated Planning Framework, a proposed development site which was partially within the 400m Consultation Area would be refused due to the adverse effect on the integrity of the site. The revision resulted in cases whereby an application that was previously refused due to being partially within the 400m Consultation Area could now be considered an acceptable development and the application approved.
35. The complainant's request relates to the revision of the Council's approach to residential development within 400m of the Dorset Heathlands SPA, Ramsar and Dorset Heaths SAC. The complainant's first planning application which was refused in 2009, and then a revised application was submitted and approved after the Planning Authority had adopted the Dorset Heathlands Planning Framework 2015-2020 Supplementary Planning Document ("SPD") in January 2016.
36. The complainant's first planning application in 2009 was refused due to the impact on the Heathlands, as the site is shown within 400 metres of Kinson Common and right on the boundary of the 400m consultation area.
37. The Planning Authority's new method of assessment takes into account the access to the property in relation to the exact 400m radius. In the case of the complainant's new application, this cuts across the site and therefore the application did not receive an objection from Natural England.
38. The successful planning application and supporting documentation, including the LPA's Decision Notice is published on the Council's website.
39. As part of the planning process, applicants have the opportunity to complain about a planning decision. This opportunity is open to the applicant up to 6 months after the Decision Notice is issued. When a Decision Notice is issued to the applicant, details of the applicant's rights and the appeals process are also included.
40. Although the Council received correspondence from the applicant in 2009 about its refusal of planning consent, the Council did not receive an official complaint from the complainant until 3 February 2015. The complaint related to the refusal of the 2009 planning application and the assessment of the 400m consultation area. This complaint was dealt with through the Council's 3 stage internal complaints process.
41. Once a complaint has been through the 3 stage complaints process and the complainant remains unhappy, they can take their matter to the Local Government Ombudsman (LGO).
42. In this case, the complainant chose not to take his complaint to the LGO.

Reasons for decision

The complainant's position

43. The complainant accepts that the Council has provided him with a map entitled "Turbarry and Kinson Commons draft consultation area" which the Council claimed contains the information he had requested.
44. The complainant says that, the Dorset Heathlands Policy dictates that planning applications for new residential development are to be assessed against a 400m straight line distance from the Protected Area, and the Planning Report drawn up by the Planning Officers confirms that the application was assessed in accordance with Policy against the exact 400m radius. He therefore asserts that the information the Council provided was materially defective.
45. The complainant believes that case officers could not have assessed the location of the proposed development site against a 400m straight line distance from the Protected Area in reliance on the Consultation Area map supplied by the Council, as the map does not contain any evidence showing a 400m straight line distance.
46. On 19 Sept 2017 the complainant asked the Council, "If you do not hold the information requested please confirm how the Council assessed the location of the proposed development site against your 2015/20 Dorset Heathlands Policy". The complainant asserts that the Council's Head of Planning provided him with false information.
47. In the Council's response of 22 November 2017, the Council confirmed how the location of the proposed development site was assessed against its Policy, stating "the Case officers involved used the buffer zone defined by the Natural England map and the SPD that explains how to interpret this. This information had previously been supplied to the complainant and is publicly available on the Council website.
48. According to the complainant, the SPD explains that the location of a proposed development site is to be assessed against the exact 400m radius and not against the buffer zone defined by the Natural England Consultation Area map. He therefore asserts that the response provided by the Council is materially defective. In the complainant's eyes, the assessment detailed by the Case Officers in their Report could not have been established by using the buffer zone defined by the Natural England Consultation Area map.
49. Since making his requests of 31 May and 17 August 2017, the complainant wrote to the Council on 7 March 2018 and has asked the Council for further clarification. The complainant informed the Commissioner that his 7 March 2018 request is not a separate request,

but was designed to provide Bournemouth Council with the opportunity to accept that its review response was materially defective and correct it.

50. The complainant asked the Commissioner to register his concern about the involvement of two of the Council's officers who he believes have been involved in withholding information records created by the Council's Planning Office.
51. The complainant asserts that the Council's Head of Planning has defended numerous appeals against the Council's Dorset Heathlands Policy which was adopted in January 2007.
52. The complainant asserts that, "Where an appeal is defended, the planning authority is required under Planning Legislation to submit all the evidence it intends to rely on to the Planning Inspectorate and to the Planning Applicant before the Appeal is heard". Therefore, the complainant argues that, "...at the date of the review carried out by Bournemouth Council it was holding documentary evidence of the exact 400m radius it relied on at those Planning Appeals".
53. The complainant holds the belief that if the Council's defence evidence which it relied on to establish that a planning application was contrary to Council Policy has ever been submitted by Bournemouth Council at appeal, the Planning Inspectorate would not have allowed the Dorset Heathlands Policy to be applied to any appellants planning applications in the Bournemouth Council area.

The Council's position

54. The Council asserts that the complainant's requests for information are a continuation of his complaint about the refusal of planning consent which is based on his belief that the English Nature 400m Consultation Map is not adequate or accurate enough to use to make planning decisions.
55. Under Regulation 5(1) of the EIR a public authority is required to 'make available on request' information which is environmental information.
56. The Commissioner has sought to determine whether the Council holds information which the complainant seeks.
57. In making this determination, the Commissioner applies the civil test of the balance of probabilities. This test is in line with the approach taken by the First Tier Tribunal (Information Rights) when it has considered whether information is held in cases which it has considered in the past.
58. The Commissioner has investigated this complaint by asking the Council a number of questions about the searches it has made to locate the

information which the complainant seeks. The Commissioner's investigation also included questions about the possible deletion/destruction of information which might be relevant to the complainant's request.

59. The Council has given the Commissioner its assurance that it has provided the complainant with the maps used by the Planning Authority for the purpose of deciding planning applications. The Council's position is such that it has advised the Commissioner that further searches are not required as there is no additional information to be located or provided to the complainant.
60. For the avoidance of doubt, the Council assures the Commissioner that the 400-metre consultation zone published by Natural England is also held as a GIS layer. Notwithstanding this, the Council has confirmed to the Commissioner that it does not use GIS software to calculate the 400m limit, but refers to the map produced by English Nature.
61. The Council is adamant that it holds no further recorded information relevant to the terms of the complainant's request other than the information already provided to him, it has made no searches of its manual or electronically held records.
62. The Council has further assured the Commissioner that the maps referred to when making a decision to refuse a planning application are those produced by Natural England. The Council told the Commissioner that these maps have been provided to the complainant on numerous occasions.
63. The Commissioner asked the Council whether it has deleted or destroyed any information relevant to the complainant's request. In answer to this enquiry the Council stated, "Information has not been destroyed and the maps used to determine the outcome of the application have been provided to the complainant".
64. The Council says that it has provided the complainant with the information he has requested and, in the Council's opinion, it has provided appropriate advice and assistance in responding to the complainant's correspondence on this matter.
65. Finally, the Council position in this matter is that all Local Planning Authorities use the maps produced by Natural England, which show the detailed 400 metre zone around the protected heathland sites. The Council strongly asserts that it has complied with the Environmental Information Regulations and has provided the complainant with the relevant information that it holds in relation to his requests.
66. The Council has also confirmed that information relating to the complainant request has not been destroyed by the Council.

67. The Commissioner has considered the complainant's position. She understands the complainant's frustration at not being given the information and clarification he considers he is entitled to receive. Nevertheless, the Commissioner must impress on the complainant that under the EIR, public authorities are not obliged to provide clarification of their decisions. The provisions of the EIR are concerned only with the recorded information which is actually held by a public authority at the time it receives a request and there is no obligation for the public authority to create information in order to respond to a request.
68. In this case, the Commissioner considers the Council's position to be both plausible and persuasive and she is satisfied that the Council, on the balance of probabilities, does not hold the information which the complainant seeks. The Commissioner's decision is that the Council has complied with Regulation 5(1) of the Environmental Information Regulations 2004.

Right of appeal

69. 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

70. 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.
71. 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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SK9 5AF