

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 29 March 2023

Public Authority: Warwick District Council

Address: Riverside House
Milverton Hill
Leamington Spa
CV32 5HZ

Decision

1. The complainant requested information from Warwick District Council ("the Council") relating to site visits that took place at St Mary's Lands.
2. The Commissioner's decision is that the Council holds further information within the scope of the request.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - The Council must provide the complainant with a fresh response in relation to the information referred to at paragraph 16 below, that the Commissioner has found is held on behalf of the Council. That fresh response must either disclose the information in question, or give a valid ground under the EIR for refusing to disclose that information.
4. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Request and response

5. The complainant made the following information request to the Council on 28 January 2022:

"I request under the Freedom of Information Act/Environmental Regulations to know the answers to the following questions (shown in bold in brackets) please

Questions re WDC Comments on FoSML report

Extracts with questions in brackets:-

The temporary fencing has been shown to be effective in ensuring that dog walkers are not accidentally traversing the main breeding grounds for skylark and meadow pipit. This has been personally observed by the ornithologist during 2021 from frequent visits to St Mary's Lands. [which ornithologist and where were these incidents recorded?]

We would predict that this number will increase further in 2022 as long as the fencing is installed again and possibly expanded to enclose further skylark pairs. [who are 'we']

During 2019, we observed dog walkers and their dogs walking through skylark territories in grassland that was not enclosed. [who are 'we'] This happened often [when? Where is the record of these incidents?]

During 2021, we observed dog walkers near the spinney, walking through unenclosed grassland with their dogs, right through skylark territories that were outside of the fence line. [who are 'we'] This would pose a direct danger to skylarks especially if happening on a daily basis. For this reason we have proposed that the fencing is expanded so further pairs of skylarks can be protected. [who are 'we']

It is our professional opinion and as a life-long ornithologist, that the temporary fencing must remain in use every year from now on at St Mary's Lands, if skylarks and meadow pipits are to continue to breed for future generations to enjoy. [who are 'our'] and [who is 'life-long ornithologist']

How much did the fencing cost (including labour) which was erected on the area to protect ground nesting birds?"

6. On 11 February 2022, the complainant submitted a second request for information to the Council asking for the following information:

"I request to know under the Freedom of Information Act/Environmental Regulations the names and other information requested in red which was contained within Appendix 3c of the Cabinet Papers for the meeting on 10th February 2022. Rather than a blanket answer for the whole report, I request to know the answers to each section marked in red against each extract. The answers to these questions are in the public interest since they relate to statements which have informed Warwick District Council's decision to fence off an area of public land.

From Appendix 3c

The following has been written by qualified and experienced ecologists and ornithologists to clarify information relating to the protection of ground nesting birds at St Mary's Lands and provide further details on questions raised by FoSML. [who are the 'qualified and experienced ecologists and ornithologists?']

The temporary fencing has been shown to be effective in ensuring that dog walkers are not accidentally traversing the main breeding grounds for skylark and meadow pipit. This has been personally observed by the ornithologist during 2021 from frequent visits to St Mary's Lands. [who is the 'ornithologist' and where is the evidence of 'frequent visits to St. Mary's Lands? Where is the evidence/records? [Name redacted] of [company name redacted] only made two visits during 2021. Did [name redacted] make frequent visits from her London address?]

Without any doubt, this is a key reason why the skylark numbers have gone from 8 to 11 pairs. We would predict that this number will increase further in 2022 as long as the fencing is installed again and possibly expanded to enclose further skylark pairs. [Who are 'we'?]

During 2019, we observed dog walkers and their dogs walking through skylark territories in grassland that was not enclosed. This happened often [who are 'we' and where is the evidence/records?]

During 2021, we observed dog walkers near the spinney, walking through unenclosed grassland with their dogs, right through skylark territories that were outside of the fence line [who are 'we' and where is the evidence/records?]

For this reason we have proposed that the fencing is expanded so further pairs of skylarks can be protected. [who are 'we'?] It is our professional opinion and as a life-long ornithologist, that the temporary fencing must remain in use every year from now on at St Mary's Lands [who are 'our' and who is the life-long ornithologist?]"

7. The Council provided the complainant with some information within the scope of the requests but denied holding information which records the site visits that took place at St Mary's Lands.

Reasons for decision

8. This reasoning covers whether the Council is correct when it says that it has disclosed all the information it holds within the scope of the requests.
9. The complainant considers the Council to hold further information within the scope of their requests. Specifically, the complainant considers the Council to hold information relating to some site visits that took place at St Mary's Lands including notes taken during those site visits and the dates of the visits. They also consider the Council to hold information which records whether one of the individuals who carried out the site visits made frequent visits to St Mary's Lands from their London address.

The Council's position

10. In its submissions to the Commissioner, the Council explained that St Mary's Lands is owned and managed by the Council and a masterplan relating to St Mary's Lands has been adopted by the Council. The Council explained that it has hired an external contractor, Plincke, to deliver the work relating the masterplan and that as part of that work, Plincke hired two individuals ("the subcontractors") to produce two studies. The site visits, referred to in the request, were carried out by the subcontractors when they were producing the two studies for Plincke.
11. The Council stated that as Plincke was contracted by the Council to undertake work relating to the masterplan, any information held by Plincke relating to that work is held on behalf of the Council. However, as the subcontractors were employed by Plincke rather than the Council, it does not consider information held by the subcontractors to be held on behalf of the Council. The Council stated that there is no direct relationship between the Council and the subcontractors.

12. The Council explained that Plincke does not hold any notes that were taken by the subcontractors during the site visits as when producing the two studies for Plincke, the subcontractors were only required to provide formal reports. They were not required to provide any notes that had been taken when producing the reports.
13. The Council explained when searching for information within the scope of the request it consulted Council officers who were involved with the St Mary's Lands Masterplan and the Council's contact at Plincke. The Council explained that it has been informed by Plincke that whilst Plincke does not hold notes from the site visits that took place at St Mary's Lands, it does hold information relating to the dates of the visits. This information has not been disclosed to the complainant however, the Council has stated that it would be happy to disclose the information.
14. The Council stated that as it did not employ the subcontractors or pay for the subcontractors to travel to St Mary's Lands to make the site visits, it does not hold information which records whether one of the subcontractors made frequent visits to St Mary's Lands from their London address.

The Commissioner's position

15. The Commissioner has reviewed the Council's contract with Plincke and is satisfied that any information held by Plincke which relates to the work it has carried out for the St Marys Lands Masterplan, is held on behalf of the Council for the purposes of the EIR. Therefore, as Plincke holds information relating to the dates of the site visits that were carried out by the subcontractors, that information should have been disclosed to the complainant or been the subject of a refusal notice as it is held on behalf of Council.
16. The Commissioner's decision is that on the balance of probabilities the Council holds further information within the scope of the request, that being the dates that site visits took place. He requires the Council to disclose the dates of the site visits to the complainant or provide a refusal notice.
17. The Commissioner does not consider information held by the subcontractors to be held on behalf of the Council for the purposes of the EIR, even though the subcontractors are likely to hold information relating to the St Mary's Lands Masterplan, such as notes taken during the site visits. The Commissioner understands that the Council does not have a direct contractual relationship with the subcontractors. The Council only has a contract with Plincke and having reviewed that contract, the Commissioner is satisfied that there are no clauses that gives the Council control of, or access to information held by the

subcontractors or any subcontractor for that matter. This position is in line with the Commissioner's guidance¹ and the position taken in FER0484371² which found that information held by a subcontractor was not held on behalf of the Olympic Delivery Authority for the purposes of the EIR .

18. Whilst information which records whether one of the subcontractors made frequent visits from their London address may be held by Plincke as the subcontractors' employer, the information does not directly relate to the St Mary's Lands Masterplan and the work carried out as part of that plan. The information more closely relates to the subcontractors' employment with Plincke and the terms of that employment. The Commissioner therefore, does not consider information which records whether one of the subcontractors made frequent visits from their London address to be held by Plincke on behalf of the Council for the purposes of the EIR.

¹ [Outsourcing – FOIA and EIR obligations | ICO](#)

² [fer_0484371.pdf \(ico.org.uk\)](#)

Right of appeal

19. 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

20. 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.
21. 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

Ben Tomes
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF