

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 20 November 2014

Public Authority: Somerset County Council
Address: County Hall
Taunton
Somerset
TA1 4DY

Decision (including any steps ordered)

1. The complainant requested information relating to a planning agreement. Somerset County Council (SCC) disclosed some information within the scope of the complainant's request but stated that no other relevant information was held. During the course of the Commissioner's investigation SCC confirmed nothing further was held either in its own records or held by another organisation on its behalf. The Commissioner's decision is that on the balance of probabilities it is unlikely that SCC holds further information in its own records, and that no information within the scope of the request is held on behalf of SCC. No steps are required for SCC to meet its obligations under the EIR.

Request and response

2. The complainant wrote to SCC to make a request on 20 December 2013. Full details can be found on the whatdotheyknow website.¹
3. SCC stated that the response encompassed several hundred pages of information and so asked the complainant to refine his request. In

¹

https://www.whatdotheyknow.com/request/killams_taunton_south_planning_a

response to this, on 17 January 2014 the complainant wrote to SCC and requested information in the following terms (numbers added by the Commissioner for reference):

"I am only interested in the 2012 application with the TDBC Killams planning reference already given (38/12/0203) and for the period 24/01/2013 thru to the Decision Notice being issued on 24/12/2013.

- 1. I would like disclosure of the SCC Officer meeting notes for meetings with TDBC and the developer's agents for meetings on 24/01/2013, 07/03/2013, 12/06/2013.*
- 2. I would like disclosure of the emails and correspondence that relate to the above meetings (both pre & post meeting please).*
- 3. As SUSTRANS have informed me that they pulled out of being the PTP provider for Killams, can you also disclose that correspondence.*
- 4. I would like disclosure of the s106 approval from SCC that enabled TDBC to finally issue the Decision Notice for Killams."*

4. SCC responded on 6 February 2014 as follows:

- 1 & 2. Withheld information under regulations 12(4)(d) and 12(4)(e) (exceptions for incomplete records and internal communications)
3. Confirmed no relevant information was held
4. Provided relevant information
5. SCC issued its internal review on 25 February 2014. This found that regulations 12(4)(d) and 12(4)(e) did apply but the public interest test favoured disclosure. It therefore disclosed to the complainant the relevant information it considered to hold. SCC's position meant it considered it had provided the complainant with all of the information it held.

Scope of the case

6. The complainant contacted the Commissioner on 29 April 2014 to complain about the way his request for information had been handled. He believed that further information should be held by SCC, and that other records might be held by an organisation called Summerfield Developers, the third party who had proposed the planning application and were present at the meetings mentioned in the request.

7. Based on the complainant's representations to him, the Commissioner considers the scope of the case to be whether SCC holds any further information relating to relating to item 1 of the complainant's request. The meetings referred to in this request were to discuss the section 106 agreement between SCC and the developers Summerfield. In the Commissioner's view the term "meeting notes" includes minutes of the meeting as well as general notes taken. The Commissioner will look at both information held in SCC's records and whether information is held on its behalf by another person.

Case background

8. The request relates to a planning development in Taunton, Somerset. This development has attracted controversy in the local area and is the cause of significant public discussion.²
9. The "s106" agreement referred to is in reference to section 106 of the Town and Country Planning Act 1990. This section confers obligations on the person or organisation that is proposing the planning application. The obligations are usually designed to bring the development in line with local, regional or national planning policies.³

Reasons for decision

Is the information environmental?

10. The definition of environmental information is provided in regulation 2 of the EIR:

(1) In these Regulations –

...

² <http://www.westerndailypress.co.uk/Hundreds-protest-Taunton-green-wedge-homes/story-18731569-detail/story.html>

³ http://www.pas.gov.uk/3-community-infrastructure-levy-cil/-/journal_content/56/332612/4090701/ARTICLE

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, 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, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

11. The Commissioner considers that if further relevant information were held it would meet the definition under 2(1)(c). A planning application is a measure that would affect the elements listed in 2(1)(a), and meeting notes or documents from those meetings would discuss plans that relate to this measure. Therefore the decision will be considered under the EIR.

Information held in SCC's records

12. When determining whether a public authority might hold further information, the Commissioner – in accordance with a number of First-Tier (Information Rights) Tribunal decisions – applies the civil standard of the balance of probabilities. 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).
13. In the Commissioner's view it is important to understand the role SCC played in the development. Knowing this would create a reasonable expectation about what information would be in SCC's records.
14. On this point there is some disagreement between both SCC and the complainant. As SCC is the county council it is not the local planning authority – that responsibility falls to Taunton Deane Borough Council (TDBC) – but it does act as the education authority and highways authority. However, in its response to the Commissioner SCC stated that it had acted in "an advisory" role to TDBC but did not allude to its role as the education and highways authority until pressed on the matter.

The Commissioner considers it pertinent that SCC has these obligations; the planned development is for several hundred homes to be built, which would have an impact on schools in the area as well as roads and other forms of transport. The Commissioner also notes that part of the deal offered by Summerfield (the third party developer) was land to be used for a primary school. Therefore the Commissioner considers there is a reasonable expectation that information would be held by SCC.

15. It is worth noting that SCC has disclosed some information relevant to the complainant's requests. However, the information that related to the matter of this decision extended to a few sides of A4 and did not go into significant detail about the planned development. It seems reasonable that there might be more information held given the size of the project and the impact it would have on matters that are handled by SCC.
16. Despite this, the Commissioner's investigation has been unable to locate anything further held by SCC. SCC has admitted to the Commissioner that better records should have been kept of the s106 meeting, but this does not provide any proof that the information is in fact held. SCC has confirmed that to identify relevant information it searched the manual records pertaining to the development and conducted electronic searches of the email accounts of those individuals involved with the development. The Commissioner views this as a reasonable search for information that is likely to be held about the development that comes within the complainant's request.
17. Whilst the Commissioner is far from satisfied about the standard of record keeping displayed by SCC, its responses to his enquiries are acceptable, and it seems that all of the necessary reasonable searches have been carried out to identify any information held relevant to the complainant's request.
18. Therefore, on the balance of probabilities, the Commissioner's decision is that it is unlikely further information is held relevant to the complainant's request. Whilst there is a reasonable expectation that more should be held in SCC's records, one that SCC has acknowledged, the Commissioner has not seen any evidence to suggest that more information is held.

Information held on SCC's behalf

19. Regulation 3(2)(b) of the EIR states that:

3 (2) For the purposes of these Regulations, environmental information is held by a public authority if the information –

...

(b) is held by another person on behalf of the authority.

20. The Commissioner's interpretation of regulation 3(2)(b) is that information is "held" by a public authority under the terms of the EIR if it is held by another person – which means a legal person and could be an individual or an organisation – for the public authority's own purposes.
21. In determining whether the information is held by an organisation on behalf of a public authority the Commissioner makes his decision based on the specifics of the case, and aspects such as:
- The relationship between the two parties
 - Whether the public authority has access to the information
 - Whether the public authority has a degree of control over the information
22. In this case, the matter before the Commissioner is whether information held by Summerfield (the third party developers) is held on SCC's behalf. The meetings that come within the scope of the request were attended by members of SCC staff, TDBC and also Summerfield. It is clear that information held by TDBC is held for its own purposes as it is a public authority in its own right, but the Commissioner has also considered whether information within the scope of the complainant's request held by Summerfield is held on behalf of SCC as per regulation 3(2)(b)
23. SCC was involved in the s106 agreement because it was the Statutory Consultee as education authority and highways authority. In the government's guidance on Statutory Consultee performance it states the following about the role:

"Statutory consultees are organisations and bodies, defined by statute, who must be consulted on relevant planning applications. Local planning authorities can give significant weight to the advice of the key statutory consultees on specialist technical issues where an authority may have limited expertise. This can mean authorities are reluctant to determine applications without input from these key bodies.

Comments made by these bodies can also lead to the imposition of planning conditions and, in a limited number of cases, lead to a refusal of planning permission, either entirely or partially based on the advice the statutory bodies have provided.

Statutory consultees therefore play an important role in the delivery of development that best meets the needs of the local area. While local

authorities remain ultimately responsible for planning decisions, statutory consultees should take responsibility for the advice they give.”⁴

24. The Commissioner’s view is that in these circumstances SCC, acting as Statutory Consultee, had a significant role in the development of the s106 agreement. It was there to provide advice but there was also the possibility that its views would be enough to lead to a refusal of the planning application. However, the Commissioner notes that the authority to refuse a planning application rests with LDBC, and SCC did not have right of refusal because it was not content with the proposal put forward by Summerfield. In the Commissioner’s view there is a degree of separation between SCC and Summerfield. SCC does not have authority over the planning application to the extent that the relationship between the two organisations could be seen as one where SCC has a degree of ownership of Summerfield’s records.
25. When considering whether SCC has access to the information the Commissioner has given due weight to a comment made by SCC’s Strategic Manager for Traffic and Transport Development to the complainant, in which he stated that:

“In accordance with normal practice it is usually the role of the meeting host to prepare and provide official minutes and records of the meeting.”
26. The Commissioner has considered whether this practice would confer a degree of access to the information. It shows SCC is dependent on another party to document and record the minutes of an important meeting, one that would have implications for its role as the education and highways authority. This makes it clear that SCC would have use for the information, and certainly have an interest in it. It follows that this would confer a level of access to the information that would not be applicable to persons who did not attend the meeting.
27. However, it is also the case that this interest in the information held by Summerfield only exists because SCC failed to keep a record of the minutes itself. The Commissioner’s view is that SCC has an obligation to keep detailed records about its involvement in the s106 application so that it can justify the decisions made as the education and health

authority. SCC also needs to provide an audit trail to those with interest in the development. However, it is not the role of the Commissioner to formally decide on what information a public authority *should* hold; that role is restricted to determining what it *does* hold. He also considers that SCC's failings in keeping a proper record of meetings do not mean that information held by other parties is necessarily held on behalf of SCC.

28. SCC's submission to the Commissioner maintained that it does not have control over information that is held in Summerfield's records regarding the s106 agreement. It has no contract or partnership in place to formalise the role between the two organisations, and SCC does not make decisions about the information that is held by Summerfield to document the s106 agreement, such as whether it should be altered or when it can be deleted. The Commissioner views this as significant in assessing whether information held by Summerfield relating to the meetings is held on behalf of SCC.
29. The Commissioner's decision is that information held by Summerfield relating to the meetings within the scope of the request is held by Summerfield for its own purposes, and not for those of SCC. Whilst there is an argument that SCC does have an interest in the information, the Commissioner has not seen any evidence that SCC has a degree of control over the information and nor is there any formal agreement between the two to share the information. SCC does not have a degree of control over the records held by Summerfield that come within the scope of the request, and so the Commissioner's decision is that it SCC cannot be viewed as holding the information under the terms of the EIR.

Other matters

30. The Commissioner wishes to address the failings of SCC's record keeping practices, which have led to a paucity of relevant information being held and the complainant submitting an appeal to the Commissioner in the belief that more information is held. SCC itself has admitted that it did not do enough to keep detailed records of significant meetings about a controversial development.
31. The section 46 code of practice has the following to say on the importance of good record keeping:

"Freedom of information legislation is only as good as the quality of the records and other information to which it provides access. Access rights are of limited value if information cannot be found when requested or, when found, cannot be relied upon as authoritative. Good records and information management benefits those requesting information because

it provides some assurance that the information provided will be complete and reliable."

32. The public's confidence in SCC's actions in these matters would be greatly enhanced by increased transparency over significant decisions, which can only occur if sufficient records are kept.
33. During the course of the investigation SCC acknowledged its mistake and has introduced a new records protocol which should provide greater detail about decisions that are made in meetings. However, the Commissioner notes that this only came about during the Commissioner's investigation, six months after it would have known the scant amount of information held in relation to the meetings. The Commissioner asks that SCC is quicker to respond to concerns about its record keeping practices in future.

Right of appeal

34. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

35. 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.
36. 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

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