

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

Date: 6 February 2017

Public Authority: Oxford City Council
Address: St Aldate's Chambers
St Aldate's
Oxford
Oxfordshire
OX1 1DS

Decision (including any steps ordered)

1. The complainant made a five-part request for information from Oxford City Council (the 'Council') about a draft Waterways Public Space Protection Order ('PSPO'). The Council provided the information in relation to part 5 of the request but refused to provide the remainder by virtue of section 21 of FOIA (information accessible to applicant by other means). Following an internal review the Council maintained its position but concluded that the request should instead have been handled in accordance with the EIR. During the Commissioner's investigation, the Council partly revised its position and said that no information is held in relation to parts 3 and 4 of the request.
2. The Commissioner's decision is that the requested information constitutes environmental information and therefore falls under the EIR. She has concluded that, on the balance of probabilities, the Council has provided all the information it holds in accordance with regulation 5(1) of the EIR for parts 1 and 2, this being available on its website. The Commissioner also finds that, again on the balance of probabilities, the Council holds no information in relation to parts 3 and 4 of this request.
3. However, following clarification in relation to part 5 of the request, the Commissioner finds that the Council has not considered the names of all those concerned. She therefore requires the Council either to provide the names of all those who were involved in the development of the draft PSPO or to issue a valid refusal notice in accordance with the EIR.

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 the Act and may be dealt with as a contempt of court.
5. In addition, by failing to provide its response within the statutory 20 working days' time frame the Council breached EIR regulation 5(2). It also breached regulation 11 of the EIR by failing to conduct an internal review within the statutory timescale.

Request and response

6. On 25 March 2016, the complainant wrote to the Council via the *What DoTheyKnow.com* website¹ and requested information in the following terms:

"In relation to the Draft Waterways Public Space Protection Order (Scrutiny Committee 7-3-2016 Agenda Item 5 and Executive Board Meeting 17-3-2016 Agenda Item 193) (the "Draft PSPO"), please provide the following information:

1 A schedule of the parties consulted, in relation to the development of the Draft PSPO, prior to the inception of and during development of the Draft PSPO

2 The specific correspondence between Oxford City Council and those contained in Item (1)

3 The numbers of (a) private land owners (b) private property owners and (c) commercial bodies that were consulted under Item (1); for the avoidance of doubt I do not seek any proscribed information

4 Any material that relates to those persons or organisations specifically excluded from consultation, in relation to the development of the Draft PSPO, prior to the inception of and during development of the Draft PSPO

5 The names of all officers and councillors involved in the development of the Draft PSPO, prior to the inception of and during development of the Draft PSPO".

¹https://www.whatdotheyknow.com/request/waterways_public_space_protection

7. The Council acknowledged receipt of the request but failed to provide a response within the requisite 20 working days. On 25 May 2016 the complainant requested an internal review. The Council advised him that if a review is requested about time compliance it is Council policy for such matters to be dealt with through its complaints procedure. However, it then responded to the original request on 2 June 2016.
8. The Council provided some information within the scope of the request (names in part 5 of the request) but refused to provide the remainder (parts 1-4). It cited section 21 (information accessible to applicant by other means) of FOIA and provided the complainant with a weblink to the relevant information on its website².
9. The complainant requested an internal review on 20 June 2016 because he did not consider that the information contained in the weblink answered his request. The Council sent him the outcome of its internal review, late, on 10 August 2016. It upheld its original position but said that the request should have been considered under the EIR.
10. During the Commissioner's investigation the Council revised its position and advised that it does not hold the information requested at parts 3 and 4.

Scope of the case

11. The complainant initially contacted the Commissioner on 15 September 2016 to complain about the way his request for information had been handled. On 1 November 2016 the complainant subsequently provided clarification of his grounds of complaint and confirmed he was not satisfied with the Council's handling of all parts of his request because:

"The web link proffered by OCC [the Council] refers to the pre-consultation of a project called "PSPO-W". The consultation documents refer to the background behind the consultation but make no reference to the actors involved in the exercise leading into the consultation. It follows that the web link does not provide the information sought.

We know (from our own intelligence and responses from other parties to other (different) FoI requisitions that as a minimum the following were consulted: Canal & River Trust; Environment Agency; Thames

²https://www.oxford.gov.uk/info/20101/community_safety/1073/draft_water_ways_public_spaces_protection_order_for_consultation/4

Valley Police. We also wanted to know which private sector bodies were consulted. None of this was addressed in the response by OCC. The consultation documents are silent on the details surrounding the private sector actors involved...

... While OCC may claim that the web link provides the information sought, it is a matter of fact that it does not."

12. In respect of parts 1 and 2 of the request, and in line with the complainant's grounds of complaint above, the Commissioner will consider whether there is any further information held other than what is already available on the Council's website. She has not considered any redactions made within the online documentation as this has not been challenged by the complainant, unless these include the names of any parties which fall within part 5 of the request.
13. In respect of parts 3 and 4 of the request, the Commissioner will consider the Council's revised position that no information is held.
14. In respect of part 5, on 31 January 2017 the Commissioner spoke to the Council and subsequently to the complainant. The Commissioner's interpretation of "*The names of all officers and councillors involved in the development of the Draft PSPO, prior to the inception of and during development of the Draft PSPO*" is that "*all officers*" would include all those officers acting in their professional capacity involved in discussions about the PSPO. The Council said it had interpreted this part of the request as being **only** for the names of its own officers and councillors which it had provided on 2 June 2016.
15. Having spoken to the complainant, it became apparent to the Commissioner that he requires the names of all those individuals involved in "*pre consultation and development of*" the PSPO. The complainant further clarified this by way of an example, stating that if the Environment Agency was one of the parties involved, he would like the names of all those officers; this will be considered below.
16. The Commissioner has also considered the time the Council took to respond to the request and its failure to conduct a timely internal review.

Reasons for decision

Is the information environmental?

17. Information is 'environmental' if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR. Under regulation 2(1)(c), any

measures that will affect, or be likely to affect, the state of the elements referred to in 2(1)(a), will be environmental information. The requested information relates to decision making with regard to usage of local canals and waterways. The Council determined at the internal review stage that the request falls under the remit of the EIR. The Commissioner also finds that the request is for environmental information and should be dealt with under the terms of the EIR.

Regulation 5(1) – duty to make information available on request

18. Regulation 5(1) states that any person making a request for information is entitled to have that information communicated to them. It requires a public authority to establish accurately what information it holds that falls within the scope of the request. If the Commissioner finds that the Council failed to identify correctly what relevant information it held in relation to this request, this would mean it was in breach of regulation 5(1) of the EIR.
19. When considering whether a public authority has identified all relevant information that it holds, the Commissioner applies the civil standard of the balance of probabilities. Therefore, the issue here is whether, on the balance of probabilities, the Council has identified all the information it held that fell within the scope of the complainant's request.
20. The complainant requested five different pieces of information relating to the development of a PSPO concerning the management of the waterways in Oxford. The Council has explained that before the summer of 2015 it gave initial consideration to the possibility of a PSPO being created to allow for management of the Oxford waterways. It said this was one of a number of options that were examined to deal with a variety of unauthorised mooring and antisocial behaviour issues affecting the waterways within the city. Most of that work was conducted in collaboration with a group called the Unlawfully Moored Boats Enforcement Group ('UMBEG') which was made up of representatives from the Council, The Environment Agency, The Canal and River Trust and Thames Valley Police.
21. Copies of the minutes of the meetings of that group are available on the Council's website, together with copies of all information generated for and by those meetings. The documents have been redacted to remove the personal information of third parties. The Council confirmed that it does not hold any other consultation documents of any sort.
22. Comments were sought from the many stakeholders, primarily the riparian owners, by the Council's Green Space Development Manager on what might be included in such an order. The several interested parties were asked for their views and a number of meetings did take place. Copies of the documents prepared during that stage are on the Council's

website. The documents have been redacted to remove the personal information of third parties. The Council said it does not hold any material that relates to persons or organisations specifically excluded from consultation (information requested in part 4) as the Council's officers consulted all parties of which it was aware.

23. Work on the initial proposals stopped in the summer of 2015 because the Council had decided that work on a PSPO for the city centre should be given priority. Therefore, a draft PSPO in relation to the waterways was not produced by the Council for formal consultation at that time.
24. After the conclusion of the work on, and introduction of, the city centre PSPO, efforts were again focused on producing a PSPO to cover the waterways. A draft PSPO was duly prepared in the weeks preceding the March meeting of the City Executive Board. At its meeting on 17 March 2016, the Council's City Executive Board resolved to approve the draft Waterways PSPO for formal consultation.
25. The Council said it has undertaken an extensive search of its records which included obtaining access to electronic filing records of former members of staff. All documentation relating to the proposals for the draft PSPO and the meetings of UMBEG has been placed on the Council's website, redacted to remove the personal information of third parties.

Part 5 of request – information provided

26. As part of its response to the request, the Council provided the complainant with an email which it said contained the names of *"all officers and councillors involved in the development of the Draft PSPO, prior to the inception of and during development of the Draft PSPO"* as requested in part 5.
27. However, the complainant has argued that as individuals from other parties, such as the Canal & River Trust, Environment Agency and Thames Valley Police (which are all part of UMBEG) were involved with the draft consultation, he has not been provided with a complete list. Further, he has argued that the Council has been 'silent' on the participation of any private sector individuals.
28. The Commissioner raised this matter again with the Council on 17 January 2017. In reply, the Council clarified that the now disbanded group UMBEG was a partnership between various agencies which met to discuss many issues related to the waterways in Oxford. Whilst the group did discuss the possibility of a PSPO in relation to the waterways it did not meet exclusively to do so. It said *"This means that the minutes of the group will refer to individuals who attended some or all of the meetings as representatives of various agencies to discuss many and varied issues but not necessarily the potential for a PSPO to deal with management of the waterways in Oxford"*.

29. The Council also explained that the list of names it had given to the complainant on 2 June 2016 constitutes its own officers and councillors who were directly involved in and/or who had direct responsibility for consideration of the proposal to introduce a PSPO to manage Oxford's waterways.
30. However, as set out above, on 31 January 2017, it became apparent that the complainant and the Council had interpreted part 5 of the request differently. For clarity, the Council had understood that the complainant wanted the names of Council officers and councillors; however, the complainant had intended, and indeed confirmed to the Commissioner, that he is seeking the names of any and all officers who were involved in the draft PSPO, both prior to its inception and during its development. As a result, the Commissioner finds that the Council, on the balance of probabilities, holds more information in relation to part 5 of the request than has been disclosed to date.

Parts 1 and 2 of request – information withheld

31. The Council has said that in response to part 1, where the complainant requested a schedule of the parties consulted, in relation to the draft PSPO, prior to the inception of and during development of the draft, he was directed to the Council's website. It stated that *"No other individuals or bodies were consulted other than those listed or otherwise referred to in the documents posted on the website."*
32. For part 2, specific correspondence between the Council and those contained in part 1, the Council again directed the complainant to its website. It told the Commissioner that *"No other documentation is held by the Council."*
33. The complainant considers that more information is held over and above that on the website although he has not provided any evidence to the Commissioner to support this. The Commissioner therefore has considered whether the Council holds any further information.
34. With regard to the Council's explanations about the make-up and activities of UMBEG and how the draft PSPO was considered, the Commissioner has concluded that the information requested in parts 1 and 2 of the request is publicly available on the Council's website. She also considers that, on the balance of probabilities, the Council has provided all information held pertinent to parts 1 and 2 of the request.

Parts 3 and 4 of request- information held/not held

35. The Council advised it does not hold the actual numbers sought at part 3 of the request but considers that this information can be ascertained as details of the parties consulted are reasonably accessible by reference to the information which has been posted on its website. In addition, the

Council stated that it does not have any other record of the breakdown of the number of private landowners, private property owners and commercial bodies that were consulted.

36. In relation to part 4, the Council said it does not hold any material that relates to persons or organisations specifically excluded from consultation as the Council's officers consulted all parties of which it was aware.
37. Having considered the explanations from both parties, the Commissioner is satisfied that, on the balance of probabilities, the Council does not hold the information requested at parts 3 and 4 of the request.

Regulation 5(2) - Duty to make environmental information available on request/time for compliance

38. Regulation 5(2) of the EIR states that on receipt of a request, a public authority must comply with regulation 5(1) as soon as possible and not later than the twentieth working day following the date of receipt of the request.
39. The complainant submitted his request on 25 March 2016. As the Council did not issue a response by the twentieth working day after the date of receipt it breached regulation 5(2) of the EIR.

Regulation 11 – Representations and reconsiderations

40. Under regulation 11: *"an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request"*. In other words, the EIR includes a statutory right for applicants to request an internal review, so long as they submit it within 40 working days of receiving the response. The public authority then has 40 working days in which to carry out its internal review.
41. In this case the Council failed to provide its internal review within the statutory timeframe, thereby breaching regulation 11 of the EIR.

Other matters

42. As well as issuing this notice, the Commissioner has made a separate record of the delays in this case. These issues may be revisited with the Council should evidence from other cases suggest that this is necessary.
43. The Commissioner would also remind the Council that if it is considering a request under the EIR regime it is not able to cite an exemption which is proper to the FOIA as it did in this case, ie section 21.

Right of appeal

44. 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

45. 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.
46. 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

Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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