

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

Date: 12 September 2017

Public Authority: Wokingham Borough Council
Address: Shute End
Wokingham
Berkshire
RG40 1WH

Decision (including any steps ordered)

1. The complainant requested planning information from Wokingham Borough Council ("the council"). The council provided information with some redactions made under section 40(2) of the Freedom of Information Act 2000 ("the FOIA"). The complainant alleged that more information was held, which the council denied. The Commissioner decided that the request should have been dealt with under the Environmental Information Regulations 2004 ("the EIR"). However, the Commissioner decided that no further information was held falling within the scope of the request. There are no steps to take.

Request and response

2. The complainant requested information in the following terms:

"Please provide in electronic form copies of the following information:

1. Correspondence relating to the omission/reduction of noise reduction fencing and visual screening from the Eastern relief Road south section between Hochtief and Wokingham Borough Council planning and between the dates 1 Jan and 30 August 2016.

2. Correspondence relating to planning application 162004 excluding formal planning process documentation. Correspondence between the

dates 1 June and 30 Sept 2016 and between Hochtief and WBC.

3. Correspondence relating to conditions imposed as a result of planning decision 162004 excluding formal notifications between Hochtief and WBC planning dates between 1 August and 20 October 2016".

3. The council replied on 24 November 2016. It provided information with some redactions made using the exemption under section 40(2) of the FOIA.
4. On 25 November 2016, the complainant requested an internal review because he believed that further information was held.
5. The council completed an internal review on 5 January 2017. It said that no further recorded information was held beyond that already provided.
6. The complainant expressed further dissatisfaction on 10 January 2017.

Scope of the case

7. The complainant contacted the Commissioner on 11 January 2017 to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the council held any more information.

Reasons for decision

Environmental information

8. The council considered the request under the terms of the FOIA. However, as the requests relate to planning information, the Commissioner's view is that the requests should have been dealt with under the terms of the EIR. Regulation 2(1)(c) defines environmental information as any information relating to plans affecting or likely to affect the elements and factors of the environment. The council accepted this view.

Regulation 5(1) – Duty to make environmental information available

9. Regulation 5(1) of the EIR provides a general right of access to recorded environmental information held by public authorities. Public authorities should make environmental information available within 20 working days unless a valid exception applies.

10. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. She will also consider the actions taken by the authority to check that the information was not held and she will consider if the authority is able to explain why the information was not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held. She is only required to make a judgement on whether the information was held "on the balance of probabilities".¹
11. The background to this matter is that the original approval for the Eastern Relief road was granted on appeal by the Secretary of State in November 2012. Subsequent to the approvals, including noise barriers, in summer 2016 the council received a further planning application seeking to vary the originally approved landscaping and acoustic fencing details. The council proposed to approve the amendments. The application was considered at the council's September 2016 Planning Committee and the decision notice was issued on 17 January 2017. As part of the process, the council commissioned an independent review regarding the issue of noise.
12. A noise impact report provided evidence that no acoustic fencing was required to the southern section of the Eastern Relief road since mitigation could be achieved through a low noise surfacing material. Given the concerns raised, the council imposed a condition on the planning permission requiring further noise monitoring and the possibility of changes if the noise exceeded a certain level once the road was in operation. Mindful that the acoustic barrier was to be omitted, the planning permission included considerable landscaping and tree planting to provide visual screening.
13. The complainant has expressed concerns that more information beyond that provided was held by the council. He has argued that it is extremely surprising that more information was not held given that this issue is related to strategic development planning and contractual variations. The complainant says that he believes both of these areas are heavily regulated and potentially subject to a wide range of legal challenges. He does not accept the council's explanation that not all of the communication regarding these matters was recorded. He has said that as the outcome was a "significant variation in strategically agreed development plans it is beyond comprehension that communications

¹ This approach is supported by the Information Tribunal's findings in Linda Bromley and Others / Environment Agency (31 August 2007) EA/2006/0072

would not be recorded or could have been deleted for the purposes of email storage management etc”.

14. Following inspection of the information provided to him, the complainant made some specific comments about why he believed that further information was held by the council. The complainant has compared two emails and commented that the subsequent email contains “additional clarification” indicating that other communication had taken place in the meantime. In other correspondence from 5 May, the complainant noted reference to the final type, design and extent of a noise barrier being fully reviewed and accepted by the council. He said that this suggests agreement took place between or subsequent to 1 and 17 March however this is not shown in the recorded information. The complainant points out that another email refers to “as agreed” but this process is not shown anywhere in the information provided. The complainant said that these examples strongly indicate that other communications have taken place.
15. In its internal review, the council did not deny that other communication may have taken place. However, it said that such communication could have been verbal, for instance over the telephone or during a meeting. The council also highlighted that some information will be routinely deleted such as emails for the purposes of email storage management.
16. In correspondence to the Commissioner, the council explained that the requests were regarded as being very narrow in focus and the lead planning officer for the scheme provided all the information falling within the scope of the requests. The council said that it acknowledges that there may well be other correspondence that exists between the council and Hochtief (the developer concerned) however this would be between the Highways department (rather than the planning department) and Hochtief as part of the “the technical approval process”. The council reiterated that there were also verbal conversations that took place, either in person or via the telephone which were not recorded.
17. The council said that when it received the request it searched the council's network drives where information relating to the Eastern Relief road was stored, along with searching Microsoft Outlook accounts of the planning officers involved. The council also spoke to the lead planning officer to check that no further information within the scope of the request was held by the planning department.
18. The council clarified that all information of any significance would have been retained and provided as part of the request. The council said that in line with standard records management guidance, the council

advises that some records do not need to be kept and may be routinely destroyed in the normal course of business. Examples of this are telephone message slips, meeting invitations and arrangements and draft documents. Emails of no real significance would have been deleted as part of routine business.

19. In relation to the complainant's concerns about deleting or not recording some information, the council explained that practices vary across different council departments and areas such as Finance, Audit or Legal would generally keep more detailed notes of conversations but this is not policy across the whole council. It said that the council's planning officers are best placed to make decisions about what is appropriate to record. The council added that it is important to note that any opinion expressed by officers in advance of a planning application is merely an informal opinion and is not open to legal challenge. Any verbal opinions expressed would have been done so on the proviso that the changes needed to be subject to full scrutiny under a planning application, as was the case here. The council said that the planning application is the formal documentation upon which the council makes its determinations. Given this, it is not considered to be necessary to keep all documentation or notes relating to discussions held in the pre-application stage. The council added that in this case, the applicant did not seek formal pre-application advice from the Local Planning Authority.
20. The council explained that the development had been the subject of monthly progress meetings between the applicant and council officers in both the Planning and Highways departments. These meetings have allowed issues to be discussed, opinions to be expressed, advice to be given and problems to be resolved without the need for further exchange of correspondence as may have otherwise been required. The council said that notes of the meetings were recorded however as the notes had not been exchanged they were not considered to be "correspondence" and so were not regarded as falling within the scope of the request.
21. Following the council's comments above regarding the scope of the request, the indication that there had been some contact between the complainant and the council to try to clarify the nature of his interest, and the discovery of additional information relating to the matter held by the Highways department, the Commissioner considered that it was appropriate to consult the complainant about his request. The complainant said that his request was intended to include but was not restricted to correspondence. He said that although the original request did state "correspondence", this was subject to two clarifying telephone calls between himself and the council. He said that he made one telephone call prior to submitting the request where he was assured

that the request would include meeting notes and emails and another call in which it was confirmed that the response would include meeting notes. The complainant said that both calls were made to the council's customer relations team. He added that there was subsequent contact with the council where the complainant again asked for guidance and confirmation.

22. The complainant also highlighted that the council's original response had included a range of documents and meeting notes so it was not clear why the council would now deem them to be excluded. He said that in its initial response the council stated that any meetings were unrecorded as they may have been verbal or by phone only. He said that at no time did the council refer to the non-inclusion of meetings.
23. In response, the council said that it had no record of the telephone calls referred to and having consulted staff, was unable to corroborate the complainant's account of this. However, it did acknowledge that on 27 October 2016, a member of its central FOI/EIR team contacted the complainant to try to gain a clearer understanding of what information would satisfy the request. It asked whether he was interested in any external companies, departments or individuals in particular. The council said that the complainant focused on the planning department, Hochtief and councillors and did not expand the request beyond the planning department. The council said that it had no reason to believe that the complainant did not know what he was asking for, particularly because the council considered that the complainant possessed significant knowledge about the background to this particular matter. The council made the following comments:

"The council maintains that it answered the questions that it was posed, and we cannot anticipate or assume that the questions asked were not what the applicant meant otherwise we would be required to go back on every request that we received. Usually an applicant submits a request that is too broad and encompasses the whole council, but on this occasion, they have narrowed the focus of the request too far, for what they may have wanted".

24. In relation to the information that was supplied in response to the complainant's request, the council said that this did include agendas of the upcoming meetings. However it said that this would have been sent via email to those attending in advance, as well as other documents that would have been exchanged in the course of the project. It said that accordingly, they were caught by the terms of the request which asked for "correspondence". It said that it had referred to meetings briefly in its internal review because it was simply responding to the complainant's point and this was not intended to imply that meetings were caught by the request in general.

25. The council provided a copy of its correspondence with the complainant on 27 October 2016 referred to above. The Commissioner could see from this that the complainant outlined the parties he was interested in as Hochtief, the planning department and a particular councillor. The Commissioner therefore accepts that the requester had asked for information from the planning department and that his request was limited to "correspondence". This is supported by the actual request itself.
26. However, the Commissioner has explained to the council that there is a duty to provide advice and assistance to those who request information. This is provided by regulation 9 of the EIR. The Commissioner considers that the council could have gone further to help the requester define the information that he was interested in, ideally before, but also after the request had been made and to make a new request as appropriate.
27. The Commissioner notes that the council has expressed some concerns about regulation 9 and its practical application. The Commissioner would like to explain therefore that providing advice and assistance in the way proposed is not the same as requiring the council to "go back on every request received". This is simply acknowledging that a public authority best knows the information that it holds and is best placed to help support a requester to define his request and to make a new request subsequently if necessary. This is a two way process. This cooperative and flexible relationship is envisaged by the Code of Practice on the Discharge of the obligations of public authorities under the EIR (SI 2004 No. 3391). As this case exemplifies, this approach can save time further down the line and help to avoid a complaint about the information provided. This will not be necessary in many cases, but the circumstances here suggest that this was an instance where further engagement from the council would have assisted the requester to access the information he was seeking more efficiently. For ease of reference, a copy of the Code of Practice is here:

https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf
28. It is clearly the case that there was a close connection between the work being done by the Planning department and the Highways department with respect to this particular planning application. The council has said that the Highways department is responsible for the technical approval of the scheme. That being the case, it would have been appropriate for the council to refer to this when it sought clarification from the complainant or at the very least at the internal

review stage when the requester had expressed concern that not all of the information had been identified and had pointedly referred to meetings, and information that was likely to be held by the Highways department. The Commissioner also agrees with the complainant that it would have been appropriate at this stage for the council to make it clear that it had excluded meetings in general from the request and to explain why it had done so.

29. With respect to the request as it stands, the Commissioner accepts that the information held by the Highways department, including meeting records, falls outside the scope of the request. He also accepts that any information that was not exchanged and is not therefore "correspondence" also falls outside the scope of this request. It appears that the way in which the request was formulated, leading to a narrow response by the council, accounts for the complainant's concern that more information was likely to be held to a significant degree. Beyond this, there is no clear evidence available to the Commissioner to suggest that further information was held falling within the terms of the request as it was made.
30. The council has been able to demonstrate that it has conducted appropriate searches, encompassing the areas where information about the Eastern Relief road would be stored in the planning department. It has also consulted appropriate staff members within the department. There is no clear evidence available to suggest that information has been deleted or destroyed inappropriately and there is nothing to suggest that any information falling within the scope of the request has been mislaid.
31. The Commissioner can appreciate why some of the comments made in the disclosed information may have suggested to the complainant that further information was held. Indeed, it is likely to be the case that further information relevant to these specific concerns was in fact held by the Highways department or would be caught by the submission of a wider request not restricted to "correspondence". The council has told the Commissioner that it believes that this was the case.
32. In any event, the council has been able to explain why no further information was held falling within the scope of the request as it was made by reference to its planning department processes. The council's planners make appropriate decisions about what information to retain having gone through the different stages of the planning processes, and ultimately the planning application itself is the formal document upon which these determinations are made. The council has explained that despite what the complainant may have assumed, the fact is that prior to the submission of a planning application, some communication can take place which has a level of informality and may not be retained

in accordance with planning officers exercising a normal level of discretion.

33. On the balance of probabilities, the Commissioner accepts that no further information was held by the council falling within the scope of the request. For the reasons described, the Commissioner's understanding is that further information that would be of interest to the complainant is likely to be held by its Highways department. Further information of interest may similarly be held either in the Planning department or the Highways department in the event of a request being made that was framed more widely and not restricted to "correspondence". This would seem to represent the best way of resolving these particular concerns and the complainant is of course free to make such a request.

Other Matters

34. The EIR provide that a valid request can be made verbally. However, the Commissioner would recommend that a request made in this way is confirmed in writing to avoid disputes about the terms of the request. In this case, the complainant alleges that he made two telephone calls to the council to clarify the nature of the information he was interested in. Unfortunately, there are no records of this and it is therefore not possible to confirm the complainant's account. The Commissioner would like to take this opportunity to reiterate that it is good practice to keep records of such calls relating to information requests.

Right of appeal

35. 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

36. 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.
37. 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

Elizabeth Archer
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