

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 21 June 2019

Public Authority: Darlington Borough Council
Address: Town Hall
Feethams
Darlington
County Durham
DL1 5QT

Decision (including any steps ordered)

1. The complainant has requested information relating to the councils 5 year housing supply position relating to a committee statement on a housing application in 2017. The council said that it does not hold the requested information.
2. The Commissioner's decision is that, on a balance of probabilities, the council does not hold information falling within the scope of the request. She has however decided that the council did not comply with the requirements of Regulation 5(2) in that it did not respond to the request within 20 working days.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 15 July 2018, the complainant wrote to the council and requested information in the following terms:

"The only document I can find on DBC website is Darlington Borough Council Five Year Housing Land Supply Position Statement February 2018:

This document refers to a plan period commencing 01 April 2016 to 2036 and a six year period commencing 01 April 2016 to 31 March 2022 and converting this to a five year period commencing 01 April 2017 to 31 March 2022.

I am investigating the planning application 16/000578/OUT (planning committee 29 March 2017), which coincides with the commencement date 01 April 2017 to 31 March 2022 which contained the following statement:

"In relation to housing, the NPPF requires local authorities to plan positively for housing development to meet the needs of their area. It advises (paragraph 49) that policies for the supply of housing should not be considered up to date if the Local Planning Authority cannot demonstrate a five year supply of deliverable housing sites. If there is no five year housing land supply, the relevant local housing development plan policies are considered out of date and therefore planning applications would be subject to paragraph 14 of the NPPF. At present, Darlington cannot demonstrate a five year supply of deliverable housing sites against an objective assessment of housing need and therefore the Development Limits identified on the Local Plan Proposals Map and the locational strategy of the Core Strategy 2011 are considered out of date and in the context of the NPPF carry little weight when assessing new housing proposals. In order to continue to plan positively for housing development to meet the needs of our population, applications for planning permission for residential development in all areas of the Borough should be considered with regard to the presumption in favour of sustainable development set out in the National Planning Policy Framework".

Can I see the details of the 5 year housing land supply position, which was used to justify the above statement, including buffer percentage?"

5. The council responded on 11 October 2018. It said that it did not hold any information falling within the scope of the request.
6. On 23 October 2018 the complainant wrote back to the council stating:

"Clearly DBC does hold information about it's housing needs, including NPPF 5 year housing land supply details, as it is able to inform me that "we have only delivered our yearly housing requirement (based on Policy CS 10 of the Core Strategy) only twice since 2011".

7. Following an internal review the council wrote to the complainant on 7 November 2018. It maintained its previous position that no relevant information is held. It said that: *"The Planning Policy Team is unable to locate any recorded information relating to the 5 year housing land supply position. The officer who would have made any contribution as to whether the Council had a five year supply or not at the time of the application no longer works for the Authority."*

Scope of the case

8. The complainant contacted the Commissioner on 7 November 2018 to complain about the way his request for information had been handled.
9. His central concern is that the information falling within the first part of his request has not been disclosed to him. He argues that he is *'perplexed that the council states it does not hold information which is a statutory requirement to hold since the introduction of the National Planning Policy Framework ('the NPPF') introduced in 2012'*.

Reasons for decision

Regulation 12(4)(a)

10. Regulation 12(4)(a) provides that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
11. Although Regulation 12(4)(a) is subject to a public interest test where the exception is engaged the Commissioner recognises that, in reality, it can be impossible to do a meaningful public interest test if no information is held.
12. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request).
13. The Commissioner also feels it relevant to point out that she can only consider what the council held at the time the request was made. This is because the council has confirmed that can *now* demonstrate a 5 year land supply.

14. The council's statement outlined in the planning committee briefing of 29 March 2017 clarifies that at the time that the relevant planning application was being considered the council declared that it could not demonstrate a 5 year land supply for the purposes of the National Planning Policy Framework (the NPPF).

15. Guidance provided by the Government on future land supply¹ states:

"A 5 year land supply is a supply of specific deliverable sites sufficient to provide 5 years' worth of housing against a housing requirement set out in adopted strategic policies, or against a local housing need figure where appropriate in accordance with paragraph 73 of the National Planning Policy Framework."

16. The fact that a local authority does not have an identified 5 year land supply for the purposes of the NPPF has important repercussions as to the planning policy considerations which can be taken into account when the council, acting as the planning authority, is considering planning applications it has received.

17. As part of her investigation the Commissioner asked the council a series of questions in order to determine what searches had been carried out for information falling within the scope of the complainant's request.

18. The council confirmed that the Head of Planning Policy confirmed that the Council does not hold information regarding the five year housing land supply position for the period requested.

19. It said that, following the Commissioner's investigation letter, it carried out further searches for information, and although a document had been found relating to part 2 of the complainant's request, this had not initially been provided to the complainant through error. The document details the total number of permissions granted for the period requested and relates to the buffer percentage. It therefore disclosed this document to the complainant on 15 May 2019. It confirmed however that it holds no information falling within the scope of part 1 of the complainant's request.

20. The council confirmed that it is not aware that it ever held information relevant to the scope of part 1 of the complainant's request.

21. It said that if information was held, it would be likely the information would be held in an electronic format. All information is either stored on

¹ <https://www.gov.uk/guidance/housing-and-economic-land-availability-assessment>

the electronic casefile or is considered via the exchange of emails between officers. It said therefore that it had carried out a search of emails and of its electronic case files. It confirmed that no relevant information was found on the electronic casefiles, either public or restricted.

22. It provided the Commissioner with details of the search terms it had used to carry out the above. The Commissioner was initially concerned however as the key words it used to carry out searches related to the planning application to which the briefing note of 29 March 2017 relates. The Commissioner told the council that she considered that information relating to a 5 year land supply may well be held on files outside the scope of the individual planning application. She therefore asked the council to carry out further searches on the basis that information on a proposed 5 Year land supply would not be held specifically relevant to one planning application.
23. The council therefore carried out further searches using the key terms '5 Year Supply' '5 Yr Supply' 'Five Year Supply' and 'Five Yr Supply' on its entire Planning Policy server folder. These searches did not find any relevant information.
24. It confirmed that it has also searched for any documents created or modified between the publication of its OAN [Objectively Assessed Need and Housing Targets] in 3 November 2015, and the relevant planning committee briefing which the complainant's request refers to dated 29 March 2017.
25. It explained that it did this because the OAN of 2015 clarifies (at paragraph 47) that only a 4 year land supply was held at that point. By establishing that no further documents relating to a 5 year land supply were held between this point and the planning committee statement of 29 March 2017 its searches could establish that no information was held.
26. It added that "*The figure of four year supply set out in para 47 of the cabinet report (Planning for Darlington's Future Housing Needs Nov 3 2015²) uses information from the SHMA report* [Strategic Housing

Market Assessment] (2015)³ and SHLAA [Strategic Housing Land Availability Assessment] Update 6 (Sept 2015)⁴ to come to that figure. In para 47 of the report it states that the SHLAA indicates that there was a land supply of 2600 dwellings which equated to just over four years supply of housing land rather than the 5 years required".

27. Paragraphs 46 and 47 of the document 'Planning for Darlington's Future Housing Needs' (Nov 3 2015) clearly states that at that time the council did not have a 5 year land supply:

"46. Until the Council can demonstrate that it has a five year supply of suitable, available and deliverable housing land, any planning applications for new housing development will have to be determined in accordance with the presumption in favour of sustainable development that is set out in national planning policy, rather than in accordance with the Council's own development plan policies, such as the limits to development policy, which could otherwise provide a reason for refusing some proposed new housing developments.

47. By establishing its up to date objectively assessed housing needs, the Council has moved a step closer to demonstrating a five year supply, as it now has a robust and credible benchmark against which housing land supply can be measured. The latest housing land supply data collected through the Darlington Strategic Housing Land Availability Assessment (SHLAA) Update 6, published in September, indicates that the 5 year housing land supply is 2600 dwellings. This is the equivalent to just over four years supply of housing land, rather than the 5 years required; land that can deliver a further 400+ new homes by 2021 is needed to achieve a 5 year supply."

28. The council therefore clarified that between this point in November 2015, and the planning committee report which the complainant refers to in his request dated the 29 March 2017 its searches found 'no relevant position statements on five year supply between these dates'. It therefore considers it is correct to state that it does not hold information falling within the scope of the complainant's request.

³ <https://www.darlington.gov.uk/environment-and-planning/planning/planning-and-environmental-policy/strategies-projects-and-studies/strategic-housing-market-assessment-2017/>

⁴ <https://www.darlington.gov.uk/environment-and-planning/planning/planning-and-environmental-policy/strategies-projects-and-studies/shlaa/>

29. As regards part 2 of the request it clarified that whilst planning permissions etc. are available from its planning portal, the Council does not hold a summary document detailing the total number of permissions granted for the period requested. The Commissioner notes that this in itself would not respond to the complainant's request even if it were to be collated and provided to him, although she also notes that that information is already available should the complainant wish to carry out the necessary work to establish this information. As noted above, the council did provide further information which it found during the course of the Commissioner's investigation, and it disclosed this to complainant on 15 May 2019.

The Commissioner's conclusions

30. In coming to a decision in this case the Commissioner has considered the evidence which was provided to her by the complainant in support of his submission that the requested information is held, together with the council's responses to her questions and the other evidence which is available to her.
31. 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 is not held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held.
32. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072) in which it was stated that "*there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records*". It was clarified in that case that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test the Commissioner will apply in this case.
33. In discussing the application of the balance of probabilities test, the Tribunal stated that, "*We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had*

not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed." The Commissioner has therefore taken the above factors into account in determining whether or not the requested information is held on the balance of probabilities.

34. When considering the case she has taken into account that the planning report of 3 November 2015 declared that the council only had a 4 year supply identified. The committee report which the complainant based his request upon provides a public statement, made as part of a planning committee meeting on *29 March 2017*, confirming that a 5 year land supply had not been identified by that point. The council statement on 29 March 2017 was that:

"At present, Darlington cannot demonstrate a five year supply of deliverable housing sites against an objective assessment of housing need..."

35. The complainant requested:

"Can I see the details of the 5 year housing land supply position, which was used to justify the above statement."

36. The earlier assessments which the council had done were reported in Paragraphs 46 and 47 of the document '*Planning for Darlington's Future Housing Needs*' (Nov 3 2015). These are based upon evidence presented in the SHLAA and the SHMA reports. All of this information is already available from the council online. In effect, the Commissioner notes that it was already clear under the circumstances that a 5 year land supply was not held by the council, and this is clarified in the council's statement in its planning committee briefing. A 5 year land supply had not been established between the publication of the earlier reports in 2015 and the planning committee briefing of 29 March 2017.
37. The council has further demonstrated that it has carried out relevant searches and established that it does not hold any information which could respond to the complainant's.
38. The complainant stated in his complaint to the Commissioner that he is *"perplexed that the council states it does not hold information which is a statutory requirement to hold since the introduction of the National Planning Policy Framework ('the NPPF') introduced in 2012"*. However it is not for the Commissioner to comment on the council's lack of a 5 year land supply during the relevant period. Her role is simply to identify whether relevant information was held or not.

39. The Commissioner considers that, on a balance of probabilities, at the time of the request the council did not hold information falling within the scope of the complainant's request for information.

Regulation 5(2) - Duty to make available environmental information on request

40. Regulation 5(2) provides that Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.
41. The complainant made his request for information on 15 July 2018. The council did not however provide its response to the complainants request until 11 October 2018.
42. The Commissioner has therefore decided that the council did not comply with the requirements of Regulation 5(2) in responding to the request for information.

Right of appeal

43. 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

44. 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.
45. 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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