

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 30 October 2019

Public Authority: Watford Borough Council

Address: Town Hall,
Watford,
WD17 3EX

Decision (including any steps ordered)

1. The complainant has requested information relating to pre-planning application advice provided by the council to a developer. The council provided the advice it holds, however the complainant believes that the council holds planning officer notes which have not been disclosed to him.
2. The Commissioner's decision is that on a balance of probabilities the council does not hold any further information falling within the scope of the complainant's request for information. Regulation 12(4)(a) therefore applies.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 28 February 2019 the complainant made the following request for information under the EIR:

"Any any [sic] all written correspondence between Watford Borough Council, their agents or planning officers with Fairview Homes, their agents or representatives to include but not exclusively representatives including employees and agents from [name redacted] (development consultants). I would request any Emails or written documentation pertaining to the above. I would request details of any meeting or consultation and any meeting minutes if any such meetings have been held between Watford Borough council (planning officers) and the developers or their agents, and copies of any relevant documents held by Watford Borough council in relation to any such meeting. I would further request any Emails or written correspondence held in relation to this development that have been created internally between planning officers or other involved in the pre application process specifically in relation to this pre- application consultation"

And

"Any and all correspondence, records or advice that is held in relation to this previous pre-application proposal for the same site from 2017/18 (as above)."

5. The council responded on 8 April 2019. It disclosed some information via an electronic disclosure. Further to this, the complainant's was also invited to the Town Hall where he was provided with further hard copy documents on 17 April 2019.
6. Following further correspondence, on 9 May 2019 the complainant wrote to the council stating:

"Can you or the planning dept responsible for holding the pre application advice meeting with developers therefore confirm the following.

- Having submitted plans and other documents to WBC planning before a number of meeting that there are no notes or records prepared by the planning officer(s) as a result of those submissions to take to those meetings (or in response to the meetings other than those provided) ?*

- *No notes or records by the planning officer(s) of the discussions at those meetings (you have already confirmed this is the case)?*

In simple terms it seems from the documentation I have received that the developers have submitted material before a meeting (that material has been provided as far as I can see in the form of plans, power points etc), the meeting takes place at a later date but there are no records of the thoughts, observations or relevant points that the planning officer prepared prior to that subsequent meeting nor a record of what was said or discussed at that meeting (which I believe you have already confirmed). That must therefore mean that having received and reviewed the material from the developer the planning officer(s) attending that meeting without a single written word or thought and that they met with all their observations "in their heads"?"

7. On 20 May 2019 the relevant planning officer responded to the complainant. He said that:

"Your Freedom of Information request dated 28 February 2019 did not request notes or records prepared by the planning officer(s) as a result of the submissions to take to the meetings".

8. On 20 May 2019 the complainant wrote to the council again. He clarified that his view was that his request did encompass any notes within its scope:

"Can I therefore confirm that the councils position is that the "notes and records prepared by the planning officers(s) as a result of those submissions to take to the meetings" are not considered to be "any relevant documents held by Watford council in relation to those meetings" (as per the request above) and that you now require a specific request for those documents which [name of council officer redacted] has indicated do exist. It is clearly exactly this type of material my request was seeking to cover and I believe it did cover the planning officers [sic] notes taken to those meetings to discuss."

9. The council wrote back to the complainant, again on 20 May 2019. It said that:

"[Name of council officer redacted] has confirmed that no minutes were taken of the meetings held between officers of Watford Borough Council and Fairview Homes and their agents and that I have provided you with all the information that we hold in relation to the pre-application submitted by Fairview homes which includes a summary of any meetings that were held."

10. Following an internal review the council wrote to the complainant on 29 May 2019. It maintained its position that all information it holds falling within the scope of the request has now been disclosed to him.

Scope of the case

11. The complainant contacted the Commissioner on 21 May 2019 to complain about the way his request for information had been handled.
12. He believes that he has evidence that the council does hold notes falling within the scope of his request, and would like the council to provide these to him. The council denies holding such notes.
13. The Commissioner therefore considers that the complaint is whether the council holds further information, falling within the scope of the complainant's request for information, which has not been disclosed to him.

Reasons for decision

Information not held – Regulation 12(4)(a)

14. Regulation 12(4)(a) of the EIR 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.
15. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First Tier Tribunal decisions, applies the civil standard of the balance of probabilities.
16. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
17. In this case, the Commissioner has sought to determine whether, on the balance of probabilities, the council held further information within the scope of the request.
18. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the searches carried out by the public authority, in terms of the

extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, she will consider any other information or explanation offered by the public authority which is relevant to her determination.

19. During the course of her investigation, the Commissioner asked the council to describe the searches it carried out for information falling within the scope of the request, and the search terms used. She also asked other questions, as is her usual practice, relating to how the council established whether or not it held further information within the scope of the requested.

The complainant's position

20. The complainant's position is that the relevant planning officer informed him that notes of the meetings were not included within the scope of his request. However when he pointed out that they clearly did fall within its scope the council said that no information was held.
21. He further argues that it is unlikely that planning officers would attend pre-planning application advice meetings, which the developer had paid significant amounts of money for, and provided significant amounts of information to the council to consider, without making any notes of any relevant points prior to the meetings.
22. On a side issue, the complainant highlighted a complaint letter which he had sent to the council on 23 July 2019. In that letter he argues that the councils pre-planning advice service was subject to a complaint from the developer that the site had been bought on the basis of its pre planning advice. He argues that its complaint was that it was now receiving mixed messages regarding the suitability of the land for high density development.
23. In his letter to the council the complainant argues that, subsequent to this point, the tone of the advice appears to have changed to consider the possibility of high density development, whereas previously this advice had suggested that this was not suitable for the site.
24. The Commissioner understands that the point being made is to suggest that the council's advice prior to this complaint was that a high density development may not be suitable for the site, but this advice changed following the complaint by the developer. Presumably the complainant seeks to highlight that the initial pre-application notes may shed light on whether the advice previously given to the developer did state that the site was unsuitable for high density development.

The council's position

25. In response to the Commissioner's questions the council responded providing further information about how it had searched for relevant information.
26. It confirmed that in January 2018 the planning department of the council implemented a paper free environment so records are all stored electronically in its document management system.
27. It argues that on receipt of the request a search of its planning application software system (Uniform) was conducted. All planning applications, including pre-applications, are recorded in this system. It is aware that the site is known by few different addresses, so several variations of the address were searched to ensure that the relevant information was located. It provided a list of these to the Commissioner.
28. It confirmed that an email was sent to the case officer requesting copies of any additional documents which had not been saved to the document management system. Its planning policy team also confirmed that they had conducted searches of all of their shared drives, personal drives and emails, as they were asked to comment on the application during the pre-application process.
29. It said that searches of shared drives, personal drives and emails were conducted by all members of the planning policy team, however it was unable to confirm what searches were conducted by the case officer as he no longer works for the council.
30. It said that no documents relating to the pre application have been deleted or destroyed.
31. It said that it believes that the requested notes simply do not exist. It argues therefore that the complainant has received all of the pre-application advice records which it holds regarding the proposed development. It confirmed that *"There is no mention or reference to officers notes or minutes from any meetings as none were ever produced"*.
32. It confirmed that in line with its document management policy, all documents relating to this pre-application are still held by the council.
33. It said that any views or opinions expressed during the pre-application process are given without prejudice to the final consideration of any formal planning applications it receives. Although a planning officer might give an opinion from a professional point of view, this does not affect the council's position once the application has been submitted. It said that the pre-application information it generates is held for a period

of two years in order to assist any formal application. However, as there is no statutory duty to provide a pre-application service, it considers that there is no statutory requirement on the council to retain that information. Its document retention policy however states that all associated documents are retained for two years.

The Commissioner's conclusion

34. The Commissioner has carefully reviewed the submissions of both parties and their arguments put forward.
35. The Commissioner fully understands the complainant's concern and his reluctance to accept that notes are not held by the council. If the complainant's points are correct, the council was presumably paid significant amounts of money to provide the pre-application advice, and the complainant suggests that it was provided with detailed information by the developer to consider prior to the advice being provided. Insofar as the council's response is concerned however, the planning officer considered this information but wrote no notes prior to the meetings between the council and the developer.
36. The complainant's suspicions are further compounded by the planning officer's initial response, which said that notes were not within the scope of his request, whereas they would in fact clearly fall within its scope.
37. The complainant has also highlighted that when the relevant planning officer left his position at the council in May 2019, he handed over responsibility for the application to another planning officer. He questions how the planning officer who was leaving the council was able to recount, with any degree of accuracy, any detail from several meetings, over almost 10 months, if there were no notes or records relating to either the pre application meetings or the communications between himself and the developer.
38. Whilst the Commissioner can understand why minutes may not always be taken in such meetings, she is less convinced that planning officers would generally attend such meetings with no personal notes on the advice which needs to be provided. Nonetheless, she must consider that that is not impossible. There is no clear evidence that any notes were made, and the Commissioner understands that the officer concerned was a senior and experienced planning officer, who may have been able to provide advice without the need to make notes prior to the meeting. The officer no longer works for the council and so it has not been able to establish whether any handwritten notes might have been taken into the meeting but destroyed shortly after that point. He did however work for the council at the time of the request, and as stated, it was his initial response that notes were not included within the scope of the request.

39. The Commissioner has considered the searches performed by the council and explanations as to why there is no information held. She has also considered carefully the complainant's concerns and his arguments. Having considered all available information, the Commissioner does not consider that there is no specific evidence demonstrating that the council holds any further information falling within the scope of the complainant's request.
40. The council has carried out significant searches, in the appropriate sections of its records, and to an appropriate degree in order to satisfy itself that no further information is held.
41. The Commissioner is therefore satisfied that the council has demonstrated that it has reasonable grounds for considering that it does not hold any further information falling within the scope of the request, and therefore that it has complied with the requirements of Regulation 5 of the EIR in this case.
42. The Commissioner is therefore satisfied that, on the balance of probabilities, the council does not hold the requested information for the purposes of Regulation 12(4)(a) of the EIR.
43. Technically, Regulation 12(4)(a) of the EIR is subject to the public interest test. However, the Commissioner considers this is an unnecessary exercise where she has found that a public authority did not hold the requested information at the time of the request. The Commissioner cannot consider the public interest factors for and against disclosure when she has found that there is no recorded information held for potential disclosure.

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@justice.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

Andrew White
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