

Freedom of Information Act 2000 (Section 50)
Environmental Information Regulations 2004

Decision Notice

Date: 13 September 2011

Public Authority: East Sussex County Council
Address: County Hall
St Anne's Crescent
Lewes
East Sussex
BN7 1SW

Summary

The complainant submitted a request to East Sussex County Council ('the Council') for a copy of a Grant of Approval notice for a development on his land, and information about the status of that development in 1974. The Council responded and stated that it did not hold this information. The Commissioner has investigated and is satisfied that on the balance of probabilities, the Council does not hold any information within the scope of the complainant's request. He does however find a procedural breach of regulation 14(3)(a) due to the Council's failure to cite regulation 12(4)(a) when stating that it did not hold the requested information. The Commissioner does not require the Council to take any further action.

The Commissioner's Role

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

Background

2. The complainant states that in 1973, the East Sussex County planning committee granted permission for a comprehensive development of

land in Horam. The complainant owns land that was to provide the access point for the whole development. However, as a result of the Local Government Act 1972, responsibility for planning was then passed to Wealden District Council. The complainant was then apparently unable to develop his land as Wealden District Council stated that no permission had ever been granted. The complainant has approached several agencies including the police and the Serious Fraud Office about this matter but there has as yet apparently been no resolution about the exact circumstances of the planning permission application, the decision or the administration of the changeover of planning responsibility.

The Request

3. On 6 September 2009, the complainant submitted the following request to the Council:

“...a copy of the Grant of Approval Notice of the comprehensive development upon (redacted address) which included the application number K/73/1794 as proposed and deemed acceptable by the County Planning Committee of the East Sussex County Council which was passed to Wealden District Council on 1 April 1974 with all the relevant documents. I also ask that you advise me as to the status of the comprehensive development which included my land at the change over on the 1 April 1974”.

The complaint also made a subject access request under the Data Protection Act 1998 for exactly the same information.

4. On 10 September 2009 the Council acknowledged the request and asked that the complainant clarify whether the second part of his request was for the current status of the comprehensive development, or for the status of the comprehensive development as at 1 April 1974. The complainant responded on 13 September 2009 and explained that he wished to know what the status of the development was when the documents were passed to Wealdon District Council on 1 April 1974.
5. The Council responded on 22 September 2009. It stated that it did not hold the requested information because information related to the development was passed to Wealden District Council for its statutory planning register. The Council provided contact details for Wealden District Council.

6. On 9 October 2010,¹ the complainant requested an internal review of the Council's response. He provided some information to explain why he believed the requested information must be held by the Council.
7. The Council provided the outcome of its internal review on 3 December 2010. This upheld the original response that the requested information was not held.

The Investigation

Scope of the case

8. On 7 February 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

Chronology

9. The Commissioner wrote to the Council about this complaint on 5 March 2011, and discussed the complaint further during June 2011.

Findings of Fact

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10. The Local Government Act 1972 came into force on 1 April 1974. This reformed the structure of Local Government throughout England and Wales. At this point, responsibility for planning (except planning functions relating to minerals or waste) was passed to district councils, who then administered the majority of planning functions for their administrative area.

Analysis

Substantive Procedural Matters

Regulation 2

11. The Commissioner has considered whether the information requested by the complainant is environmental information as defined by the EIR.

¹ The Commissioner notes that regulation 11(2) of the EIR provides that an applicant should send any representations of appeal to the public authority within 40 working days. The complainant was therefore out of time for requesting an internal review, and Council was consequently under no obligation to conduct one. However, given that the Council chose to do so, and informed the complainant of his further right of appeal to the Commissioner, the Commissioner has gone on to consider the complaint.

12. The Commissioner considers that the information requested falls within regulation 2(1)(c): “measures (including administrative measure), 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 these elements”. This is because the proposed development – and planning decisions related to it – are ‘measures’ that would be likely to affect the elements of the environment as set out in regulation 2(1)(a). The Commissioner therefore considers the information requested by the complainant to be environmental information.

Regulation 5

13. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request. The Council’s position is that it does not hold the requested information. The complainant contests this. Where there is a dispute about whether information is held, the Commissioner will make a decision using the civil standard of the balance of probabilities test.
14. The Council’s position on this matter is clear. It states that following the local government reorganisation in 1974, all planning applications were passed to the relevant district or borough councils to manage. In this case, all relevant documents would have been transferred to Wealden District Council because of the location of the proposed development. Nevertheless, the Council has searched its internal Council planning register that covered the period 1970 to 1974 and its filing database for archived records. Neither of these searches have returned any documents with the references specified by the complainant. The Council also points out that even if it had retained copies of the documents referred to, they would have been destroyed after seven years in line with its retention policy.
15. The complainant has concerns that information in this file may not have been passed to Wealden District Council. This is presumably because he has had problems securing the requested information from this body. The Commissioner has made enquiries of the Council to try to determine that the information was definitely passed to this other public authority. However, the Council explains that it does not know whether there was any policy or procedure for administering the handover of files in 1974. It does not hold any such policy now. The Council emphasises that these events took place nearly 40 years ago. It has considered the possibility that there might be reference to the administrative handover process in committee reports or minutes dating from the 1970s. Searches have been conducted of records held

there, and within the Council itself. No policy can be found. However, the Council is confident that the information would have been transferred to the District Council, because district councils took over responsibility for planning matters after this date. It cannot however confirm that the records definitely were transferred, but points out that in any case, it cannot locate any of the requested information within its own records now.

16. The complainant has provided the Commissioner with submissions and extensive documents concerning the original development and the subsequent debate over it and documents associated with it. Much of the complainant's submission focuses on his belief that the Council *should* have created or retained certain information, and his dissatisfaction in the way that the application for the development was handled. The Commissioner wishes to emphasise that his remit in complaints of this nature is solely to investigate whether a public authority has dealt with a request in accordance with the EIR.
17. Aside from these arguments, the complainant's grounds for believing that the Council holds the requested information are as follows:
 - o Records of a Hailsham District Council meeting in January 1974 show that a member of the County Planning department, along with another signatory, put his initials to a notice attached to three applications which were to be passed to the new Wealden District Council for them to continue the process of the comprehensive development.
 - o Another note from the agenda suggests that adjourned applications to be refused by the County Council, so that fresh applications should be made to Wealden District Council. The complainant believes that this policy was adopted, and the fact that he was not informed that his application had been refused means that it had already been approved by the County Council. Also, on a draft layout sketch plan of the comprehensive development the relevant application number was marked in "heavy bold print" on the outline plan, which the complainant believes "could only have been sanctioned by the full planning committee showing what had been approved".
 - o At an appeal hearing of 12 November 1974, in a statement concerning an appeal against a different planning permission, Wealden District Council's senior planning officer detailed permissions that had recently been granted

in the area. One of those listed was the comprehensive development relevant to the complainant's request. The officer stated that "the former county planning department has produced an overall scheme for the site for 56 residential units and a revised application is awaited". The complainant believes that in order to produce this statement, the officer must have referred to files forwarded to Wealden District Council.

18. The Commissioner does acknowledge that the complainant has experienced much difficulty in trying to establish the exact circumstances of the events that led to him being unable to develop his land. He has provided the Commissioner with circumstantial evidence that suggests that the County Council did approve this development. However, he has not provided the Commissioner with any evidence to suggest that the requested information is held by the County Council now. As emphasised above, the Commissioner's remit is only to establish whether a public authority has complied with the EIR. He cannot look into the wider issue of what exactly happened regarding the planning permission for the development, or investigate the Council's record-keeping practices during the 1970s. The Commissioner also acknowledges the Council's point that relevant members of staff who might have had some knowledge of this particular matter, or the wider process of the handover of planning, have all long since left the Council.
19. The Commissioner is aware, both from a previous complaint made to him about this issue, and correspondence provided to him by the Council, that the complainant has made several previous requests for this information both prior to, and under the Act. The matter has been the subject of dispute between the complainant and the Council for many years. The Commissioner notes that the Council has consistently stated that it does not hold the requested information. In a letter to the Commissioner of 5 April 2011, the Council writes "...I am at a loss to know what more I can add, other than we have made extensive searches in both current and archived records but that we do not hold the information requested".
20. The Commissioner acknowledges that it is always difficult to conclusively prove that information is not held. In this case, the Council cannot verify that the information was definitely passed to Wealden District Council. Although he acknowledges the complainant's very comprehensive submissions on this matter and the wider history of the proposed development, the Commissioner is satisfied on the balance of probabilities that the council does not hold the requested information. This is because of the comprehensive nature of the searches

undertaken by the Council, the likelihood that the information was passed to the district council as a result of the Local Government Act, the amount of time that has elapsed, and the fact that the Council's retention policies mean that this information would have been destroyed some years ago even if it were held.

Regulation 14

21. Regulation 14(3)(a) provides that a refusal notice should specify any exceptions that a public authority relies upon. In this case, the Council responded to the request under the Freedom of Information Act. Under section 1(1)(a) of the Act, a public authority that does not hold the requested information needs only to state this in its response.
22. However, the Commissioner has determined that this request should have been dealt with under the provisions of the EIR. Regulation 12(4)(a) of the EIR provides an exception which should be cited where information is not held. As the Council failed to cite this specific exception, the Commissioner finds a breach of regulation 14(3)(a).

The Decision

23. The Commissioner's decision is that the Council does not hold any information within the scope of the complainant's request. However, he finds that the Council breached regulation 14(3)(a) by failing to cite regulation 12(4)(a) in its refusal notice.

Steps Required

24. The Commissioner does not require the Council to take any further action.

Right of Appeal

25. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 13th day of September 2011

Signed

**Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Regulation 2 - Interpretation

Regulation 2(1)

In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“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;

Regulation 5 - Duty to make available environmental information on request

Regulation 5(1)

Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 11 - Representation and reconsideration

Regulation 11(1)

Subject to paragraph (2), 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.

Regulation 11(2)

Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(4)

For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant's request is received;

Regulation 14 - Refusal to disclose information

Regulation 14(3)

The refusal shall specify the reasons not to disclose the information requested, including – any exception relied on under regulations 12(4), 12(5) or 13