

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

Date: 31 January 2013

Public Authority: North East Derbyshire District Council
Address: Council House
Saltergate
Chesterfield
Derbyshire
S40 1LF

Decision (including any steps ordered)

1. The complainant made four requests for information related to a specific area of land and one request related to planning complaints. North East Derbyshire District Council ('the council') supplied some information but the complainant disputed that he had been provided with all information held.
2. The Commissioner's decision is that, on the balance of probabilities, the council has provided all information it holds for requests 1, 2 and 3. The Commissioner has also decided that the council has not supplied the information it holds for request 4 and has not adequately dealt with request 5.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the schedule requested at request 4.
 - Issue a fresh response to request 5, providing advice and assistance to the complainant as necessary.
4. The public authority 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.

Request and response

5. The Commissioner notes that there have been numerous pieces of correspondence between the complainant and the council since the first request made on 1 February 2012 and the internal review response of 20 June 2012. However, he has only included those directly relevant to the information requests in this section.

Request 1 – council ref. 1007

6. On 1 February 2012 the complainant made the following request for information:

“I [complainant], request under The Freedom of Information Act, copies of all correspondence pertaining to area marked in red SLA 100019665 2012 since 1950 and Local Plan Inspectors Report 2005, recommendation IRGS45 and EC(6) to land adjacent to mine”.
7. The council responded on 17 February 2012 confirming that it does hold the requested information and provided a bundle of paperwork.
8. On 10 May 2012 the council wrote to the complainant stating that it may not hold information dating as far back as 1950 as some will have been destroyed under the council’s document retention policy, that some is on microfiche, and some relates to matters prior to the complainants ownership and is held on a different file. It enclosed copies of the previous enforcement file and stated it was arranging for the microfiche information to be located.
9. The complainant expressed his dissatisfaction with the response on 14 May 2012. He stated that the correspondence supplied only really covers 1989/90 and the original planning issue with the erection of the original stables. He also stated that there has been numerous correspondence since 1996 and none of this has been included.
10. The council wrote to the complainant again on 7 June 2012 stating that it was enclosing the remaining contents of the files which comprise the subject matter of the complainant’s request.
11. The council provided its internal review response on 20 June 2012. It stated that all correspondence held on the site identified and also the relevant extracts from the Local Plan Inspectors report has been provided in addition to a number of items already in the public domain namely details of three planning applications determined within the defined area (NED888/868, NED589/515 and NED1089/1086). It also stated that it was the council’s intention to send planning application information held for a number of other applications that have been

submitted and determined within the defined area (879/954, 1080/1261, 897/564, 398/182, 00/969 and 05/401), even though the information is already in the public domain, along with correspondence on the parking of HGVs on the site that has not previously been provided and confirmed on 22 June 2012 that this information had been sent. In respect of planning applications 00/969 and 05/401 the council asked the complainant for his instructions as these applications relate to the erection of a goat shed and a garage respectively, and so not the matter in hand, and were made in the complainant's name.

Request 2 – council ref. 1008

12. On 1 February 2012 the complainant made the following request for information:

“In response to the planning contravention notice 17/01/2012 my lawyer requests copies of all photographs and council records of the site for August 2002. Please supply the requested information within 24 hours.”

12. The council responded on 3 February 2012 and stated that it does not hold the requested information. The council explained that the reference to August 2002 was mistaken and that the relevant date was July 2002 and attached a copy of the photograph taken on that date.
13. An internal review was requested by telephone on 8 June 2012 and the council provided a response on 20 June 2012. It stated that the request has been fully met and requested that the complainant advise the council if he believes the information has been deficient.

Request 3 – council ref. 1009

14. On 3 February 2012 the complainant made the following request for information:

“Can you please clarify why [named individual] was taking photographs of my garden dated 2/7/2002. Please forward copies of all photographs taken of my property and the reasons why since Dec 1996.”

15. The council responded on 3 February 2012 and stated that the photograph previously supplied was on the council's enforcement file and therefore would have been taken as part of Mr Lawson's activities as Planning Enforcement Officer.
16. The council also responded on 17 February 2012 and provided a bundle of paperwork.

17. An internal review was requested by telephone on 8 June 2012 and the council provided a response on 20 June 2012. It stated that the request has been fully meet and requested that the complainant advise the council if he believes the information has been deficient.

Request 4

18. On 21 February 2012 the complainant made the following request for information:

"We also require the schedule of ALL site visits to this property from December 1996 to the present, stating the purpose of the visits. We have had numerous visits from the Planning Department since 1997 and from our recollection, all were unannounced. It was also reported to us by an immediate neighbour that on at least 3 occasions an official person was seen wandering around our land taking photographs. If this was the Planning Department, we require copies of all photographs that pertain to this property."

19. The Commissioner has not seen evidence that this request was responded to but notes that the internal review response provided on 20 June 2012 referred to this request. The council stated that all information held on enforcement files had been provided along with the purpose of the visits. It further stated that it was unsure what further information was required and requested that the complainant advise the council if he believes the information has been deficient.

Request 5

20. On 21 February 2012 the complainant made the following request for information:

"Please confirm over the last 18 months how many Planning complaints were reported to the NEDDC Planning Department and of these how many were dealt with on the same day, in the same manner as we were?"

21. The Commissioner has not seen evidence that this request was responded to but notes that the internal review response provided on 20 June 2012 referred to this request. The council apologised for not previously advising of the total number of complaints and advised that it received 752 complaints from 1 April 2010 to 31 March 2012. It further stated that it does not hold information relating to the speed of the complaint investigation.

Scope of the case

22. The complainant contacted the Commissioner on 12 June 2012 to complain about the way his request for information had been handled. The complaint was closed on 16 August 2012 when the Commissioner wrote to the complainant requesting further documentation needed in order to progress the complaint. This case was then opened on 5 September 2012 following receipt of the required documentation.
23. The Commissioner considers the scope of the case to be whether the council has complied with the EIR and supplied all the relevant information it holds pertaining to the complainant's requests.

Reasons for decision

Is the information environmental?

24. As the council has on some occasions referred to the requests as EIR requests and on others as FOIA requests, the Commissioner has considered whether the information is environmental.
25. Regulation 2(1) of the EIR defines 'environmental information' as having the same meaning as in Article 2(1) of Council Directive 2003/4/EC:
"...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;
 - (d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)'.

26. In the Commissioner's view, the use of the word 'on' indicates a wide application and will extend to any information about, concerning, or relating to the various definitions of environmental information.
27. The Commissioner considers the requested information to be information on a measure, namely planning, likely to affect the elements and factors referred to in Regulation 2(1)(a) and 2(1)(b) and is therefore satisfied that this constitutes environmental information by virtue of Regulation 2(1)(c).

Is the information held?

29. Regulation 5(1) of the EIR states that:

"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."

30. 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. He will also consider the actions taken by the authority to check that the information is not held and he will consider any other reasons offered by the public authority to explain why the information is not held. He may also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held, he is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
31. The complainant alleged the following:
 - a. That he has only received information for 1989/90 but he viewed the history file for this property in 1997 (file N405), which at that time was a considerable size and certainly contained information beyond the dates of 1989/90.

- b. He finds it hard to believe that all data prior to 1988 has been destroyed.
 - c. He has received very little correspondence beyond the early 1990s to the present date and as an example he stated that the council has referred to NED/879/954 and NED/1080/1261 in the past but no correspondence has been supplied regarding these applications.
 - d. He was notified by neighbours on several occasions that a professional looking person was on his land was taking photos and he believes this to be a member of the Planning Department.
 - e. He believes that a database/log would need to be kept of the date of complaint and any course of action taken. He states he has in his possession at least 2 references that substantiate that this indeed happened in his case and believes it should be possible to extrapolate the data requested.
32. The Commissioner asked the council to comment on points a) to e) above and received the following responses:
- a. I can confirm that all the information from file N405 held by the Council was released to [complainant]. This is with the exception of one map, which does not relate to the area of land in question.
 - b. As background [named individual], Planning Manager, has been in post for approximately 7 years, however he was previously employed by the Council between 1994-1999, as a Planning Officer. [named individual] recalls that a 'culling' exercise was instigated by the previous management around 1994 and continued ad-hoc through to the late 1990's / early 2000's. This was to rationalise and reduce files due to space. This primarily resulted in the separation off of determined applications from the general history file, which had previously held determined planning applications and so formed part of a history file. The planning applications are now held separately as stand alone files. This creates two different hard copy filing systems. Each file would have been assessed and a decision reached about what needed to be kept and what could be destroyed.

To the best of our knowledge no further culling of history files has taken place other than as above.
 - c. As stated above [complainant] has received all of the content of file N405. [Complainant] has also received the content of 879/954 – residential applications and 1080/1261 – residential applications.

- d. We are unable to comment on this statement as no dates / details have been provided.
- e. A complaint has already been released as part of file N405.
33. The Commissioner enquired as to whether the information has ever been held, the scope, quality, thoroughness and results of the searches carried out by the council and whether copies of information may have been made and held in other locations. The council stated that all available files have been checked and released and explained that microfiche files were searched and hard copies provided and that no separate electronic records are kept of the information set out in the request. The council has no electronic document management system within the Planning department. It further stated that it could not provide a precise answer for when information was destroyed as in general it does not keep records on destruction dates as this would be too onerous and adds no value to its work.
34. The Commissioner also enquired as to what the council's record management policy says about records of this type and was informed that the council's Document Retention Guidelines state that the majority of planning and land use documents should be destroyed after 15 years unless by law it is required to keep them indefinitely.
35. In reaching a decision as to whether the requested information is held, the Commissioner has also considered whether there was any legal requirement or business need for the council to hold the information. The council stated that planning applications need to be retained statutorily (section 69 of the Town and Country Planning Act 1990 and the relevant sections of The Town and Country Planning (General Development Procedure) Order 1995) and that these are referenced by year. It clarified that file N405 is a 'history' file which is maintained as useful background for a period of time.
36. The Commissioner also considered whether the council had any reason or motive to conceal the requested information. He appreciates the complainant's view that he was refused additional time to reply to a PCN (Planning Contravention Notice) while he waited for the reply to his requests but the Commissioner does not see this as evidence of a reason or motive to conceal the requested information.

Request 1

37. The council provided information in response to this request on 17 February 2012, 10 May 2012 and 7 June 2012. On 22 June 2012 it confirmed to the complainant that all correspondence held on the site, and the relevant extracts from the Local Plan Inspectors report, has

been provided along with planning applications already in the public domain.

38. Although the complainant alleges that he has not received information pre-dating 1989/1990, the Commissioner notes that the council informed the complainant on 10 August 2012 that the oldest documentation it holds regarding the complainants property dates back to 1979 (held on microfiche and relates to heavy goods vehicles) and has been provided to the complainant.
39. In the circumstances, taking into consideration the council's explanation regarding the 'culling exercise', its statement that the complainant has received the content of NED/879/954 and NED/1080/1261, and the response to the Commissioner's enquiries detailed at paragraphs 33 to 35, he does not consider that there is any evidence that would justify refusing to accept the council's position that it does not hold any further information relevant to this request. The Commissioner is therefore satisfied that on the balance of probabilities, further information is not held by the council. Accordingly, he does not consider that there was any evidence of a breach of regulation 5(1) of the EIR.
40. Specifically in relation to the applications 00/969 and 05/401 (erection of a goats shed and garage), the Commissioner notes that the council has informed the complainant that these are already in the public domain and it does not intend to send copies. The Commissioner considers that regulation 6(1)(b) applies;

"Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless –

...the information is already in the public domain and easily accessible to the applicant in another form or format";

and therefore the council has no duty to make the information available under regulation 5.

Request 2

41. Taking into consideration the council's explanation that the reference to August 2002 was mistaken and that the relevant date was July 2002, the fact that a copy of the photograph taken on that date was provided, and the responses to the Commissioner's enquiries detailed at paragraphs 33 to 35, he does not consider that there is any evidence that would justify refusing to accept the council's position that it does not hold any further information relevant to this request. The Commissioner is therefore satisfied that on the balance of probabilities, further information is not held by the council. Accordingly, he does not

consider that there was any evidence of a breach of regulation 5(1) of the EIR.

Request 3

42. The Commissioner notes that as well as requesting copies of all photographs taken of his garden since Dec 1996, the complainant also asked for clarification as to why a named individual was taking photographs of his garden dated 2 July 2002 and the reasons why any other photographs has been taken.
43. Public authorities are not required to provide 'clarification' unless such clarification is held as recorded information. The Commissioner notes that the council did however provide clarification of why a photograph was taken on 2 July 2012 by stating that it was taken as part of the named individual's activities as Planning Enforcement Officer.
44. The Commissioner has considered the complainant's statement that he was notified by his neighbours on several occasions that a professional looking person was on his land taking photographs but he has not been provided with any evidence that this was a member of the Planning department. Taking into consideration the responses to the Commissioner's enquiries detailed at paragraphs 33 to 35, he does not consider that there is any evidence that would justify refusing to accept the council's position that it does not hold any further information relevant to this request. The Commissioner is therefore satisfied that on the balance of probabilities, further information is not held by the council. Accordingly, he does not consider that there was any evidence of a breach of regulation 5(1) of the EIR.

Request 4

45. The council has stated that the complainant has all the papers from its enforcement files which set out when the property was visited, along with the purpose of the visits, therefore it doesn't believe that a schedule is necessary. The complainant has pointed out to the Commissioner that he wasn't asking for details from the enforcement files but has requested a schedule of all site visits and therefore he believes a schedule is necessary and reasonable to ask for.
46. In his guidance on 'Determining whether information is held'¹, the Commissioner states that the extraction of existing information and

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http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freed

presenting as a schedule is not the creation of new information. The Commissioner also considers that public authorities are required to provide summaries for environmental information when requested, as long as it is reasonably practical to do so.

47. As the council has confirmed that the information it holds sets out when the property was visited, along with the purpose of the visits, the Commissioner considers that extracting this information and presenting it as a schedule is reasonably practical to do as it would only require a reasonable level of judgement to identify the relevant building blocks, that are known to be held, into the format requested. Therefore, the Commissioner considers that the requested information is held and that the council has breached regulation 5(1) of the EIR by not providing it.
48. The Commissioner considers that the part of this request requiring 'copies of all photographs that pertain to this property' has been dealt with as part of request 3.

Request 5

49. The Commissioner notes that the council provided the number of complaints it had received from 1 April 2010 to 31 March 2012 which is over a period of two years rather than the requested 18 months.
50. The council stated that it does not hold the data requested on the speed of the complaint investigation so it cannot advise how many were responded to within 24 hours.
51. The Commissioner notes that the council do hold a database of all complaints that are found to be unauthorised development but it has stated that this does not reliably track when complaints were made and when they were visited. Although the council has not provided further details to the Commissioner, he considers it is feasible that such a database would record some information as to when the complaint was made and when it was investigated.
52. In his guidance on 'Determining whether information is held' referred to above, the Commissioner states that in most cases when information is held in electronic files and can be retrieved and manipulated using query tools or language within the software, that information is held for the purposes of FOIA and the EIR. The use of query tools or languages does

not involve the creation of new information. Their use should be viewed simply as the means of retrieving information that already exists electronically.

53. As the Commissioner considers it feasible that some dates would be recorded in the council's complaint database, it therefore follows that the information requested by the complainant may be held. If the dates required to produce the exact information requested are not held in the database, it is feasible that other information relating to the speed of the complaint investigation could be held in the database which the council should consider providing to the complainant in line with its duty at regulation 9 of the EIR to give appropriate advice and assistance.

Statutory time for compliance

54. The council did not supply all of the requested information within 20 working days of the requests. This is a breach of regulation 5(2) of the EIR which states that information shall be made available as soon as possible and no later than 20 working days after the date of receipt of request.

Other matters

55. The Commissioner wishes to remind the council that where any information requested would constitute the personal data of the requestor, that information should be considered in accordance with the subject access provisions of the Data Protection Act 1998. However, in this case, the Commissioner accepts that this would not ultimately have resulted in the complainant being provided with further information.
56. The Commissioner also wishes to comment that the piecemeal disclosure of information in this case has not been helpful for either the complainant or the Commissioner in determining whether all the requested information has been provided. Although the council has an opportunity to provide further information in its internal review response, in future it should endeavour to provide all information it holds within the scope of the request in the initial response.

Right of appeal

57. 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

58. 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.
59. 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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