

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 18 January 2017

Public Authority: Essex County Council
Address: County Hall
Chelmsford
Essex
CM1 1LX

Decision (including any steps ordered)

1. The complainant has requested all documentation regarding the Integrated Waste Management Facility (IWWMF) application (original and addendum). Essex County Council (the council) initially responded by providing a link to the planning application associated with the IWWMF in question. In his request for an internal review the complainant stated that the information was required in permanent form, such as on a disk or USB drive. The council maintained its position that the information was publicly available. During the course of the Commissioner's investigation, the council clarified that all of the requested information was available to view on the planning register at County Hall with the exception of legal advice which it maintained was excepted from disclosure under regulation 12(5)(b).
2. The Commissioner's decision is that the council has correctly engaged regulation 6(1)(b) in stating that the majority of the requested information was publicly available and easily accessible. The Commissioner also finds that the council was correct to rely on regulation 12(5)(b) to withhold the legal advice. However, as the council had not issued a refusal notice within 20 working days, the Commissioner finds that the council has breached regulation 14(2).
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 10 March 2016 the complainant made the following request for information under the EIR for:

"I would like a copy of all and any documentation held by ECC with respect to the IWMF application (both the original and the addendum). Please can you advise as to how these can be made available?"
5. The council responded on 16 March 2016 and advised that the information was publicly available on the website. It provided a link to the planning portal and advised that using the planning reference *ESS/34/15/BTE* as a search term would return the requested information.
6. The complainant requested an internal review on 23 March 2016 in which he explained that he could not access the information due to limited broadband speeds, and asked whether it was possible to have the information in a permanent form, such as on disk or pen drive.
7. The council emailed the complainant the outcome of the review on 19 May 2016, in a letter dated 26 April 2016. The review maintained the council's original position that the information was publicly available. However, the council also advised that in the event that the request required it to provide the information in the form specified, regulation 12(4)(b) applied.
8. On 20 May 2016 in correspondence following the internal review response, the complainant stated that he would be prepared to visit the council to use its computer to copy the information himself. In response to this email, the council responded on the same day inviting the complainant to visit County Hall to look at the paper version of the application. It also advised that it could provide access to a computer to view that part of the information which is only held electronically. It stated that the connection at County Hall may be better than the complainant's home internet connection. It also advised that all Essex libraries have free internet access and again, these may be faster than the complainant's home connection.

Scope of the case

9. The complainant contacted the Commissioner on 6 July 2016 to complain about the way his request for information had been handled. He considered that as the planning application contains several hundreds of documents, directing him to the planning portal did not constitute a response to his request.
10. The Commissioner has therefore considered whether the council's response to direct the complainant to publicly available information was correct.

Reasons for decision

Information in scope of request

11. The council has explained to the Commissioner that it interpreted the complainant's initial request to be for information about how a copy of the specified planning information can be made available. It has described it as "*an act preparatory to making an EIR request*" as the second sentence stated "*Please can you advise as to how these can be made available?*". The council therefore questions whether the information covered above was caught by the request. The Commissioner does not accept this as an objective reading of the request as it is clear that the first part of the request specified that a copy of the information was required: "*I would like a copy of all and any documentation held by ECC with respect to the IWMM application (both the original and the addendum)*". Even if the original request could have been considered to be ambiguous, the internal review made it clear that the complainant sought permanent copies of the requested information:

"Thanks for this but this response simply points me to a web page. I don't actually believe this meets the requirement as it simply tells me where it is and does not actually provide the information. Furthermore there is a significant amount and I believe its unreasonable to expect me to select and down load several hundred of documents of varying sizes individually, consequently and as they

already exist on the server in and electronic format, is it possible to have a disk or stick for which I will happily pay?"

12. The Commissioner views an objective reading of this request to be to have the information in question communicated to him.
13. There has also been some confusion as to which planning applications the request related to. The council initially directed the complainant to ESS/34/15/BTE, and this was not disputed by the complainant as being incorrect information until the council disclosed some information on a USB drive as a matter of good customer service. The council has explained that the request was taken as being for ESS/34/15/BTE because the complainant referred to the "original application and the addendum". An addendum was made to ESS/34/15/BTE by the developer, and the council therefore determined that the complainant was requesting all information relating to ESS/34/15/BTE, it being an original application subject to an addendum. The Commissioner agrees with this as a reasonable interpretation of the information in the scope of the request.

Regulation 6(1)(b) - form and format of information

14. In this case, the relevant exception is regulation 6(1)(b). This states that:

"(1) 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 –

(b) the information is already publicly available and easily accessible to the applicant in another form or format."
15. The council did not specifically state that it was relying on regulation 6(1)(b), however, in directing the complainant to the publicly available information, both online and at County Hall it is clear to the Commissioner that this is the correct regulation in the circumstances.
16. Regulation 5(1) states that a public authority must make information available on request. In terms of the EIR, this is understood to mean providing access to information, as well as providing copies. This is clear from the wording of regulation 8 which instructs that public authorities may not make a charge for information contained in a public register or to

examine the information at the place where it is available for examination. Therefore, the Commissioner is satisfied that inviting a requester to view the planning register, or directing them to an online source, is compliant with the EIR in terms of making information available.

17. In the Commissioner's initial investigations, it was established that the planning portal was not operational in respect of the planning application ESS/34/15/BTE. However, the complainant confirmed to the Commissioner that the planning portal had been operational at the time of his request, but that it was intermittent and that his broadband limitations meant that downloading each and every document was not practical.
18. The council initially explained to the complainant that to put the documents onto a USB drive or disk was not as simple a task as he believed it to be. It stated that there was no way for the documents to be downloaded in one go or in batches; rather each one would have to be downloaded separately, which would be a time consuming task.
19. However, once the council learnt that the information was not currently available on the planning portal, it provided the complainant with a USB drive of the documents contained in the planning application ESS/34/15/BTE on 13 December 2016. It advised the Commissioner that it did so as a matter of good customer service. The council also explained to the Commissioner that it took 11 hours of council officer time to download the relevant files, it then took a further 8 hours to copy the files to a USB drive, and format it in a way which would be useable by the complainant as the standard format at the council is to encrypt information to be viewed and used only by other council equipment.
20. On receipt of the USB drive, the complainant then disputed that all the information he requested had been provided. The complainant stated to the council that he had not only requested the information at ESS/34/15/BTE, but also that at ESS/55/14/BTE. The council explained to the complainant that during the course of dealing with this request, it had always been understood that ESS/34/15/BTE was the requested information. This was the application number referred to in the original response on 16 March 2016, and was not disputed at any time until the complainant's email to the council on 13 December 2016. The council clarified to the complainant that the USB drive contained the following information:

"The USB storage device we sent you includes all the application ESS/34/15/BTE, which is the planning application for the development of Rivenhall IWMF which was current at the time of your enquiry and also seemed to fit the bill because it was also the application which was subject to an addendum submitted by the developer. The documents on the device included all the application documents for this application – both as originally submitted - and all the amendment documents on the amendments to that application (your email referred to the 'original application and the addendum'). That, we understood, is what you had enquired about in March 2016."

21. The council also explained that the information held in respect of ESS/55/14/BTE was available online, and comprised 19 documents. The commissioner can confirm that there is no issue with accessing this information on the planning portal.
22. The complainant also informed the Commissioner that the information provided did not contain any objections to the planning application. He stated that he submitted an objection, and this has not been made available. He also stated that the information provided did not contain any legal advice in respect of changes to the capacities of the IWMF.
23. The Commissioner raised these issues with the council. With regard to the objections, the council advised that these were held as part of the relevant file on the paper planning register, but were not published online in order to comply with the Data Protection Act 1998. The Commissioner then enquired whether all the requested information was on the planning register, and whether the council had offered the complainant the option of viewing the planning register. The council confirmed that on 20 May 2016, it had offered the complainant a viewing of the information at County Hall, and gave him the details of the person to contact to arrange this.
24. The Commissioner enquired whether all the requested information was contained in the planning register. The council confirmed that all the information it held falling within the scope of the request is available to view on the planning register, with the exception of some legal advice. The council has explained that the legal advice in question was subject to a previous request for information submitted by the complainant on 11

September 2015. The council's response to this request was that the information was excepted from disclosure under regulation 12(5)(b) as it was covered by legal professional privilege. The council has confirmed that the complainant did not request an internal review of this response, and has also confirmed that regulation 12(5)(b) still applies in respect of this request.

25. It is the Commissioner's view that although at the time of the initial response of 16 March 2016, the planning portal was operational in respect of ESS/34/15/BTE, it was not a full response in terms of the EIR. This is because the request is quite broad; *"I would like a copy of **all and any** documentation held by ECC with respect to the IWMF application (both the original and the addendum)"*. During the course of the Commissioner's investigation, it was established that the objections and legal advice were not part of the information available on the online planning portal, but that the objections were available to view in the planning register, which the council had invited the complainant to view on 20 May 2016.
26. It is clear to the Commissioner that by inviting the complainant to view the information, the council has made the information available in accordance with regulation 5(1). Regulation 6(1)(b) means that despite the fact that the complainant asked for the information to be provided in permanent form on a USB drive, the information was otherwise publicly available and easily accessible. The Commissioner therefore finds that the council was correct to direct the complainant to other publicly available and easily accessible sources of the requested information.
27. This finding is with exception to the legal advice, which is not publicly available, and which the Commissioner will now go on to consider.

Regulation 12(5)(b) – Course of justice

28. Regulation 12(5)(b) provides an exception from the duty to disclose information where the disclosure would adversely affect "the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature". The Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege.

29. In this case, the council has explained that the information in question is legal advice which was sought regarding whether the application ESS/34/15/BTE could be considered as an amendment rather than requiring a full new application. It has argued that disclosure of the legal advice in question would compromise the council's ability to receive a fair trial and therefore the course of justice would be adversely affected. It has also argued that any of the council's decisions could be subject to a legal challenge and its position in any such legal action would be adversely affected if it had to disclose legal advice received.
30. The council has had regard to the complainant's view that as the planning application had been determined at the time of his request, the legal advice in question must be available for disclosure. The council has argued that at the time of the request in March 2016, the decision (ECC061852-15) was still recent, and the advice therefore still had not lost the confidence attached to it.
31. The Commissioner has considered that the decision on the planning application had recently been determined at the time of the request, but she agrees with the council that the legal advice still attracts privilege, and therefore she finds that the exception at 12(5)(b) is engaged.
32. The next step therefore is to determine where the balance of the public interest lies. The council has stated that in favour of disclosure on the information, there is a clear public interest in ensuring that public bodies take decisions which may affect the environment in an open and transparent way. It suggests that this is the reason that the EIR were enacted.
33. In favour of maintaining the exception, the council has argued that courts and tribunals have repeatedly made it clear that strong weight must be given to legal professional privilege, and that it is generally in the public interest for legal advice to remain confidential, otherwise public authorities may be deterred from seeking legal advice, or the advice that is provided is may be more circumspect than would otherwise be the case.
34. The council's view is that the balance of the public interest in this case favours maintaining the exception.

35. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their actions, particularly with regard to information subject to the EIR, regulation 12(2) of which states that a public authority shall apply a presumption in favour of disclosure.
36. However, the Commissioner has observed that the public interest in maintaining this exception is a particularly strong one. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors. In this case, the Commissioner does not consider that the public interest in disclosure equals or outweighs the strong public interest that is inherent in maintaining the council's right to obtain legal advice in confidence. She therefore finds that the council was correct to withhold the legal advice under regulation 12(5)(b).

Regulation 14(2)

37. Regulation 14(1) states that if a request for information is refused by a public authority "*the refusal shall be made in writing*". Regulation 14(2) requires that "*the refusal shall be made as soon as possible and no later than 20 working days*", and regulation 14(3) states that the refusal "*shall specify the reasons not to disclose the information requested*".
38. In this case, the complainant did not receive a valid refusal notice until the internal review, which although was dated 26 April 2016, was not provided to him until 19 May 2016. The council therefore did not provide a valid refusal notice within 20 working days and so the Commissioner finds a breach of regulation 14(2).

Right of Appeal

39. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

40. 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.
41. 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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