

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

Date: 5 August 2022

Public Authority: Rossendale Borough Council
Address: Haslingden Old Road
Rossendale
BB4 6RE

Decision (including any steps ordered)

1. The complainant has requested information on specific planning applications around the subject of contaminated land. Rossendale Borough Council ("the Council") answered parts of the request, providing links to the public file, and withheld some communications under regulation 12(4)(e) of the EIR.
2. The Commissioner's decision is that in respect of communications with the agent the Council has complied with regulation 5(1) and provided all the information it holds. However, the Commissioner finds the Council has incorrectly applied regulation 12(4)(e) to the communications between itself and Salford City Council officers.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information described at part 1(a) of the request with appropriate redactions for any personal data.
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. On 4 January 2021 the complainant made a request to the Council for information in the following terms:

“1. Please supply full details of all communication between Rossendale Borough Council (as the Local Planning Authority) and:

- a) The Senior Environmental Health Office of Salford City Council (or person acting on his behalf)
- b) Hurstwood Holdings (or their agent).

in respect of the Contaminated Land Remediation Strategy for planning application nos 2020/0039 and 2015/0517 (Land off Johnny Barn Close), between 1/6/2020 and 29/12/20.

2. Please supply copies of:

- a) ‘A Remediation Strategy and Gas Protection Verification Plan for Land at Johnny Barn Farm, Rossendale Issue 1.3 (03 July 2020)’ as referred to by the Senior Environmental Health Officer at Salford City Council in his correspondence to Rossendale Borough Council dated 10/7/20 (planning portal date entry).
- b) Issue 1.2 of the same plan, if one exists.

3. Please confirm whether or not the applicant’s proposals for the sampling and testing of material around the swale, highlighted as an issue in the above correspondence by the Senior Environmental Health Officer of Salford City Council, are in place.

The above information is required to enable potential contamination receptors (residents adjacent to the development site) to assess whether or not proper health protection measures have been put in place to protect from the adverse effect of asbestos and hazardous ground gases found in Made Ground samples taken from the site.”

6. The Council responded on 8 February 2021 stating that information was held but was being withheld under section 36 of the FOIA.
7. The complainant requested an internal review on 15 February 2021. They argued the request should have been handled under the EIR. The Council responded on 1 April 2021 acknowledging the request should have been considered under the EIR. For the first part of the request the

Council now sought to rely on the regulation 12(4)(e) exception to withhold the information it held. For the other parts of the request the Council stated that the reports referred to had now been located and provided a link to the application and documents.

8. The complainant responded further on 6 April 2021 expressing dissatisfaction with the decision to withhold information and also raising concerns that no position had been stated on disclosure of communications with the developer Hurstwood Holdings or their agent. The Council responded and stated after searching its records it had concluded that any correspondence between itself and Hurstwood Holdings was uploaded to the Council's planning file in an unredacted form.

Scope of the case

9. The complainant contacted the Commissioner on 28 April 2021 to complain about the way their request for information had been handled.
10. The Commissioner considers the scope of his investigation to be to determine if all the information in the scope of part 1 of the request has been identified and if the information that has been withheld engaged the regulation 12(4)(e) exception under the EIR.

Reasons for decision

Regulation 5(1) – duty to make environmental information available

11. Regulation 5(1) of the EIR says that a public authority that holds environmental information shall make it available on request.
12. For clarity, the Commissioner is not expected to prove categorically whether the information is held. He is required only to make a judgement on whether the information is held on the civil standard of proof i.e. on the balance of probabilities.
13. In this case the complainant was concerned that not all the communications between the Council and the agent/Hurstwoods had been published on the planning portal. The complainant raised this with the Council in a communication on 4 June 2021, with three specific points being put to the Council. The Commissioner asked for the Council's comments on these points and also asked for details of the searches carried out by the Council to locate information in the scope of part 1 of the request.

14. The Council explained that in responding to this part of the request it conducted searches of electronic records by asking officers to check electronic files, paper records and the Council's portal. The Council experienced some difficulties as some officers have left the Council since the validation of the application but other officers were asked to check other users email accounts, where still active, as well as their own.
15. Whilst the Council has not gone in to significant detail in respect of the searches it initially carried out it has provided more detail with regard to the points the complainant raised in their correspondence of 4 June 2021 which the Commissioner will go on to consider shortly.
16. The Commissioner notes this part of the request was clearly formulated and specific; asking for communications with the agent/Hurstwood Holdings on the subject of contaminated land strategies in relation to two planning applications. The request also provided a time period of six months. This clear formulation of the request, in the Commissioner's view, would have made searching for relevant information a straightforward matter and if the Council has searched email accounts and electronic records using keywords, given the clear parameters of the request, it is reasonable to conclude that relevant information would have been returned. However, for completeness the Commissioner now turns to the complainant's three specific areas of concern. The first of which is set out below:

"1. The actual date on which the council was first made aware of the contamination has not, to local residents' knowledge, been made public, nor has the source of the information, but we feel it likely came from the developer/agent, for the information to appear in the council's Local Plan Evidence Base - Appendix E, published on 7th June 2017. Assuming that the source of the information was the developer/agent, is there no record of discussions/decisions about what action was taken before and/or after that date?"

17. The Council has explained that it further reviewed electronic records to look for scanned planning enforcement files, which are not held in the public domain. The Council does have some communications with Hurstwoods but it pre-dates the time period specified in the request (1 June 2020 and 29 December 2020).
18. The second specific area raised by the complainant was as follows:

"2. 18th September 2017 - an email from the then Planning Manager to the late [name redacted] and named councillors (including the Council Leader and copied to the council's then Chief Executive), gives specific detail of communication between

the council and the developer/agent. Where is the record of the two unauthorised contaminated land excavation operations carried out by the developer, which the Planning Manager undertook to publish and the record of communication around this?"

19. The Council advised that a further review of the planning enforcement record relating to this matter found no email dated 18 September 2017 from the Planning Manager, but stated the email referred to of 13 September 2017 provided the Planning Manager's position on the matter. Furthermore the Council stresses that any information that might have been returned from these searches would have been outside the scope of the initial request as it pre-dated the time period specified.

20. Turning to the final point:

"3. 16th July 2020 - the developer's Remediation Strategy Version 1.4 was published on the planning portal, having specifically been 'updated with Local Authority comments'. Part of this update quite possibly relates to a requirement to sample earth to the north of the site for possible contamination. Where is the detail of the communication between the council and the developer/agent that informed this update."

21. The Council has explained that Remediation Strategy Version 1.4 was submitted on 16 July 2020 and was uploaded to the public file for the planning application 2020/0039. The Environmental Health Officer's comments on version 1.3 dated 10 July 2020, that subsequently informed version 1.4, and the Planning Officer's communication with the agent/developer dated 14 July 2020 are already on the public file.

22. The Commissioner considers that the Council's explanations about the searches it has conducted and its explanations regarding the specific points raised by the complainant are reasonable. The Commissioner is satisfied that any information in the scope of the request would have been identified by these searches and that which has been found is in the public file. The Commissioner's decision is that, on the balance of probabilities, the Council has complied with regulation 5(1) of the EIR.

Regulation 12(4)(e) – internal communications

23. Regulation 12(4)(e) states:

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

(e) the request involves the disclosure of internal communications."

24. The Commissioner's guidance on this exception¹ defines a communication as encompassing any information which someone intends to communicate to others, or places on file (including saving to an electronic filing system) where others may consult on it. It also states that an 'internal' communication is a communication within one public authority, and that a communication sent by or to another public authority, a contractor or an external adviser will not generally constitute an internal communication.
25. The information that this exception has been applied to is that requested at part 1(a) of the request – communications between the Council and the Senior Environmental Health Officer of Salford City Council. On face value this would seem to clearly not be 'internal' communications as it involves communications between two public authorities.
26. The Commissioner's guidance makes it clear that only in exceptional circumstances be seen as 'internal' when they involve communications with a third party. The Commissioner therefore asked the Council for further explanations as to why it considered these communications 'internal'.
27. The Council stated that the exception was applied in relation to recorded information it holds between the planning case officer at the Council and a named individual at Salford Council. The Commissioner has viewed this information and notes it is an email chain between these individuals and is clearly a communication.
28. With regard to the issue of whether the information is 'internal'; the Council has explained that Salford Council provides officer support and services between councils under the Local Government Act (LGA) and as such are not considered by either Rossendale Council or Salford Council as acting in the capacity of a contractor. They argue the named individual at Salford Council is treated as though they are an officer of Rossendale Council that is sat with the planning team.
29. The Council further explained that at the time the information was created, officers were working on a more agile basis due to covid restrictions and officers were having to operate differently than sitting side by side in an office where they can talk freely about cases.
30. The Commissioner asked the Council to provide more detail on the shared services agreement between the two councils and to specify the

¹ [Internal communications \(regulation 12\(4\)\(e\)\) - EIR guidance - v3 \(ico.org.uk\)](#)

part of the LGA that was relevant in this case. The Council located the original letter of agreement between the parties from 2015 and stated that whilst a more up to date copy had not been located, the agreement has rolled on since it was first agreed.

31. The Commissioner has had sight of this agreement and notes it is referred to as a 'collaborative service partnership' between the two councils. Salford Council propose the provision of support services to Environmental Planning Services at Rossendale. The agreement refers to the LGA and to section 113 of the Local Authorities (Goods and Services) Act 1970² ("LAGS") which the agreement states provides specific statutory power to make staff available and provide administrative, professional and technical services to another local authority.
32. The agreement sets out the specific arrangements in place as "the provision of advice and support regarding environmental consultations" and states an experienced environmental planning officer will be provided as required by Rossendale Council for an agreed hourly rate. The agreement was to run for six months with a review after this time.
33. The Council also stressed that although the agreement referred to the LAGS they also consider section 101 of the LGA³ is relevant.
34. The Commissioner had some concerns with this position, in particular that no current copy of the agreement had been located and the version provided expired in June 2016. The Commissioner asked the Council to either locate a current copy of the agreement or confirm if a formal verbal agreement was in place but no further information was provided.
35. Two legislative regimes have been referred to - one being section 113 of the LGA and the other the LAGS. These vary quite considerably. Section 113(1) of the LGA allows a local authority to enter agreements to place the services of officers at the disposal of other local authorities. Whereas the LAGS allows local authorities to enter agreements for the provision of various services. As this is the legislation referred to in the agreement it raises further questions as to whether the arrangement is more similar to a contractor as there is an agreement to provide services at a cost.
36. The Commissioner asked the Council to provide further details on the arrangement, such as whether the officer of Salford Council is subject to

² [Local Authorities \(Goods and Services\) Act 1970 \(legislation.gov.uk\)](http://legislation.gov.uk)

³ [Local Government Act 1972 \(legislation.gov.uk\)](http://legislation.gov.uk)

any of Rossendale Council's human resources policies or arrangements. The Commissioner also questioned the physical location of the officer to ascertain if the officer has ever been, or would ever be expected to be located at Rossendale Council. Unfortunately the Commissioner did not receive any further clarification on the arrangements so has reached a conclusion based on the information he has available.

37. The first point the Commissioner must stress is he has not seen a current copy of the arrangement so cannot be sure if a formal agreement is still in place or if Salford Council provides staff support on an ad hoc basis without a formal arrangement in place. If no arrangement is in place the Commissioner cannot accept that the officer can be seen to be part of Rossendale Council or imbedded in it to the extent that the communications would be 'internal'.
38. In the event there is an up to date arrangement covering the provision of support services between the two councils, the Commissioner is still not minded to accept that the officer at Salford can be seen in the same way as an employee of the Council – they are providing support in a niche area which Rossendale Council may not have much in-house expertise in. This is provided at an hourly cost so is more of a similar situation to an external consultant or contractor providing paid services to the Council than to the officer being, for all intents and purposes, the same as an officer of Rossendale Council.
39. In conclusion, based on the information available to the Commissioner he does not accept that the communications can be said to be internal and he does not find that regulation 12(4)(e) is engaged. He now requires the Council to disclose this information, subject to any personal data.

Right of appeal

40. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

41. 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.
42. 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

Jill Hulley
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