

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

Decision notice

Date: 26 March 2013

Public Authority: North Somerset Council
Address: Town Hall
Walliscote Grove Road
Weston-super-Mare
BS23 1UJ

Decision (including any steps ordered)

1. The complainant requested information from North Somerset Council ("the council") relating to the proposal to build a new crematorium. The council supplied some information but withheld other information using exceptions under the Environmental Information Regulations 2004 ("the EIR"). The complainant asked the Commissioner to consider whether this information had been correctly withheld and also whether the council had identified all the information requested with reference to particular areas of concern. During the Commissioner's investigation, further information was disclosed to the complainant and the only exception that remained relevant was regulation 13(1).
2. The Commissioner's decision is that the council did hold some additional information and he has therefore found a breach of regulation 5(1) and 5(2) for the failure to disclose this information within 20 working days or by the date of the internal review. The Commissioner considered that the council had correctly withheld some information using regulation 13(1).
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 24 February 2012, the complainant requested information from the council in the following terms:

"I think it would not be unreasonable to request, under the Freedom of Information Act, precisely what the Council have done since 30th July 2009 to secure the safer and more suitable access for construction traffic".

5. The council acknowledged the request and gave it the reference number FOI/2012/0154.

6. On 1 March 2012, the complainant made a further request for information in the following terms:

"1. The names of Councillors who sat on the Project Board for the New Crematorium between 1st April 2009 and 31st December 2011

2. The name of the Officer who was Project Manager

3. The minutes of the Area Planning Committees on 15th and 16th July 2009, in particular in respect of Planning Application 09/P/0727/OT2 and the minutes regarding the address to Committee by the public and the minutes of the meeting pertinent to that application only".

7. The council acknowledged this second request on 1 March 2012 under the same reference number.

8. The council responded to both requests on 27 March 2012 and supplied information. Regarding the first request, the council also said that it wished to apply exceptions under the EIR to withhold some information.

9. The complainant requested an internal review of the handling of both requests on 29 April 2012. He said that the information supplied appeared to be incomplete and he also said that he did not accept that the exceptions cited had been correctly applied.

10. On 5 July 2012, the complainant requested further information. The council explained to the Commissioner that it decided to treat these additional requests as forming part of the previous requests. The requests made were as follows:

"In the Project Board's Meeting dated 27th October 2009 under Item 8, reference is made to 'The Board has delivered the requirements of the Executive decision'. Looking at the Executive Agendas on the council's website I have not seen any Agenda Item in the last 5 years that refers to the Crematorium. Perhaps you would kindly advise of the date of the Executive Meeting and the Agenda Item. A copy of the Executive Decision would be appreciated..."

In the Agenda for the Board's meeting dated 14th September 2009 Item 2 'Actions from previous meeting – Notes 'Planning Application – Letters

sent out to residents and local Councillors, no comments have been received back'...

It is strongly recommended that you investigate this matter and supply us with a copy of the letter allegedly sent to 'local members and residents'.

11. The council wrote to the complainant on 13 June 2012 to ask for information to assist it in conducting the internal review.
12. On 14 June 2012, the complainant replied and supplied information that he considered would help the council to conduct the internal review including a detailed schedule outlining areas of concern.
13. The council responded with a partially completed internal review on 28 June 2012. The council said that it had located some additional information which it made available. The council wrote again on 4 July 2012 and said that it had completed a review of the outstanding issue – whether or not the exceptions under the EIR had been correctly applied. The council said that it had now decided that some of the information could be released and it supplied this to the complainant.
14. The complainant wrote to the council again on 5 July 2012 and subsequently to express further dissatisfaction with the response.
15. The council replied on 18 July 2012 to address the further concerns. The council said that it had provided a copy of the schedule outlining the outcome of the internal review in more detail.
16. The complainant replied on 3 August 2012, continuing to express dissatisfaction. He supplied further comments on the schedule.
17. The council replied on 8 August 2012 and said that it had now completed its internal review process. In subsequent correspondence, the council said that no further information was held.

Scope of the case

18. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider issues relating to individual numbered points on the schedule referred to above. In relation to items 13, 15, 17, 19, 33, 37, 40, 65, 69, 74 and 75 on the schedule, the complainant asked the Commissioner to consider whether the council held this information and if so, whether it should have supplied it. In relation to items 28, 31, 36, 50 and 59, the complainant asked the Commissioner to consider

whether the council had correctly withheld information using exceptions under the EIR.

19. During the course of the Commissioner's investigation, the council provided some additional information thereby informally resolving parts of the complaint as described in further detail below.

Reasons for decision

Regulation 5(1) – Was more information held?

20. Regulation 5(1) of the EIR provides a general right of access to recorded information held by public authorities which meets the definition of "environmental information" provided by regulation 2(1). Regulation 2(1)(c) states that any information on activities, measures, plans etc. affecting or likely to affect the elements of the environment listed in the regulation will be environmental for the purposes of the EIR. One of the elements listed is land. It is clear that the construction of a new crematorium would affect the land.
21. 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 was not held and he will consider if the authority is able to explain why the information was 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 balance of probabilities".¹

Schedule item 13 and 15

22. In these parts of the schedule, the complainant refers to an email dated 3 November 2011 timed 15:09 and an email dated 4 November 2011 timed 14:48. He notes that he has not been supplied with any responses from the parties the correspondence was sent to. The council has confirmed to the Commissioner that this information was not held because there were no responses. The council said that the officers involved had conducted searches of their email to check that this was in fact the case and no information had been found. There is no evidence

¹ This approach is supported by the Information Tribunal's findings in Linda Bromley and Others / Environment Agency (31 August 2007) EA/2006/0072

available to the Commissioner suggesting that any information has been deleted, destroyed or mislaid.

Schedule item 17 and 19

23. The complainant refers to an email from a particular member of staff and he expresses the view that a section of it appears to be missing. This impression appears to have arisen as a result of an email signature for a member of staff appearing at the end of an email from another member of staff dated 9 November 2011. The council said that while it can appreciate that the way the emails are presented may suggest that information is missing the council has concluded that this is simply an incorrect impression arising from the way the emails were drafted and sent. It said that it has double-checked the emails concerned and could confirm that no further information was held. The Commissioner was not provided with evidence demonstrating that any information had been deleted, destroyed or mislaid.

Schedule items 33 and 37

24. The complainant refers to an email dated 20 December 2011 timed 10:10. He indicates that this email had a plan attached to it that has not been provided. The council said that having checked the email, it realised that it had not disclosed this plan to the complainant. It has now released this information thereby informally resolving this particular aspect of the complaint.

Schedule item 40

25. The complainant refers to an email dated 29 December 2011 timed 9:46. The complainant notes that this email refers to "a one-to-one" meeting between two members of the council's staff. The complainant believes that the council held further information, particularly in respect to what one member of staff said and the direction he gave relating to a planning committee's previous decision. He asked for notes or minutes of this meeting to be released. Having consulted the staff members involved, the council identified that it held some handwritten notes taken at this meeting. The council also confirmed that no other relevant records existed. It said that the relevant section of the notes simply provides the same information as reflected in the email already provided. The council agreed to disclose the relevant section of the notes to the complainant in any event in an attempt to offer reassurance about the extent of the information held. For clarity, other parts of the notes do not relate to the crematorium. There is no evidence available to the Commissioner to suggest that any relevant information had deleted, destroyed or mislaid.

Schedule item 65

26. The complainant refers to an email dated 24 February 2012 timed 16:12. The complainant said that no information had been supplied to prove that certain documentation had been received by a particular deadline referred to in the email. He alleged that a planning officer had included information in a committee report even though the deadline had been exceeded. The council said that the information being sought had actually already been provided as shown in the email concerned which contained reference to part of another email showing the relevant information. The council said that for the avoidance of any doubt, it would provide a website link to the complainant showing the full detail of the email concerned. There was no evidence to the Commissioner suggesting that any relevant information had been deleted, destroyed or mislaid.

Schedule item 69, 74 and 75

27. In relation to item 69, the complainant refers to a project board meeting relating to the crematorium in October 2009. The complainant states that he would like to know the details of the executive decision and brief since he cannot find this information under 'Executive' on the council's web portal. The complainant referred to information that had been provided by the council and said that the council had not provided any information about the constitution of the project board, its terms of reference, powers and the date the board commenced operation and the date it was formally disbanded. When the Commissioner questioned the council about these concerns, the council said that it did not wish to maintain that it held no relevant information. Following further searches, it identified the information that was held and provided it to the complainant. There was no evidence available to suggest that any more information was held or that any information had been deleted, destroyed or mislaid. The council also confirmed that it would disclose to the complainant a copy of a helpful summary document that it created to assist the Commissioner in understanding the relevant chain of events, although this information was not held at the time of the request for clarity.

Commissioner's conclusion

28. Based on the above, it was apparent that some additional information was held falling within the scope of some of the requests. This has now been provided. While the Commissioner can understand why the complainant made the particular queries that he did following the disclosure of information to him, the council has been able to provide a satisfactory account of why no further information was held. There was no strong evidence that would allow the Commissioner to conclude on

the balance of probabilities that any more information was held beyond that which has now been provided.

Information withheld using exceptions under the EIR

Schedule item 36

29. The complainant refers to an email dated 20 December 2011 timed 16:09 and complains that the council had withheld information using regulation 12(5)(e). The council clarified that this information had in fact been disclosed to the complainant without any redaction. The email in question was in fact timed 16:01 rather than 16:09 as stated by the complainant.

Schedule item 50

30. The complainant refers to an email dated 15 January 2012 timed 15:21. He notes that information has been withheld using regulation 12(5)(e). The council explained to the Commissioner that this document had also been disclosed to the complainant in full. It said this information was disclosed during the council's internal review when it decided not to maintain its reliance on the exception.

Schedule item 28, 31 and 59

31. The complainant referred to a document with the reference number '20111219', an email dated 19 December 2011 timed 17:40 and an email dated 10 February 2012 timed 15:40. He complained to the council about its decision to withhold the entire contents. The council told the Commissioner that it had reviewed its decision to withhold this information and decided that it should not continue to rely on the exceptions under regulation 12(5)(e) and 12(4)(e) because circumstances had changed due to the passage of time. The council said that it would disclose this information to the complainant with the exception of some personal data relating to third parties. The council said that it wished to maintain its position that this information was excepted under regulation 13(1). This has been considered further below by the Commissioner.

Regulation 13(1) – Third party personal data

32. This exception provides that third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act 1998 ("the DPA").

Is the withheld information personal data?

33. Personal data is defined by the DPA as any information relating to a living and identifiable individual. The council provided redacted and un-redacted versions of the information in question to the Commissioner. It said that it had withheld information relating to the tenants of certain land relevant to some negotiations connected to the crematorium. The Commissioner inspected the information and notes that the withheld information comprises of the names and contact details of the particular tenants involved. As such, the Commissioner was satisfied that the information represents personal data.

Would disclosure breach the Data Protection Principles?

34. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations

35. The council said that disclosure would not have been within the reasonable expectations of the tenants concerned. The council said that the information was intended to be a record of private negotiations between the tenants and the council. The council said that while it appreciates the details of land ownership may be accessed via the land registry that is not the case in relation to tenants.

Consequences of disclosure

36. The council pointed out that when combined with the information already released, the information is revealing of the tenant's private circumstances, such as their arrangements with the landowner.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

37. There is always some legitimate public interest in the disclosure of information held by public authorities. This is because the disclosure of information helps to promote the general aims of transparency and accountability. However, in the circumstances of this case, the

Commissioner was not persuaded that any legitimate interest in disclosure was strong enough to outweigh the tenants' rights to maintain their privacy.

38. The Commissioner accepts that there is no evidence to indicate that the tenants were given an explicit expectation that their information would be disclosed. Furthermore, given the nature of the negotiations, the Commissioner's view is that the tenants could legitimately expect their details to remain confidential. The Commissioner considers that if the information was disclosed, it could cause distress, particularly since it would reveal information about the tenants' private circumstances. The council said that in its view, it had satisfied the legitimate public interest in being transparent about its actions to a reasonable extent by disclosing redacted version of the information. With regard to all the circumstances, the Commissioner agrees with that conclusion. The Commissioner was satisfied that disclosure would be disproportionate and unfair. It would therefore breach principle 1 of the DPA and regulation 13(1) is engaged.

Procedural issues

39. Regulation 5(1) and 5(2) provide a general right of access to environmental information held by public authorities within 20 working days. During the Commissioner's investigation, the council conceded that it did hold additional information. The Commissioner has therefore found breaches of these regulations.

Other Matters

40. The Commissioner would like to highlight particular concerns with regard to the way in which the council conducted its internal review on this occasion. There is no statutory time limit for conducting internal reviews but the guidance is that they should be conducted promptly and no later than within 20 working days unless exceptional circumstances are involved. They should also not consist of more than one stage. Public authorities should have one opportunity to reconsider the matter. Any further issues should then be referred to the Commissioner. The Commissioner trusts that the council will make improvements to its internal review process in the future in line with these comments.
41. The Commissioner would also like to ask that the council ensures that once it has received and responded to a particular request, any subsequent requests are acknowledged and dealt with separately to avoid any confusion to the process.

Right of appeal

42. 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

43. 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.
44. 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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