

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 June 2016

Public Authority: Winchester City Council
Address: City Offices
Colebrook Street
Winchester
SO23 9LJ

Decision (including any steps ordered)

1. The complainant has requested information relating to Tree Preservation Orders (TPOs).
2. The Commissioner's decision is that Winchester City Council (WCC) has provided the complainant with all the information it holds and has therefore correctly cited regulation 12(4)(a) of the EIR. However, the Commissioner notes that WCC has breached regulation 5(2) of the EIR by not providing its response within 20 working days.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 24 August 2015, the complainant wrote to WDC and requested information in the following terms:

"I refer to your letter dated 12 August and the attachments. Your response does not provide all the details I require. Please note the following:

FOI Request

WCC has provided me with the following TPOs:

Ref 1296

Ref 2086 of 2013

Ref 1207
Ref 1488
Ref 1513
Ref 1564
Ref 1146

Please provide the documented, detailed justification and grounds for all the foregoing, which must be provided by Regulations in the various Planning and Land Acts. The requested information shall also include the minutes of the various Planning Committee meetings that discussed/.approved the various TPOs and the grounds for any such approvals.

Please note it is not sufficient to state: "the trees are an important local amenity feature adding character to the area". There is no definition under the law for "local amenity" and "adding character to the area", particularly where the trees are located on private land and not accessible by the general public."

5. WCC responded on 9 November 2015 and denied holding some of the requested information. WCC addressed each TPO in turn and provided copies of the information it said it held.
6. The complainant requested an internal review on 17 November 2015, however WCC did not respond.
7. In its response to the Commissioner, WCC stated that it had no record of a request for review. However, it maintained that even if a review had been carried out it would not have changed its initial response.

Scope of the case

8. The complainant contacted the Commissioner on 15 January 2016 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of this case to be to determine if WCC has dealt with the request in accordance with the EIR 2004.

Reasons for decision

10. Regulation 12(4)(a) of the EIR provides that:

"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;

11. Where there is a dispute about the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of proof; 'a balance of probabilities'. So that in order to determine such complaints the ICO must decide whether, on the balance of probabilities, a public authority held relevant information at the time of the information request.
12. WCC explained that most of the TPOs were made as emergency TPOs under powers delegated to officers and were also confirmed under delegated powers. Emergency TPOs were, and are, only taken to Planning Committee where there are objections to them being confirmed. The TPOs sent to the complainant are each marked to show whether they were confirmed as an unopposed order or whether they were confirmed following a Committee meeting. Where a Committee meeting confirmed the TPO, WCC provided the complainant with the reports and minutes that it held.
13. Committee minutes/reports would therefore not have been created if the TPO was made under delegated powers. Even where Committee reports or minutes did exist, since some of the TPOs were made nearly 30 years ago, some records have been destroyed.
14. WCC further explained that it had spent a considerable amount of time carrying out an extensive search for the information requested. The FOI coordinator for the Planning Dept searched for any records held on the relevant electronic document management system – which are filed under each TPO reference. Paper records are not retained by the Planning or Landscape teams for old TPOs. The Planning Dept, have held their records electronically since 2006. Any records still held by Planning have been provided to the complainant.
15. Each TPO itself is held as an original paper copy in the Legal Deeds store and as they have all been indexed, they were relatively easy to locate. These were provided to complainant in a letter of 12 August 2015. WCC also then searched for the Legal file (a hard copy of which is opened for every TPO made). TPOs are all made by a Legal Officer, on instructions from the Planning/Landscape team.
16. WCC provided the Commissioner with a printed copy of the record for each TPO file. Some have been destroyed and this is indicated in each case on the record. The first file shown on the list (PL1/9/80) does not state that the record has been destroyed but equally does not seem to

have resulted in a TPO being made. The file is not in the WCC archive however, and the print out from the file index indicates that files from PL1/9/92 onwards (a 1982 file) have been marked as destroyed- although no date is given for the destruction. WCC considered it is not unreasonable to conclude that files older than this, even where not marked destroyed have been destroyed. Where the paper file still exists, information within the terms of the request has been provided to the complainant.

17. The complainant also asked for copies of minutes and the justification for the TPOs being made. Where a minute was referred to in the Legal file or the limited planning/landscape papers, WCC arranged for a search to be carried out for the minute/ Committee report (where applicable). The Council holds electronic minutes/committee reports back to 2000, bound minute books back to 1990, held in its on-site archives. Any older minute books have been sent to Hampshire Records Office (HRO).
18. Where the Legal or Planning papers refer to a minute or Committee report, the minute or report was provided to the complainant in accordance with WCC's letter of 9 November 2015, in which it specified the information included in the letter. A member of WCC staff visited the HRO to look for the minutes but was unable to locate the minute for TPO 1207 which was either not indexed properly or was missing. WCC also confirmed that its Retention Schedule for TPOs is that the TPO itself is required to be retained permanently but the correspondence on the Legal file can be destroyed after 6 years (subject to review). In practice, many files are kept for longer but when destroyed the File Index is marked- as has been the case here. There is no statutory requirement for the Council to retain any TPO information - although clearly the Order itself must be retained for it to be capable of enforcement.
19. Having reviewed the information provided by WCC, the Commissioner is satisfied that it has undertaken all reasonable searches to locate the information to provide to the complainant. He is further satisfied that on the balance of probabilities WCC does not hold any further information within the scope of the request.
20. Regulation 12(4)(a) of the EIR is technically subject to a public interest test but the Commissioner considers conducting a test to be a futile exercise where, as here, he is satisfied, on the balance of probabilities, that the public authority did not hold the requested information at the time of the request. Therefore the Commissioner has not gone on to consider the public interest balancing test.
21. The Commissioner notes however that WCC breached regulation 5(2) of the EIR when dealing with the original request, by failing to provide a response within 20 working days.

Right of appeal

22. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

23. 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.
24. 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

Pamela Clements
Group Manager
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SK9 5AF