

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

Date: 28 March 2017

Public Authority: Northumberland County Council
Address: County Hall
Morpeth
Northumberland
NE61 2EF

Decision (including any steps ordered)

1. The complainant has requested information relating to the relocation of Newbiggin Library. Northumberland County Council disclosed some information and confirmed that other information was not held.
2. The Commissioner's decision is that Northumberland County Council has correctly confirmed that information is not held and complied with regulation 5(1) but that it wrongly handled the request under the FOIA and issued a late response, breaching regulation 5(2).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 9 June 2016 the complainant wrote to Northumberland County Council (the "council") and requested information in the following terms:

"1. Minutes, including date, those present and any recorded resolution at the meeting at which the decision was taken to remove library provision from the ARCH Front Street Development in Newbiggin by the Sea.

2. Minutes, including date, those present and the relevant resolution of the meeting at which the decision was taken to relocate Newbiggin Library to Newbiggin Sports and Community Centre.

3. Any recorded information regarding the relocation of Newbiggin Library which occurred after the Planning Committee decision to award Planning Permission for the demolition of the Railway and Dolphin public houses in the Newbiggin Conservations Area to allow a new build by ARCH which would include new library provision.

4. The first date on which the decision to remove library provision from the Front Street development and/or relocate Newbiggin Library to Newbiggin Sports and Community Centre was first communicated to any member of Newbiggin Town Council or the Clerk to the Council.

5. All written, electronic or recorded telephone conversations regarding the removal of library provision from the new build on Front Street and the relocation of the library to Newbiggin Sports Centre."

5. The council responded on 3 August 2016. It disclosed information and confirmed that it did not hold the information specified in parts 1, 2, 3 and 5 of the request.
6. Following an internal review the council wrote to the complainant on 19 September 2016. It maintained its position that no further relevant information was held.

Scope of the case

7. On 21 September 2016 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that her investigation would consider whether the council handled the request under the correct legislation, the timeliness of its responses and whether it had disclosed all the relevant held information.

Reasons for decision

Is it Environmental Information?

9. During the course of her investigation the Commissioner advised the council that she considered the requested information fell to be considered under the EIR. The Commissioner has set down below her reasoning in this matter.
10. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is as any information in any 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...'

11. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
12. In this case the focus of the withheld information is planning and change of use of land. The information, therefore, relates to land/landscape and advice which could determine or affect, directly or indirectly, policies or administrative decisions taken by the council.
13. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information

14. Tribunal in the case of Kirkaldie v IC and Thanet District Council (EA/2006/001) ("Kirkaldie").
15. In view of this, the Commissioner has concluded that the council wrongly handled the request under the FOIA. During the course of her investigation the council acknowledged that the request should have been handled under the EIR.

Regulation 5(2) – time for compliance

16. Regulation 5(2) of the EIR requires public authorities to provide environmental information specified in a request no later than 20 working days after the date of receipt.
17. In this case the complainant submitted their request on 9 June 2016 and received an automatic acknowledgement that the request had been received by the council that same day.
18. The council has explained that the automatic reply was generated by "Lagan", the council's Customer Management Relationship system (CMR). The council confirmed that its officers did not receive notification from its CMR that the request had been received and that it had stopped using Lagan as an online platform for the submitting of requests in 2015. It further explained that hyperlinks for the Lagan system had been removed from its Freedom of Information web pages approximately a year prior to the complainant submitting their request.
19. The complainant contacted the council on 18 July 2016 to enquire after a response to their request. The council was unable to locate the request on its systems, however, it accepted that the complainant had received an acknowledgement.
20. The Commissioner's guidance states that the date a request is received by a public authority is "The day on which the request is physically or electronically delivered to the authority."¹
21. The Commissioner acknowledges that the council had, in good faith, taken steps to disable its Lagan system and was not aware that the request, as originally submitted on 9 June 2016, had been received.

¹ <https://ico.org.uk/media/for-organisations/documents/1165/time-for-compliance-foia-guidance.pdf>

22. However, as the request had technically been received on 9 June 2016 and the council did not issue a substantive response until 3 August 2016, the Commissioner must find that the council failed to comply with the request in time and breached regulation 5(2) of the EIR.

Regulation 5(1) – duty to provide environmental information

23. Regulation 5(1) of the EIR provides that a public authority that holds environmental information shall make it available on request.
24. In this case the council disclosed some information to the complainant but confirmed that, in relation to request parts 1, 2, 3 and 5, no recorded information was held. The complainant disputes this.
25. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
26. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
27. To assist with this determination the Commissioner approached the council and sought its response to a range of questions routinely used in such scenarios. The questions and a summary of the council's responses are provided below.

What searches were carried out for information falling within the scope of the request and why would these searches have been likely to retrieve and relevant information?

28. The council confirmed that technicians from its Information Services Department carried out searches of its email system in an attempt to identify any relevant information. The council explained that, given the search terms used (see below), a search of its entire document and email management systems would be expected to identify any information falling within the scope of the request.

If recorded information was held but is no longer held, when did the council cease to retain this information?

29. The council confirmed that no recorded information was or is held.

If searches included electronic data, which search terms were used?

30. The council confirmed that its IT department conducted searches using the following terms: *Newbiggin Library; Newbiggin Library (and) ARCH; Newbiggin Library (and) Newbiggin Sports and Community Centre.*
31. The council explained that a search of its records management system using the above search terms returned 78 documents, whilst an email search returned 227 results. It confirmed that, having reviewed all the retrieved information, none related to the decision to relocate Newbiggin Library from its Front Street location to Newbiggin Leisure Centre. It confirmed that these searches did not retrieve information falling within the scope of the request.
32. The council confirmed that it also conducted searches of key senior officers' computers for information falling within the scope of the request. It stated to the Commissioner that no relevant information was found.

Is there a business purpose for which the requested information should be held? If so what is this purpose?

33. The council stated that it is *"...perhaps regrettable that for business purposes a clearer audit trail has not been kept on this occasion but it is obviously the case that the decision has been taken by virtue of the physical consequences of its effect."*

Are there any statutory requirements upon the council to retain the requested information?

34. The council stated that it was not aware of any statutory requirements which would require the formal recording and subsequent retention of the information.

Conclusions

35. The complainant has submitted that they find it astonishing that no recorded information documenting the decision to relocate Newbiggin Library is held by the council. However, whilst noting that there are concerns about the council's record keeping in this matter the Commissioner has no direct evidence to contradict the council's confirmation that no relevant information falling within the scope of the request is held.
36. Having considered the council's explanation of the searches it conducted and the relevant facts the Commissioner has concluded that, on the balance of probabilities, the council has correctly confirmed that it does

not hold relevant information. She has, therefore, concluded that the council complied with regulation 5(1) of the EIR.

Other Matters

37. Although they do not form part of this decision notice the Commissioner would like to note the following matters of concern.
38. The code of practice issued under section 46 of the FOIA (the "code") contains recommendations for public authorities as to good practice in relation to records management².
39. Part 8 of the code, which the Commissioner considers is equally applicable to good practice in relation to the handling of requests under the EIR, recommends that authorities should ensure that key decisions are adequately recorded.
40. The Commissioner acknowledges that it is for public authorities to decide what records should be kept for business purposes or to justify the rationale for decisions. However, she has noted the complainant's concerns and the council's acknowledgement that "*(it is) perhaps regrettable that for business purposes a clearer audit trail has not been kept on this occasion.*"
41. The Commissioner expects that the council will have due regard for the recommendations of the code in its future records management practice.

2

<http://webarchive.nationalarchives.gov.uk/20150730125042/http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section-46-code-of-practice.pdf>

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF