

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

Date: 29 September 2022

Public Authority: Gravesham Borough Council

Address: freedomgravesham@medway.gov.uk

Decision (including any steps ordered)

1. The complainant requested the outcome of an independent review regarding a planning application. Gravesham Borough Council ('the Council') originally refused the request on the basis that it was vexatious, citing section 14(1) FOIA. However, following the Commissioner's investigation, it confirmed that the information is not held. The Commissioner's decision is that the Council should have considered the request under the Environmental Information Regulations 2004 ('the EIR'). The Commissioner has also concluded that, on the balance of probabilities the Council does not hold the requested information. The Commissioner does not require any steps.

Request and response

2. On 14 July 2021, the complainant wrote to the Council and requested the following information:

"In an email sent to us on 7 July 2020 [named individual] said:

"In due course, when I know the outcome of the independent review of the handling of the original planning application, I shall share that with you."

He never told us the outcome of this review, so can we please have a copy of the independent review that he said was taking place."

3. The Council responded on 14 October 2021. It referred the complainant to its correspondence of 18 December 2020 citing the following extract from that correspondence:

"To clarify the current situation, the council will no longer enter into correspondence with you on this matter, other than automated mailbox responses, you will not receive acknowledgement of receipt of any correspondence in relation to this matter."

4. It added:

"The council's opinion is that the matter is closed and it will no longer enter into correspondence regards the history of this matter and the above statement made on 18 December 2020 remains.

Scope of the case

5. The complainant contacted the Commissioner on 5 October 2021 to complain about the way their request for information had been handled.
6. As stated previously, the Council has since confirmed to the complainant and the Commissioner that it does not hold the information as no review was undertaken. The Commissioner contacted the complainant to establish whether they were satisfied with this amended response and it was agreed that a decision notice outlining the rationale for this decision would be the most appropriate way forward.
7. The following analysis is therefore whether the Council is likely, on the balance of probabilities, to hold any information falling within the scope of the complainant's request for information.
8. Additionally, having considered the wording of the request, the Commissioner is of the view, that if any relevant information was held, as the investigation related to concerns made by the requester, a significant proportion of it would be the complainant's own personal data and therefore exempt from consideration under the EIR by virtue of regulation 5(3) of the EIR.

Reasons for decision

The appropriate legislation

9. The Commissioner notes that the Council has dealt with the request under the FOIA. However, he considers that if the information were held

it would be environmental information as defined by regulation 2 of the EIR.

10. Regulation 2(1) of the EIR defines what 'environmental information' . The relevant parts of the definition are found in 2(1)(a) to (c) which state that it is 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 planning and development of land is a measure, as defined by regulation 2(1)(c), which is likely to affect the elements of the environment referred to in regulation 2(1)(a), namely land and landscape. As the investigation relates to a review of a planning application if relevant information were held, the Commissioner considers that the request would fall to be considered under the EIR.

Regulation 12(4)(a) –Information not held

12. As stated in paragraph 6 of this notice, following the Commissioner's investigation, the Council reviewed the request, and concluded that it did not hold relevant information.
13. Regulation 5 of the EIR requires that a public authority that holds environmental information shall make it available on request. This is subject to any exclusions or exceptions that may apply.
14. Regulation 12(4)(a) of the EIR says that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
15. In scenarios where there is some dispute between whether the public authority holds relevant information, the Commissioner, following the

lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.

16. 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).
17. The Council provided copies of internal email correspondence to the Commissioner dated between 6 September 2021 to 14 October 2021 while it was in the process of establishing whether it held relevant information.
18. The correspondence initially contains uncertainty around whether a review took place. The information confirms that [named individual A] asked Legal Services to conduct an independent review on 24 June 2020, with it being allocated to [named individual B].
19. However, the Council confirmed that a search of [named individual A's] folders did not yield anything relevant to the request.
20. [Named individual B] also searched their folders up until the end of March 2021 and could not find any relevant information. As such contact was made with Legal Services to see whether the review was completed.
21. Subsequent correspondence from [named individual C] confirms the following:

" The review hasn't been done ...[named individual B] emailed back in September 2020 asking if it was still required ...and didn't receive a response so didn't take this matter any further.

I thought ...that the piece of work was being formally abandoned as it hasn't been done."

The Commissioner's conclusion

22. The Commissioner has considered the chain of internal emails provided by the Council and considers that having searched the folders of the relevant individuals and contacting the department tasked with the investigation, there are no further steps he could reasonably ask the Council to take, as the searches outlined above are both reasonable and proportionate.
23. Based on the supporting information provided by the Council, the Commissioner is satisfied that although an independent review was initially planned, it did not actually take place, meaning that no relevant

information is held by the Council. Based on this, the Commissioner is satisfied that regulation 12(4)(a) is engaged.

Regulation 12(1)(b) – the public interest test

24. Regulation 12(1)(b) of the EIR requires a public interest test to be carried out if a request is refused under any of the exceptions set out under regulation 12 of the EIR.
25. However, as no information has been found to be held, the Commissioner can only find that the public interest in maintaining the exemption at 12(4)(a) of the EIR outweighs any public interest in disclosure, simply because there is no further information to disclose.

Right of appeal

26. 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

27. 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.

28. 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

**Catherine Dickenson
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**