

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 April 2020

Public Authority: South Hams District Council Address:
Follaton House Plymouth Road
Totnes Devon TQ9 5NE

Decision (including any steps ordered)

1. The complainant has requested information in relation to a planning application. During the Commissioner's investigation, South Hams District Council disclosed the requested information.
2. The Commissioner's decision is that South Hams District Council has complied with regulation 11⁽¹⁾ (Representations and reconsideration) of the EIR. However, the Commissioner considers that South Hams District Council has breached regulations 5(2) (Duty to make available environmental information on request) and 14(3) (Refusal to disclose information) of the EIR.
3. The Commissioner does not require South Hams District Council to take any steps as a result of this decision.

¹ . On 13 March 2019, the complainant wrote to South Hams District Council (the council) and requested information in the following terms:

"A decision has now finally been made in relation to application 1690/18/HHO (a resubmission of application 4205/17/HHO) and so I would like to make a final request for all further documents/emails in relation to these applications, that have arisen since the last batch of documents/emails were provided. My file shows that the last correspondence provided was dated 26 September 2018. I would like to

Request and response

request everything since that date therefore, including internal correspondence and correspondence from/to external parties.

I am now preparing an appeal against the planning decision made in relation to application 1690/18/HHO. Since the previous two applications that were made are essentially the same as 1690/18/HHO but with minor changes, it is important that I have copies of all letters of support or objection in relation to all three applications. I have noticed that (for understandable reasons) letters of support/objection are removed from the planning website after a certain time and that currently only those relating to the most recent application are on the planning website. Could I ask that you kindly provide copies all letters of support/objection for all three planning applications as these are relevant documents for the appeal. Some have been provided to date, but not all I believe. Many thanks

Finally while I accept that Part 3, 12, (4) (e) of the EIR provides that a public authority may refuse to disclose internal communications, it cannot have been the intention of the legislation that a public authority may pick and choose which internal communications may be disclosed so as to convey (potentially) a slanted version of events. Nor can I find any reference to the need to withhold documents so that the Council can "consider matters privately and frankly". It seems to me that either all internal documents should be disclosed - subject to the other circumstances where disclosure may be refused as set out in the Regulations - or none should be disclosed, because in that way there is no risk of selective editing on subjective grounds."

5. The council responded on 5 April 2020. It disclosed some information and refused to provide the remaining information, citing regulation 12(4)(e) (Internal communications) of the EIR.
6. Following an internal review the council wrote to the complainant on 15 May 2019. It upheld its original position and also referred to regulation 12(3)(b) (Manifestly unreasonable). In addition, the council mentioned that the requested information could be considered to be the complainant's personal information.

Scope of the case

7. The complainant contacted the Commissioner on 3 September 2019 to complain about the way her request for information had been handled.

8. Initially there was some confusion as the complainant referred to several requests for information she had submitted to the council. The Commissioner contacted the complainant about this. The complainant explained that the present request of 13 March 2019 relates to previous requests for information which she had submitted after each planning application decision was made. The complainant confirmed that the present request followed the council's decision of 6 March 2019, regarding her latest planning application.
9. The Commissioner confirmed to the complainant that she would be considering how the council dealt with her request of 13 March 2019 (as set out above).
10. During the Commissioner's investigation, the council explained to her that it was also relying on regulation 12(4)(d) (internal communications) of the EIR. However, the council subsequently disclosed the withheld information to the complainant during the investigation.
11. The complainant explained that she was still dissatisfied and complained about the length of time taken to deal with her request. She also explained that: *"None of the original reasons cited by SHDC for withholding information were applicable. The council has flagrantly breached the EIR/FOI regulations. I must ask what measures the ICO is proposing to take in relation to this clear misconduct by a public body."*
12. The complainant also explained that: *"There needs to be a finding on this complaint which either exonerates SHDC (ie finds that the exceptions it sought to rely on in withholding information were correct) or finds that it was in breach of its obligations under the EIR."*
13. The Commissioner will consider the length of time taken to deal with the request. However, she will not be considering the exceptions applied by the council any further, as it has disclosed the withheld information to the complainant. The Commissioner notes the complainant's comments regarding exceptions and possible breaches of the EIR. She will address these comments under "Other matters".

Reasons for decision

14. The complainant submitted her request on 13 March 2019. The council disclosed the information during the Commissioner's investigation.

Regulation 5 - Duty to make available environmental information on request

15. Regulation 5(2) of the EIR provides that information should be made available as soon as possible and no later than 20 working days after the date of receipt.
16. The council did not disclose all of the requested information to the complainant until the Commissioner's investigation. The Commissioner therefore considers that the council has breached regulation 5(2) as it took longer than 20 working days to disclose all of the requested information.

Regulation 14 – Refusal to disclose information

17. Regulation 14(3) of the EIR provides that if a public authority wishes to refuse a request it must issue a refusal notice within the 20 working day time for compliance, citing the relevant exception(s).
18. The council did not confirm that it was relying on regulation 12(4)(d) until the Commissioner's investigation. The Commissioner therefore considers that the council has breached regulation 14(3) as it took longer than 20 working days to inform the complainant that it was relying on a second exception.

Regulation 11 – Representations and reconsideration

19. The complainant requested an internal review on 17 April 2019. The council sent the outcome of its internal review on 15 May 2019.
20. Regulation 11(4) of the EIR provides that once a public authority has received a request for an internal review, it should respond as soon as possible and no later than 40 working days after it received the internal review request.
21. The Commissioner notes that the council responded on the nineteenth day (taking into account the bank holiday at the beginning of May 2019). She therefore considers that the council has not breached regulation 11.

Other matters

22. The Commissioner notes the following comments made by the complainant to her:

- *"None of the original reasons cited by SHDC for withholding information were applicable. The council has flagrantly breached the EI[R]/FOI regulations. I must ask what measures the ICO is proposing to take in relation to this clear misconduct by a public body."*
 - *"There needs to be a finding on this complaint which either exonerates SHDC (i.e. finds that the exceptions it sought to rely on in withholding information were correct) or finds that it was in breach of its obligations under the EIR."*
23. A requester may ask for any environmental information a public authority holds; however, this does not mean that a public authority always has to provide it. In some cases, there will be good reasons for not disclosing it.
24. Even if a cited exception is found not to apply, a public authority has not breached the EIR by simply relying on any of the exceptions initially. A public authority may decide to reverse or amend its position once the Commissioner commences her investigation. This may also be done when a case proceeds to the First-tier Tribunal.
25. The Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function. This aligns with the goal in her draft "Openness by design"¹ strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of EIR enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"².

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)

¹ https://ico.org.uk/media/about-the-ico/documents/2615190/openness_by_design_strategy_201906.pdf

² <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-actionpolicy.pdf>

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Website: www.justice.gov.uk/tribunals/general-regulatorychamber

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

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