

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 15 February 2016

Public Authority: Hastings Borough Council
Address: Town Hall
Queens Road
Hastings
TN34 1QR

Decision (including any steps ordered)

1. The complainant has requested information in relation to a planning application. Hastings Borough Council (the council) provided its response but the complainant was not satisfied that the council had provided all the information it held. He also considered that it had deliberately withheld, concealed or provided inaccurate information.
2. The Commissioner's decision is that the council has provided the information it holds within the scope of the request. He has also considered the complainant's concerns about information he considers has been deliberately withheld, concealed or inaccurate in the 'other matters' section at the end of this decision notice.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 8 September 2014, the complainant made a request to the council – See *Annex 1* for the request and council's response.
5. The council provided its response on the 23 January 2015 responding to each of the questions individually. – See *Annex 1* for response
6. The complainant requested an internal review on the 25 February 2015. The council provided its review on the 11 May 2015. It advised that it considered that many of the questions were seeking opinions and recollections rather than requesting recorded information.
7. However, on reviewing the request, the council considered whether it held any further recorded information that could be provided to the

complainant, but determined that no further information could be located.

8. It did find, in its internal review response, that it had not responded correctly to part a) of the complainant's request, where he asked who instructed the site survey. The council concluded that its response should have been that the information is not held rather than offering an explanation as to why the survey was undertaken.
9. Also for part J of the request the council stated that this is asking for the officers recollections relating to the boundary plan, and before it can comment it would be necessary for the complainant to provide a copy of the mentioned plan as it is unsure of which plan is being referred too. It also considered this was not a request for recorded information – and therefore fell outside the scope of the Freedom of Information Act.
10. Lastly, the council considered that the questions may be in relation to a boundary dispute. It recommended that if this was the case, then the complainant may wish to direct his questions to the land owner, East Sussex County Council, the Land Registry and possibly the Ordnance Survey. It explained that boundary disputes are not dealt with by it and they are not a material planning consideration.

Scope of the case

11. The complainant contacted the Commissioner on 31 July 2015 to complain about the way his request for information had been handled, as he considers the council has withheld information.
12. During the Commissioner's investigations, he asked the council to consider whether this case should actually have been considered under the EIR rather than the Freedom of Information Act 2000 (the FOIA). The council confirmed that this case, being in relation to a planning issue, should have been considered under the EIR.
13. The Commissioner considers the scope of the case is to determine whether the council has provided the complainant with all the information falling within the scope of the request in accordance with regulation 5(1) of the EIR. The broad tenor of the complaint is based around the assertion of the complainant that the council has not accurately recorded past events in order to suit their desired outcome on a particular planning matter. However, the Commissioner cannot consider the veracity of the information held at the time of the request, but simply what is held. To that end, the investigation has focused on the primary issues raised by the requestor and looked to see what else might be held by the council regarding the matters raised.

Reasons for decision

Regulation 5(1) of the EIR – Information held/ not held

14. Regulation 5(1) of the EIR states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information within the scope of the case, and if so, to have that information communicated to him.
15. Where there is some dispute between the amount of information identified 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 First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request).
16. Even though the council considered the complainant's request was not all a request for recorded information, it took a broad approach to the request in order to determine what recorded information it held in order to respond to the complainant.
17. With regards to Part J of the complainant's request, the council in its internal review determined this was not a request for information but a request for comments on an officer's recollection. On reviewing this part of the request, the Commissioner is satisfied that this is not a request for recorded information and so will not be considered further in relation to this section of the decision notice. However Part J of the request is discussed further in the 'other matters' section.
18. The council has explained to the Commissioner that the case officer and line manager who would have carried out the initial searches for the information held for this request have since left the council, but has stated that this case officer was very meticulous and would have searched the relevant planning files and correspondence in relation to this request.
19. This request was also referred to the council's Planning, Arboriculture's, and Planning Enforcement departments as well as its Principal Solicitor to determine what information it held in order to respond to the request.
20. The council has confirmed to the Commissioner that the information is held as both manual and electronic records and all the information it holds is kept in its planning files.
21. It has explained that all of the information it keeps in relation to planning related matters (applications and enquiries) is stored on

Acolaid (the council's planning application and enquiries software) or IDOX (an electronic document storage database linked with Acolaid). Searches would have been made under the property on both systems.

22. The council has told the Commissioner that no information has been deleted or destroyed.
23. The complainant has stated to the Commissioner that he was provided with a summary of a boundary meeting dated 6 June 2013 and considers that this does not reflect the actual minutes. The Commissioner on this point cannot consider the accuracy of a summary of minutes that was produced by the council prior to the request being made. The Commissioner's role is to determine what information is held within the scope of the request and whether the information should be provide, if it has been refused.
24. The Commissioner has asked the council though, whether it holds the actual minutes. The council has responded to advise that no formal minutes were created as this was a site visit rather than a meeting. The council's planning enforcement officer took written notes on site which were typed up and these notes were initially intended for internal records of the on-site discussion. The council has confirmed that both a copy of the notes and the hand written typed up notes have been provided to the complainant.
25. The complainant considers that the council's responses *"produced no document to corroborate any opinions being expressed by respondents"*. The council has responded to the Commissioner to this stating that it is of the view that it has provided the complainant with everything it holds in respect of this request.
26. The Commissioner has reviewed and is satisfied with the council's responses to his enquiries. Also the council's statement in its internal review response explaining that the complainant may wish to direct his questions to the land owner, East Sussex County Council, the Land Registry and possibly the Ordnance Survey and explaining that boundary disputes are not dealt with by it and would not be a material planning consideration, may be a reason why the council does not hold more information that that expected by the complainant.
27. Therefore the Commissioner has determined that, on the balance of probabilities, the council does not hold any further recorded information within the scope of the complainant's request.

Other matters

Section 77 of the Freedom of Information Act 2000 (the FOIA)

28. Section 77 of the FOIA states:

(1) Where-

- (a) A request for information has been made to a public authority, and
- (b) Under section 1 of this Act or section 7 of the Data Protection Act 1998, the applicant would have been entitled (subject to payment of fee) to communication of any information in accordance with that section,

Any person to whom this subsection applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by that public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communication of which the applicant would have been entitled.

29. The complainant has raised a section 77 concern with the Commissioner. He has explained the 2 parts of his request he considers the council breached section 77 of the FOIA.

30. The first part he considers is a section 77 issue is the summary of the boundary meeting of 6 June 2013, which was provided to him but he considers is false, not accurately reflecting the minutes. However this summary was created in June 2013 and the complainant's request was made on 8 September 2014. This is not a section 77 issue as the council provided him with the summary. The complainant may not agree with the accuracy of the information recorded but the Commissioner's role is not to determine whether information created before a request was made is accurate, his role is to determine if the information held has been provided or correctly withheld. In this case it was provided.

31. The other part the complainant has raised a section 77 concern about is in relation to part J of his request. He considers the council has withheld its own in-house boundary plan. He has stated to the Commissioner:

"HBC's FOI has withheld their own patently false 'in-house' boundary plan ('Blue Plan') created 28 March 2013 ignoring Land Registry plans to Stone Court (2008) falsely relocating Olive Lodge Western boundary South and East up to 6 meters to mislead their Planning Committee in April 2013; thereby corruptly to enhance

prefer and/or uphold their client developer's false "Certificate A" claiming sole ownership of red-line site ('blue pegs 1-5') to obtain for their client a planning consent on 24/25 April 2013 AFTER their client developer's planning application HS/FA/13/00114 had been suspended in March 2013 for Planning Officer's investigation upon objections by East Sussex County Council (ESCC) as then owner of Olive Lodge also by myself as then tenant-occupant (owner from 20 May 2014). Said protests cited the client developer's false Certificate A red-line site boundary; still covertly endorsed by HBC planning officers. Upon my receipt of Planning Officer's exculpatory letter dated 6 April 2013, falsely asserting ESCC acceptance, I submitted my "2013 Submissions Invalid Certificate A" (attached). It never was uploaded onto HBC Planning Website nor brought before Planning Committee on 24 April 2013 when ESCC again also protested the developer's planning application site-boundary previously marked by trespassing 'blue pegs' removed on ESCC orders."

32. Again the complainant made his request on 8 September 2015, the way in which the council went about gaining planning consent in 2013 is not something the Commissioner is able to look into or make comment on as it is not in his remit to make determinations on such processes.
33. The Commissioner did ask the council whether it held a copy of this plan – providing it with a copy that the complainant had supplied to the Commissioner. The council on view of this plan confirmed that it does hold a copy of it, and advised that this plan was provided to it by the Land Registry and not prepared by the council. It also points out that at the time of the complainant's request the council responded to part J of his request asking the complainant to supply it with a copy of the plan he held so as to determine which plan was being referring to before responding to part J of the request, but the council never received this clarification from him.
34. The Commissioner has viewed this correspondence where the council has asked the complainant to supply it with a copy of the plan so it knew which one he was referring to. This again is not a section 77 issue; it is the council trying to clarify with the complainant which plan he is referring to before it can comment. Also, part J of the request was seeking comments, not asking for recorded information. Seeking comments, rather than recorded information, is outside the Commissioner's remit to investigate.

Right of Appeal

35. 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

36. 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.
37. 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

Annex 1 - to decision notice FS50592080

Request A

"Who requested or instructed said HBC aberrant survey of 'agreed boundary' to [address redacted] and [address redacted]?"*

Council Response:

The site visit was necessary as part of ongoing investigations that the development had not been built in accordance with the approved plans.

Request B

"Was not the instructing party nor any of the said three named HBC officers all involved in planning application [planning application number redacted] aware that Boundaries Partnering (BP) plan 'blue pegs' immediately was discredited as true boundary?"

Council Response:

The Boundaries Partnering plan was sent to Hastings Borough Council by East Sussex County Council who confirmed that the boundary shown was the agreed boundary between the two properties.

Request C

"Did neither the instructing party nor the said three named HBC officers refer to the all-party boundary agreement by landowners and occupants on 6 June 2013 site meeting under the aegis of HBC Planning Enforcement site meeting, also recorded in HBC Planning Enforcement minutes of 6 June 2013? Note: [Address redacted] owner-developer's emails 3/4 July 2013, confirmed the agreed boundary as [address redacted] Yucca-hedgeline; the said agreed boundary position and alignment described by ESCC solicitor 16 July 2013 to parties' solicitors†; surveyed by Mr [name redacted] in first Report dated 16 July 2013. Only then did ESCC permit [address redacted] owner-developer access to [address redacted] as required by The Party Wall etc. Act 1996 being cited by ESCC. †Counsel's advice on 22 August 2013 regards the said boundary agreement as legally binding."

Council Response:

At the site meeting [name redacted], Estates Team Leader, East Sussex County Council advised that the blue pegs marked the agreed boundary (this was in the notes of the 'on site summary of discussion' which

has already been supplied to you). As stated previously a copy of the Boundaries Partnering plan was used to help determine whether the development was located within the site's boundaries.

Request D

"Did the said three named HBC officers in November 2013 anyway not personally recall nor have any record of the said legally binding boundary agreement of 6 June 2013 site meeting when each of the officers was present?"

Council Response:

Please see response to point c).

Request E

"Did neither the instructing party nor the said three named HBC officers not see fit to distinguish between agreed discredited survey by BP (07/01/13), and HBC Enforcement site-meeting's all-party boundary agreement between both the landowners and occupants on 6 June 2013 and confirmed in July 2013? Note: Counsel - boundary agreement is legally binding."

Council Response:

There is no record of the Boundaries Partnering plan being discredited.

Request F

"Did not the said three named HBC officers in November 2013 anyway not observe nor question total absence of [address redacted] former yucca hedgeline agreed boundary position and alignment extant 6 June 2013 at HBC site meeting at which all were present? Note. developer had excavated yucca line to encroach [address redacted] up to 2m with new permanent structures."

Council Response:

It is not considered that the yucca hedge line marked the boundary (this was in the notes of the 'on site summary of discussion' which has already been supplied to you).

Request G

"Did none of the said three named HBC officers in November 2013 anyway refer to HBC Planning Records of [address redacted] road-frontage cited by ESCC agent-surveyor HEYNES 4 March 1982 to HBC Planners as 320' 0" [97.53m]?"

Council Response:

It was felt necessary to make use of the most up to date information available which in this case was the Boundaries Partnering plan.

Request H

"Did not the said three named HBC officers in November 2013 anyway not recall ESCC's and occupants' protests to Planning Officers also to Planning Committee at the said planning application's encroachment over [address redacted] said 1982 road frontage of 97.53m by 2.55m (S) and 5.4m (N) under 'Certificate A' falsely claiming sole-ownership of all land?"

Council Response:

Boundaries/ownership can change over time and it was felt necessary to make use of the most up to date information available which in this case was the Boundaries Partnering plan.

Request J

"Did not the HBC Planning Officers in November 2013 anyway not recall to his colleagues his department's own aberrant boundary plan created in March 2013 to counter ESCC's and occupants' submissions that developer's Certificate A falsely claimed sole-ownership of all the planning application's red-line site that encroached on [address redacted]? Note: HBC's own in-house 'boundaries' plan (18/03/2013) adapted OS line features and created new lines dissecting Olive Lodge's 1977 garages replacing 1892 barn."

Council Response:

Before it is possible to comment it will be necessary to provide a copy of the plan being referred to.

Request K

"Were not the said three named HBC officers in November 2013 aware that by entering [address redacted], to measure permanent structures and

ascertain the said legally binding agreed boundary without prior appointment nor any consent from legal occupants, each committed torts of trespass against the legal occupants Mr and Mrs [name redacted] and are liable for damages arising from said trespasses, i.e. by the said HBC's aberrant survey?"

HBC Response:

It was not necessary for the officers to enter [address redacted] in order to measure the proximity of the buildings to the boundary. The site visit took place within the boundaries of [address redacted]. Furthermore planning officers have the right to enter properties in order to investigate potential breaches of planning control.

Request L

Did HBC give prior notice to landowner of [address redacted] to obtain access to survey the said agreed boundary and to measure any encroachment into [address redacted] above also below the altered or replaced ground levels?

Council Response:

Please see answer to point k) above.

Request M

"Did ESCC respond and if so what was that response and was any response qualified?"

Council Response:

Please see answer to point k) above

Request N

"Other than HBC Principal Solicitor [name redacted], to whom did the said three named HBC officers report?"

Council Response:

[Name redacted], Development Manager.

Request O

"Did the Council or any of the said three named HBC officers inform [address redacted] owner-developer of their verbal report of their de facto aberrant survey of position and alignment of legally binding agreed boundary also encroachment by development site's permanent structures erected under protested HBC planning permission [planning reference redacted]?"*

Council Response:

Site contractors employed by the owners/developers were present on the day of the site visit.