

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulation 2004 (EIR)**

Decision notice

Date: 30 October 2018

Public Authority: City of York Council
Address: West Offices
Station Rise
York
YO1 6GA

Decision (including any steps ordered)

1. The complainant requested information with regards to the need for Grade A offices. City of York Council (the council) responded that it did not hold the requested information.
2. The Commissioner's decision is that the request is for environmental information and that the council does not hold the requested information as per regulation 12(4)(a) of the EIR. The Commissioner did find that the council should have provided advice and assistance in accordance with regulation 9 of the EIR in order to provide some clarity to why the specific information requested was not held.
3. As this clarity has been provided by the council to the Commissioner in response to her enquiries, the Commissioner does not require the council to take any steps.

Request and response

4. On 6 March 2016 the complainant made the following request to the council via the WhatDoTheyKnow website:
 1. *"What evidential records do you hold that indicate an unsatisfied demand for up to one million square feet of Grade A offices being needed in York over the coming years?"*
 2. *Provide a copy of that evidence*
 3. *If no evidence exists confirm this to be the case."*
5. The council wrote to the complainant on the 7 March 2016 clarifying its interpretation of the request as:

"A copy of any evidence the council holds to indicate an unsatisfied demand for up to one million square feet of Grade A offices being needed in York over the coming years."
6. The council then provided its response on the same day stating that it does not hold the requested information.
7. The complainant request an internal review on the 8 March 2016 as he did not accept that no information was held.
8. The complainant then complained to the Commissioner on the 27 November 2016 as he had not received a response to his internal review request.
9. The Commissioner wrote to the council in December 2016 asking that it carry out an internal review.
10. In October 2017, the complainant contacted the Commissioner again as he had still not received an internal review response from the council. He advised he had been out of the country and had not received the Commissioner's previous correspondence about this case, which is why he had not contacted sooner.
11. The Commissioner contacted the council further and the council sent its internal review response, via email, on the 19 December 2017. However, due to a system error, the internal review response did not actually 'send' and once realised, it was finally provided to the complainant on the 20 February 2018. It maintained that no information was held.

Background Information

12. The information request relates to York Central¹, a development expected to be built over a 15–20 year timeframe and is one of the largest city centre brownfield regeneration sites in England. The 45 hectare site will consist of housing and office space for businesses.

Scope of the case

13. The complainant has told the Commissioner that he considers that the council does hold information relevant to his request and that it appears to be saying his specific wording is refused, but indicate that there may be material available if he had used different wording.
14. The Commissioner considers the scope of the case is to firstly determine whether the information requested falls under the FOIA or the EIR, then consider whether the council holds information falling within the scope of his request. She will also consider whether the council could have provided the complainant with any advice and assistance, as per either section 16 of the FOIA or regulation 9 of the EIR, depending on whether the request falls under the FOIA or EIR.

Reasons for decision

Is the information request for environmental information?

15. The Commissioner has first considered whether the requested information as defined by regulation 2(1) of the EIR. Regulation 2(1)(c) with (a) are relevant in this case as the request is in relation to measures, such as (c) "*policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect...*" (a) "*the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites...*".
16. The Commissioner is of the view that the 'measures' in this case would be evidence of "*unsatisfied demand for up to one million square feet of Grade A offices*" as this would very likely impact on the surface of the land that these offices would sit.

¹ <http://www.yorkcentral.info/>

Regulation 12(4)(a) of the EIR – Information held/ not held

17. Regulation 12(4)(a) of the EIR states 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"*.
18. 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).
19. The Commissioner also feels it relevant to point out that she can only consider what the council held at the time the request was made, which was in March 2016.
20. The council has responded to the Commissioner's enquiries on this by explaining that as this information had not been commissioned, no searches were undertaken and the York Central Team confirmed the information was not held.
21. The York Central Team consisted of the Assistant Director Regeneration and Asset Management, a Project Manager, a Project Officer and the Director of Economy and Place. The council also contacted the Economic Development team.
22. The council has told the Commissioner that if information falling within the scope of the request did exist, it could have existed both manually and electronically.
23. The council has confirmed to the Commissioner that no information falling within the scope of the request has been deleted or destroyed.
24. The Commissioner asked the council whether there is business purpose for the requested information to be held. It responded by stating that it might be appropriate for the council to seek evidence for demand in York Central in order to support a business case for investment of council funding which relied upon such a demand for commercial space to be evidenced. However, that situation has not yet arisen.
25. The Commissioner also asked the council to explain, if it maintains that no information is held, why it would not carry out reports/consultations or gather evidence on whether or not there is a need for such a development.

26. The council responded to the Commissioner saying that the council, on behalf of The York Central Partnership (the council, Network Rail Homes England and National Railway Museum) has commissioned viability assessment work to develop the business case and master plan for the site.
27. The council has explained to the Commissioner that the development of York Central is a 15-20 year build and the council's role at this time is to facilitate the infrastructure development to open up the site for housing and commercial development. At no single point does it expect to require the demand to be present to fill all the commercial space in the master plan. The council says that this demand will emerge over time on the back of the council's enabling works and central government grant funding.
28. The council has stated to the Commissioner that a viability assessment is not the same as definitive evidence of demand for commercial space as per the request made. And when the viability assessment work is complete (expected in quarter 4 of 2018) the intention will be to share this with Members (barring any potential exemptions) to enable them to decide upon the financial plan and Partnerships Agreement with the York Central Partners. This will include determining the allocation of central government grant funding for which the council is the accountable body.
29. The complainant provided an email trail from 2016 of correspondence between council's Corporate Director of Economy and Place, himself and others. The complainant considers that this demonstrates the Corporate Director of Economy and Place's position is that demand for office space exists and that the council is pursuing the matter by, among other things, seeking reports and information from local estate agents and property professionals.
30. The Commissioner provided the council with a copy of this email trail. It responded that its managers have stated that they do not hold the specific information requested and they cannot see anything in the email trail which responds to the questions asked, to show where there is evidence for a need for offices.
31. The council's Corporate Director of Economy and Place responded directly on this stating:

"The further reports alluded to in my responses are due to go to Executive and full Council in the next 6 months and the evidence base for those reports is being developed but not complete.

So our response remains the same, the evidence didn't exist at the time of the request, no suggestion has been made by me that the evidence does / did exist and the business case is in development and will be presented to Members at public Executive when they are asked to fund/borrow for the project, which is likely to be before the end of the calendar year."

32. The council has confirmed that a search of all the Corporate Director of Economy and Place's emails and correspondence files have been carried out and there is no information relating to the complainant's request.
33. The Commissioner is satisfied that the 2016 email trail does not specifically state that the information requested is held, she does note though that on 18 April 2016 it was stated by the Corporate Director of Economy and Place in the email trail: *"I agree that public sector funds are very precious and therefore to ensure that we do not find ourselves in a position of undertaking investments for which there is little commercial demand we are working with our public sector partners to develop a robust business case. This will be brought back to members at the appropriate time."* However, this statement does not confirm either way whether there is a demand or not.
34. The Commissioner considers that even though the council is creating information in relation to this development in the form of a viability assessment, if the council knows, from checking with the most relevant department, The York Central Team, that it has not commissioned any reports, assessments or other information *"to indicate an unsatisfied demand for up to one million square feet of Grade A offices being needed in York over the coming years"*, then it is hard to disprove otherwise. Also, the council has told the Commissioner, it does not expect to require the 'demand' to be present to fill all the commercial space in the master plan.
35. The fact it is not expecting to require a demand solidifies its stance as to why it does not hold the requested information.
36. Therefore on the balance of probabilities, the Commissioner is satisfied, that no information is held that falls within the scope of the complainant's request.

Regulation 9 of the EIR – Advice and assistance

37. Regulation 9(1) of the EIR states:

"A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants."

38. Regulation 9(3) of the EIR states:

"Where a code of practice has been made under regulation 16. And to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case."

39. The EIR code advises that the list of recommendations it provides should not be considered exhaustive and that authorities should be ready to provide such advice and assistance to requesters "so far as it would be reasonable to expect it to do so", as required by regulation 9(1). However, the Commissioner considers that the nature of advice and assistance suggested by the EIR code falls into 3 broad categories: assisting potential requesters in submitting their requests; helping applicants to better describe the information they are seeking (clarification) and assisting requesters who have requested information in a specific form and format (relating to the application of regulation 6).

40. In this case, the complainant has told the Commissioner that the council appear to be saying 'my specific wording is refused, but indicate there may be material available if I had used different words'.

41. The council's internal review response stated:

"On review, the service area has confirmed that no recorded information is held that meets the specific criteria of your request."

42. The Commissioner also notes that the council clarified the complainant's request on the 7 March 2016 and the complainant did not dispute this clarification.

43. Having looked at the council's handling of the request, it appears to the Commissioner that the council has taken steps to clarify what has been sought by the complainant and has then gone on to confirm whether or not it holds information within the scope of the request. However, the confirmation of their position did not take into account the clarified focus provided by the complainant and only served to frustrate the requestor by not using the refinement within the context of 'advice and assistance' as provided for in Regulation 9.

44. There are differences to advice and assistance as provisioned under the EIR to that the FOIA. Under the EIR, the duty is wider and is not limited to certain triggers as in the FOIA.

45. The Commissioner's guidance² on Regulation 9 of the EIR at paragraphs 21 and 22 state:

"21. The duty to provide advice and assistance can also be triggered if the public authority is aware at the time of the request that the applicant may actually be seeking other information, over and above what they have asked for.

22. The Commissioner is of the view that, taking into account what is said at the time of making the request, if it is obvious that the applicant is seeking other information and what that other information is, then the public authority should give advice and assistance so that the applicant can make another request. In such a situation the public authority should still answer the original request but at the same time offer advice and assistance to enable the applicant to make a further request."

46. Although not the exact situation in this case, it gives an indication of how advice and assistance should be considered, and it was clear from the complainant's internal review request that he is after information justifying the demand for the office space. He clearly states:

"I again ask you for a copy of the recorded information that senior employees of York Council have consistently and repeatedly claimed that they hold which justifies a demand for massive Grade A office provision in York."

47. The Commissioner is of the view that the council should have offered some advice and assistance to the complainant explaining why the premise of his request was wrong and that the business case was yet to be produced and presented to the council.
48. As clarity on this has now been provided, no steps are required to be taken.

² <https://ico.org.uk/media/2013834/eir-advice-and-assistance-regulation-9.pdf>

Right of appeal

49. 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

50. 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.
51. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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