

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

Decision notice

Date: 9 December 2013

Public Authority: Cambridge City Council
Address: Mandela House
4 Regent Street
Cambridge
CB2 1BY

Decision (including any steps ordered)

1. The complainant has requested an agreement between Brookgate and Network Rail. Cambridge City Council confirmed that the requested information was not held.
2. The Commissioner's decision is that Cambridge City Council:
 - wrongly handled the request under the FOIA and breached regulation 5(1) and regulation 14(1) of the EIR;
 - correctly confirmed that the requested information is not held.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 3 June 2013, the complainant wrote to Cambridge City Council (the "council") and requested information in the following terms:

"Under Section 2 Recitals from the Section 106 document (08/0266/OUT) it says: 2.4 "Brookgate is the registered proprietor of the Brookgate Land and has the benefit of an agreement with Network Rail for the acquisition of a leasehold interest in the Network Rail Leased Land." I assume that you must have the details of this agreement otherwise you would not have referred to it in the Section 106 document (not only in section 2 but also in parts 20 and 21 referring to the yellow phase and the covenant with the Council) - I should be very grateful if your staff could provide the details of this agreement to me under the Freedom of Information Act."

5. The council responded on 25 June 2013. It stated that the requested information was not held.
6. Following an internal review the council wrote to the complainant on 23 July 2013. It stated that it was maintaining its original position and re-confirmed that the requested information was not held.

Scope of the case

7. On 1 July 2013 the complainant contacted the Commissioner to complain about the way their request for information had been handled. They re-submitted their complaint on 24 July 2013, following the completion of the internal review.
8. The Commissioner confirmed with the complainant that his investigation would determine whether the council had correctly confirmed that the requested information was not held.

Reasons for decision

Is it Environmental Information?

9. During the course of the investigation the council confirmed that, following a further review, it had determined that, if held, the requested information would be likely to be environmental information as defined by the EIR. The Commissioner accepts this conclusion and has set out the relevant reasoning below.

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. The Commissioner notes that the requested information relates to planning matter. He has considered whether this information can be classed as environmental information, as defined in Regulation 2(1)(a)-(f), and he has concluded that it can for the reasons given below.
13. In this case the subject matter of the withheld information relates to land/landscape and advice which could determine or affect, directly or indirectly, policies or administrative decisions taken by the council.
14. 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 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 and breached regulation 5(1) of the EIR.

Regulation 14 – refusal to disclose information

16. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore where the procedural requirements of the two pieces of legislation differ it is inevitable that the council will have failed to comply with the provisions of the EIR.
17. In these circumstances the Commissioner believes that it is appropriate for him to find that the council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and indeed its internal review) failed to cite any exception contained within the EIR because the Council actually dealt with the request under FOIA.

Regulation 5 – is the requested information held?

18. Regulation 5(1) provides that a public authority that holds environmental information should make it available on request.
19. In this case, the council has maintained its position that the requested information is not held. The complainant disputes this and believes that the council does hold the information.
20. In scenarios where there is some dispute between a public authority's explanation of information held and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
21. 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).
22. In order to assist with this determination the Commissioner asked the council to address a number of standard questions which he routinely uses in such cases. These, along with the council's responses are reproduced below.

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

23. The council clarified that the complainant had asked for a copy of an agreement between Brookgate and Network rail for the acquisition of a leasehold interest in land covered by a planning agreement, to which the

council, Brookgate and Network Rail are parties. The council acknowledged that the complainant believes that the council must hold a copy of the requested leasehold agreement because it is referred to in the planning agreement; however, it has confirmed that council files relating to the preparation of the legal agreement have been reviewed and a copy has not been found.

24. The council has confirmed that further searches have been conducted, including searches at an external solicitor retained by the council to act on its behalf in preparing and completing the planning agreement. The solicitor confirmed that they had not seen a copy of the agreement in question and searches of 11 bankers' boxes of papers confirmed this.

If searches included electronic data please explain whether the search included personal information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.

25. The council explained that, as the request was for a single document, if it were held, it would be in one of a small number of places, i.e., in the files of the external solicitor, in the files of the internal legal service or on the relevant planning file. The council confirmed that its legal department had determined that the document was not something the council would have needed to retain a copy of.

Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?

26. The council confirmed that the requested information had never been held.

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

27. The council confirmed that the information was never needed by or requested by the council nor its external legal advisors in connection with the matter referred to in the request.

Analysis and conclusions

28. In weighing the balance of probabilities the Commissioner has considered the explanations provided by the council and referred to the complainant's submissions.
29. The complainant has raised concerns that the council should hold the requested information in order to administer the substantive planning matters referred to in the request.

30. Whilst the Commissioner is alive to the complainant's concerns he has no material basis on which to challenge the veracity of the council's confirmation that information is not held. The records management code of practice issued under section 46 of the FOIA (also applicable to the EIR) is clear that it is for public authorities to decide what information needs to be retained for its business and auditing purposes.
31. Without direct evidence which shows that relevant information was held by the council at the time the request was received the Commissioner is not in a position to contradict the council's response. Although he does not dispute the strength of the complainant's concerns in this matter he must reach his conclusions on the basis of the available evidence.
32. Having considered the explanations provided by the council and noted the extent of the searches it conducted he has concluded that, on the balance of probabilities, it has truthfully confirmed that the information is not held.
33. The Commissioner finds that, in handling the request, the council complied with regulation 5(1) of the EIR.

Right of appeal

34. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

35. 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.
36. 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
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