

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

**Date:** 3 March 2020

**Public Authority:** Milton Keynes Council  
**Address:** Civic Offices  
1 Saxon Gate East  
Milton Keynes  
MK9 3EJ

**Decision (including any steps ordered)**

---

1. The complainant requested from Milton Keynes Council (the Council) various information relating to a planning application. The Council disclosed some information it held and stated that it did not hold the remainder.
2. The Commissioner's decision is that the Council has:
  - i. on the balance of probabilities, disclosed all the information it held within the scope of the request, at the time it was submitted;
  - ii. breached regulation 5(2) of the EIR by failing to provide information it held within 20 working days; and
  - iii. breached regulation 11 of the EIR by failing to conduct an internal review within 40 working days.
3. The Commissioner does not require the Council to take any step as a result of this decision notice.

## Background information

---

4. In November 2016 the Council received a planning application (16/03023/FUL) for the demolition of an existing warehouse and its replacement with a larger warehouse and ancillary works, including provision for access.
5. On 11 May 2017, the Council's Development Control Committee members resolved to grant planning permission for the development subject to conditions. The Council's planning permission that was issued had a number of conditions missing.
6. The applicant appealed against one of the conditions which limited working hours on the development. . However, this appeal has been subsequently withdrawn.
7. Later, in September 2018 a further planning application (18/02341/FUL) was submitted. This planning application was similar to the earlier application described above.
8. Local residents organised in a group called "*Blakelands Residents Association*" objected to this planning application. Their concerns became the subject of a number of local and national media reports.
9. The Council commissioned an external review in relation to this and other relevant planning applications. During the course of the Commissioner's investigation of the present complaint, this external review was still ongoing.

## Request and response

---

10. On 13 February 2019 the complainant wrote to the Council and requested information of the following description:

*"Please send me the following information in relation to planning application 18/02341/FUL*

- 1. The pre-application advice provided by [redacted] and [redacted] with the applicant and their agents.*
- 2. The covering letter that was submitted with the planning application.*
- 3. All correspondence between the Council's officers and the applicant and their agents in relation to this application.*

*I would like the above information to be provided as electronic copies"*

11. The Council acknowledged receipt of the request on 13 February 2019 and provided the complainant with a response on 18 March 2019. The Council's response contained four attachments. In response to Part 1 of the request the Council asserted that no information was held. The information requested in Part 2 of the request was one of the documents attached. The rest of the information provided was in response to Part 3 of the request.
12. In addition, the Council provided a web-link to its planning portal, where according to the Council the remaining relevant information could be accessed.
13. However, the Council did not make it clear which information was relevant to which part of the information request.
14. Remaining dissatisfied with the Council's response, on 17 April 2019 the complainant requested an internal review and expressed her position that the Council's initial response was incomplete and that she believed that further information was held.
15. Following the Commissioner's involvement, the Council provided the complainant with the outcome of its internal review on 5 July 2019. The internal review conducted uncovered additional information held by the Council. This information was contained in 4 files containing 583 pages of information in total. The information mainly consisted of email correspondence relating to the planning application specified in the request.

### **Scope of the case**

---

16. The complainant contacted the Commissioner on 9 May 2019 to complain about the way her request for information had been handled. The complainant confirmed that she was satisfied with the response received in relation to the second part of the request, but was specifically concerned about the information the Council stated it did not hold and about the time the Council took to respond to her request.
17. During the course of her investigation, the Commissioner advised the Council that since the information requested relates to planning matters, it was likely to fall within the EIR. Therefore, the Commissioner asked the Council to consider this access regime when responding to the Commissioner's investigation queries.
18. The Commissioner was notified in the meantime that the Council had received further information requests submitted by the complainant. The

Council considered them to be similar or related to the content of the present complaint and intended to refuse them as manifestly unreasonable. However, the Commissioner advised the Council that it is for the Council to deal with each request it receives. These later requests fall outside of the scope of the present investigation.

19. The following analysis will determine whether the Council complied with:
  - i. Regulation 5(1) of the EIR, when it stated that it held no further information within the scope of the request beyond what was already disclosed;
  - ii. Regulation 5(2) of the EIR, in relation to the timing of its response to the complainant's information request; and
  - iii. Regulation 11 of the EIR, in relation to the time it took to conduct the internal review

## Reasons for decision

---

### **Regulation 5(1) – Duty to make environmental information available on request**

20. Regulation 5(1) of the EIR states that "*a public authority that holds environmental information shall make it available on request.*" This is subject to any exceptions that may apply.
21. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. She will also consider the actions taken by the authority to check that the information is not held, and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held.
22. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072) in which it was stated that "*there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records*". It clarified that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test the Commissioner applies in this case.

23. In discussing the application of the balance of probabilities test, the Tribunal stated that, *"We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."* The Commissioner has therefore taken the above factors into account in determining whether or not further information is held, on the balance of probabilities.
24. As part of her investigation, the Commissioner wrote to Council requesting submissions in respect of a number of questions relating to the allegations raised by the complainant. The Commissioner's questions were focused on the Council's endeavours in providing the requested information to the complainant, its searches conducted in relation to the complainant's request, and whether any of the information falling within the scope of the requests was deleted or destroyed.
25. In its response to the Commissioner, the Council explained that its planning officers involved with the planning application that is the core of the information request in the present case, were asked to search their e-mail mailboxes, electronic files (both individual and shared folders) and any paper files they held.
26. The Council stated that it *"does not believe it is possible for the data requested to be held in any other form and therefore is satisfied any relevant information has been retrieved."*
27. The Council asserted that two members of staff of the Council's Planning Department which were specifically named in the complainant's information request had left the Council prior to or around the time of the original request being received. The Council added *"We were able to access these individuals' accounts and conduct searches for the information however a large amount of information had already been deleted and it is not possible for us to recover deleted information from our servers."*
28. In response to the Commissioner's question as to which search terms were used during the Council's endeavour to identify information that would fall within the scope of the information request, the Council stated *"Search terms advised to officers included 'Blakelands', 'warehouse',*

*'Yeomans', '18/02341/FUL', the agent's name and the applicant's name and email. Additionally all emails of officers' involved in the planning application were searched for the period of time requested by [the applicant's name redacted], January to December 2018."*

29. The Council stated that all identified information within the scope of the request was held in electronic records. It added *"Although paper records were also checked however no information in relation to this request was found within paper records as any letters are scanned, filed electronically and shredded."*
30. As to whether any information held within the scope of the request was deleted or destroyed, the Council explained that it is possible that some correspondence between officers with the applicant and agent has been deleted in order to free up mailbox space, *"because the email was superseded in the email trail or because the email no longer contained relevant information that the officer felt they needed to retain."* Nevertheless, the Council confirmed that *"MKC do not believe that any information in relation to this request was deleted between the time of the original request and the internal review request. Having spoken to all the officers involved MKC are confident that no information was intentionally deleted in relation to this request."*
31. The Council confirmed that it does not hold a back-up of deleted emails or documents.
32. In response to the Commissioner's query relating to the Council's retention policy regarding the information within the scope of the request, the Council reiterated that *"the only records which could have potentially been deleted prior to the request and in relation to this request were correspondences. This would typically be emails. MKC's corporate retention policy for emails is at the officers' discretion, based on their content."*
33. When asked if there is any business purpose or statutory requirement for retention of information, the Council responded negatively in relation to email messages and added that *"As the documentation relates to a planning obligation anything required by law for the planning application is published and therefore there is no requirement to keep anything further."*
34. The Council concluded that all relevant officers of the Council involved in this planning matter who are still Council employees were contacted and all the information that the Council held within the scope of the request was identified and disclosed.

### ***The Commissioner's view***

35. The Commissioner has examined the submissions of both parties. She has considered the searches performed by the Council, the information it disclosed, the Council's explanations as to why there is no further information held and the complainant's concerns.
36. Having considered the scope of the request, the Commissioner is satisfied that, although not in a timely fashion, the Council carried out necessary searches to identify the requested information that was held at the time of the request.
37. The Commissioner appreciates the complainant's concerns, however, in the absence of evidence to the contrary, the Commissioner is satisfied that the Council has provided the complainant with all of the relevant information which it held falling within the scope of the request.
38. Therefore, the Commissioner is of the view that, on the balance of probabilities, the Council did not hold further information within the scope of the request.

### **Regulation 5(2) of the EIR – Time to respond**

39. As explained above, Regulation 5(1) requires a public authority to provide information it holds when requested. Regulation 5(2) of the EIR requires this information to be provided to the requestor within 20 working days following receipt of the request.
40. The complainant requested the information on the 13 February 2019 and the Council provided part of the information held on 18 March 2019. Additional information held was provided to the complainant, on 5 July 2019, with the outcome of the Council's internal review.
41. This is a period of more than four months and as such it is outside of the required 20 working days. Therefore the Commissioner finds that the Council breached regulation 5(2) of the EIR.

### **Regulation 11 – Internal review**

42. Regulation 11 of the EIR states that:

*"(1) An applicant may make representations to a public authority in relation to their request for environmental information if it appears to the applicant that the authority has failed to comply with the requirements of the Regulations.*

*(2) Those representations need to be made in writing no later than 40 working days after the date which the applicant believes the public authority failed to comply with the requirement.*

*(3) The public authority shall on receipt of the representations and free of charge –*

*(a) consider them and any supporting evidence produced by the applicant; and*

*(b) decide if it has complied with the requirement.*

*(4) A public authority shall notify the applicant of its decision under paragraph (3) no later than 40 working days of the date of receipt of the representations."*

43. In its response to the Commissioner, the Council claimed that it provided the complainant with the outcome of its internal review within the statutory deadline as required by regulation 11 of the EIR. It stated:

*"It should be noted that the internal review was completed within 40 working days of the receipt of all required information from the requestor and the requestor was kept informed as she was in contact with MKC on other issues regarding the topic of the request."*

44. The Commissioner reiterates that to be valid, a request for internal review must be:

- in writing (this includes by electronic means); and
- submitted within 40 working days after the date of the substantive response to the request.

45. The Commissioner notes that the complainant wrote to the Council on 17 April 2019, clearly stating that she was not satisfied with the amount of information received and explained which parts of the requests she considered to be outstanding.

46. The Commissioner's view is that this was a valid request for an internal review. Therefore, the outcome of the internal review should have been provided by 18 June 2019.

47. The Council argued that it asked the complainant to clarify the request and that additional clarifications provided on 10 May 2019 by the complainant widened the scope of the initial request and restarted the clock for conducting the internal review.

48. The Commissioner disagrees with the Council on this point. She reiterates that any necessary clarification should have been requested



prior to responding to the original request in compliance with regulation 9 of the EIR and any further information requested outside the scope of the initial request, should have been handled as a new request. However, this is not a valid reason to extend the statutory deadline of 40 working days to provide an outcome of the internal review.

49. In addition, the Commissioner notes that in its correspondence of 5 July 2019 to her, the Council admitted that the outcome of internal review was not provided in timely fashion, stating:

*"I can confirm that [the complainant] has now received a response to the internal review she requested.*

*I am sorry that in this case the response was not received within the timeframe we would expect to respond to an internal review."*

50. In light of the above the Commissioner finds that the Council has breached regulation 11(4) of the EIR.

## Other matters

---

51. Although they do not form part of this decision notice the Commissioner wishes to highlight the following matters of concern:
52. The Commissioner notes that only during her investigation did it become apparent to the Council that the information requested was environmental in nature.
53. The Commissioner reiterates that any public authority must consider carefully the content of requested information in order to ensure that it handles a request under the correct regime: the EIR or FOIA.
54. This is particularly important when refusing to provide information, as the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions).
55. When the Council receives requests for information that may be environmental, it should consult the relevant ICO guidance on determining what is environmental information.<sup>1</sup>

---

<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1146/eir\\_what\\_is\\_environmental\\_information.pdf](https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf)

## Right of appeal

---

56. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

57. 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.
58. 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 .....**

**Ben Tomes  
Team Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**