

Freedom of Information Act 2000 (Section 50) *Environmental Information Regulations 2004*

Decision Notice

Date: 3 June 2010

Public Authority: East Dorset District Council
Address: Council Offices
Furzehill
Wimborne
Dorset
BH21 4HN

Summary

The complainant requested a record of a meeting that took place on 3 November 2006 between members of Wimborne Town Council ("the Town Council") and East Dorset District Council ("the Council"). The Council stated that it held no records of this meeting. As the complainant did not accept this response, the Information Commissioner ("the Commissioner") investigated. The Commissioner decided that the request should have been handled under the terms of the Environmental Information Regulations 2004 ("the EIR"). However, the Commissioner was satisfied that the Council did not hold the information requested on the balance of probabilities and requires no steps to be taken. He found that the Council breached regulation 14(2) and 14(3)(a) of the EIR.

The Commissioner's Role

1. The EIR were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Commissioner. In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 ("the FOIA") are imported into the EIR.

The Request

2. On 23 June 2009, the complainant sent an email to the Council requesting information in the following terms:

"We are aware that prior to 21 November 2006 there was a meeting between members of the Town Council and certain EDDC Members. We understand that 'contributions' from the Section 106 Agreement that would be part of the eventual Waitrose Planning Permission were discussed – a year before an application was actually made. The meeting was clearly sufficiently formal to warrant a report to the Wimborne Local Action Group as noted at Item 4 of its report of the meeting that took place on 21 November 2006 viz:

General Updates

4/ E.D.D.C Councillors have met with Town Councillors regarding Town Centre enhancement works and £80,000 has been set aside for this. There will be a need to all pull together with this plan and it was highlighted that there was a need to involve young people (possibly through Q.E School and The Planet) and to include comments from 'the wider hinterland'. The possibility of utilising potential Section 106 (Planning Gain monies) from the proposed Waitrose and Costa Coffee developments was also mentioned. Ron Tomlin (Community Development Officer E.D.D.C.) reported that District Council Planners have received a 'Scoping document' from Waitrose and that a full application was anticipated before the end of the year.

I have asked two Wimborne Town Councillors neither of whom have a record of this meeting within Town Council Minutes of the relevant period. But since EDDC Members were involved in this meeting with Town Councillors no doubt you have a copy of the relevant minutes. We are particularly anxious to discover what precisely was discussed on this occasion and by whom.

We look forward to receiving this information within 20 working days. If we do not do so then we shall proceed in accordance with the Freedom of Information Act by seeking an internal review of your conduct and, finally, by making an appeal to the Information Commissioner".

3. On 3 July 2009, the complainant wrote to the Council again referring to the fact that he had made the same request for information to the Town Council (For clarity, this request is not being considered by the Commissioner and did not result in the complainant obtaining the information he requires). The complainant stated that the response had

- revealed that the meeting he was interested in took place on 3 November 2006. The complainant stated that he presumed that officers of the Council would have been present to take minutes. He explained that the meeting had been mentioned in Town Council minutes dated 7 November 2006.
4. On 7 July 2009, the Council emailed the complainant to acknowledge receipt of his correspondence. It stated that it was investigating whether it held the information.
 5. On 23 July 2009, the complainant emailed the Council chasing a response. He pointed out that the 20 working day deadline for a response had passed.
 6. On 24 July 2009, the Council replied and apologised for not writing sooner. It explained that it had been unable to trace any documentation regarding the meeting. The Council confirmed that it was awaiting responses from some councillors that it had contacted about the request and it asked for more time before supplying its final response.
 7. On 28 July 2009 the complainant replied. He expressed incredulity regarding the Council's statement that it had not found any record of the meeting. The complainant referred again to details of the meeting recorded in Town Council minutes dated 7 November 2006.
 8. On 18 August 2009, the Council replied. It confirmed that it had completed its investigation and wished to confirm that the information was not held.
 9. At this point, the complainant submitted a complaint to the Information Commissioner. However, this was rejected because the Council had not yet completed an internal review. Following this, on 18 November 2009, the complainant wrote to the Council requesting an internal review.
 10. On 24 November 2009, the Council supplied its internal review. It confirmed that it wished to maintain that it did not hold the requested information. It did however accept that it did not respond within the 20 working days timescale. The Council stated that in accordance with its duty to advise and assist under section 16 of the FOIA, it would suggest that the complainant contact the Town Council about the request.
 11. The complainant replied on 26 November 2009 pointing out that he had already advised the Council that he had been in contact with the Town Council. He referred again to the content of minutes he had been

provided with as a result of his request to the Town Council and continued to express incredulity regarding the Council's response.

The Investigation

Scope of the case

12. On 2 December 2009, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the Council held the information he had requested.

Chronology

13. On 18 February 2010, the Commissioner wrote to the complainant setting out his understanding of the complaint. The Commissioner asked the complainant to supply all the evidence he had demonstrating that the meeting had taken place.
14. On 24 February 2010, the complainant replied. The complainant confirmed that the Commissioner had accurately understood the details of his complaint. He also supplied a copy of the Town Council's response to his request dated 29 June 2009, the relevant extract from the minutes of Wimborne Local Action Group ("WLAG") dated 21 November 2006 and the relevant extract from the Town Council minutes dated 7 November 2006. The complainant stated that he continued to find it incomprehensible that Councillor Cook could not provide an account of the meeting even if no formal minutes had been taken.
15. On 1 March 2010, the Commissioner wrote to the Council. He asked a number of questions to help him to consider whether, on the balance of probabilities, the Council held the information in question. The Commissioner also indicated at this point that he considered that it was likely that the request should have been considered under the EIR.
16. On 1 March 2010, the Commissioner wrote to the complainant stating that his investigation would be limited to whether the Council held the recorded information that had been requested. He explained that this meant he could not consider whether Councillor Cook could provide an account of what was discussed. The Commissioner further explained that he would be considering whether the Council held the information on the balance of probabilities.

17. On the same day, the complainant replied. He referred to the Town Council minutes dated 7 November 2006 and the fact that Councillor Cook had indicated that details of the meeting would be circulated when "there was something concrete to report". The complainant stated that he wanted to know what these details were.
18. On 1 April 2010, the Commissioner telephoned the Council to ascertain whether a response had been sent. The Council confirmed that it had sent a response but would provide another copy. The Council explained to the Commissioner that it maintained that it did not hold any record of the meeting in question. It explained that it was its understanding that the meeting was an informal discussion. It stated that this, coupled with the fact that the meeting had taken place at the Town Council, supported the Council's position that no recorded information was held by the Council.
19. On the same day, the Council provided a copy of its response dated 30 March 2010. It responded to the Commissioner's questions. The details of the Council's response have been set out below in the Analysis section of this Notice.

Analysis

Substantive Procedural Matters

Was the request for environmental Information?

20. Some details regarding the discussion that took place were provided in the minutes of the WLAG dated 21 November 2006 as detailed in the request itself set out at paragraph 2 of this Notice. It is clear from this that the meeting involved discussion about plans that would have affected the environment. The Commissioner considers that the request therefore fell within the scope of regulation 2(1)(c) of the EIR as it is a request for information on a plan affecting one of the elements of the environment (in this case land).

Did the Council hold the information on the balance of probabilities?

21. When it is alleged that a public authority held information it claimed it did not hold, the Commissioner will consider whether this was the case on the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality and thoroughness of any searches undertaken by the authority as well as considering, where

appropriate, any other reasons offered by the public authority to explain why the information was not held.

22. As mentioned in the Chronology section of this Notice, the complainant provided evidence to the Commissioner that the meeting in question had taken place. The relevant content of the minutes of the WLAG are quoted in the request at paragraph 2 of this Notice and therefore do not need to be repeated. It is also the case that, following a request made by the complainant to the Town Council, the complainant was made aware that the meeting mentioned in the minutes above also appears to have been mentioned in Town Council minutes dated 7 November 2006 as follows:

"Cllr Mrs March asked if the Minutes of last week's meeting between the Town Council and the District Council would be circulated. Cllr Cook responded that when there was something concrete to report all Members would be sent details".

23. Within the same minutes is a reference to "the meeting on 3 November 2006 between District and Town Councillors on The Square..."
24. The complainant has argued that it is incredible that the Council would not hold any record of the meeting, particularly as it was clearly sufficiently formal to be recorded in the minutes of the WLAG and the Town Council.
25. The Council advised the Commissioner that it wished to maintain its position that it held no record, informal or otherwise, of the meeting. It explained that, following receipt of the request, it had contacted the three local district councillors who represent the Wimborne Minster Ward and the Leader of the Council at the time. It explained that it had asked them for details of any meetings held prior to 21 November 2006 with Wimborne town councillors in relation to the matter in question. The Council also asked them for copies of any notes or more formal minutes that were taken or produced. The Council also contacted the Clerk of the Town Council about the request. In addition, the Council consulted the Head of Planning and Building Control, the Principal Solicitor, the Community Development Manager and the Chief Executive of the Council.
26. The Council stated that it had searched relevant Council records and in particular, planning files held by the Planning Department, the Chief Executive's file of Quarterly meetings with the Town Council and the Legal Division records.

27. The Council confirmed that the above investigation and searches had been unsuccessful as no record of the meeting was located and all those consulted confirmed that they had not attended the meeting and held no relevant records. The Council stated that it was unlikely that any officers or district councillors other than those consulted attended the meeting and it had not located any evidence indicating that this was the case. The Council also stated that its position was that the information had never been held and had not been deleted, destroyed or mislaid.
28. As the complainant believes Councillor Cook, who was a town councillor at the time, attended the meeting, the Commissioner specifically asked the Council to consult with him in order to try to establish more details about the meeting in question. However, the Council has stated that Councillor Cook was unable to confirm that he did in fact attend the meeting as his recollection is unclear. He explained that if a meeting had taken place, it would most likely have been an informal discussion with no minutes being taken. The Town Clerk also advised the Council that any such meeting was likely to have been informal and impromptu.
29. Based on the evidence provided, the Commissioner accepts that a meeting on the relevant date did take place involving town and district councillors. The Commissioner considers that it is unfortunate that no councillors have been able to confirm their involvement. The Council has explained that this could be due to the passage of time and the informal nature of the meeting or discussion. However, even if the Council had been able to establish who attended the meeting, there is no evidence available to the Commissioner indicating that any records of the meeting were held by the Council, informal or otherwise. The Commissioner is satisfied that the Council's responses support the conclusion that the information was not held on the balance of probabilities.

Procedural Requirements

30. The Commissioner considers that the request should have been handled under the terms of the EIR. Under the EIR, when a public authority's response to a request is that the information is not held, it must issue a refusal notice in accordance with regulation 14 citing the exception under regulation 12(4)(a). As the Council did not recognise that the request was for environmental information, the Commissioner considers that it breached regulation 14(2) for failing to issue a valid refusal under the EIR within 20 working days of the request and regulation 14(3)(a) because it had not rectified this by the date of its internal review.

The Decision

31. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR:

- It did not breach the EIR for failing to identify that it held relevant information because, on the balance of probabilities, the information was not held.

32. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:

- The Council breached regulation 14(2) and 14(3)(a) of the EIR because it did not handle the request under the terms of the EIR.

Steps Required

33. The Commissioner requires no steps to be taken.

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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is sent.

Dated the 3rd day of June 2010

Signed

**Gerrard Tracey
Principal Policy Adviser**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other 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;

Regulation 5 - Duty to make available environmental information on request

Regulation 5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant’s request is received;

Regulation 14 - Refusal to disclose information

Regulation 14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3) The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13;
and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).