

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

Decision notice

Date: 15 February 2012

Public Authority: Bedford Borough Council
Address: Borough Hall
Cauldwell Street
Bedford
MK42 9AP

Decision

1. The complainant has requested the council to release any information it holds relating to a discussion which took place between a parish councillor and the council's planning department relating to an option to close a road and divert traffic via Milton Ernest.
2. The Commissioner's decision is that Bedford Borough Council ('the council') does not hold the requested information and has therefore complied with the requirements of the EIR.
3. The Commissioner requires no further action to be taken.

Request and response

4. On 29 August 2011, the complainant wrote to the council and requested information in the following terms:

"Please advise me by whom and why was [councillor's named redacted] advised by Bedford Borough Council that Clapham could (if they wanted) apply for a construction access route via the A6 and access the Twinwoods Business Park site via the Milton Ernest gate".

"The Business Park is in the parish of Milton Ernest, was anyone from Milton Ernest consulted?"
5. The council responded on 21 June 2011. It stated that in relation to the first question, it does not hold any recorded information. In respect of

the second question, the council confirmed that Milton Ernest Parish Council was notified of the proposal.

6. Following an internal review the council wrote to the complainant on 29 July 2011. In relation to question one, the council maintained its position that it does not hold any recorded information of the description specified in the complainant's request. Regarding question two, the council provided the complainant with a little more clarification and forwarded a link to him as to where relevant information could be accessed.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He stated that he remained dissatisfied with the council's response to question one of his request and believes recorded information should be held addressing this matter by the council.
8. This notice will focus on question one of the complainant's information request and whether the Commissioner agrees, on the balance of probabilities, with the council that it holds no recorded information addressing this element of his request. The Commissioner understands that the complainant received a satisfactory response to question two from the council, so this element of his request will not be addressed in this notice.

Reasons for decision

Does the council hold recorded information addressing question one of the complainant's request?

9. Regulation 12(4)(a) states that a public authority may refuse to disclose information to the extent that it does not hold the information when an applicant's request is received. A public authority will have complied with the requirements of regulation 5(1) (duty to make environmental information available on request) if the Commissioner is satisfied that the information requested is not held.
10. The complainant believes the council must hold recorded information addressing this element of his request because the Clapham Parish Council minutes of 20 January and 19 May 2009 make reference to the council's planning department giving a particular councillor within the parish the option to close Twinwoods Road and divert traffic to Milton

Ernest. He stated that the council must hold some record of the discussions that took place with the councillor over this issue for the matter to be recorded in the parish council minutes and because the issue concerns an arrangement between the parish council and the council's planning department for a road that has been open for over 50 years to be closed.

11. The Commissioner wrote to the council asking it to explain exactly what searches it had undertaken of its records to try and establish whether it holds the requested information. He also asked the council to provide its response to the complainant's allegations.
12. The council responded. It informed the Commissioner that it has made extensive searches of its records but it is satisfied that it does not hold any information addressing this element of the complainant's request. The council forwarded a link to the Commissioner so he could access all recorded information that is held relating to this planning application. It confirmed that if this information was held it would be held in this location and would therefore be accessible by the same link.
13. The council confirmed that planning applications are managed by its development management team and that it had contacted each member of this team about this request. The council advised that no one recalled any conversations or correspondence taking place with the parish council over the time this application was live of the description specified in the complainant's request. It stated that it was unable to contact the planning officer who was responsible for this application because they no longer work for the council but it was able to make enquiries to all other members of this team. Each team member does not recall any conversation or correspondence of the nature specified in the complainant's request taking place.
14. The council also advised that it had checked all planning application files relating to Twinwoods to see whether the requested information is held on these files. No reference to any conversation or correspondence taking place exists.
15. In its response to the Commissioner the council offered various reasons why this information may not be held:
 1. "[The councillor] was mistaken when he gave the information to the Parish Council. I do not suggest this, nor can I imagine why this would be the case."
 2. "The conversation took place over the telephone and the advice, given informally, was not recorded. Such situations are commonplace in our council, verbal advice particularly if the question was

as simple as "is there any reason why we shouldn't make a planning application for a new access if we want to?" The answer is a simple statement of legal correctness. Anyone can make a planning application if they want to. We give this level of general, informal advice all day every day and do not make file notes. It is not our normal procedure to record all requests for informal guidance and it is regarded as being disproportionate to start recording all such advice unless the advice is going to require or commit the council to a particular course of action."

3. "A record was made at the time but it is not now available. We have no reason to suppose that this is the case. None of the officers has said they held such a conversation. Our files are open to public inspection and there is no reason to suggest that, if such a conversation was held and a note made, it would have been removed subsequently."
16. The Commissioner relayed this information to the complainant and informed him that it was the Commissioner's preliminary view that on the balance of probabilities the requested information is not held.
17. The complainant responded advising that it was unhappy to accept this assessment. In his response he outlined further reasons why this information should be held and directed the Commissioner to further correspondence that he considers supports his case.
18. The Commissioner asked the council to respond to the complainant's further points and to see whether his further reasoning suggested that the information is or should be held.
19. The council responded. It advised the Commissioner that it can only reiterate what it has previously stated. It has made extensive searches for the information in question but it is not held. If it was held it would be happy to provide it to the complainant. The council stated again that the fact that the information is not held does not mean it is also saying that the conversation did not take place. Only that there is no record of any conversation or correspondence of the nature specified and this would not be unreasonable considering its own practices of recording informal advice.
20. The Commissioner has given this matter careful consideration. In cases such as this the Commissioner applies the normal standard of proof when determining whether a public authority holds the recorded information which is the civil standard of the balance of probabilities.
21. In deciding where the balance lies, the Commissioner considers the scope, quality and thoroughness of searches conducted by the public

authority together with any reasons offered by the public authority or the complainant as to why the information is not held or should be held, where appropriate.

22. The Commissioner's approach was supported by the Information Tribunal in the recent hearing of *Thompson and Dyke v Information Commissioner EA/2011/0164 and 0165*. The tribunal stated that the Commissioner is:

"entitled to accept the public authority's word and not to investigate further in circumstances where there is no evidence as to an inadequate search, any reluctance to carry out a proper search and any grounds for believing there is a motive to withhold information actually in its possession."

The tribunal referred to the Commissioner's national remit and limited resources and that to act otherwise might require a full scale investigation to be carried out in every case where a public authority is:

"...simply not believed."

23. In this case the Commissioner is satisfied that the council has carried out adequate searches of its records. It has explained where the information would be held if it were indeed held and provided the complainant and the Commissioner with a link to this location. It has checked all planning files related to Twinwoods and made enquiries to all members of the development management team. The council has also provided a list of possible reasons as to why this information is not held.
24. There is no evidence of any inadequate search or grounds for believing there is a motive to withhold information. The Commissioner is therefore satisfied in this case that on the balance of probabilities the council does not hold any recorded information which addresses question one of the complainant's request.

Right of appeal

25. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

26. 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.
27. 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

Rachael Cragg
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