

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

**Date:** 23 June 2014

**Public Authority:** Hinckley & Bosworth Borough Council  
**Address:** Council Offices  
Argents Mead  
Hinckley  
Leicestershire  
LE10 1BZ

**Decision (including any steps ordered)**

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1. The complainant has requested information relating to a planning application. He asked for all copies of correspondence between certain parties and the planning department at the council. The council provided some information however the complainant was aware that other correspondence had taken place and had not been disclosed to him. The Commissioner asked the council to confirm whether other information was held, and after further searches established that other information was held.
2. The Commissioner's decision is that council failed to provide all relevant information it held to the complainant within 20 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - To provide the complainant with copies of the information it has now discovered it holds.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 2 September 2014, the complainant wrote to the council and requested information in the following terms:

*"Copies of all correspondence between the agent (Mr. Aaron Smith) and HBBC Planning Department to/from the Environment Agency with respect to planning application [planning reference redacted].*

- *If the correspondence was by email, then my request includes providing me with the emails in full, including headers.*
- *If the correspondence was by paper (i.e. letter or fax) then a scanned copy sent to me by email is sufficient.*
- *If the correspondence was verbal (i.e. telephone or meeting), and records were made, then please forward me copies."*

6. The council responded on 17 September 2013 providing information to the complainant in response to his request.
7. On 18 September 2013 the complainant wrote to the council stating that he did not believe he had all of the information. He gave an example of references within the disclosed documents to other emails which had not been disclosed to him.
8. The council responded on 30 September 2013 clarifying the situation, but the complainant wrote again on 2 October 2013 saying that he remained concerned that he still did not have all of the information which the council holds. The council wrote back to the complainant on 14 October 2013 confirming that it had disclosed all of the information it holds to him and referred him to his right to make a complaint to the ICO.

## Scope of the case

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9. The complainant contacted the Commissioner on 25 October 2013 to complain about the way his request for information had been handled. He said that the council had not found or provided all of the information and that he had had evidence that there had been further correspondence between the council and other parties. He was concerned that if this information had not been identified then there may be other documents which had not been found. He asked the Commissioner not to provide the council directly with copies of the correspondence he had received initially however as he wanted to

ensure that the council carried out full searches without knowledge of the information he already held.

10. The Commissioner wrote to the council and asked it to provide details of the searches it had carried out for relevant information. He also told the council that the complainant had evidence that there had been further correspondence between the council and the named parties.
11. The council responded to the Commissioner stating that it had found all relevant information and that its searches had not found any other information relevant to the request. It also said that to its knowledge no information had been deleted.
12. With the complainant's permission the Commissioner then wrote back to the council providing it with the dates and the names of the correspondents of the correspondence which the complainant had obtained from elsewhere. He asked the council to consider the further information and explain why the information had not been found, or a record of its deletion made.
13. The council responded on 22 May 2014. It explained that it had now found further information. It said that it had not found the correspondence initially as it had narrowed the scope of the complainant's request to only include information which was relevant to the planning decision (and therefore held on the planning file). It said that the planning department's general policy is to save copies of all correspondence which would be material to the determination of the planning application. In the context of the request, only information material (i.e. directly considered) as part of the relevant planning application was searched.
14. It said that the additional information provided to it by the Commissioner had led it to search personal email archives containing non-material correspondence. It had then located further information. It said however that without the sender or the date it would not have been possible to locate this information as it was held in personal archives, and that it is not possible to search all the archive using, for instance, a planning reference. It had therefore needed to know the relevant officer and dates in order to locate the information.
15. The council confirmed that after searching through the archive using the information provided no other information had been found.
16. The council therefore admitted that further information was held by it, but said that it would not have been possible to find that information without the further information that the complainant had provided.

## Reasons for decision

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### Regulation 5

17. Regulation 5(1) of the EIR states that

*"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."*

18. Regulation 5(2) of the EIR states that

*"Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."*

19. The Commissioner is satisfied with the council's argument that it was not able to locate the information initially as it did not have the information which would have allowed it to narrow its searches to the relevant areas. The descriptions of the searches which it had carried out previously were relatively adequate in scope however it did not locate emails which were not directly material to the planning decision. Hence the council effectively breached Regulation 5(1) in that it did not provide information that should otherwise have been communicated to the complainant.

20. The council has now located the information and is prepared to disclose it to the complainant, effectively complying with its obligation under Regulation 5(1). However the request was made to the council on 25 October 2013 and has not been disclosed to him at the date of this decision notice.

21. The Commissioner therefore considers that the council has also breached Regulation 5(2) in that it failed to provide the complainant with information to which he was entitled within 20 working days of the date of receipt of the request.

### Regulation 12(4)(a)

22. The council's argument is that it has not been able to find any further information as regards the complainant's request. The council presumably cannot say therefore that it has now provided all of the information which it holds to the complainant however it has confirmed that it was not able to find any further information after it searched the email archive. It cannot, however, with absolute certainty, state that no further information is held because it has clarified that it is not able to

locate further emails without additional details being provided by the complainant.

23. When the Commissioner receives a complaint that a public authority has not provided any or all of the requested information, it is seldom possible to prove absolutely that there is no further information held. The Commissioner will apply the normal civil standard of proof in determining the case, i.e. he will decide on the balance of probabilities whether the information is held. In applying this test the Commissioner will consider:
  - the scope, quality, thoroughness and results of the searches; and, or
  - other explanations offered as to why the information is not held.
24. Where the question is whether the council holds information or not the Tribunal has in the past outlined that where its searches are adequate the decision must be that the information is not held on a balance of probabilities. Even if further information is held the Tribunal does not expect that an authority will search every scrap of paper held by an authority in order to determine whether further information is held or not. It expects that the authority will have carried out appropriate searches of the relevant areas to determine whether information can be found or not.
25. The council has outlined how it carried out searches of the relevant planning file, and once it had been provided with details of the correspondence which the complainant had already obtained it carried out a further search of its officers archived email accounts. The Commissioner notes however the council's inability to identify relevant emails without further information being provided to it. It has explained how only information material to the decision is held on the planning file, and that subsequent to the provision of further information it has searched and obtained further 'non-material' correspondence from the email archives of its officers. It has been unable to find any further information however it admits that its archive system and its administrative procedures have been lacking in this regard.
26. The test which the Commissioner applies is whether 'on a balance of probabilities' any further information is held. The council does not therefore have to prove 'beyond a reasonable doubt' that no further information is held. The Commissioner is therefore satisfied that the council has now carried out adequate searches of its records using the information it has to identify relevant correspondence. Accordingly the Commissioner's decision is that on a balance of probabilities no further information is held, and that Regulation 12(4)(a) is therefore applicable.

27. Regulation 12(1) provides that where information is not held under Regulation 12(4)(a) then the authority is under a duty to carry out a public interest test. The test is whether in all the circumstances of the case the public interest in the exception being maintained outweighs the public interest in the information being disclosed.
28. In general this test serves little purpose where an authority can say categorically that no further information is held. However in this case there is merit to the test in that if the balance of the public interest lies in favour of information being disclosed then the council would be obliged to carry out further searches to locate and identify any further information which it 'might' hold which has not been located and which it is not currently aware of.

### The public interest test

#### The public interest in the information being disclosed

29. The central public interest test in favour of the information being disclosed in this case revolves around creating greater transparency and openness about planning issues. Planning matters are meant, in the main to be open to the public in order that they can assure themselves that the decisions taken are fair and open and that all relevant factors have been taken into account. Similarly the applicant can assure himself that objections are fair and factually correct.
30. The Commissioner accepts that the disclosure of all correspondence relating to a planning application would enhance the transparency of the process and add greater assurance of the integrity of the final planning decision. There is a strong public interest in this given the often controversial issues which arise around planning applications. The Commissioner also accepts that in general objections to applications are published on the planning portal of the council's website. There is therefore an expectation of transparency generally.

#### The public interest in the exception being maintained

31. The central public interest in the exception being maintained in this case rests in the use of council resources which would be required to carry out further searches for information which may not in fact exist. As stated, the test to be applied is that no further information is held 'on a balance of probabilities'. The council does not need to prove beyond a reasonable doubt that it does not hold any further information.
32. The Commissioner must therefore consider whether the public interest in the potential to find further information is outweighed by the public interest in preventing the cost in time and resources searching for information which may not exist.

33. The Commissioner firstly notes that all information 'material' to the decision is contained within the planning file, and that this has already been located. If there is any further information it is not considered to be material to the planning application decision. This effectively lowers the public interest in requiring the council to search for further information.
34. The complainant has copies of some correspondence and is able to provide details of this in order to obtain further information, however in actuality it is not this information he has concerns over, but whether any further information is held which he does not hold copies of.
35. The Commissioner recognises that the council has records management issues which this request has highlighted. This in itself is a relevant consideration as to whether the council should be required to carry out further searches to establish whether any further information exists. It affects the overall use of council resources which would be required to search for information which may not even exist.
36. The Commissioner accepts that the complaint was in this case valid, and it has brought failures in records management to the council's attention. However he does not consider that this leads to an automatic decision that the council should be required to carry out extensive further searches where it remains unclear what, if any further information might be found. The council's current procedures are likely to mean, in any event, that that information would have little relevance to the final planning decision as information material to the planning decision is already retained on file and has been disclosed to the complainant.
37. Having considered this the Commissioner's decision is that the public interest rests in the exception being maintained in this instance. If there is further information held it would require significant searches by the council in order to assure itself that it has located all of the relevant information. In any event, much of that information would be likely to be already held by the complainant. The Commissioner therefore considers that this would be a significant drain on the resources of the council for little public gain, and would be unlikely to provide any further details which might aid the complainant or the general public in representing their interests as regards the application.
38. The Commissioner's decision is therefore that the public interest rests in maintaining the exception.

## Other Matters

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39. For its part, given that it has now discovered the reasons why the information was not located in its initial searches the council has outlined changes it intends to make to its recording procedures to ensure that errors such as this do not occur in the future.
40. The council said that it intends to ensure that a standard email subject format is used for all application correspondence so as to make correspondence easier to identify. It also said that any email correspondence that is not material in planning terms (and therefore not a fundamental part of the justification for the decision on the associated planning application) should either be saved on the relevant planning file or deleted. It considers that these steps should ensure that errors such as this do not occur in the future. The only place where information will be held will be on the relevant planning file.
41. The Commissioner considers that these steps are appropriate to prevent, or lessen the possibility of information failing to be located in the future. The council is taking steps to address the issues which this case has been highlighted to it.
42. The Commissioner is concerned that the council narrowed the scope of its searches to information material to the decision when there was no such narrowing of the request in an objective reading of the complainant's request. The council should at the least have contacted the complainant and asked him if his request was intended to encompass a wider interpretation and explained the difficulties that might arise with the wider interpretation.
43. The Commissioner also notes that the council did not explain to the Commissioner that it had narrowed the terms of the request (and therefore of its searches) when it initially responded to him stating that it had not been able to locate any further relevant information.
44. Public authorities need to ensure that they are careful and clear that they interpret a request objectively and clarify with a requestor where there is any doubt as to what information is being asked for. Any deliberate narrowing of an otherwise clear request done with the intention to avoid providing information that should otherwise have been provided to an applicant could ultimately be considered to be a breach of section 77 of the FOI Act, which is a criminal offence.



## Right of appeal

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45. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

46. 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.
47. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**