

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

**Decision notice**

**Date:** 23 September 2014

**Public Authority:** Brecon Beacons National Park Authority  
**Address:** Plas y Ffynnon  
Cambrian Way  
Brecon  
Powys  
LD3 7HP

**Decision (including any steps ordered)**

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1. The complainant requested information in respect of a 2005 planning consent which had been deemed 'contrary to policy'. The Brecon Beacons National Park Authority stated that it did not hold relevant information.
2. The Commissioner's decision is that the Park Authority:
  - Wrongly handled the request under the FOIA instead of the EIR, and failed to issue a proper refusal notice, breaching regulation 14 of the EIR.
  - Correctly confirmed that it does not hold the requested information and, in so doing, complied with regulation 5 of the EIR.
3. The Commissioner does not require the Park Authority to take any steps.

**Request and response**

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4. On 10 December 2013, the complainant wrote to the Park Authority and requested the following information:

*"On 21 February 2008 Head of Planning – [named employee] informed CEO of BBNP, solicitor to the Authority and an enforcement officer that the 2005 planning consent for the Caravan and Camping Park at Gilestone was 'contrary to policy'.*

*I request a detailed list from [named employee] as to which Policies (each one to be named, numbered and supplied) the 2005 consent did not comply with."*

5. The Park Authority responded on 29 January 2014. It stated that having undertaken a search of its records from that time, it did not hold any notes of the meeting on 21 February 2008. It did however provide details of the relevant policies in force at the time and attached a further copy of a report written by the consultant engaged to review planning issues at Gilestone at the time.
6. Following an internal review the Park Authority wrote to the complainant on 20 February 2014. The review upheld the Park Authority's original response.

### **Scope of the case**

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7. The complainant contacted the Commissioner 27 February 2014 to complain about the way her request for information had been handled.
8. The complainant informed the Commissioner that she does not accept that the Park Authority does not hold notes of the meeting and pointed out that she did not ask for meeting notes in her request, but for a list of policies which the 2005 consent failed to comply with. The complainant added that as Head of Planning, she would have expected the named employee to document the reasons for reaching such a conclusion.
9. The Commissioner agrees that the request was for a list of policies as opposed to meeting notes and has pointed this out to the Park Authority which has since reconsidered this request and maintains the stance that it does not hold any relevant information. As the Commissioner considers that any information held relevant to this request is likely to fall within the definition of regulation 2 of the EIR, he has therefore considered whether the Park Authority has complied with its obligations under regulation 5 of the EIR.

### **Reasons for decision**

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## **Is it Environmental Information?**

10. The Park Authority appears to have dealt with the request under the FOIA. However, the Commissioner considers that the information, (if held) is likely to be environmental as defined by regulation 2 of the EIR.
11. Regulation 2(1) of the EIR defines what 'environmental information' . The relevant parts of the definition are found in 2(1)(a) to (c) which state that it is 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...'*

12. The information requested (if it were held) relates to a planning consent which would fall within the category of a 'measure' affecting the land. The Commissioner is therefore satisfied that the information is environmental as defined by regulation 2(c) of the EIR.

## **Regulation 5**

13. Under regulation 5(1) of the EIR, in response to a request for information a public authority is only required to provide recorded information it holds and is not therefore required to create new information in order to respond to a request.
14. In his consideration of this case, the Commissioner is mindful of the former Information Tribunal's ruling in EA/2006/0072 (Bromley) that there can seldom be absolute certainty that additional information relevant to the request does not remain undiscovered somewhere within the public authority's records. When considering whether a public authority does hold any additional information therefore, the normal

standard of proof to apply is the civil standard of the balance of probabilities.

15. The Commissioner's judgement in such cases is based on the complainant's arguments and the public authority's submissions and where relevant, details of any searches undertaken. The Commissioner expects the public authority to conduct a reasonable and proportionate search in all cases.
16. In this particular case, the complainant has stated to the Commissioner that there must be documented information within the scope of her request. The Commissioner considered that this was a reasonable assumption and therefore asked the Park Authority to conduct a further search of its records in respect of both the 2005 and 2008 planning applications for Gilestone.
17. In response to the Commissioner's investigation, the Park Authority has confirmed that a meeting took place with the current Chief Executive, the named employee and its Legal Officer. During the meeting, the named employee was again asked whether he recalls giving such advice that the 2005 consent was 'contrary to policy' and he has again confirmed that he has no recollection of offering such advice either during the meeting which he attended on 21 February 2008, or on any other date.
18. The Park Authority has also confirmed that during the period referred to, the named employee was not providing advice to the Park Authority on the Gilestone planning matters as all advice relating to Gilestone was given by the independent Planning Consultant. The Park Authority has informed the Commissioner that it does not therefore envisage that in any circumstances, the named employee had the opportunity to provide advice that the 2005 consent was 'contrary to policy'.
19. The Park Authority has further stated that it is satisfied that the then Chief Executive did not receive any such advice from the named employee that the 2005 consent was contrary to policy, and as far as it is aware, neither did any other officer. It has also stated that the former Chief Executive left the Park Authority in September 2008, and has argued that it cannot address claims made by him, or on his behalf relating to events some six years ago.
20. However, following the meeting, both the named employee and the Legal Officer conducted a further search of all records relating to the 2005 consent and 2008 application, as requested by the Commissioner. The Park Authority remains satisfied that it holds no recorded information relating to a meeting on 21 February 2008, nor a meeting on 28 May 2008 where it was concluded that the 2005 planning consent

was 'contrary to policy'. It has further stated that there is no recorded information held whereby the named employee gives a list of the policies to which he concludes the 2005 consent was contrary.

21. Having considered the representations from the complainant, the Commissioner accepts that it is a reasonable assumption that an organisation would hold information relating to a decision to determine planning consent as 'contrary to policy'. However, based on the searches undertaken by the Park Authority and its response to his queries, he has concluded that on the balance of probabilities, the Park Authority does not hold information relevant to the request and that it has therefore complied with its obligations under regulation 5 of the EIR.

### **Regulation 14 – Refusal to disclose information**

22. In this particular case, the Commissioner has found that although the Park Authority originally considered the request under the FOIA, it is the EIR that actually applies to the requested information. Therefore, where the procedural requirements of the two pieces of legislation differ, it is inevitable that the Park Authority will have failed to comply with the provisions of the EIR.
23. In these circumstances the Commissioner believes that it is appropriate for him to find that the Park Authority breached regulation 14(1) of the EIR which requires that any public authority refusing a request for information, to specify, within 20 working days, the exceptions upon which it is relying. As the request was considered under the FOIA, the Park Authority's refusal notice and internal review failed to specify an exception contained within the EIR.

## Right of appeal

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24. 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@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)

25. 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.
26. 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 .....**

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