

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

Date: 10 February 2016

Public Authority: Cheshire East Council
Address: Westfields
Middlewich Road
Sandbach
Cheshire
CW11 1HZ

Decision (including any steps ordered)

1. The complainant has requested information relating to Section 106 highways contributions regarding a specific planning application. The Commissioner's decision is that, on the balance of probabilities, Cheshire East Council does not hold the requested information. He does not require any steps to be taken to ensure compliance with the legislation.

Request and response

2. Following a letter of complaint dated 10 February 2015 in which various questions and requests were made, the complainant made the following requests for information to Cheshire East Council ('the council') on 30 April 2015:

"...the robust tests and evidence that your Highways Authority used to establish that the significant Section 106 highways contributions sought from the appellant were fairly and reasonably related in scale and kind to the development proposal and were in compliance with 05/2005 and the CIL Regulations...

...any documented evidence of instructions, directions, minutes and reasons for changing from initially requesting A533 highway improvement works to exclusive footway and cycling works."

3. The council responded on 24 June 2015 stating the following in relation to the above requests:

"Officers have noted that you have made references to Circular 05/2005 throughout your letter. However, they have advised that Circular 05/2005 was replaced by paragraphs 203 to 206 in the National Planning Policy Framework ("NPPF"). This came into force on the 27th March 2013. The Planning Inquiry was held in February 2014. Therefore the circular to which you have made reference is of no relevance to the decision making process in this case. For further information considered at the appeal please click on the following link to the relevant pages on the Planning inspectorate website: [link] The appeal reference is APP/R0660/A/13/2196044.

You also requested documents relating to Section 106 contributions and documented evidence relating to A533 highway improvement works. In response, please refer to the attached email and word document."

The council also said that it has provided all information in response to the requests made in the letter of 30 April 2015.

4. On 15 July 2015, the complainant requested an internal review. To summarise, he said that the replacement for Circular 05/2005 imposes the same stringent tests for compliance as the tests in the CIL which he also referred to and that the supplied documentation does not provide any robust evidence to support the inclusion of highways improvements in any Section 106 contribution and does not mention any reasons for change from highway improvement works on the A533 to exclusive footway and cycling works. He also said that other documentation and location maps relevant to the Section 106 highway suggestions did exist and were produced as evidence at the appeal inquiry.
5. The council provided an internal review on 17 August 2015. It provided additional documents and repeated the link provided on 24 June 2015.
6. The complainant wrote to the council on 23 and 26 August 2015 providing details of further information he believes to be missing as follows:
 - Mr Haywood's reply to Ms Dillon's email dated 27 January 2014 at 15.40.
 - Information relating to the substantially modified and updated compilation from 27 to 30 January.

- Robust tests and evidence that your Highways Authority used to establish that the significant Section 106 highways contributions sought from the appellant were fairly and reasonably related in scale and kind to the development proposal and were in compliance with 05/2005 and the CIL Regulations.
 - Mr Curtis's response to Mr Jones's email dated 23 January 2014 at 19.04.
7. The council wrote to the complainant on 23 September 2015 providing further information.

Scope of the case

8. The complainant wrote to the Commissioner on 2 October 2015 to complain about the way his request for information had been handled. He stated that the council have not declared that it does not have any further information to disclose and requested that the council disclose what information it has relating to the specific objective tests and evidence the council used to establish that the Section 106 highways contributions sought from the appellant were fairly related in scale and kind, were necessary to make the development proposal acceptable in planning terms and complied with the Community Infrastructure Regulations ('CIL Regulations'). He also asked the Commissioner to obtain the missing communications between 27 January 2014 and 30 January 2014 relating to the change in format of the various highway measures on which the Section 106 contributions would be expended.
9. The Commissioner is aware that there were other requests for information made within the letter of 30 April 2015 detailed above. For the avoidance of doubt, the requests quoted above are the only ones within the scope of this complaint.
10. During the course of the investigation, the complainant confirmed that he had received Mr Haywood's reply to Ms Dillon's email dated 27 January 2014 at 15.40.
11. In response to the Commissioner's enquiries, the council said that the Planning Inspector considered that the CIL statement provided sufficient evidence to show that the significant Section 106 highways contributions sought from the appellant were fairly and reasonably related in scale and kind where necessary to make the development proposal acceptable in planning terms and complied with the Community Infrastructure Regulations 2010.

12. During a telephone conversation on 19 January 2016 regarding the council's position, the complainant confirmed that he had a copy of the CIL statement and accepts that is all that is held related to the robust tests and evidence he requested. He also stated that he does not accept that there are no emails between 28 and 30 January 2014 and he does not accept that there is no email response from Mr Curtis and believes Ms Dillon may have been copied into it as she was coordinating responses. The complainant confirmed this by email on 26 January 2016.
13. The Commissioner has therefore considered whether, on the balance of probabilities, the council holds further information as follows:
 - Information relating to the substantially modified and updated compilation from 27 to 30 January 2014.
 - Mr Curtis's response to Mr Jones's email dated 23 January 2014 at 19.04.

Reasons for decision

Regulation 5 – Duty to make environmental information available on request

14. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request. Regulation 5(2) states that this information shall be made available as soon as possible and no later than 20 working days after the date of receipt of request.
15. 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. He 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. He will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held, he is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
16. The complainant alleges that information relating to the substantially modified and updated compilation from 27 to 30 January 2014 must be held because there was a dramatic change from the original list to the final compilation of schemes and associated costs included in the CIL

document which was presented at the appeal inquiry. He stated the following:

"...it is clear from Mr Jones's email and attachment dated 30th January at 20:56 to Mr Haywood that Mr Jones's original compilation dated 27th January has been substantially modified and updated for Mr Haywood. This can only have been done at the request and input of others."

17. The complainant also believes that there must be a response from Mr Curtis to Mr Jones's email dated 23 January 2014 at 19.04. When the Commissioner informed him of the council's position that Mr Curtis has retired from the council and that his email account is no longer accessible, the complainant suggested that Ms Dillon may be able to supply copies of any email correspondence from Mr Curtis, or other parties to the highway contribution issue, as she was coordinating responses for the CIL contributions.
18. The Commissioner enquired as to whether the information has ever been held, the scope, quality, thoroughness and results of the searches carried out by the council, whether information had ever been held but deleted and whether copies of information may have been made and held in other locations. He asked the council to make specific reference to the information which the complainant believes must exist.
19. The council informed the Commissioner that all current officers who were involved in the discussions and in the giving of advice regarding this planning application were contacted and asked to provide information falling within the scope of the request in whatever format it is held and from whatever storage source. It said that all officers either provided the information they held, which was passed on to the complainant in response to his request, or they confirmed that they had no documents falling within the scope of the request. It said that information would be held electronically and, that the following search terms were used:

12/2426C; Elworth Hall Farm Phase 2; Ellworth Hall Phase 2; S106; Section 106; Elworth Hall Farm comments; Ellworth Hall Farm comments; CIL Tests. It also said that the advanced search facility was utilised which located all documents whose titles included one word from the individual search terms specified and that various spellings were used. The council explained that all the documents located on the searches were provided to the complainant and that there was no business need for officers to still be holding the emails at the time of the request as all relevant documentation is held on the council's Planning File and by HM Inspector of Planning.

20. In relation to whether information had ever been held which had since been deleted or destroyed or held in other locations and whether the council would have a record of destruction of documents, the council said that as the information being requested largely consists of emails which were exchanged two years ago, it is possible that emails were deleted in the intervening period prior to the request being made but the council will not have records of when emails were deleted – if any further emails within the scope of this request were held. It explained that there was a gap of 18 months between the dates of the communications and the making of the request during which time further information may have been deleted as there was no business or statutory need to retain the information. The Commissioner notes that the gap between the requests being made in April 2015 and the information in question dated January 2014 is only 15 months but does not consider that the shorter timescale makes it less likely that emails would have been deleted, particularly given that all relevant documentation is held on the council's Planning File and by HM Inspector of Planning.
21. In relation to any formal records management policy about the retention and deletion of records of this type, the council confirmed that there is no records management policy relating to the retaining of emails. It explained that officers are advised to retain documents as required by a business need or by statute on the database or on the relevant case file and that the email system, Outlook, should not be used as a filing system. It also informed the Commissioner that it is looking to introduce new retention deadlines for emails after which automated destruction will take place.
22. With regards to Mr Curtis's response to Mr Jones's email dated 23 January 2014 at 19.04, the council said that the email account for Mr Curtis is no longer accessible as he retired on 31 March 2015 as the email account was deactivated at that time. The Commissioner notes that this was before the request in this case was made. It explained that its ICT team has checked Ms Dillon's email account and by doing this it can verify who Ms Dillon received emails from and who she sent them to between the dates the complainant has specified. The ICT team confirmed that Mr Curtis did not send any correspondence to Ms Dillon; nor did she send any emails to him around the time being specified. It also undertook a similar check on Mr Jones' account to validate that no reply from Mr Curtis was received between the dates specified. No response from Mr Curtis to Mr Jones was located. It therefore said that this information was never held by the council as Mr Curtis had not responded to Mr Jones' original email. The council noted that Mr Jones' email was sent to MrMcKinney as well as Mr Curtis and Mr McKinney replied to the email at 10:08am on 24 January 2014 with a

comprehensive response. This was supplied to the complainant on 23 September 2015.

23. In reaching a decision as to whether the requested information is held, the Commissioner also enquired whether there was any legal requirement or business need for the council to hold the information. The council said that there is no statutory need to hold the requested information and no business need for it to continue to hold the information. As mentioned above, it explained that all the information the authority is required to retain is in the public domain on the planning file and on the Planning Inspector's file.
24. The Commissioner also considered whether the council had any reason or motive to conceal the requested information. The Commissioner has not seen any evidence of wrongdoing surrounding its records management obligations and has not identified any reason or motive to conceal the requested information.
25. Taking all of the above into consideration, the Commissioner does not consider that there is any evidence that would justify refusing to accept the council's position that it does not hold any further information relevant to this request. He considers that the council has undertaken appropriate searches, adequately explained why there is no business need to hold the information, and provided a feasible reason why there is no response from Mr Curtis to Mr Jones's email dated 23 January 2014 at 19.04.
26. The Commissioner is therefore satisfied that, on the balance of probabilities, further information is not held by the council. Accordingly, he does not consider that there was any evidence of a breach of regulation 5 in relation to such information.

Right of appeal

27. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

28. 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.
29. 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

Deborah Clark
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Wycliffe House
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