

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

**Date:** 14 September 2016

**Public Authority:** Horsham District Council

**Address:** Parkside  
Chart Way  
Horsham  
West Sussex  
RH12 1RL

**Decision (including any steps ordered)**

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1. The complainant has requested emails between specific Councillors and a specific individual in relation to the Horsham District Planning Framework and a letter in a local newspaper. Horsham District Council initially stated that it does not hold the requested emails for the purposes of the EIR. The Commissioner's decision is that, on the balance of probabilities, Horsham District 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**

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2. On 2 October 2015, the complainant wrote to Horsham District Council ('the council') and requested information in the following terms:  
  
"Release of all emails (on their HDC email and their private email and held on a council issued device such as laptop or tablet) between (a) Cllr Claire Vickers and Cllr Ray Dawe; and (b) Cllr Claire Vickers and [name redacted]; and (c) Cllr Ray Dawe and [name redacted], sent and received between one another from Monday, 7 September 2015 to Friday, 2 October 2015 (inclusive) regarding North Horsham and the HDPF and NHPC's position on North Horsham and a judicial review of the HDPF and consideration or suggestions or encouragement of [name

redacted] letter and Cllr Vickers' letter in reply for publication in the local newspaper."

3. The council responded on 28 October 2015 with the reference of Legal/EIR/127. It said that the request has been handled under the Environmental Information Regulations 2004 (EIR) as the information requested is of an environmental nature as defined in Regulation 2(1)(c). However, it then said that it does not hold the requested emails for the purposes of the EIR because information held by councillors for their own political or personal purposes will not be covered by the EIR, but information they hold on behalf of, or as part of, a local authority will be.
4. On 29 October 2015, the complainant requested an internal review. He said that both the date range and the issues referred to are narrow and further pointed out that the response does not make it clear whether the Councillors have been asked to check their own personal email accounts.
5. On 29 December 2015 the council provided an internal review in which it maintained its original position. It said that it considered the ICO guidance entitled 'Information held by a public authority for the purposes of the EIR (regulation 3 (2))'<sup>1</sup> and the following factors:

"It is unlikely that information is held to any extent for the purposes of the public authority where:

- The authority has no access to, use for, or interest in the information;
- The authority does not, at its own discretion, create, record, file or remove the information; or
- The authority merely provides physical or electronic storage facilities."

### **Scope of the case**

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6. The complainant contacted the Commissioner on 15 February 2016 to complain about the way his request for information had been handled.
  7. The Commissioner initially made enquiries of the council to establish whether it held information in accordance with regulation 3(2) of the
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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1640/information\\_held\\_for\\_the\\_purposes\\_of\\_eir.pdf](https://ico.org.uk/media/for-organisations/documents/1640/information_held_for_the_purposes_of_eir.pdf)

EIR. She asked the council to provide a detailed explanation as to the basis on which it has concluded that although it may physically hold the information requested it is not needed for any of the council's own functions or relates to the business of the council and therefore it is not held for the purposes of the EIR. She also asked specific questions designed to determine whether the information is held for the purposes of the EIR including whether the named councillors sit on any planning committees.

8. The council said that all councillors sit on one of the council's Development Management Committees, details of which can be found on its website. However, it said that this request relates to a subject matter that is not relevant to the business of a Development Management Committee as it relates to alleged correspondence between two Councillors and an unknown third party named in the request. It also said that the request does not relate to information concerning council business or make any reference to the Councillors' wards. It confirmed that it has no access to, use of, or interest in, the information according to its understanding of the description of the alleged information made in the request and said that the request is the only source whereby the existence of such information is alleged.
9. Having considered the response, the Commissioner informed the council that she considers that if information within the scope of the request exists in this case, it is entirely feasible that it could be held for the purposes of the EIR. Because the wording of the request relates to the Horsham District Planning Framework, it is feasible that information within the scope of the request relates to the business of the council in relation to the Horsham District Planning Framework. The Commissioner noted that Cllr Vickers is the Cabinet Member for Planning and Development as well as the Chairman of the Planning and Development Policy Development Advisory Group which adds weight to the view that information within the terms of the request could relate to the business of the council and therefore be held for the purposes of the EIR.
10. The Commissioner informed the council that when a public authority receives a request, its first task is usually to determine whether it holds the requested information. She informed the council that it appears that too narrow a view of the scope of the request has been taken in this case and therefore access has not been sought to the requested information to make a proper determination as to whether the requested emails are held for the purposes of the EIR. She asked the council to identify all the information potentially falling within the scope of the request, including that held on non-council email addresses, ensuring that any information relating to the business of the council is considered as information held for the purposes of the EIR, and either provide the complainant with the requested information or, if the council

maintains that it does not hold the requested emails for the purposes of the EIR, provide the requested emails to her in order for a full assessment to be made. She also informed the council that, if after reconsideration, the council considers that it does hold the requested emails for the purposes of the EIR but is not prepared to disclose them, to specify which exception of the EIR it is relying on and submit a full rationale as to why the exception applies including consideration of the public interest test.

11. The council's response stated that it does not hold the alleged information. Therefore, the Commissioner has considered whether, on the balance of probabilities, the council holds information within the scope of the request.

## **Reasons for decision**

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### **Regulation 5 – Duty to make environmental information available on request**

12. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request.
13. 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. She 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. She 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, she is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
14. In his request for an internal review, the complainant stated that 'the date range is narrow and the issue is a very narrow one indeed'. He also commented that the council's response does not make it clear if Cllr Vickers and Cllr Dawe have been asked to check their own personal email accounts.
15. Following the Commissioner's communication to the council as detailed in paragraphs 9 and 10, the council requested that the Councillors referred to in the request conduct a search for the requested information. It provided the Commissioner with confirmation that council and personal emails had been searched and that there were none which

relate to the information request. The council also confirmed, for the avoidance of doubt, that it does not hold the alleged information.

16. In reaching a decision as to whether the requested information is held, the Commissioner considered whether there is any legal requirement or business need for the council to hold the requested information but she is not aware of any.
17. The Commissioner also considered whether the council had any reason or motive to conceal the requested information but she 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.
18. In the circumstances, 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 information within the scope of this request. The council has carried out searches and confirmed that it does not hold the information. The Commissioner considers that the council's initial response and internal review response could lead to the belief that some information within the scope of the request exists but neither response specifically states that the information is in existence. She also acknowledges that there is often a difference between what a complainant believes should be held by a public authority with what is actually held by a public authority. She is therefore satisfied that on the balance of probabilities, information within the scope of this request is not held by the council. Accordingly, she does not consider that there was any evidence of a breach of regulation 5 in relation to such information.

## Right of appeal

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19. 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)

20. 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.
21. 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**