

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

**Date:** 4 October 2017

**Public Authority:** Derbyshire County Council  
**Address:** County Hall  
Matlock  
Derbyshire  
DE4 3AG

**Decision (including any steps ordered)**

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1. The complainant requested information from Derbyshire County Council ("the council") relating to a Flood Risk Assessment. The council provided information but the complainants disputed that the council had provided the information sought. The Commissioner's decision is that the council did not in fact hold the information. He finds that the council breached regulation 14(2) and 14(3)(a) for not stating that it did not hold the information sought by relying on the exception under regulation 12(4)(a) of the Environmental Information Regulations 2004 ("the EIR"). She does not require any steps to be taken.

**Request and response**

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2. On 4 January 2017 the complainants requested information from the council in the following terms:

*"Letter of Tuesday 25<sup>th</sup> October 2016 to [name]- Strategic Director, DCC, Economy Transport & Environment Department. We consider our letter clearly set out our concerns, especially with regard to the Consultee Planning Response From.*

*Therefore we request the following information:*

*DCC FLOOD RISK MANAGEMENT TEAM RECOMMENDATIONS –*

*OBJECTION*

*REASONS AND KEY CONCERNS*

*1. No site specific Flood risk Assessment has been provided with this particular application nor has any drainage strategy been proposed, therefore the Derbyshire County council Flood risk Management Team recommends an objection to the proposed development.*

*The FRM Team Consultee response to AVBC Case Officer 'Following receipt and review the submitted Flood Risk Assessment, I [name] can confirm the Flood Risk Management Team has no further comment to make'.*

WE REQUEST With regard to FRM team comments at point 1: Please supply where has the evidence (to support Consultee response) been taken from in the submitted Flood Risk Assessment by Planning Design? Page number and specific sections to be named.

*REASONS AND KEY CONCERNS*

*2. Furthermore the County Council are aware of flooding within close proximity of the proposed site boundary and this should be considered in detail by the applicant.*

*WE REQUEST With regard to FRM team comments at point 2: Please supply where has the evidence (to support Consultee response) been taken from in the submitted Flood Risk Assessment by Planning Design? The FRM Team requirement be considered in detail by the applicant Page number and specific sections to be named".*

3. The council responded on 6 January 2017 and supplied information.
4. The complainants requested an internal review on 22 February 2017.
5. The council completed its internal review on 24 March 2017. It maintained that it had responded to the requests.

**Scope of the case**

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6. The complainants complained to the Commissioner on 27 January 2017. They asked the Commissioner to consider their complaint that the council had not provided the information requested.

## Reasons for decision

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### Regulation 5(1) – Duty to make information available

7. Regulation 5(1) of the EIR provides a general right of access to make recorded environmental information available. Public authorities should make environmental information available within 20 working days unless a valid exception applies.
8. 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 was not held and she will consider if the authority is able to explain why the information was 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 balance of probabilities".<sup>1</sup>
9. This complaint relates to a Flood Risk Assessment for land off Crich Lane in Belper. It concerned plans to develop the land to erect 8 holiday lodges, construct new access roadways, car parking and drainage including a sewage treatment plant and associated works. The report was written to support the full planning application and its purpose was to assess the likely risk of flooding in the development and to other areas as a result of the development.
10. When the council responded to these requests on 6 January 2017 it said that, "...the information in sections: 2 (page 3), 7 (page 13) and 8 (page 14) in the submitted FRA were used to help form the Flood Risk Management teams response".
11. The Commissioner telephoned the complainants to discuss the reasons why they were dissatisfied with the council's response. The complainants said that they had expected the council to provide a response to two separate requests, and moreover, the response provided did not answer either request.
12. In relation to the first request, the Commissioner understands that the complainants would like to know what site specific information within the Flood Risk Assessment resulted in the team stating that it had no

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<sup>1</sup> This approach is supported by the Information Tribunal's findings in *Linda Bromley and Others / Environment Agency* (31 August 2007) EA/2006/0072

- further comments to make. The Commissioner understands that the complainants were interested in this because they believe that the council had not shown why it was reasonable to withdraw an objection based on the information in the Flood Risk Assessment.
13. In relation to the second request, the Commissioner's understanding is that the complainants would like to know what site specific evidence within the Flood Risk Assessment shows that the applicant considered in detail the council's awareness of flooding within close proximity of the proposed site boundary and was used to support the council's consultee response.
  14. The Commissioner understands that there is a long history of the complainants expressing concern about drainage issues involving voluminous correspondence between the complainants and the council. The council explained that these particular requests had followed on from some earlier requests made on 30 November 2016 for the same information as well as other information not caught by the requests made on 4 January 2017. The council sought some clarification and there was contact between itself and the complainant during which the council confirmed that it considered that it had provided all the documentation held in relation to the requests. The council suggested that it appeared that the complainants were seeking to question why the council had acted the way that it had. The council explained that if the complainants remained dissatisfied, they had the right to use the council's complaints procedure.
  15. The complainants made a complaint about this matter, which was investigated and responded to by the council's complaints team. The council said that this proved to be very difficult as the precise focus of the complainants' concerns related to unrecorded information where the council had to rely on the recollection of one of its officers who had used his knowledge and experience at the time to complete the tasks in hand. It was noted that all the recorded information held had been provided, and each time a request or enquiry had been made, the council had searched the relevant department's "CONFIRM" customer database. It said that officers had interrogated their emails and a thorough search was made of all relevant files held both in an electronic and paper format. This clearly confirmed that the reason why the particular actions had been decided upon had not been recorded but had been implemented simply based on officer experience. The council documented the action taken only.
  16. To assist the complainants in the best way it could, the council said that its complaints officer undertook a thorough investigation and worked with relevant Flood Risk Management officers to piece together from recollection why they had made the decision that they did. This

resulted in the council sending the response on 6 January 2017 that is the subject of this particular complaint.

17. It is clear to the Commissioner that it has taken some time in order to clarify and understand precisely what information was being sought by the complainants. Now that this is clear, the Commissioner's role is to consider whether the council has provided the information sought. It is clear that the complainants are asking about information in the Flood Risk Assessment that was used to inform the consultee response provided by the council. It is the case that a copy of the Flood Risk Assessment itself has already been provided to the complainants as part of their regular contact with the council. The dispute that has arisen concerns the council's response to requests posed about the use of that information.
18. The council provided clarification to the Commissioner that it did not in fact hold any recorded information of the nature requested. It said that its consultee decision was based on officer experience and information about the making of that decision was not recorded. Having consulted the relevant team, the answer provided to the complainant on 6 January 2017 was an attempt to indicate the parts of the Flood Risk Assessment that were considered most relevant. The fact is that the answer to the question posed was simply not held in a recorded form.
19. The council said that its only involvement regarding the planning issue at Crich Lane, Belper was in the role of being a consultee. It said that Amber Valley Borough Council is the Local Planning Authority in relation to the particular planning area in question. The council explained that Amber Valley Borough Council's decision was that this was a minor application and as such meant that the council's Flood Management Team were not even statutorily required to pass comment, nor could they formally suggest or implement any conditions. The council said that this background explains why it was not considered necessary to keep any particular record about how the officer formed the opinion that he did resulting in the consultee response. The council conducted searches as described in paragraph 15 and confirmed that no relevant information had been deleted, destroyed or mislaid.
20. It is worth noting that the complainants themselves also indicated during a telephone call with the Commissioner that the answer they were expecting to the second request was that the information was not held, and this complaint had arisen in part because the council had not confirmed that, leading the complainants to allege that this was a deliberate attempt to conceal information.
21. The council has clarified the limited involvement that it had in this matter in comparison to the Local Planning Authority Amber Valley

Borough Council. This means that it was never likely to hold any recorded information providing the further clarification about the contents of the Flood Risk Assessment and the impact on the planning application that the complainants sought. The complainants already possess a copy of the Flood Risk Assessment itself and it is clear that there is no further recorded information held that the council would be able to provide in response to these particular requests. The council has explained that it has searched appropriately and that no relevant information was deleted, destroyed or mislaid. In view of these facts, the Commissioner finds that on the balance of probabilities, the information sought was not held by the council.

### **Procedural issues**

22. The council provided a response to the complainants' requests in which it attempted to highlight parts of the Flood Risk Assessment that may be most relevant. It is clear from the above that it ought to have clarified that it did not in fact hold the information sought. When information is not held, a public authority should cite the exception under regulation 12(4)(a) under the EIR within 20 working days and by the date of its internal review. Not doing so in this case was a breach of regulation 14(2) and 14(3)(a) of the EIR.

### **Other Matters**

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23. The complaints alleged that the council had dealt with their requests as if they were one rather than two separate requests in order to try to conceal information deliberately, and avoid stating that it did not hold the information. The Commissioner did not consider that there was any evidence to suggest that this was the case. Rather it appears that the council had responded in this way in order to try to assist the complainants. As noted above, the council should have provided clarity over the recorded information that it held and appropriate breaches of the EIR have therefore been recorded. The Commissioner trusts that the council will in future confirm or deny whether recorded information is held as appropriate.

## 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 .....**

**Elizabeth Archer**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**