

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

Decision notice

Date: 17 April 2018

Public Authority: Breckland Council
Address: Elizabeth House
Walpole Loke
Dereham
Norfolk

Decision (including any steps ordered)

1. The complainant has requested copies of all comments made on a planning application. Breckland Council (the council) referred the complainant to its planning website for the comments held.
2. The complainant was not satisfied with the information provided as he stated some comments had been removed and he wanted copies of these also.
3. The Commissioner's decision is that the council does not hold the deleted comments and has provided the complainant with the information it does hold.
4. The Commissioner does not require the council to take any steps.

Request and response

5. On 25 January 2017 the complainant made the following request to the council:

"I would like email copies of all comments entered to the planning website for application Reference [number redacted]"

6. The council acknowledged the request on the 6 February 2017 and responded on the 14 February 2017 advising that the information is available on its website. It provided a link to its planning page and

advised what steps the complainant needed to take to locate the information.

7. The complainant requested an internal review on the 14 February 2017 as he did not consider that this was all the comments entered on to the website. He stated that some have been removed.
8. The council provided its internal review response on the 19 July 2017 upholding its original response. The council advised that its planning department has confirmed that all the information is available online and that nothing has been removed.

Scope of the case

9. The complainant contacted the Commissioner on the 4 August 2017 as he considers that the council has removed comments from the planning page regarding the planning application and that these removed comments should be provided.
10. The Commissioner considers the scope of the case is to determine whether the council has removed any comments from its planning page and if so, whether they are still held by it.

Reasons for decision

Regulation 12(4)(a) of the EIR –Information not held

11. Regulation 5(1) of the EIR requires a public authority, who holds environmental information, to make it available on request.
12. Regulation 12(4)(a) of the EIR allows a public authority to refuse to provide the requested information if it does not hold it at the time of the request being received.
13. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request).
14. In this case the complainant wants the council to provide him with comments from its planning site that he states have been deleted.

15. The Commissioner will need to determine whether this information is still held or not. As the FOIA only relates to recorded information held at the time of the request, any information that has been deleted prior to the request being made would mean that the information is not held by the public authority.
16. In response to the Commissioner's enquiries, the council has told her that it contacted its Planning Department's Validation Team to determine whether all the comments are online and whether any have been deleted. This department is responsible for scanning all the planning files to the web and checking it for accuracy after scanning.
17. The council has advised the Commissioner that whilst the Validation Team cannot recall having removed any specific comments from the website, following some further investigation, the Parish Clerk of Blo Norton Parish Council has explained that a deletion did indeed occur.
18. A member of the Parish Council inadvertently used the unique link sent to the Parish Council when consulted on the application to submit their personal views. It was these that were uploaded onto the system initially, giving the incorrect impression that it was a formal response from the council.
19. The council say that when the above came to light, the comment attributed to the Parish Council would have been deleted by a member of the council's Technical Support Team and then resubmitted by the parish councillor in his own name (in a personal capacity) rather than under the Parish Council's. It is this resubmission that is available on the Breckland Council website.
20. The council does not have a record or date of when this original comment was uploaded or removed, but it assumes that it would have been around the time that the time the Parish Council members personal comments were uploaded in their own name on the 28 December 2016.
21. The council has stated to the Commissioner that it does hold paper files, but because the original Parish Council comment was submitted electronically, there would be no paper copy of it as electronic comments go directly on to the website.
22. The council has however, for completeness, checked each paper document its holds against the online scanned versions to ensure no paper documents were left off the website or any potentially deleted online comments were still held manually. These checks were done using the council's database.

23. The council has advised that personal staff computers are not used for planning applications and so no searches were carried out on them.
24. The council has told the Commissioner that it has also checked with its computer supplier to see if it is possible the deleted comments are still held in some form. The supplier has advised that if comments are removed either by deleting them or overwriting them, they cannot be retrieved from the database as they will no longer exist.
25. The Commissioner asked the council under what circumstances it would remove or amend comments. The council responded that comments are removed if they are defamatory, discriminatory or abusive or if they have been recorded against the incorrect application or consultee.
26. The council has also told the Commissioner that there is no requirement for it to record amendments or a deletion of a comment.
27. The Commissioner's investigations have confirmed that there were comments that have been deleted, and she understands why the complainant might expect that the council would hold a record of any deleted comments. However the council has checked its system and with its computer supplier as to whether these deleted or amended comments can be retrieved, but its enquiries have confirmed they would no longer exist.
28. On this basis, the Commissioner sees that it would be difficult to know what comments have been deleted or amended on a planning application when no record is kept of amended or deleted comments. It seems it would come down to the memory of the officer tasked with the amendment or deletion as to whether or not this occurred. Or in this case, the memory of the Parish Clerk.
29. However, what someone remembers happening is not 'recorded information' under the FOIA and so without documented records of what the comment was, the Commissioner can only find, on the balance of probabilities, that the council does not hold any other recorded comments other than what is available online.

Regulation 12(1)(b) of the EIR – The Public Interest Test

30. Regulation 12(1)(b) of the EIR requires a public interest test to be carried out if a request is refused under any of the exemptions set out under regulation 12 of the EIR.
31. However, as no further information has been found to be held, the Commissioner can only find that the public interest in maintaining the exemption at 12(4)(a) of the EIR outweighs any public interest in disclosure, simply because there is no further information to disclose.

Right of appeal

32. 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

33. 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.
34. 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
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