

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

**Decision notice**

**Date:** 26 June 2018

**Public Authority:** North Hertfordshire District Council  
**Address:** Council Offices  
Gernon Road  
Letchworth Garden City  
Hertfordshire  
SG6 3JF

**Decision (including any steps ordered)**

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1. The complainant requested information relating to pre-application correspondence relating to a specific site which was part of a proposed local plan. The council initially applied Regulation 12(5)(e)(commercial confidentiality) and 12(5)(f)(interests of a third party) to the information. After reviewing its decision it disclosed some information but it applied Regulation 12(4)(b) (manifestly unreasonable) on the basis that it could not carry out further searches of its general file system without significantly affecting its network systems over a period of days. However during the course of the Commissioner's investigation it said that it had carried out further searches and confirmed that it does not hold any relevant information falling within the scope of the request.
2. The Commissioner's decision is that on a balance of probabilities the council was correct to say that it does not hold any information falling within the scope of the request.
3. The Commissioner does not require the council to take any steps.

## Request and response

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4. On 26 June 2017 the complainant wrote to the council and requested information in the following terms:

*"Please could you provide me with all written correspondence from NHDC employees and councillors with employees/ representatives of Barratt Homes, David Wilson Homes and Meeting Place Communications for a twelve-month period from 22 June 2016 to 21 June 2017 in relation to site LS1 of the Proposed Submission Local Plan. This is to include all forms of written communication, including emails, letters and reports."*
5. The council initially responded on 24 July 2017. It said that it needed more time to consider the request before responding. It then responded on 11 August 2017. It confirmed that it held relevant information but said that the exceptions in Regulation 12(5)(e) (commercial confidentiality), and Regulation 12(5)(f) (the interests of a third party) applied.
6. Following an internal review the council wrote to the complainant on 12 September 2017. It said that it now considered that it did not need the consent of the third party and therefore provided some information to the complainant (although the complainant argues that this did not fall within the scope of his request). Additionally the council said that a planning application had by that time been received and so some information relating to the application was now in the public domain. It therefore withdrew its reliance upon Regulation 12(5)(e).
7. It said however that as regards to all written correspondence from the council with employees/representatives of Barratt Homes, David Wilson Homes and Meeting Place Communications over a 12 month period it was withholding the data under Regulation 12(4)(b) (manifestly unreasonable) as searching for the information would create a disproportionate burden on it.

## Scope of the case

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8. The complainant contacted the Commissioner on 31 October 2017 to complain about the way his request for information had been handled. He disputed that his request was manifestly unreasonable and argued that the public interest rested in the request being fully responded to.
9. However, during the course of the Commissioner's investigation the council reconsidered the request. It said that it had initially taken the

request literally and considered it to be for information from all or any officers or members of the council. It said however that on reflection only a small number of officers or members would in fact have had any reason to have correspondence with the developers and if it searched for correspondence from these individuals rather than all officers or members then this would narrow the scope of the searches which it needed to make. It therefore carried out further searches of its email servers for those relevant individuals.

10. It confirmed to the complainant in a letter dated 5 May 2018 that no further information had been found and that it did not believe that it would hold any further information as all other correspondence should be held in its document management system. Nevertheless it initially held to its claim that it could not search the general file system without damaging its network efficiency for an extended period of time.
11. However in a telephone call with the Commissioner on 6 June 2018 the council said that it has carried out searches of the files of relevant employees and departments to establish whether information was held within their individual file systems. It confirmed that having done this, and having found no further information, its decision was that it does not hold any information falling within the scope of the request.
12. The Commissioner therefore considers that the complaint relates to whether the council is correct to state that no information is held falling within the scope of the request. She has not therefore found it necessary to consider whether the council was initially correct to apply Regulation 12(4)(b) to the request.

## Reasons for decision

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### Regulation 5(1)

13. Regulation 5(1) of the Act states that:

*"Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request."*

14. The Commissioner has considered whether council has complied with Regulation 5(1) and whether it was correct to say that no further information is held. Regulation 12(4)(a) provides the exception to the obligation to disclose information where no information is held, however in this case the council did provide information after its review after

withdrawing its reliance upon Regulation 12(5)(e). The complainant said that this information does not fall within the scope of his request, and he was seeking correspondence from the council to the developer, rather than from the developer to the council.

15. The council applied Regulation 12(4)(b) on the basis that searching its general file server had in the past caused a slowdown of its systems, and had taken 18 days to complete. It therefore carried out searches of its systems but said that it could not carry out a search of this file system as this would cause a manifestly unreasonable burden on it to do so.
16. In its letter to the complainant of May 2018 it confirmed that it had carried out searches on its email server and found that no further information was held falling within the scope of the request on this system.
17. It also confirmed that it had provided all of the information which it had held in its document management system following its decision in the internal review, although the complainant had confirmed that the information it disclosed to him did not in fact fall within the scope of his request. This is significant as the council argues that copies of all correspondence should be stored by its staff members on the document management system. The council therefore confirmed that if correspondence was held, this file system should be the place where it would expect records of this to be retained.
18. As stated, in a telephone discussion with the Commissioner dated 6 June 2018 the council said that during the course of the Commissioner's investigation, and following its response to the complainant stating that Regulation 12(4)(b) was applicable, it had considered how to approach the request differently in order to avoid placing a burden onto its network systems. Instead of wide scale search of its server it had considered which individuals and departments would hold relevant information and carried out searches of their relevant individual and departmental drives. These drives form part of the council's general file server overall, but the searches which the council carried out would be more specific and would not create the burden an overall search of the general file server would cause. It said that, as it had expected, it had not found any relevant information as officers had correctly followed its procedures which require that all relevant documentation should be stored in its document management system rather than on individual drives.

19. The council therefore withdrew its reliance upon Regulation 12(4)(b) as it considered that any searches of the full general filing system would not, in any event, locate further information falling within the scope of the request. As it had now carried out searches of the files of all relevant individuals and teams, of its email servers and its document management system it confirmed that it wished to rely upon its decision that no further information is held falling within the scope of the request.

### Conclusions

20. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)* in which it was stated that "*there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records*". It clarified in that case that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test the Commissioner will apply in this case.
21. In discussing the application of the balance of probabilities test, the Tribunal stated that, "*We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.*" The Commissioner has therefore taken the above factors into account in determining whether or not the requested information is held on the balance of probabilities.
22. The Commissioner is also mindful of the case of *Ames v the Information Commissioner and the Cabinet Office (EA/2007/0110)*. In this case Mr Ames had requested information relating to the September 2002 "Iraq's Weapons of Mass Destruction" dossier. The Tribunal stated that the Iraq dossier was "*...on any view an extremely important document and we would have expected, or hoped for, some audit trail revealing who had drafted what...*" However, the Tribunal stated that the evidence of the Cabinet Office was such that it could nonetheless conclude that it did not "*...think that it is so inherently unlikely that there is no such audit trail that we would be forced to conclude that there is one...*". Therefore the

Commissioner is mindful that even where the public may reasonably expect that information should be held this does not necessitate that information is held.

23. In considering whether information is held on a balance of probabilities, the Commissioner will consider:
  - the scope, quality, thoroughness and results of the searches; and, or
  - other explanations offered as to why the information is not held.
24. The Tribunal does not expect that an authority will search every scrap of paper it holds in order to determine whether further information is held or not. It expects that the authority will have carried out appropriate searches of the relevant areas to determine whether information can be found or not. Where searches are both appropriate and adequate and there is no evidence to counter the argument that there is no further information held then on a balance of probabilities the Commissioner's decision will be that no further information is held.
25. Authorities are not expected to carry out searches of every document which they hold in order to ascertain whether relevant information is held. To require this of authorities would effectively make far larger numbers of requests, if not all, subject to Regulation 12(4)(b), or to exceed the appropriate limit where the majority of authorities are concerned. Following the above, the Commissioner does not require an authority to search their entire network systems in response to a request if they are able to identify the relevant and appropriate areas which should hold all of the relevant information requested.
26. The council did carry out searches and provide information to the complainant in response to his request. It initially claimed the exemption in Regulation 12(4)(b) on the basis that searching its entire general filing system had been shown in the past to slow its networked systems whilst the search was ongoing. It had clarified to the complainant however that it had searched its other document management system, and it had also later carried out searches of its email systems. It said that all relevant correspondence should however be held in its document management system.
27. With the council's subsequent searches of personal and shared drives for relevant individuals and teams, together with the relevant sections of its email server it has therefore carried out a comprehensive search of its electronic filing systems and avoided the need to carry out a full search of its general filing system in order to avoid the burden this would create.

28. The council has therefore confirmed that it has carried out relevant searches of the relevant areas, and said that it has not found any further information. It has disclosed information where it has found this.
29. In coming to a conclusion in this case the Commissioner has considered what information she would expect the council to hold and whether there is any evidence that the information was ever held.
30. The complainant said that the developers had indicated in an open meeting that the council had encouraged early applications for the site in order to demonstrate that the local plan was sound. However there is no evidence that this occurred through correspondence rather than through via telephone or in discussions in informal meetings.
31. The Commissioner also notes that the council would, in all likelihood, have had no reason to make a record of any discussions of this nature. Effectively, any suggestion by the council that the developers might aid in the approval of the local plan by submitting early applications would still be reliant on the developers submitting the applications. The council would not therefore have a need to either record or retain a record of any discussions, and any such discussions would be unlikely to have formed the basis of legally binding agreements between the parties.
32. The complainant argued that the council initially said that it did hold information falling within the scope of his request. He therefore questioned how the council can now argue that it does not. However the council initially applied Regulation 12(5)(e) to some information which it subsequently disclosed. The council's confirmation that it held relevant information and applied an exception, however that information was not the information which the complainant had requested.
33. The Commissioner has therefore decided that on a balance of probabilities that the council does not hold any further information falling within the scope of the request. The council therefore complied with the requirements of Regulation 5(1) in its response to the complainant's request.

## Right of appeal

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34. 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)

35. 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.
36. 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**  
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**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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