

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

**Decision notice**

**Date:** 16 May 2012

**Public Authority:** Babergh District Council

**Address:** Corks Lane  
Hadleigh  
Ipswich  
IP7 6SJ

**Decision (including any steps ordered)**

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1. The complainant requested information from Babergh District Council ("the council") relating to Nayland Airfield. The council initially said that the information was exempted under the EIR. During the Commissioner's investigation, the council clarified that it should have said that the information was not held. The complainant did not accept that this was the case.
2. The Commissioner's decision is that, on the balance of probabilities, the information was not held.
3. The Commissioner does not require any steps to be taken.

**Request and response**

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4. On 11 February 2011, the complainant requested information from the council in the following terms:

*"Regarding the attachment (your refer PL 3/3/53/7(d) Case No. 01570)*

*I wish to make an application under the Environmental Information Regulations for copies of documents labelled.*

1. *Arial Map*
7. *File Note*
9. *Letter(s) from [name]*

*10. Committee meeting minutes November 1988"*

5. The council responded on 9 March 2011. It said that it considered that the request was manifestly unreasonable under regulation 12(4)(b) and it also cited the exception under regulation 12(4)(e).
6. On 3 May 2011, the complainant replied and asked the council to undertake an internal review on the basis that he did not accept that the exceptions cited had been correctly applied.
7. The council completed an internal review on 10 June 2011. The council said that it would look for the map requested and it would also send the committee minutes requested. In relation to the file note, it said that it still considered that it was right to withhold this information using regulation 12(4)(e). In relation to the letters from the named individual in point number 9 of the request, the council cited regulation 12(5)(f). The complainant was subsequently provided with a copy of the committee minutes and he accepted that the council could not locate a copy of the map.

### **Scope of the case**

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8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He initially asked the Commissioner to consider whether the council had correctly applied exceptions under the EIR in relation to points 7 and 9 of the request. When subsequently informed that the information was not held, the complainant said that he was not prepared to accept that was the case.

### **Reasons for decision**

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#### **Is the information environmental?**

9. There is no dispute between the parties that the appropriate legislation is the EIR. The Commissioner accepts that this is correct because the information relates to an airfield and planning matters connected to the airfield. This brings the request within the scope of regulation 2(1)(c) of the EIR because the request relates to activities affecting or likely to affect at least one of the elements and factors of the environment listed in regulation 2.

## **Regulation 5(1) – General right of access**

10. Regulation 5(1) of the EIR provides a general right of access to environmental information held by public authorities.
11. 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 was not held and he 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. He is only required to make a judgement on whether the information was held "on the balance of probabilities".<sup>1</sup>
12. The complainant refuses to accept the council's position because it initially applied exceptions under the EIR. The council told the Commissioner that when it applied exceptions to the information, it had not actually searched for the information. The Commissioner understands that the council did not consider that this was necessary because it had initially considered that the request was manifestly unreasonable. Although the council did not maintain its reliance on this exception at the interval review stage, the council once again took no steps to ascertain whether the information was held because it formed the view that it would in any case be excepted.
13. The council told the Commissioner that it has now conducted a search for the information and it could not be located in relevant planning and legal paper files. The council said that, following some work carried out by an external firm of solicitors and a solicitor on secondment, one particular legal file from 1996 had gone missing and could therefore not be searched. The council explained to the Commissioner that it considers that it is possible that the information requested by the complainant was part of the missing file. The council said that it realised that this file was missing in 2005. It said that it had contacted the solicitor who had been on the secondment at the time however he was unable to recall whether he had checked that all the files he provided to the external solicitors involved had been returned. The council explained that it had also contacted the external firm who had carried out a search for the missing file. However, the file was not located.
14. The council said that there is no evidence to indicate that the information had been destroyed in line with the council's normal record

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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

management procedures. The council said that it would have expected such information to have been retained.

15. The council told the Commissioner that the complainant has provided documentation to it that it believes may have been part of the missing file referred to above. Despite being asked to explain how that information came to be in his possession, the complainant refused to respond fully, stating only that he has no reason to believe that any documentation has come into his possession by improper means.
16. In view of the above, the Commissioner decided that on the balance of probabilities, the information was not held by the council. The Commissioner notes that the complainant is suspicious about the council's initial decision to apply exceptions however the Commissioner is satisfied with the explanation provided. The complainant alleged that the council was being deliberately dishonest in this case. The Commissioner did not consider that there was sufficient evidence to support this allegation.

## **Other Matters**

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17. The Commissioner was concerned that the council had considered that it was appropriate to rely on the exceptions under regulation 12(4)(e) and regulation 12(5)(f) without firstly ascertaining whether the information was held. This may indicate that the internal review was not conducted with an appropriate degree of thoroughness or that there are training issues that the council needs to address or both. The Commissioner trusts that the council will make appropriate improvements when handling future requests for information.
18. On the subject of the missing file, the Commissioner considers that this situation was indicative of poor records management practice at the time. The Commissioner would like to highlight the recommendations set out in the Code of Practice under section 46 relating to good records management. For ease of reference, the Code may be accessed via the following link:

<http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/code-of-practice>

## 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

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**