

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

Date: 12 May 2015

Public Authority: East Devon District Council
Address: Knowle
Sidmouth
Devon
EX10 8HL

Decision (including any steps ordered)

1. The complainant requested various items of information from East Devon District Council ("the council") relating to the council's proposed relocation from Knowle. The council responded to the requests by supplying internet links to information it had already published on its website. It subsequently said that some information was excepted under regulation 12(4)(e), 12(5)(b) and 12(5)(e) of the Environmental Information Regulations 2004 ("the EIR"). These exceptions relate to internal communications, information that would adversely affect the course of justice and the confidentiality of commercial information. The council also referred to the exemption under section 21 of the Freedom of Information Act 2000 ("the FOIA"). The Commissioner found breaches of regulation 5(1) and 5(2) of the EIR for the failure to make information available. He found a breach of regulation 9(1) because of the council's failure to provide reasonable advice and assistance. Additional breaches under regulation 14(2) and 14(3)(a) and (b) were found for the failure to justify a refusal to provide information. Finally, there was a breach of regulation 11(4) for the failure to conduct an internal review within 40 working days. The Commissioner has not ordered any steps to take for reasons that are explained in the decision notice.

Request and response

2. On 19 April 2014, the complainant requested information from the council in the following terms:

"1. Can you please provide me with the up-to-date business case for relocation from the Knowle including details, pros & cons and costs of all recommended and rejected options.

2. Can you please provide me with a list of all public and private meetings held with councillors relating to the Knowle relocation, including details of invitees and attendees.

3. Can you please provide me with copies of all minutes of all meetings with Councillors related to the Knowle relocation.

4. Can you please provide me with a list of all reports provided to Councillors pertaining to the Knowle relocation.

5. Can you please provide me with copies of all reports provided to Councillors pertaining to the Knowle relocation.

6. Can you please provide me with the detailed scope/statement of work for any external consultants working on the Knowle Relocation.

7. Can you please provide me with a breakdown of costs to date relating to the Knowle relocation (including both explicit external costs and an estimate of internal costs), and the latest estimate of future costs (both capital and revenue) pertaining to the recommended option.

Please note that I am only requesting information where Councillors and/or the DCOE responsible for this project have been involved, and not information/communications which were purely internal between EDDC officers and not involved Councillors or the DCOE Internet web links which point directly to the information requested are an acceptable response".

3. The council replied on 13 May 2014. It provided a number of internet links to information it had already published on its website and said that the information requested in points 2 and 3 was excepted under regulation 12(4)(e) of the EIR. It referred to a previous decision notice issued by the Commissioner under case reference FS50498100 relating to minutes of meetings with councillors concerning the Knowle relocation. In this decision notice, the Commissioner had found that the minutes were excepted under regulation 12(4)(e) of the EIR.

4. The complainant wrote to request an internal review on 29 May 2014. He questioned the use of the exception under regulation 12(4)(e) in relation to request 2 and alleged that the council had not provided all the information held in relation to the remaining requests. For clarity, the review was requested via the What Do They Know website. The council says that it has no record of receiving the request however it accepts that it could have been overlooked. The Commissioner drew the council's attention to the request for review on 27 August 2014 prior to the start of his formal investigation.
5. The council did not provide an internal review until it was contacted by the Commissioner at the start of his investigation. The review was provided to the complainant on 7 January 2015. The council withdrew its reliance on regulation 12(4)(e) in relation to request 2 and provided some information. It sought to rely on the exemption under section 21 of the FOIA in relation to request 1. In relation to request 4, the council referred to progress reports but it provided no further detail. In relation to request 5, the council said the reports were the subject of an appeal to the First-Tier Tribunal (Information Rights) and it would be inappropriate to disclose them. In relation to request 7, the council maintained that it had provided the most up to date information available at the time of the request.

Scope of the case

6. The complainant initially contacted the Commissioner on 5 August 2014 to complain about the way his requests for information had been handled. Following the internal review completed only once the Commissioner's investigation had begun in January 2015, the complainant still wished to pursue a complaint. He said that he was willing to accept the council's response to points 3 and 6. However, he wanted the Commissioner to consider whether the council had provided the information held in relation to the other requests and in relation to request 5 specifically, the complainant said that he did not accept that the council had adequately justified the refusal. The complainant also complained that the council had provided responses outside of the 20 working days and that it had failed to complete an internal review until contacted at the start of the Commissioner's investigation.
7. Subsequently, the complainant clarified that he did not wish the Commissioner to order steps for the council to comply with any of the requests since he considered that the information was no longer useful because of the passage of time. He said that he did not wish the Commissioner to continue to seek "answers" to the requests but he still wanted an outcome to his complaint that reflected the council's failure

to respond properly at the time. As a result of this clarification, the Commissioner has taken a view, on the balance of probabilities, about whether or not the council breached its obligations under regulation 5(1) and 5(2) to make environmental information available within 20 working days using the information available to him at the time of the complainant's clarification. By this point, the council had been provided with multiple opportunities to clarify its position.

Reasons for decision

Background

8. The Commissioner considers that it would be helpful to set out briefly some background information in this decision notice to help to put these requests into their appropriate context.
9. The council had been based in the Knowle parkland for around 40 years when it decided to investigate relocation to new offices. The primary driver for that decision was government funding cuts which increased the need for the council to make efficiency savings. The council was concerned that the old buildings were expensive to maintain and the layout was restrictive. It also considered that the Knowle was an asset that could be used to fund a new, more efficient, headquarters.
10. In July 2011, the council's Cabinet decided to pursue an office relocation project. Initially, the objective was to identify whether sufficient value could be derived from the Knowle's redevelopment to fund a move to council land at Honiton, Heathpark. As part of the viability assessment, the council prepared an outline planning application for the Knowle. However, that planning application was refused. Following this, further options were considered. A search for a new location identified 15 proposals. The initial choice was a site at SkyPark, close to Cranbrook. However, after further consideration, the council decided that this option was not viable. In March 2015, the council agreed to sell its Knowle headquarters (with a certain amount of parkland offered to Sidmouth Town Council) and move to two sites in Honiton and Exmouth. It is estimated that the project will be completed in 2017.
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's general approach is to consider the complainant's evidence and argument. He will also consider the actions taken by the authority to make the information available and to check the extent of the information held. The Commissioner will consider if the authority is able to explain why information was not held. For clarity, the Commissioner is not expected to prove categorically whether

information was held. He is only required to make a judgement "on the balance of probabilities".¹

Request 1

12. The council provided internet links in response to this request. The complainant was dissatisfied because he said he had asked for the most recent business case. He said that he had been pointed to a council web page and the agenda for a cabinet meeting in July 2013. He said this information did not contain the business case requested.
13. In its internal review, the council said that it had provided links to cabinet reports and minutes where it said the case for relocation had been repeatedly presented together with a wealth of related detail. It said that at the time of the request, this was the most recent information that had been made available to the council's Cabinet. The council said that it considered that the complainant's request was extremely broad in scope and it said that its intention had been to highlight information that had already been published from which the complainant could raise any further queries directly. The council also provided a link to a more recent report from 3 December 2014 although it acknowledged that this information had not been available at the time of the request. The council referred to the exemption under section 21 of the FOIA and said that the information was exempt from disclosure since it was already available by other means.
14. The complainant remained dissatisfied with the internal review. He said that the more recent cabinet meeting on 3 December 2014 referred to by the council did not contain a business case either. He said the words "business case" are used only once in that document in relation to revenue and capital estimates. He said that the only figures in the document relate to refurbishments of existing offices and do not constitute a business case for the project. He said he wanted the council to state clearly whether or not it had a business case, which he would expect for a project of this nature and size.
15. The council told the Commissioner that it has never held a document entitled "business case" or a single document comprising information that one might expect to see in a business case. Furthermore, the council said that responding to the request had been made a more difficult task because the phrase "business case" could potentially be

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

interpreted very broadly. Against this background, the council considered that directing the complainant to the information that had already been published was a reasonable response as the intention was that the complainant could raise any resulting queries about that information afterwards.

16. During the Commissioner's investigation, the council changed its website and as a result, the links previously provided ceased to work. Moreover, even when the links were still operational, the Commissioner highlighted to the council that it was difficult to understand precisely what information it considered fell within the scope of the request. The Commissioner asked the council to identify the relevant information comprising its response to this request more clearly and specifically, which the council attempted to do. It highlighted relevant information in its Cabinet reports and other general information that was available on the council's "Moving and Improving" web pages at the time of the request.
17. The Commissioner also shared with the council a general definition of a "business case" which described how a business case basically captures the reasoning for initiating a project or a task and comprises information from which the justification for the project is derived. The council said that it considered that the information it had referred to above did broadly meet this general definition of a "business case". The council said that the information it had highlighted makes it clear that the reason for initiating the project as a whole was that the current office accommodation at the Knowle was not considered to be sustainable and so alternatives were investigated. The council said that the history to that matter, the context and reasons for the project are outlined clearly in the Cabinet Report dated 17 July 2013. The council said that this document could, in itself, be defined as the council's business case for this project. However, it said that it had also made other information available that sets out the reasons for the project and the next steps being considered as the project had progressed.
18. Given that the council had indicated to the Commissioner some uncertainty about the precise nature of the information being sought by the complainant, the Commissioner asked the complainant if he could provide further clarification to explain more clearly what information was being sought and why he did not consider that it had been made available. At this point, the complainant explained to the Commissioner that he no longer wanted a response to this request because so much time had passed and the information would be out of date. Nonetheless, the Commissioner considered that he was able to form a view on whether the council had complied with its obligation under regulation 5(1) and 5(2) to make environmental information available, and

whether it had acted in accordance with the relevant duty to provide appropriate advice and assistance to requesters under regulation 9(1).

19. The general obligation under regulation 5(1) is to make environmental information available. Under regulation 5(2), information should be made available within 20 working days. Generally, when dealing with requests for information under the legislation, it is important to have an appropriate level of precision about what information falls within the scope of a request, not only for the complainant's benefit, but in the event of a subsequent complaint to the Commissioner should a dispute arise. In the event of a very subjective request of this nature where both sides may deem certain information to fall in and out of scope, the obligation to provide reasonable advice and assistance in accordance with regulation 9 of the EIR is particularly relevant. Regulation 9 provides that a public authority shall provide advice and assistance so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants. This obligation is discussed in the associated "Code of Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004 (SI 2004 No. 3391)".
20. In this case, the council had clearly formed the view that providing website links was an appropriate way to respond to these requests because it had already published a good deal of information about this large project in an effort to be proactively transparent. Its intention appears to have been that the complainant would engage with it afterwards. However, the council did not make that intention explicit until months after its initial response, and it was only prompted by the start of the Commissioner's investigation. The council also acknowledged that this was a very broad request with a subjective interpretation. This project is still ongoing and is large and complex. There have been changes to the plans as they have progressed. In the Commissioner's judgement, it would have been reasonable to expect the council to engage more proactively with the complainant, at a much earlier point, to try to clarify the nature of the information being sought and to assist him in understanding what information the council held that may fall within the scope of the request.
21. As already noted, the Commissioner has not ordered the disclosure of any information in this notice and he has not exhaustively considered the full extent of all the information held by the council in view of the fact that this information is no longer required by the complainant. However, the Commissioner considers that it is reasonable for him to make a finding on the balance of probabilities that the council breached its obligation under regulation 9(1) to provide appropriate advice and assistance and also its obligations to make environmental information

available within 20 working days under regulation 5(1) and 5(2) of the EIR.

22. For clarity, the Commissioner did not consider the application of the exemption under section 21 of the FOIA because it is the Commissioner's view that the requests fall under the scope of the EIR. Regulation 2(1)(c) defines any information on activities affecting or likely to affect the elements and factors of the environment as "environmental information". In view of the background details to this project set out in this decision notice, the Commissioner considers that this project clearly affects the environment. Furthermore, the council did not provide appropriate justification for introducing an exemption under the FOIA in relation to this request.

Request 2

23. The council initially said that the minutes of groups specifically involved in discussions about the relocation project were exempt. The council referred to a previous decision notice issued by the Commissioner on 10 March 2014 under case reference FS50498100. The decision was that the minutes were exempt under regulation 12(4)(e) and the public interest favoured non-disclosure. For ease of reference, the link to that decision notice is as follows:

https://ico.org.uk/media/action-weve-taken/decision-notices/2014/963758/fs_50498100.pdf

24. The complainant said that he was dissatisfied because the previous decision notice referred to whole minutes being excepted and he had asked only for a list of public and private meetings in this case.
25. At the internal review stage, the council withdrew its reliance on the exception. It wrote to the complainant directly to explain that the group that meets to discuss progress on the relocation project is the Office Accommodation Working Party. It said that attendance at these meetings has varied according to topics under discussion however it provided a list of the members and officers who generally attend. It said that in addition to these meetings, the matter had been discussed at various public committee meetings and minutes or recordings of these meetings can be accessed on the council's website to which it provided link. It said that there had also been stakeholder meetings where members of the Office Accommodation Working Party had met with invited external representatives and partner agencies. It added that accommodation presentations have been made to all council members and the strategic management team. It provided another link to its website.

26. The complainant told the Commissioner he remained dissatisfied because the council had not provided a list of the meetings requested. He said it had only provided a list of the types of meetings that have taken place. He said it was not appropriate to refer to a website containing several hundred agenda documents and effectively say the information is in there somewhere. He also suggested that there may be more information held relating to the stakeholder meetings and presentations referred to as the council website had only mentioned two meetings on 19 July 2013 and 8 November 2013.
27. The Commissioner explained to the council that he agreed with the concerns expressed by the complainant about the difficulties of locating the relevant information and the non-specific response provided by the council. As a result, the council produced an A4 sheet of paper which it provided to the Commissioner. This set out the date of the meetings of the Member Office Accommodation Working Party and the names of the attendees at each meeting, though not invitees. The council said that it had not included a list of public meetings as this information was already publicly available however, the council provided the Commissioner with a list of stakeholders who had been invited to attend the two stakeholder events held at Exeter Airport and the East Devon Business Centre in Honiton and a list of the members of its Cabinet.
28. It is clear from the above that the council breached regulation 5(1) and 5(2) of the EIR for failing to make all the requested information available within 20 working days or by the date of its internal review. It inappropriately relied on the exemption under regulation 12(4)(e) initially, and subsequently failed to be specific enough when identifying what relevant information it held.

Request 4

29. In relation to request 4, the council again provided links to its website. It said that there may also be older reports available relating to the cabinet meetings. The complainant was dissatisfied because he said he had asked for a list but the council had merely suggested a search of its website.
30. At internal review, the council said that members of the Office Accommodation Working Party were presented with the progress reports produced by the Relocation Project Manager at each of their meetings.
31. The complainant told the Commissioner that he remained dissatisfied with the response because the council had still not provided a proper list. He also said that the council's internal review had referred to the Office Accommodation Working Party which does not have public

agendas and minutes because it is not a committee and this means that information the information is not on the council's website.

32. In response to the Commissioner's enquiries, the council produced a list of the progress reports that were presented to the Office Accommodation Working Party and their dates as well as a number of other reports that had been presented at council meetings. The Commissioner considers that the council had breached regulation 5(1) and 5(2) by failing to make environmental information available within 20 working days or by the date of its internal review.

Request 5

33. In relation to request 5, the council referred to the response it had provided in relation to request 4. The complainant was dissatisfied with the response for the same reasons as in request 4.
34. In its internal review, the council said that the reports were produced by the Relocation Project Manager and also formed the basis for the minutes of meetings. It said these reports are currently the subject of an appeal to the First-Tier Tribunal (Information Rights) and it would be inappropriate to disclose them at this stage. The reference number for that appeal is EA/2014/0072. It involves a request for the same progress reports made by a different complainant. The exceptions involved are regulation 12(4)(e), 12(5)(b) and 12(5)(e). These exceptions relate to internal communications, information that would adversely affect the course of justice and the confidentiality of commercial information. The tribunal has now published a partial outcome relating to this particular appeal which can be accessed here:
- [http://www.informationtribunal.gov.uk/DBFiles/Decision/i1540/East%20Devon%20District%20Council%20EA.2014.0072%20\(05.05.2015\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1540/East%20Devon%20District%20Council%20EA.2014.0072%20(05.05.2015).pdf)
35. The complainant said that the reports referred to provide details of an office move to SkyPark and the basis for withholding them at the time was that they were commercially sensitive due to ongoing negotiations for the purchase of land at SkyPark and the sale of land at Heathpark. The complainant said that as these negotiations had completely fallen through, there is no longer any reason to withhold the information.
36. When the Commissioner asked the council to justify its refusal to provide this information in response to this particular request, the council referred to the arguments it had already made in relation to the separate case before the tribunal referred to above. The Commissioner specifically highlighted to the council that it must take into account the passage of time since it had previously considered this request (the request being heard by the tribunal was made on 13 February 2013).

The Commissioner referred directly to the complainant's comments and asked the council to engage properly with those arguments. In response, the council said that it accepted that some of the information may no longer be excepted because of the passage of time but it was not willing to reconsider that matter further until the tribunal had reached an outcome on the previous request. It said that this was to avoid duplication of work. The council did also say that it was due to make a decision on the office relocation soon and following that, it was likely that the reports would be considered for publication.

37. The Commissioner would like to highlight that when a public authority refuses to provide information to a requester it must provide valid justification for doing so at the time. It is not acceptable for the authority to delay providing an appropriate justification to the requester and subsequently to the Commissioner because there is an ongoing tribunal case relating to a request made at a different time. The legislation provides specific timescales for responding to requests and it is important to take into account any change of circumstances when information has been previously withheld but requested again at a later stage. The Commissioner did not agree with the council's assessment that this would amount to an unnecessary duplication of work. The council's approach was neither in the spirit nor the letter of the legislation.
38. The failure by the council to provide appropriate justification for withholding the progress reports in relation to this particular request leaves the Commissioner with no alternative but to find that the reports were not excepted and that the council therefore breached its obligations under regulation 5(1) and 5(2) to make environmental information available within 20 working days and by the date of the internal review.
39. The Commissioner also considered that the council had breached regulation 14(2) and 14(3)(a) and (b) of the EIR for the failure to specify either in the initial response or internal review that some reports were being withheld in reliance on the exceptions under regulation 12(4)(e), 12(5)(b) and 12(5)(e). The council failed to explain the reasons for withholding the information to the complainant. It referred to the ongoing tribunal case mentioned above but it provided no specific details. Even if the complainant had been familiar with the contents of the Commissioner's previous decision notice relating to the tribunal appeal, that decision had only dealt with the arguments relating to regulation 12(4)(e) since the additional exceptions were relied upon at a late stage before the tribunal. As highlighted, the council made no attempt to justify its refusal to provide the information at the time of this request in April 2014.

Request 7

40. In relation to request 7, the council referred to the links it had already provided and it also included another link. The complainant complained that the costs were either not broken down or not current.
41. In its internal review, the council said that the costs provided were as of February 2013. It said that this represented the most up to date information available at the time of the request.
42. The complainant remained dissatisfied because he said that that council had not clearly confirmed or denied whether it held the information he requested. He expressed incredulity that the council would not hold more up to date cost information at the time of his request made in April 2014. Similarly, he said he could not believe that the council would proceed with the project without having some idea of future costs.
43. The Commissioner asked the council to be more specific about the information that it considered fell within the scope of this request. In response, the council referred to a Cabinet report dated 3 December 2014 (not available at the time of the request) and a Cabinet report dated 17 July 2013 where the council highlighted specific references to costs.
44. The Commissioner explained to the council that it did seem surprising that the council appeared to be claiming that the most up to date costs information held at the time of the request in April 2014 dated from the beginning of 2013. Despite asking the council to deal with that point, the council did not address it or the complainant's query about whether the council held costs information that was more "broken down". In common with its responses to the other requests, the council did not fully explain what searches it had undertaken to check that no other information was held. Despite being pressed on the point by the Commissioner, the council repeatedly only said that it had consulted those involved in the project. It did not identify more specifically who did the searches or what searches were made. The Commissioner was therefore not able to assess the adequacy of the searches conducted.
45. The council also referred to information that post-dated the request (a Cabinet report dated 3 December 2014) without clarifying whether any of the information contained in those documents had been held at the time of the request. It remained unclear to the Commissioner whether the information in the Cabinet report in July 2013 represented only the information that had been published at that time rather than all the information falling within the scope of the request. Additionally, the council mentioned information in the progress reports about bids, negotiations and land valuations discussed under "request 5" above. The

council said that this information would be excepted under regulation 12(4)(e) but it was not clear whether this information fell within the scope of this particular request.

46. The council also highlighted that the request was broad in view of the scale of this project and it had been difficult for it to understand what information the complainant required. It said that its understanding was that the complainant would engage with it further should the information not meet his needs. As described already in relation to request 1, the council has an obligation to provide reasonable advice and assistance under regulation 9(1). The Commissioner was not presented with any evidence to demonstrate that the council had engaged appropriately with the complainant to try to clarify the nature of the information being sought and to assist him in understanding what information the council held that may fall within the scope of the request. The Commissioner's view is that this would have been reasonable in the circumstances, given the scale of this project and the broad nature of the request made. As described earlier, the council made no specific reference to the intention to engage further with the complainant until its internal review, provided months after its initial response and only once the Commissioner's investigation had already started. The complainant did not wish to provide any further clarification during the Commissioner's investigation since the information was no longer relevant to him.
47. In view of the council's inadequate response to the Commissioner's enquiries as described above, the Commissioner considered that the council inevitably left sufficient room to doubt that all the recorded information held had been identified. Furthermore, in the absence of an appropriate level of engagement with the complainant about the information that was being sought in the first instance, the Commissioner finds that the council again breached its obligations under regulations 5(1), 5(2) and 9(1).

Internal review

48. Under regulation 11(4), a public authority must inform a requester of the outcome of an internal review within 40 working days. The council did not conduct an internal review until 7 January 2015 when a request for an internal review seems to have been made on 29 May 2014 via the What Do They Know website. The council said that there is no record that the review was received however it said that it could have been overlooked because of the volume of other information requests from this particular requester. However, even following initial prompting by the Commissioner on 27 August 2014, who drew the council's attention to the request for review in May 2014 and asked it to respond, the council still did not complete a review until the Commissioner's

investigation had already begun in January 2015. This was a breach of regulation 11(4).

Other matters

49. The Commissioner was concerned about the way in which the council had handled these requests and about the council's subsequent engagement with the Commissioner's investigation for the reasons outlined in this notice. The Commissioner also notes that the tribunal has echoed some concerns about the council's conduct during the related appeal mentioned in this decision notice. Given the significant public interest in a project of this nature, that is particularly regrettable. The Commissioner trusts that the council will consider the outcome of this complaint and the Commissioner's comments about the approach taken by the council in order to improve its request handling in the future. There is also a significant amount of guidance available on the Commissioner's website at www.ico.org.uk. to help authorities improve their request handling.

Right of appeal

50. 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

51. 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.
52. 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

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