

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 March 2017

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

Decision (including any steps ordered)

1. The complainant has requested information from East Devon District Council (the council) in respect of predicted energy costs at Knowle in the context of the council's office relocation project, and the documents used to reach those estimates. The council provided some information, but maintained that it did not hold the remainder. During the course of the Commissioner's investigation, further information was located within the scope of the request and some of this was provided.
2. The Commissioner's decision is that the council has failed to comply fully with this request and in doing so has breached section 1, section 10 and section 17 of the FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - With regard to the request at question 8 and the follow up request of 17 May 2016 requesting Grant Thornton's model, the council must issue a fresh response to the complainant which is compliant with section 1 and section 17 of the FOIA.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this case to the High Court

pursuant to section 54 of the Act and may be dealt with as contempt of court.

Request and response

5. On 9 April 2016 the complainant made a multi-point request for information to the council in light of the Agenda for Cabinet 3 December 2014¹ and Agenda for Cabinet 6 April 2016² regarding the council's relocation project. He has specifically complained to the Commissioner about the council's response to questions 7 and 8;

"7: Elsewhere, I have asked for clarification on the energy figures for Knowle.

Nevertheless, in the context of this FOI request and the specific document to which it refers, could you clarify exactly what the basis is for the figure of "annual energy costs of £83,900 pa" for Knowle? Is this the calculation for one year, or the average figure over a period?

I must apologise if you have indeed already provided me with this information; if so, I would be grateful if you could provide it once again. Thank you.

Does the "predicted energy cost for Honiton/Exmouth combined of £33,700 pa" still stand?

What are the calculations for the Council's energy costs for Knowle "even after repairs"?

8: Did the Council refer to Dept. of Energy and Climate Change (DECC) predictions for energy costs over the next 20 years when calculating "the total savings in running costs of Honiton/Exmouth over Knowle"?

¹ <http://eastdevon.gov.uk/media/526937/031214-cabinet-agenda-public-version.pdf>

² <http://eastdevon.gov.uk/media/1622700/060416-combined-cabinet-agendasm.pdf>

Which figures and which website links did the Council use to make these calculations?"

6. The council's response of 3 May 2016 provided links to some information in respect of both question 7 and 8. In relation to question 7, the council confirmed that information about estimated energy costs could be found in the June 2013 Energy Use and Maintenance Cost Report³. With regard to question 8, the council provided a link to the current DECC report and also confirmed that information from the report used in calculations could be found in the report produced by Grant Thornton found at Item 12 Appendix 2 of the Agenda For Cabinet 11 March 2016⁴.
7. On 17 May 2016, the complainant asked for more information in respect of question 8:

"This [the agenda for cabinet 11 March 2016] is clearly not the Dept. of Energy and Climate Change (DECC) documentation which was used by the Council when predicting energy costs over the next 20 years to calculate "the total savings in running costs of Honiton/Exmouth over Knowle".

>I would like access to the specific documentation from the DECC which the Council used when calculating energy costs over the 20 year period.

In the Grant Thornton report you provide links to, reference is made to consultations with the South West Energy and Environment Group (SWEEG) - <http://emps.exeter.ac.uk/research/energy...>

>I would like access to the specific documentation provided by the SWEEG at the time.

Furthermore, the Grant Thornton report stated that "External independent advice had been sought and, following review it was recommended that the Council should also consider incorporating the advised energy cost as identified within DECC's Updated energy and emissions projections 2014, dated September 2014. Consequently, Grant Thornton included this update within their Model.

³ <http://eastdevon.gov.uk/media/1228693/28-energy-use-and-maintenance-4-6-13.pdf>

⁴ <http://eastdevon.gov.uk/media/939266/110315-cabinet-combined-agenda.pdf>

>I would like full access to the external independent advice, the energy cost as identified within the DECC's updated projections 2014 and Grant Thornton's own model."

8. On 22 May 2016, the complainant also asked for more information in respect of question 7:

"To arrive at an 'annual cost', one would have to take an average across more than one year's worth of 'costs'; moreover, in any one year, whether 'current' or otherwise, the 'cost' figures might include a statistical outlier, which would be resolved by taking an average over a period of years.

Besides, 'current' is not the same as 'annual' by any stretch of semantics.

>In which case, could you confirm that Davis Langdon took only one year's worth of 'costs' (April 2012 – March 2013) to arrive at their final calculation of 'annual cost'; or was other statistical information taken into account to arrive at an 'annual cost'?

In the Davis Langdon report's Executive Summary, as part of the "current annual running cost at March 2013 base date", the "energy costs are £75,070".

>Could you "clarify exactly what the basis is for the figure of "annual energy costs of £83,900 pa" for Knowle?" In other words, could you please provide me with the exact calculations by which Davis Langdon arrived at the figure of £83,901 by March 2015?

>And could you provide me with the actual figure for energy costs as at March 2015?

The Davis Langdon report is now two years out of date.

>"Does the "predicted energy cost for Honiton/Exmouth combined of £33,700 pa" still stand?"

9. On 11 June 2016, the complainant asked the council to conduct an internal review. He specifically asked the council to consider the following points:

">Could you confirm that Davis Langdon took only one year's worth of 'costs' (April 2012 – March 2013) to arrive at their final calculation

of 'annual cost'; or was other statistical information taken into account to arrive at an 'annual cost'?

>Could you clarify exactly what the basis is for the figure of "annual energy costs of £83,900 pa" for Knowle?" In other words, could you please provide me with the exact calculations by which Davis Langdon arrived at the figure of £83,901 by March 2015?

>And could you provide me with the actual figure for energy costs as at March 2015?

Does the "predicted energy cost for Honiton/Exmouth combined of £33,700 pa" still stand?"

10. The council responded on 6 July 2016. It stated that it did not hold background papers to the Davis Langdon report. With regard to "actual figure for energy costs" the council stated that copies of energy bills and energy usage for the period had previously been provided. It maintained that all information within the scope of the request had been provided, and it was not prepared to make comment on the current accuracy of historical documents.

Scope of the case

11. The complainant contacted the Commissioner on 10 July 2016 to complain about the way his request for information had been handled. His complaint focused on the council's answers to questions 7 and 8, including the follow up requests of 17 May 2016 and 22 May 2016.
12. The Commissioner considers the scope of this case to be to determine whether the council had handled the request and follow up requests in accordance with the FOIA. In particular she will consider the extent to which the council holds information falling within the scope of the request, and also whether the council has breached any procedural sections of the FOIA.

Reasons for decision

13. Section 1(1) of the FOIA states that:

"Any person making a request for information to a public authority is entitled: -

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him".

14. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
15. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
16. In an email to the Commissioner on 8 November 2016, the complainant confirmed that he required the following information from the council in respect of his requests:
 - (a) Access to the documentation relied on by the council to calculate and determine energy costs. *"The background information which it would have used when making a calculation critical to its justification for moving its headquarters from Knowle."*
 - (b) Access to *"the details of the evidence to be able to determine the solidity and reliability of the figures produced."* This was in respect of information provided by SWEEG to the council.
 - (c) Access to any information the council has about the model used by Grant Thornton as he expects that the council would have asked for the basis of its use as part of contractual agreements.
17. With regard to (a) and question 7 of the request, the council confirmed that the background papers, including any information about which of the DECC reports were used in the calculation of energy costs would have been held by Davis Langdon. This external company was employed by the council to provide project management on the relocation project, and in doing so, authored a number of reports on the project. Davis Langdon was responsible for the June 2013 report which contained the predicted energy cost

assumptions, and which the council has confirmed is the basis of the statements in the 3 December 2014 Agenda for Cabinet.

18. The council's position is that it does not hold this information. It states that the information was originally held by Davis Langdon, which has since been taken over by Aecom. The council therefore maintains that the information, if it were held would be held by a third party organisation, which is not subject to the FOIA. However, for completeness, the council contacted Aecom to establish whether any information within the scope of the request was still held. Aecom confirmed to the council that the individual who prepared the report in question no longer works at Aecom, and the office in which they were based is no longer in use. In these circumstances it has confirmed that it does not hold any supporting or background information in respect of the report and the energy assumption calculations within it. The council provided the Commissioner with an email from Aecom which confirms this position.
19. The complainant maintains that any information produced or provided by Davis Langdon could not be considered as external third party information, and therefore should be held and provided by the council. He is of the view that the consultant from Davis Langdon who authored the report was embedded at the council, and so the council should hold the information. The complainant referred to a previous decision notice, FS50498100, and subsequent Tribunal decision, EA/2014/0072⁵, as evidence that the consultant was considered to be internal. This case considered whether reports created by the consultant were internal communications. Paragraph 12 of the Tribunal decision states "*the Tribunal having heard the evidence and considered the reports on the facts before us in this appeal are unanimously of the view that in this case the reports were external communication.*" Although the Tribunal accepted that the consultant was embedded at the council to an extent, it found that he was ultimately an independent expert employed by Davis Langdon.
20. The Commissioner therefore does not find that the Tribunal supports the complainant's position that the consultant is internal. She therefore finds that information he or Davis Langdon holds or held would not be information held solely on behalf of the council. In addition to this, the Commissioner is satisfied that on the balance of probabilities, the council does not hold any background information used by the consultant or any other individual at

⁵[http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i1540/East%20Devon%20District%20Council%20EA.2014.0072%20\(05.05.2015\).pdf](http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i1540/East%20Devon%20District%20Council%20EA.2014.0072%20(05.05.2015).pdf)

Davis Langdon in the calculation of predicted energy costs. The Commissioner therefore finds that the council was correct to say that no further information is held in respect of the disputed information requested at question 7.

21. With regard to part of the complainant's question 7 which asked for any information in respect of whether the predicted energy costs of £33,700 pa for Exmouth and Honiton still stand, the council confirmed to the Commissioner that no further generic estimates for the predicted energy costs for the Exmouth and Honiton sites were held at the time of the request. The complainant has confirmed to the Commissioner that he accepts this information.
22. With regard to part (b) of the complainant's complaint to the Commissioner and question 8 of his request, the Commissioner asked the council what searches it had conducted for any information provided to it by SWEEG. The Commissioner asked the council to consider the relevant part of the Agenda for Cabinet 11 March 2015 which states *"Within the running cost calculations it is worth pointing out that we have taken on board external criticism of the previous energy cost assumptions and factored in DECC future projections of energy prices. In doing this we have consulted the South West Energy and Environment Group (SWEEG)"*.
23. The council stated that neither it nor Grant Thornton held any information that was provided by SWEEG. It explained that the consultation with SWEEG took place on a verbal basis, and that the council officers involved were the senior officers leading the relocation team. The council has confirmed that it has consulted with these individuals in order to determine whether any information within the scope of the request is held, both of whom confirmed that no recorded information is held about the discussion, which lasted for approximately ten minutes. The council has also informed the Commissioner that the purpose of the discussion was for the SWEEG representative to advise the council which indices should be used to inform calculations regarding inflationary increases in energy costs. The council confirmed that the verbal advice given by SWEEG was then shared with Grant Thornton by email, and this email is the only record of the consultation with SWEEG.
24. The Commissioner has therefore had regard to what specific information the complainant requested in relation to the consultation with SWEEG; *"I would like access to the specific documentation provided by the SWEEG at the time."* Having considered the explanation provided by the council regarding the discussion with SWEEG, the Commissioner is satisfied that on the

balance of probabilities, no information within the scope of the request is held. She acknowledges that an email exists relaying a verbal discussion, but she is satisfied that the council does not hold any *documentation provided by SWEEG*.

25. Turning to part (c) of the complaint and question 8 of the request, the council has explained that the Grant Thornton model is a computer model, the purpose of which is to produce outputs to report to committee. It advised that it is a working model which is only really practical to view on screen. It also states that it would not make very much sense to the untrained eye and the council has concerns about allowing access to the public who could inadvertently make changes which would be extremely difficult to detect and rectify.
26. In addition to this, the council has confirmed that the model contains commercially confidential information identifying budgeted construction costs for the new build offices in Honiton which have not yet been subject to contract and which have been subject to a decision notice FER0608237⁶. The council has argued that to extract commercially confidential data would take an unreasonable amount of time, if indeed it would be possible to do so. It has estimated that this work would take at least 3 days, and possibly longer, it states that even then, the model would not be accurate or function correctly, nor could it be sure that all confidential data has been removed. The council suggests that as the outputs from the model have been reported publicly, it does not see that there is significant public interest in viewing this very complex background working model.
27. The council has advised that once contracts have been awarded for this work, it would be happy to allow the complainant to view the model at the council offices, but at the present time that is not possible.
28. It is clear to the Commissioner that the requested Grant Thornton model is held. From the evidence before the Commissioner it seems that the council has not communicated this to the complainant in the course of dealing with this request, and if the council intends to withhold it, it has not issued a valid refusal notice under section 17 of the FOIA. Section 17 requires a public authority that is withholding information under an exemption to inform the requester of that fact, specify the exemption in question and explain why it applies.

⁶ <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1625296/fer0608237.pdf>

29. With regard to question 8 and the follow up request of 17 May 2016 requesting Grant Thornton's model, the Commissioner finds that the council has breached section 1 and section 17 of the FOIA in neither confirming that the information is held, nor issuing a refusal notice to confirm why it is being withheld.
30. Finally, the Commissioner has had regard to the follow up request of 17 May 2016 for DECC's updated energy predictions for 2014. The council confirmed to the Commissioner that it holds the three spreadsheets in relation to this part of the request. It has explained that it had considered these to be too high level, and not what the complainant wanted, but said that they could be provided to the complainant if he required it. The Commissioner has considered the content of these spreadsheets and finds that they fall within the broad scope of question 8 and the follow up request of 17 May 2016 as they are the calculations for energy costs based on the DECC updated energy and emissions projections September 2014.
31. The Commissioner conveyed the names of the spreadsheets along with a brief description of their content to the complainant to ascertain whether he required that information. He confirmed that he did, and so the Commissioner asked the council to supply it, which it has now done. However, in providing the information outside the required 20 working days, the Commissioner finds that the council has breached section 10 of the FOIA. Section 10 requires a public authority to respond to a request by either providing the requested information or issuing a valid refusal notice under section 17 within 20 working days.

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 123 4504

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
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