

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

Date: 17 July 2018

Public Authority: Royal Borough of Windsor and Maidenhead

Address: Town Hall
St Ives Road
Maidenhead
SL6 1RF

Decision (including any steps ordered)

1. The complainant has requested information regarding a local transport infrastructure planning scheme.
2. The Commissioner's decision is that on the balance of probabilities the Royal Borough of Windsor and Maidenhead does not hold any further information to that already provided and therefore has not breached regulation 5(1) of the EIR.
3. The Commissioner notes that the Council provided its response outside of the statutory twenty working days and has therefore breached regulation 5(2) of the EIR.
4. The Commissioner does not require the Council to take any steps.

Request and response

5. On 3 October 2017, the complainant wrote to the Royal Borough of Windsor and Maidenhead ('the council') and requested information in the following terms:

"Please provide me with the following information regarding the LTP ('Local Transport Plan') LEGOLAND Corridor scheme (as disclosed in the Infrastructure Development Plan) both prior and post publication of the BLP Reg 19:

- Records of any meetings where this scheme was discussed. [1]*
- Records of any information relating to this scheme whether circulated internally or externally. [2]*
- Records of who was aware of this scheme and when. [3]*
- The rationale behind how the £3m allowance has been calculated." [4]*

6. The council responded on 23 October 2017 and denied holding the requested information stating that: *"There are currently no live or approved projects on this corridor, and improvements are likely to arise from individual planning applications / development rather than planned development identified within the Borough Local Plan."*
7. Following an internal review the council wrote to the complainant on 9 November 2017. It stated that no information is held for [1]. It provided a scheme of works and draft map proposed by Peter Brett Associates ('the development consultants') in response to [2] and stated no further information was located. It provided a redacted document setting out costs estimates for the junction scheme provided by the development consultants in response to [4]. The total costs estimates were included in the document however the council redacted the individual works costs, citing FOIA section 43 (commercial interests).

Scope of the case

8. The complainant contacted the Commissioner on 15 November 2017 to complain about the way her request for information had been handled. Specifically that the council had not fully considered her request and that the disclosure is incomplete. She also expressed concern that the council has not published its updated response, following the review, on its publically available website pages where it records its FOIA requests and responses.

9. The Commissioner considers that the scope of the case is to assess whether on the balance of probabilities, the council holds further information relating to the requests annotated [1], [2], [3] and [4] above. Additionally she will consider whether the council has made any procedural breaches of the EIR.

Reasons for decision

Is the information environmental?

10. Information is “environmental” if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR. Under regulation 2(1)(c), any measures that will affect, or be likely to affect, the elements referred to in 2(1)(a), will be environmental information. The requested information relates to decisions to develop land which are clearly a plan or activity likely to affect the land and landscape. The Commissioner therefore considers that the request should be dealt with under the terms of the EIR.

Regulation 5(1) – Duty to make information available on request

11. Regulation 5(1) states that any person making a request for information is entitled to have that information communicated to them. This is subject to any exceptions that may apply.
12. Where there is a dispute between the information located by a public authority, and the information a complainant believes should be held, the Commissioner follows the lead of a number of First-tier Tribunal (Information Rights) decisions in applying the civil standard of the balance of probabilities.
13. In the circumstances of this case the Commissioner will determine whether, on the balance of probabilities, the Council has complied with the request by disclosing all relevant held information.

The complainant's position

14. The Commissioner understands that the complainant believes further information must be held and that the council have not fully investigated their records to locate it. Explicitly the complainant has argued:
 - it is not credible that the council holds no records of formal meetings where the £3m scheme was discussed [1];

- the council have not answered [3];
- the council "appear to be refusing or are unable to justify the claim in the IDP [infrastructure delivery plan] that the Legoland Corridor will cost £3m" This is on the grounds that the cost estimates provided in the review response only total £480k.[4]

The council's position

15. By way of background the council explained that the 2016 IDP set out the following:

"Legoland Corridor

The council is reviewing options for highway improvements from the Clarence Road junction to the Legoland Access Junction on Winkfield Road. These are being considered as a means of managing the seasonal pressures that the Legoland facility places on this corridor. The council has sought to consider a number of schemes, as such an allowance of £3,000,000 for these works is being considered."

The council advised that the above statement has been dropped from the May 2017 and January 2018 updates "so it does not now feature as infrastructure that is required to support the Borough Local Plan".

16. The Commissioner observed that the statement is included in the May 2017 version of the IDP which is a component of the councils the Borough Local Plan (BLP) submission, available on their website. It was closed for comments from the public in September 2017. However in response to her enquiries on this matter the council advised that any such information is absolutely not current.
17. The Commissioner asked the council for details regarding the searches it has undertaken to retrieve relevant information including paper and electronic records. Furthermore she enquired whether information has been destroyed and if there is any statutory or business purpose for which the requested information should be held.
18. The council stated that the two employees involved in planning policy at the time when the matter was live are no longer employed by the council. Therefore it has not been able to search for information that may have been contained in emails in relation to the request. The council advised that, as far as it was aware, no information had been deliberately destroyed or deleted.

19. The council advised that it had searched the information held electronically to support the IDP and could not find *"in the policy folders any correspondence to reference this corridor."*
20. The council informed the Commissioner that in order to respond to her investigation it had interviewed an officer who had held discussions with one of the former employees at the time of drafting the IDP. The officer reported in regards to this informal and undocumented discussion: *"I remember meeting with [former employee] to review the transport elements of the document and querying where this had come from...I don't think that [former employee] was able to recall the exact source of the £3 million scheme. But indicated that he had come across it when reviewing previous planning documents. Without knowing the source, it was difficult to say what individual schemes were included or how the £3 million was calculated."*
21. The council explained that previous versions of IDP contained a table of major transport schemes, including the Legoland Corridor. The source for the table is named as the development consultants. However, it could not check for correspondence between the council and the development consultants because, as previously explained, the former employees' mailboxes had been deleted. Furthermore it had checked meeting notes with the current transport consultant, WSP, and could not find any reference to the Legoland Corridor in information supporting the current version of the IDP.
22. The council advised that there was no statutory or business purpose for holding the requested information. It stated that all live and relevant information is held on the planning portal, such as the IDP and the BLP.
23. The Commissioner queried why there are no formal records of any internal or external meetings to discuss the scheme or the estimates. The council responded *"no formal records of meetings have been recorded because these were informal discussions between officers to provide feedback on early drafts of the document. Formal records would only be created once the plans were finalised and presented to senior managers and members for approval or when third parties were formally consulted (eg Legoland and Windsor Town Forum)."*
24. The Commissioner asked why in relation to [4] the council had only provided information for one scheme valued at £480k. The council explained that in the absence of any formal records regarding the £3m estimate it had looked at what schemes were likely to have been included and it had not been able to locate anything further.

The Commissioner's decision

25. The Commissioner is sympathetic with the complainant's view that there should be further information regarding how a £3m cost estimation, that was reported in an official council planning document, was derived. She also considers it reasonable to assume that the requirements and associated proposals would have been shared internally and externally and that the related meetings minutes would be documented.
26. However the council has explained that the statement regarding the £3m works no longer features as infrastructure required to support the BLP. The council advised that it only stores "live" records pertaining to planning matters indefinitely. The Commissioner recognises that there is no obligation for public authorities to hold all information for an indefinite amount of time.
27. As set out at paragraphs 12 and 13, when considering complaints where the amount of information provided is disputed, the Commissioner will determine the case on the balance of probabilities. It is seldom possible to decide with absolute certainty whether or not further information is held.
28. Furthermore, it is not in the Commissioner's remit to issue a decision on whether a public authority should record or hold information, including that shared with a third party such as the development consultants in this case. The Commissioner's decision is solely regarding whether the information was held at the time of the request.
29. The Commissioner has considered the searches performed by the council, the amount of information provided by the council, its explanations for why the information is not held and the complainant's concerns.
30. The Commissioner considers that, on the balance of probabilities, the Council does not hold any further information to that already provided.

Procedural matters

31. Regulation 5(2) provides that:

"Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."

32. The complainant made her request on 3 October 2017. The council responded on 23 October 2017 and denied holding the requested

information. Following an internal review the council wrote to the complainant on 9 November 2017 and provided some information within the scope of the request.

33. The information was therefore provided only at the review stage which fell outside of the 20 working days required by Regulation 5(2). The Commissioner therefore finds that the council has breached Regulation 5(2) in this respect.
34. The complainant also expressed concern that the council had not updated records on its website to show its amended position in the information review response. Although this could be considered poor practice there is no provision in the legislation that requires the council to publish FOIA or EIR responses. Therefore the Commissioner finds that no breach of the EIR has been incurred in this regard.

Other matters

35. The council cited FOIA section 43 as the basis for redacting cost information in its review response. As stated the Commissioner finds that the information requested is environmental. As such the Commissioner reminds the council of the importance of determining the correct legislation under which to consider a request. The determination of the correct legislation will inform a public authority about the specific steps that it is required to take.
36. The council may wish to review its policy and procedures and for records management and keeping to ensure that it is sufficient for the purposes of answering FOIA / EIR requests. The Lord Chancellor has issued a code of practice¹ to assist public authorities in this respect.

¹ <https://ico.org.uk/media/for-organisations/documents/1624142/section-46-code-of-practice-records-management-foia-and-eir.pdf>

Right of appeal

37. 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

38. 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.

39. 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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