

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

**Decision notice**

**Date:** 22 August 2019

**Public Authority:** Chichester District Council  
**Address:** East Pallant House  
East Pallant  
Chichester  
West Sussex  
PO19 1TY

**Decision (including any steps ordered)**

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1. The complainant has asked Chichester District Council for information and advice it provided to councillors at a meeting on 21 September 2018. The information the complainant has asked for concerns the Council's proposals for the A27.
2. The Commissioner considers that the Council should have responded to the complainant's request under the provisions of the EIR rather than those of the FOIA. The Commissioner has decided that the Council has complied with regulation 5(1) of the EIR but has failed to comply with regulation 5(2).
3. The Commissioner requires the public authority to take no further action in this matter.

**Request and response**

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4. On 22 September 2018, the complainant wrote to the Council and, referring to a meeting at Boxborough on 21 September, asked it to provide him with:  
  
"...copies of all such advice that has been sent to Councillor Potter and other councillors around the A27 since the completion of the Build a Better A27 workshops but prior to the council decision to propose a mitigated Northern route... This is advice sent from officers but also

includes and information received by the council and councillors pertaining to the A27 alternative proposals.”

5. On 4 October 2018, the Council wrote to the complainant in response to his request for information. The Council advised the complainant that, “no correspondence or advice was sent to Councillor Potter or other councillors regarding the A27 since the completion of the Build a Better A27 workshops but prior to the council decision to propose a mitigated Northern route as the Council’s preferred option with the inclusion of the southern alternative”.
6. On 4 October 2018, the complainant wrote to the Council and, for the purpose of being more specific about his request, asked to be given “the advice provided to councillors that Councillor Potter referred to at the Boxborough meeting which I know exists and you are reluctant to release”.
7. Later the same day the complainant wrote to the Council to complain about its failure to disclose information which he asserted, as a matter of fact, the Council had provided to councillors prior to the meeting held at Boxborough.
8. On 9 October 2019, the Council wrote to the complainant to ask him whether he wished to ask the Council to review its handling of his request, or whether he wanted to complain about what information was provided to councillors prior to the meeting at Boxborough.
9. The complainant responded to the Council’s email by providing the following clarification of the information he required from the Council:
  - (i) The complainant asserted that the Council’s response to his request of 22 September was not correct, as papers were provided to Council members and those papers should have been provided under the FOIA. The Council should have pointed the complainant to papers which were already in the public domain.
  - (ii) He required any information not already in the public domain but which is disclosable under the FOIA.
  - (iii) He required the papers and advice to which Councillor Potter referred at the Boxborough meeting.

10. On 15 October 2018, the complainant submitted a new request for the "details of the draft transport study mentioned in this week's post<sup>1</sup>".
11. In respect of his original request, the complainant advised the Council that it was in breach of the FOIA for not disclosing the information he had asked for. He asserted that, "I have every reasonable expectation that now that a member of the council has acknowledged that the information is held it will be released as a matter of utmost urgency under the original FOI."
12. On 29 October 2018, the Council wrote to the complainant after carrying out its internal review. The Council provided the complainant with an explanation of matters connected with his request. It advised the complainant that the PBA<sup>2</sup> report and slides are confidential and that members of the council "are aware that all information about the local plan is confidential during development and the Freedom of Information Act reflects that through section 22 which permits matters in development to remain confidential pending completion..."
13. The Council informed the complainant it had considered the public interest test and the guidance issued by the Information Commissioner on confidential information and information due for publication in the future.
14. The complainant responded to the Council's internal review by arguing that the information he seeks is not confidential. He said that the information has been released by the media and non-members of the council and it has been referred to by Councillor Potter in a public meeting. The complainant alleged that the Council's response to his request was a lie on the grounds that it know advice information had been provided to councillors.
15. On 29 October 2018, the Council wrote to the complainant in response to his latest email. The Council advised the complainant that it does not assert there are no documents, only that they will be more generally available in the future. The Council informed the complainant that its consultant's transport study would be published as part of a public consultation on the Chichester Local Plan Review from 13 December 2018 to 7 February 2019. Until that time, a study and slide presentation

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<sup>1</sup> The Chichester Post

<sup>2</sup> Peter Brett Associates, A consultancy which works on major developments and infrastructure. Its Local Plan Transport Assessment Powerpoint presentation is dated 10 September 2018.

shown to Council members and any 'confidential information which might exist at this time', such as the emerging Local Plan Review, is exempt from disclosure in under section 22 of the FOIA.

16. The Council informed the complainant that its consideration of the public interest had been made in line with the Commissioner's guidance and that it had taken into consideration the history of the matter, the need for authorities to properly follow statutory decision making processes, its future intention to make information available for public consultation and the fact that the matter is still live.
17. Later on 29 October, the Council advised the complainant that it was not asserting that there were no documents, only that such documents would be made more generally available in the future. The Council's reviewer informed the complainant that he had taken into account some of the Information Commissioner's previous decisions, including one which happened to consider the application of section 35.
18. On 9 November 2018, the complainant wrote to the Council to note that it had now published some information relevant to the matter of his request but not the information had requested; namely the information provided to councillors including Councillor Potter, which the complainant asserts is not the same as the information recently published.
19. On 19 November 2018, the Council wrote to the complainant to advise him that, "You received an initial partial disclosure from [a named person] (Planning). She did not disclose one item (the transport study briefing Powerpoint) as it remained confidential at that time and indicated that an exemption had been applied to her disclosure." And, "I was advised by the client department on Wednesday 14<sup>th</sup> November that the position moved on with various documents becoming public during the period prior to the consultation on the 13<sup>th</sup> December 2019 and as such the grounds of withholding disclosure of the transport study briefing no longer applied."
20. On 15 November 2018, the Council provided the complainant with a copy of the PowerPoint presentation of a member briefing given to members of the Council on 10 September and it informed the complainant that there were no other documents held by the Council.
21. The complainant responded to the Council's final email on 20 November. He pointed out that the legislation requires that the Council can only apply section 22 to information that the Council intends to publish and that information must be specific to that which the applicant has requested. He said, "Of course you have not published the information that I have requested but the report that the briefing was based on".

## Scope of the case

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22. The complainant contacted the Commissioner on 30 October 2018 to complain about the way his request for information had been handled.
23. The Commissioner advised the complainant that the focus of her investigation would be to determine whether Chichester District Council holds the information he had asked for and whether it was entitled to rely on the provisions of sections 22 and 35 of the FOIA to withhold that information.
24. In response to her enquiries the Council has made clear that it does not rely on section 35 to withhold any information from the complainant. The Commissioner has therefore not considered that exemption in this decision notice.

## Reasons for decision

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25. The Council has provided the Commissioner with the following observations about the complainant's request and its responses to them:
26. The Council says that the complainant's series of requests and his complaint to the Commissioner are predicated on his recollections. The Council notes that, on his own admission, the complainant's recollections are not entirely precise, particularly in respect of the opening remarks made by Councillor Potter at the start of a public meeting in September 2018.
27. The complainant has stated that Councillor Potter said Council members had received correspondence from planning officers which advised them there would be no work on the A27 in the foreseeable future and that there were no developments on this issue.
28. The Council has advised the Commissioner that it has seen no 'correspondence' or 'advice' from officers or anyone else and it has been "unequivocally told that there is none".
29. In an attempt to understand the complainant's belief that there is such material, the Council has discussed the matter with planning policy officers, particularly in respect of what might have been meant by Councillor Potter in making the remarks attributed to him by the complainant.

30. The Council's best endeavours to determine what Councillor Potter might have been referring to have concluded that it is the PowerPoint presentation given to Council members at a briefing on the transport study.
31. This briefing was given on 10 September 2018. It was an informal and private member briefing on the transport study. Council Potter is recorded as having attended the meeting.
32. The consultants' transport study was still not available at that time the meeting took place and therefore the presentation was arranged to give members an idea of pertinent matters and of the emerging evidence and issues with regard to transport and the development of the draft Chichester Local Plan Review.
33. The Council has speculated as to what its officers might have informed councillors. It has done so because it has found nothing in writing about such matters. The Council believes that officers would only have said something along the lines that the Council was not relying on any strategic road schemes funded by the government for the benefit of the A27 Chichester bypass in view of the funding uncertainties.
34. On the assumption that the A27 Chichester scheme would not be included in the next national road infrastructure scheme, the Council would therefore only be looking at local road junction improvements, etc to accommodate proposed development in the emerging Chichester Local Plan Review.
35. The Council has not been able to trace the email sent to all Council members who attended the presentation. Nevertheless, the Council believes the email would have said something of the following nature:  
  
'On behalf of my colleagues in Planning Policy and further to the presentation given to members on Monday 10 September 2018, please find a link below to the PowerPoint presentation used for your information and reference relating to the emerging Transport Assessment prepared by Peter Brett Associates.'
36. The foregoing quote is speculative. The Council makes its claim on the evidence of similar emails sent by its Democratic Services which have enclosed presentations on other local plan-related subjects.
37. The Council believes the covering e-mail, which almost certainly would have been sent on 14 September 2018, did not contain any information whatsoever of the kind mentioned by the complainant.

38. The Council has informed the Commissioner that it does not wish to reverse or amend its position. The Council has provided the Commissioner with a copy of the information it holds which falls within the scope of the complainant's request. That information is comprised of the member briefing transport study PowerPoint presentation.
39. The Council notes that this was sent to the complainant on 15 November 2018 and it asserts that the Council does not hold any other documentation which falls within the scope of the complainant's requests.
40. The Council has advised the Commissioner that its reliance on section 22 is no longer relevant because the complainant has been given the one document which was in its possession that falls within the scope of his requests and, as a matter of fact, there are no other documents held by the Council which fall within the scope of his requests.
41. The information which the Council's holds and which is relevant to the terms of the complainant's requests, is solely the member PowerPoint presentation.
42. The fact that this presentation was going to be published at a future date is referred to in the sixth and seventh paragraphs of the Council's email to the complainant of 29 October 2018 and in the fifth and sixth paragraphs of the Council's email to the complainant of 29 October 2019. Both of these emails informed the complainant that information relating to the Local Plan would be made available in the future at a point or stage consistent with the publication timetable for the emerging Chichester Local Plan Review.
43. In the Council's opinion, the complainant's request for the member presentation became crystallised in his email of 15 October 2018. At that time, and at the time of his first request on 22 September 2018, the Council's published timetable for the Local Plan review was set out in the Local Development Scheme. This stated that there would be a public consultation on the Chichester Local Plan Preferred Approach in December 2018 to February 2019. This is substantiated at pages 7 to 8 of the document published by the Council at:  
  
<https://www.chichester.gov.uk/CHttpHandler.ashx?id=30892&p=0>
44. The Council acknowledges that the member presentation itself was not part of the public consultation and therefore it was not and would not have been published as part of that particular process. This acknowledgement contradicts that Council's assertion at paragraph 42 above.

45. Notwithstanding this contradiction, the Council draws the Commissioner's attention to the fact that the presentation was disclosed to the complainant in November 2018.

*The Commissioner's decision*

46. The Commissioner has carefully considered the Council's representations in this matter. She accepts that the Council has carried out enquiries and searches which are relevant to the information which the complainant has asked for and that its explanations are made in good faith.
47. The Commissioner has therefore concluded that, on the balance of probability, the Council does not hold any recorded information, other than the PowerPoint presentation disclosed to the complainant, which falls within the scope of his requests.
48. The Commissioner notes that the recorded information at the heart of the complainant's request is likely to satisfy the definition of environmental information provided by Regulation 2(c) of the EIR – it is clear that the requested information relates to measures, such as policies legislation plans, etc which are likely to affect elements of the environment, i.e. roads. The Council should therefore have made its responses to the complainant's requests under the provisions of the EIR rather than the FOIA.
49. On the basis that the Council has disclosed the PowerPoint presentation to the complainant and holds no further relevant information, the Commissioner has decided that the Council has complied with Regulation 5(1) of the EIR – the duty to make available environmental information on request.
50. The fact that the Council's disclosure took place more than twenty working days after the Council's receipt of the complainant's initial request leads the Commissioner to conclude that the Council has contravened Regulation 5(2) of the EIR.
51. The Council's initial reliance on section 22 of the FOIA was clearly in error. This is because the PowerPoint presentation would not have been published as part of the Council's intended consultation.



**Right of appeal**

52. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

53. 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.
54. 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**