

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

**Decision notice**

**Date:** 21 January 2020

**Public Authority:** Leicestershire County Council  
**Address:** County Hall  
Glenfield  
Leicester  
LE3 8RA

**Decision (including any steps ordered)**

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1. The complainant has requested information associated with the approval of building works against a given planning permission.
2. The Commissioner's decision is that, on the balance of probabilities, Leicestershire County Council holds no further information which is in-scope of the request. However, she finds that it provided a response outside of the 20 working day time limit and therefore breached regulation 5(2).
3. The Commissioner does not require any steps.

## Request and response

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4. On 22 May 2019, the complainant wrote to Leicestershire County Council ('the council') and requested information in the following terms:

*"1/ Please supply us with details of the ongoing progress of*

*18/01061/FUL within the LHA regarding approvals necessary for completion since it was permitted at the planning meeting HBBC 18/12/2018.*

*2/ Can we also have a copy of the corporate complaints team investigation report and results please?*

*3/ Can we also have confirmation of what action the LHA have taken to ensure they measured in the right position as per the application plan?*

*Not as the incorrect position as shown in photos attached to FOI 000344."*

5. The council responded on 23 May 2019, stating that the request could not be dealt with using the FOIA.
6. The council revised its position on 2 August 2019 and gave the following response:
1. *"The LHA [Local Highway Authority] have received a major s184 application with respect to works within the highway associated with application 18/01061/FUL. The LHA has reviewed the submission and has issued a technical approval letter.*
  2. *Response by the complaints team attached.*
  3. *An Officer from the Highways Development Management team and the Development Approvals team visited the site on 14 November 2018 at approximately 15:00-15:15 hours. The officers looked at the site and measured the width of the available space as per the approved access width. Sufficient space was measured at either side of this width to allow for two Head Wall constructions for the drainage ditch culvert. A wooden ruler was placed to indicate a line from the edge of 4.25m on the south side, to the back edge of the highway boundary. The Highway boundary is indicated by the change from grass to rubble.*

7. Following an internal review, the council wrote to the complainant on 30 August 2019. It upheld the details of the request response.

### Scope of the case

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8. The complainant contacted the Commissioner on 30 August 2019 to complain about the way their request for information had been handled, specifically regarding the council's response to request item [3].
9. The complainant contends that the measurement information provided does not "*relate the position of the access to the approved plan.*" It is the complainant's position that further information should be held which shows that the council measured the correct position according to the application plan such that relevant approvals were granted.
10. The Commissioner therefore considers, in light of the refinement, that the scope of this case is to establish whether, on the balance of probabilities, the council holds any further information in scope of the request. She will also consider if the council has made any procedural breaches.

### Reasons for decision

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11. Regulation 5(1) of the EIR states that: "a public authority that holds environmental information shall make it available on request." This is subject to any exceptions that may apply.
12. 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. She will also consider the actions taken by the authority to check that the information is not held, and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held.
13. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072) in which it was stated that "*there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records*". It clarified that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test the Commissioner applies in this case.

14. In discussing the application of the balance of probabilities test, the Tribunal stated that, *"We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."* The Commissioner has therefore taken the above factors into account in determining whether or not further information is held, on the balance of probabilities.

#### *The Complainants view*

15. The request is regarding an access-way which is adjacent to the complainant's property. The complainant's position is that the development has not been built in accordance with the approved plans.
16. Through other related information requests the complainant has determined that the planning enforcement team sought the advice of the LHA to determine whether the 'as built' works were acceptable in highway safety terms.
17. The complainant explained that the purpose of the request is to obtain supporting evidence that confirms that the measurements taken by the Local Highway Authority [the 'LHA'], to influence a planning consent, were referenced to the approved plan.
18. It is the complainant's position that the information provided by the council in response to request [3] does not relate the measurements of the built development to the approved plan, against which planning consent should have been given.
19. The complainant considers that that further information should be held which validates the measurement of the position in accordance with the application plan.

#### *The Council's response*

20. The council maintains that it has explained its methodology for measuring the relevant area and in that respect, thus taking the view that its response to request item [3] was perfectly adequate.

21. The council notes that request item [3] *"makes an assertion that the Council's measurements of the relevant area were incorrect. It is the Council's position that this part of the request is not in the nature of a request for information for the purposes of the Regulation 5(1) of the EIR 2004. Rather it is in the nature of argument."*
22. It states that the complainant *"seeks to assert an irregularity of the Council's decisions and approval of the plans submitted in connection with the planning application, which I [the council] consider are the basis of a public law challenge and beyond the scope of a Freedom of Information."*
23. The council asserts *"if [the complainant] genuinely believe that the Council's decision to authorise the works was predicated upon a mistake then the proper course would have been to pursue a judicial review and not to challenge the Council's response by raising a complaint with the ICO."*
24. The council advised that the complainant *"has raised concerns with the Council's response and support of the planning application as [they] consider the development of land would cause highway safety issues. [The complainant] is not in agreement with the Council's decisions and approval of the application. To this effect, [the complainant] has separately pursued a complaint with the Local Government & Social Care Ombudsman. That complaint was not upheld."*
25. Furthermore, the council states it *"has consistently tried to co-operate with [the complainant]. To date, the Council has received 6 requests made by [the complainant], to which we have replied in full, in addition to further correspondence and queries received from [the complainant] received outside of the scope of Freedom of Information requests made directly to the Council's Environment & Transport department. At all stages, the Council has provided [the complainant] with appropriate responses and, if available, documentation."*
26. The Commissioner asked for details of searches undertaken to locate further information in scope of the request. The council advised *"all reasonable and relevant searches have been undertaken. Relevant search terms have been used pursuant to the subject matter of [the complainant's] request in addition to any correspondence and/or previous requests made by [the complainant] in connection with the planning application."*
27. In answer to the Commissioner's questions about document retention, the council confirmed that no information relevant to the request had been deleted or destroyed.

28. The Commissioner asked whether there is any business purpose or statutory requirement for further information to be held in scope of the request. The council stated that it had fully complied with document retention requirements and that no information has been withheld.

### *Conclusion*

29. In coming to her conclusion, the Commissioner has considered the issue raised by the complainant and their view regarding why further information should be held by the council. The Commissioner has also considered the responses provided by the council during the course of her investigation.
30. The complainant's position that the measurement information provided does not "*relate the position of the access to the approved plan*", is clearly the crux of the matter in relation to both the request and the council's responses. The important point, in terms of the EIR, is that the complainant considers that that further information should be held which validates the measurement of the position in accordance with the application plan.
31. The Commissioner is mindful of the purpose of the EIR, being that it gives the public the right of access to recorded information that is held by a public authority. It is therefore for the Commissioner to conclude on this point only, that being whether the council is likely to be holding further recorded relevant information. Any other issues regarding the planning application and approval processes are outside of the scope of the EIR and, as such, not within the Information Commissioner's remit.
32. The Commissioner is satisfied with the council's responses regarding searches, statutory and business requirements, and document retention. She accepts its rationale regarding why it has provided all the information held in scope of the request.
33. The Commissioner appreciates the importance of the issue at the heart of this request to the complainant. However, she has found no evidence that undermines the council's position, being that it holds no other information in scope of request item [3].
34. Taking all of the above into account the Commissioner is satisfied that, on the balance of probabilities, no further information in-scope of the request is held by the council.

### **Procedural matters**

35. Regulation 5(1) of the EIR states that, subject to any exceptions, environmental information must be made available on request.

Regulation 5(2) requires that the information be made available promptly, and in any event no later than 20 working days after the date of receipt of the request.

36. The request was made on the 22 May 2019 and initially the council stated it would not be dealt with under the FOIA. The council revised this position and provided a response on 2 August 2019 which is outside of the EIR time limit.
37. The Commissioner therefore concludes that the council failed to respond within the required time limit and thus breached Regulation 5 (2) of the EIR.

## Right of appeal

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38. 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)

39. 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.
40. 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**  
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**SK9 5AF**