

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

**Date:** 14 September 2022

**Public Authority:** South Derbyshire District Council  
**Address:** Civic Offices  
Civic Way  
Swadlincote  
Derbyshire  
DE11 0AH

**Decision (including any steps ordered)**

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1. The complainant requested information relating to a surface water scheme. South Derbyshire District Council (the Council) provided some information within the scope of the request. The complainant disputed that it satisfied his request.
2. The Commissioner's decision is that the Council has conducted reasonable searches for the requested information which would have located further information, if it was held. He has therefore concluded that, on the balance of probabilities, the Council does not hold any further information in the scope of the request.
3. The Commissioner requires no steps to be taken as a result of this decision.

**Request and response**

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4. Following earlier correspondence, on 20 January 2021, the complainant wrote to South Derbyshire District Council (the Council) and requested information in the following terms:

**"I am requesting a copy of all the documentation identifying and approving the surface water scheme including**

**specifically the location of the discharge point to the ditch** mentioned on page 3 and page 4 of the attached document”.

5. Referencing earlier correspondence, on 10 February 2021 the complainant told the Council:

“The information supplied did not include these approvals so please provide the information as requested”.
6. The Council responded on 11 February 2021, providing a link to the information it holds. On 4 March 2021 it confirmed that information comprises all the information it holds that falls within the scope of the request.
7. The complainant expressed dissatisfaction with the response.
8. Following further correspondence, including the complainant writing to the Commissioner, the Council confirmed, on 13 August 2021, that the information it has provided comprises the entirety of the information the Planning Department holds, and that separate enquiries made directly to the Environment Agency and the Building Control partnership had not revealed anything further.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 30 July 2021 to complain about the way his request for information had been handled. He provided details of the lengthy correspondence that had taken place between himself and the Council.
10. In subsequent correspondence, while acknowledging that he has received correspondence from the Council, he told the Commissioner:

“I remain unconvinced that SDDC [South Derbyshire District Council] do not hold or have access to such information for what is a relatively recent newly built property in 2006”.
11. During the course of his investigation, the Commissioner found it necessary to issue the Council with an Information Notice (IN)<sup>1</sup>. In accordance with his powers under section 51 of FOIA, the IN required the Council to furnish the Commissioner with further information about

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<sup>1</sup> <https://ico.org.uk/action-weve-taken/information-notice/>

its handling of the request for information. Specifically, the Council was required to provide the Commissioner with its full and final submissions in relation to this request.

12. The Council responded to the IN within the timeframe specified by the Commissioner.
13. The analysis below considers whether, on the balance of probabilities, the Council holds any further recorded information falling within the scope of the request.

### **Reasons for decision**

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14. The requested information in this case relates to a planning evaluation and decision about a new build property. The Commissioner notes that the 'subject' in the request for information dated 20 January 2021 is "[Reference 1] and [Reference 2] Information SDDC hold on Environmental Agency Approval of Soakaway System and Discharge Point".

### **Regulation 12(4)(a) – information not held at the time of the request**

15. Regulation 12(4)(a) provides an exception from the duty to make information available if the authority does not hold the requested information at the time of the request.
16. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities.
17. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
18. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. He will also consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, he will consider any other information or explanation offered by the public authority which is relevant to his determination.

### **The complainant's view**

19. The Commissioner acknowledges that the complainant told the Council that he considered that the information is being filtered and that the archive has not been fully examined.

20. The complainant told the Commissioner:

“New build properties had to have authorisation for surface water run off and it needed to be SuDs [sustainable drainage system] compliant. This is part of the planning decision making which requires evaluation and a decision. The information I requested relates to that evaluation and the decision”.

21. The complainant disputes that the Council had conducted adequate searches for the requested information. In that respect he asked the Council:

“Please confirm that the archive filed documentation has been checked not just the element that SDDC have digitised. I do not believe that SDDC have checked the archived physical records on this”.

### **The Council's view**

22. As is his practice, the Commissioner asked the Council to revisit its handling of the request. He did so with a series of detailed questions. These included asking about the searches that had been undertaken and the search terms used.

23. In its submission, the Council told the Commissioner:

“All records relating to determination of planning applications are stored electronically either in the current live planning system from 2019 to current, or on a planning archive pre 2019 which stores the documents attached to any records. There are no alternative data archives to check”.

24. It confirmed that the information already provided to the complainant is the extent of all the information the Council holds.

25. In support of its view, the Council provided the Commissioner with details of the search terms used and confirmed that the archive had been searched by year and by case number to locate any relevant records.

26. With regard to the Commissioner's questions about whether there was a business purpose or statutory requirement to hold the requested information, the Council told him that while the information requested

was necessary to complete the determination of the case, it is not a document required by law to retain indefinitely.

27. The Council also robustly denied the suggestion that information is being filtered.
28. With regard to the issue raised by the complainant about the scanning of documents, the Council advised that relevant planning documents are kept indefinitely and that work has been completed to merge all sources of data into one central archive. It confirmed that this includes the digitisation of paper files.

### **The Commissioner's view**

29. The Commissioner's role is not to consider whether a public authority should hold information that has been requested but whether, on the balance of probabilities, it does or does not hold it.
30. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that the public authority holds no further relevant information. However, as explained earlier in this notice, the Commissioner is required to make a judgement on whether further information is held on the civil standard of the balance of probabilities.
31. In reaching his decision in this case, the Commissioner has taken account of the arguments put forward by the complainant and the explanations provided by the Council.
32. The Commissioner accepts that the requested information is clearly of interest to the complainant and that he considers that further information should be held.
33. However, the Commissioner has found no evidence which would indicate that any further information is held by the Council that is relevant to the request.
34. As a result, the Commissioner has decided that, on the balance of probabilities, there is no additional recorded information held by the Council that is relevant to the complainant's request.
35. Although regulation 12(4)(a) is a qualified exception, the Commissioner's position is that it is not necessary to consider the public interest. To do so would be illogical because the public interest cannot favour disclosure of information which is not held.

36. The Commissioner is therefore satisfied that the Council has complied with the requirements of regulation 12(4)(a) of the EIR.

### **Section 1 general right of access**

37. Section 1 of 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”.

38. In light of his decision above, and to the extent that any information within the scope of the request does not comprise environmental information, the Commissioner is also satisfied that the Council has conducted reasonable searches in the areas most likely to hold the requested information. His decision is that, on the balance of probabilities, no further recorded information is held. He is therefore satisfied that the Council has complied with the requirements of section 1 of FOIA in this case.

### **Other matters**

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39. The Commissioner is concerned to note the poor level of engagement shown by the Council in relation to his investigation.

40. He acknowledges the Council’s apology in that respect and is pleased to note that, having reviewed the processes involved in managing responses, the Council has committed to changes “which will assist the Council in proactive case management”.

## Right of appeal

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41. 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: 0203 936 8963

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)

42. 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.
43. 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 .....**

**Laura Tomkinson**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**