

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

Decision notice

Date: 8 May 2018

Public Authority: Sheffield City Council
Address: Town Hall
Sheffield
South Yorkshire
S1 2HH

Decision (including any steps ordered)

1. The complainant has requested information associated with the Independent Tree Panel which was set up to give advice to Sheffield City Council ('the Council') on how it manages its highway trees. The Council denied holding the requested information and also said that some information that had some relevance to the complainant's request was exempt from disclosure under section 21(1) of the FOIA (information accessible to the applicant).
2. The Commissioner's decision is as follows:
 - The Council should have managed the request under the EIR and not the FOIA.
 - In accordance with regulation 3(2) of the EIR, the Council did not hold the requested information at the time the request was received.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 15 December 2016 the complainant wrote to the Council and requested information in the following terms:

"I would like to ask for information under the Freedom of Information Act relating to the Independent Tree Panel.

There are presently around twenty Sheffield street 'results' uploaded on the Council website. I should like to know for which of those streets did the Independent Tree Panel take evidence from a) residents, and b) anyone else other than the Council (including their officers; Amey; Streets Ahead, etc) – and in what format (e.g. oral, written, email, presentation, hard copy, etc).

And also for which of those streets they did take / refer to 'evidence' from the Council, etc (and whether if it was from their officers, Amey, Streets Ahead, etc) – and in which format.

The Council might seek to argue that this is an independently functioning group. However, as the panel was set up by the Council; its members were selected by the Council; its members are paid for by the Council; and, their operation is wholly to consider matters pertaining to a Council function – it would appear under the Freedom of Information Act 2000, that the information requested below would be considered to be 'held by third party on the Council's behalf' and would therefore be equivalent to being held by the Council itself."

5. The Council responded on 18 January 2017 – its reference FOI3285. It had handled the request under the FOIA. The Council denied holding the requested information. This was, the Council said, because the Independent Tree Panel (ITP) was an independent body and, as such, the Council did not set or hold details of the way the ITP held or created information or related records. The Council also said that because the ITP was not a public authority it was not subject to the terms of the FOIA and so the Council had no recourse to request this information from it.
6. The Council provided a review on 28 August 2017. It upheld its original position with regard to the information the complainant had requested. The Council also advised that some evidence and information provided to the ITP was available from the ITP page of the Council's website. It referenced a document titled '*Phase 1 Final Advice*' which it considered was directly relevant to the complainant's request. The Council said that this information was available on the website and was therefore exempt from disclosure under section 21 of the FOIA (information reasonably accessible to the applicant).

Scope of the case

7. The complainant contacted the Commissioner on 10 February 2018 to complain about the way his request for information had been handled.
8. The Commissioner notes that the request was submitted in December 2016, almost 18 months ago. She makes the observation that, in the interim, the situation has moved on. For example the ITP has now disbanded and all the information the ITP held at the point it was disbanded is currently published on the relevant area of the Council's website. The Commissioner understands that no ITP information is held elsewhere at this point.
9. Bearing this in mind, the Commissioner has first considered whether the complainant's request of 15 December 2016 was for environmental information that the Council should have considered it under the EIR. The Commissioner has then gone on to investigate whether, at the time of the request, the Council could be said to hold information falling within the scope of the complainant's request.
10. Having further reviewed the complainant's correspondence to her, it appears to the Commissioner that his complaint appears to be less about the Council's application of section 21 of the FOIA to some published information and more that he considers that the Council could be said to have held other information relevant to his request for its own purposes. In the circumstances of this case the Commissioner has taken a pragmatic approach and removed from the scope of her investigation the Council's application of section 21 (or its EIR equivalent) to particular information.

Reasons for decision

Is the request for environmental information?

11. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR rather than the FOIA if it meets the definition set out in regulation 2(1)(a) to 2(1)(f) of the EIR.
12. The requested information in this case concerns a residents' consultation associated with the Council's management of its highways trees. Regulation 2(1)(a) concerns the state of the elements of the environment, including: air and atmosphere, landscape and natural sites and biological diversity. Regulation 2(1)(c) concerns measures such as programmes and activities affecting or likely to affect the elements

referred to in (a) as well as measures or activities designed to protect those elements.

13. The Commissioner considers that the Council was incorrect to handle the complainant's request under the FOIA. She considers that the requested information in this case can be broadly classed as environmental information, as defined in regulation 2(1)(a) and 2(1)(c) of the EIR and the Council should have managed the request under these regulations. This is because the request concerned an activity (a consultation) that was likely to affect trees (either their removal or preservation). Trees are part of the landscape, are associated with biological diversity and have some role in reducing the negative effects of air pollution from vehicles.
14. In recent months the Commissioner has investigated a number of complaints from a range of complainants regarding the Council's management of its highways trees. The Commissioner considers that the Council had correctly handled some of the requests that generated these complaints under the FOIA; on this occasion she is satisfied that the EIR is the appropriate regime.

Regulation 3 – Application

15. Regulation 3(1) of the EIR says that, subject to paragraphs (3) and (4) the regulations apply to public authorities.
16. Regulation 3(2) of the EIR says that environmental information is held by a public authority if the information (a) is in the authority's possession and has been produced or received by the authority; or (b) is held by another person on behalf of the authority.
17. In her published guidance on regulation 3¹, the Commissioner discusses the matter of information being in an authority's possession and having been received by an authority. (The Commissioner is satisfied that the Council did not produce the requested information.)
18. With regard to possession, the Commissioner considers that information is not in the public authority's "possession" if it is not being held to any extent for its own purposes. This means, for example, that information

¹ https://ico.org.uk/media/for-organisations/documents/1640/information_held_for_the_purposes_of_eir.pdf

which is simply stored by an authority on behalf of someone else is not "held" for the purposes of the EIR.

19. With regard to receipt, the Commissioner considers that although the phrase "received by" at first sight suggests that a wider range of information is caught by the EIR, in most cases this will refer to situations where there is a positive reason for sending information to a public authority (ie which is received by it). In other words, information is received by a public authority because it relates to the work of the authority. Therefore, it can be considered to be held for the purposes of the EIR.
20. However, information will be held by an authority if it is both in the authority's possession AND the authority has (produced or) received it. With regards to paragraph 18, a public authority will need to establish whether information is held to any extent for its own purposes. If it is, it will also be in its possession and so held for the purposes of the EIR.
21. In this case, at the time of the request and its response and internal review the Council's position was that another person; that is the ITP, held the requested information and that the ITP did not hold the information on behalf of the Council. The Council's view was therefore that it could not be said to hold the information itself, for the purposes of the Act (or for the purposes of the EIR).
22. The Council and the complainant have told the Commissioner that the ITP is now disbanded as its work has come to conclusion. However, the Commissioner must consider the situation as it was at the time of the request in December 2016. From her own research the Commissioner understands that the Independent Tree Panel was set up to provide 'independent, impartial and expert advice' to the Council on its management of the city's street trees. Its street trees management programme has been controversial and attracted a good deal of media and other attention.
23. The ITP's Terms of Reference suggest that the Council was responsible for identifying Panel members, in consultation with the Panel chair. No Panel members were to be Council employees or members; the Council would provide the Panel with sufficient resources and support but neither the Council nor its contractor Amey would play any part in the Panel's deliberations.
24. In its submission to the Commissioner, the Council has referred to its internal review response to the complainant. In this response the Council said that the FOIA does not require it to request information from third party organisations/panels; that the Council is not legally required to complete such an action and that it would have no purpose

for obtaining any such records aside from aiding the complainant's FOIA request. The Council confirmed to the Commissioner that it does not hold the records the complainant has requested and has never held them.

25. The Council went on to say that it checked with its Highways Maintenance Division and the Policy, Performance and Communication Directorate colleagues to identify if it would hold any records relevant to the complainant's request itself. The Council contacted these areas as the Highways Division manages the tree maintenance programme and the Policy Directorate managed the engagement with the ITP, and the communications posted on to its website about the ITP. The Council has told the Commissioner that both areas confirmed that the information the complainant has requested would only be held by the ITP and was not held by the Council for its own purposes in any form.
26. The Commissioner referred the Council to her guidance: '*Information held by a public authority...*'² and asked it to address relevant points raised in this guidance to help in her determination on whether the Council could be said to hold the information. Factors that would indicate whether information is also held by a public authority include:
 - whether the authority provides clerical and administrative support for the other person (the ITP in this case)
 - the authority controls the information
 - the authority decides what information is retained, altered or deleted
 - the authority deals with enquiries about the information;
 - or costs arising from holding the information are included in the authority's overall budget.
27. Other than perhaps the first, the Council did not address these factors in its submission. With regards to the first, the Council has indicated that its Policy Directorate managed engagement with the ITP and posted communications concerning the ITP on a discrete area of its website. The Council also provided funding to the ITP.
28. However, from the little information the Council has provided, and from the information the Commissioner has gleaned from her own research, she is prepared to accept that the Council did not control the ITP's

² https://ico.org.uk/media/for-organisations/documents/1148/information_held_by_a_public_authority_for_purposes_of_foia.pdf

information; that is, it did not decide what was retained, altered or deleted; or deal with enquiries to the ITP. The ITP was set up to be independent from the Council.

29. The Commissioner asked the Council if it knew what had happened to any information the ITP held at the point that it was disbanded. The Council confirmed that its understanding was that, at that point, the only information the ITP held were decision letters provided to the Council and which are published on its website.
30. The Commissioner is satisfied that any information falling within the scope of the complainant's request, if held, would not have been produced by the Council; it would have been produced by the ITP.
31. The Commissioner accepts that, over the course of the ITP's existence, the Council had received information from the ITP, so that it could be published on the Council's website. At this point, all the information associated with the ITP is published on that website and there is no further information held elsewhere.
32. At 15 December 2016, the Council may have received from ITP information that directly addressed all the elements of the complainant's request. Then again, it may not have. Almost 18 months later it is not possible to ascertain if the Council had received such information from ITP. For the purpose of this notice, if the Commissioner assumes that the Council had received the requested information, the information could not be said to have been in the Council's possession because the Council would not have been holding it for any of its own purposes. For the purposes of regulation 3(2)(a) of the EIR therefore, the Council could not be said to have held the requested information, at the time of the request. This is because, if it *had* been received, the Council may have received the requested information but it would not have been in its possession; that is, the information was not to any extent for its own purposes.
33. Similarly, for the purposes of regulation 3(2)(b), the Commissioner is satisfied that, if held at the time of the request, another person (ie the ITP) was not holding information relevant to the request on behalf of the Council. The Commissioner's decision is therefore that, at the time of the complainant's request, the Council did not hold information falling within the scope of his request.

Right of appeal

34. 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

35. 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.
36. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF