

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

Date: 8 June 2018

Public Authority: Horsham District Council
Address: Parkside
Chart Way
Horsham
West Sussex
RH12 1RL

Decision (including any steps ordered)

1. The complainant has requested information from Horsham District Council (HDC) relating to the production of a Neighbourhood Development Plan by a cluster of public authorities (SWAB). HDC disclosed some information but said that it does not hold any further relevant information. The complainant disagrees and considers that more information must be held.
2. The Commissioner's decision is that on a balance of probabilities HDC was correct to say that it does not hold any further information falling within the scope of the complainant's request.
3. The Commissioner does not require HDC to take any steps.

Request and response

4. On 21 May 2017 the complainant wrote to HDC and requested information in the following terms:

"Accordingly, under the Freedom of Information Act/Environmental Information Regulations please could you let me have copies of any notes or memoranda and of any emails or other correspondence exchanged between HDC and SWAB or any of its constituent councils and/or with AiRS which record what concerns were to be addressed at the meeting and any follow ups to it, including any agenda documents? Second, please could you let me have the same categories of document relating to what was in fact discussed at the meeting or any follow-ups and what was agreed and/or what recommendations or conditions or next steps were decided/imposed by HDC."

5. HDC responded on 26 June 2017. It provided the complainant with information in response to his request. The complainant however wrote back to HDC on 29 June 2017 saying that he believed further information must be held. He said:

1 The meeting on 5 April between HDC, SDNPA and SWAB was of critical importance to the SWAB NDP and produced a "watershed" situation, to quote [name redacted]. I find it impossible to accept that neither [name redacted] nor [name redacted] produced a single file note in preparation for the meeting, nor a single file note about what was discussed or agreed at the meeting. I ask that this aspect of my request be re-considered, please.

2 I note from the correspondence version of the agenda (as opposed to the website version – see below) that [name redacted] of HDC was to attend instead of [name redacted]. Are there really absolutely no emails or file notes prepared by [name redacted] or briefing notes passed to him by [name redacted]? See 1 above.

3 I also note that [name redacted] in his email of 3 March says "My colleague and I have had a chance to review the information you left with us and we would like to meet with you to discuss". These documents left with [name redacted] and his colleague fall within the terms of my request and so I ask for this "information", please. The context suggests that this included the pre-submission document as this is referred to in [name redacted]' email of 1 March to which [name redacted] was responding.

4 [name redacted] email of 1 March also says in the context of the intended meeting of 5 April "We would also be grateful to have more

information on what HDC require for site assessments". Presumably this was discussed at the meeting (see 5 below) and one would have expected the information to have been prepared in some kind of written format and then provided or confirmed in writing. This falls within the terms of my request and so I ask for that information, please.

5 I have noted that the agenda for this meeting which you directed me to on the SWAB website is different to the one in the correspondence you have kindly provided. The correspondence version of the agenda has an item "Work still to be completed by our consultants / evidence base update" whereas the one on the SWAB website says "Work still to be completed by our consultants". The one in the correspondence appears to be a later more accurate one than the SWAB website version because the website version says "To introduce [name redacted] and [name redacted] of Horsham District Council" whereas the correspondence version says "To introduce [name redacted] and [name redacted] of Horsham District Council (HDC) and Officers from the South Downs National Park Authority (SDNPA)". As the "evidence base" was an agenda item and it is clear that SWAB wanted guidance from HDC about this, I find it hard to accept that the meeting took place with not a single file note of preparation by any HDC officer and not a word of written confirmation afterwards as to what was required. I ask for this aspect of the request to be reconsidered, please.

6 On 6 April [name redacted] emailed SWAB asking to see a draft of the SWAB minutes of the 5 April meeting. It is now 28th June. Have there really been no draft minutes or any other confirmation of what was discussed at the meeting and no follow-ups in either direction to confirm anything which arose at the meeting?

6. Following an internal review HDC wrote to the complainant on 15 September 2017. It upheld its position that no further information is held falling within the scope of the request.

Scope of the case

7. The complainant contacted the Commissioner on 8 August 2017 to complain about the way his request for information had been handled. His initial complaint was that the council had failed to carry out a review of the request. During the course of the investigation the council responded to the request for review stating that no further information is held. The complainant argues however that HDC must hold further information falling within the scope of his request.

8. The Commissioner considers that the complaint is therefore that HDC has not provided all of the information which it holds in response to the request.

Reasons for decision

Background to the complaint

9. HDC is the district planning authority for the area. Parish councils' falling within its area develop their own neighbourhood development plans and submit these to HDC for it to include within HDC's planning framework.
10. In 2014 the complainant says that four parish councils agreed to work together as a 'cluster' to prepare a single neighbourhood development plan. The four authorities comprised of Steyning, Wiston, Ashurst and Bramber parish councils, and were given the acronym 'SWAB'. They set up a steering committee comprising of members of some parish councils together with a number of members of the public. SWAB hired consultants, AiRS, and another organisation to aid in the development of the neighbourhood plans for their area.
11. The complainant argues that from the outset the steering group was not transparent in its actions, and that this is contrary to government guidance which says that the NDP process should involve public participation to the greatest extent possible. He further argues that the development plans can be potentially worth millions of pounds in development value to landowners and developers – hence the need for transparency to ensure that decisions on neighbourhood or development plans are not affected by personal interests. The complainant also outlined some issues which he believes may have affected the integrity of some decisions taken by SWAB.
12. The complainant said that a draft plan was completed by SWAB and was about to be issued for a six week consultation when a successful judicial review of another council's neighbourhood development plan led to it being quashed by the courts. The complainant argues that SWAB's neighbourhood plan was subsequently halted. At this point some of the councils chose not to take the draft plan forward. They subsequently chose instead to work towards submitting individual neighbourhood development plans.
13. The complainant argues that this was because HDC was now reviewing the production of neighbourhood development plans more closely following the successful judicial review. It is not the Commissioner's role to comment upon or consider this aspect of the complainant's argument.

HDC issued a statement referring the de-clustering of the parish councils which states:

"In light of a changing planning landscape, the requirement to frontload a robust evidence base, a change in the makeup of the steering group and the divergence of priorities for their respective local communities, it is acknowledged that the parishes consider it would be more effective to pursue a neighbourhood plan separately."

14. The complainant argues that hundreds of hours of volunteer's time, and a significant amount of money was involved in the production of the SWAB plan, and that this will now have been wasted. He argues therefore that there is a significant public interest in allowing the public to understand the process and actions of all parties which led to this situation.
15. Some of the parish councils involved argue that the work which has been carried out previously may still be of value and used as the individual plans move forward. HDC has however said that the plan, as it stood, is no longer viable because of the de-clustering and that the separate plans will need to be reconsidered by the council's producing them; *"For any plan to be prepared for Steyning in the future, it would need to follow re-designation of the parish under the necessary legislation. Following this, the parish would need to prepare new evidence and supporting documentation. As this older information is no longer relevant it has not been retained on file by the Council"*.
16. It argues that because of this it holds no further information falling within the scope of the request.

Regulation 5(1)

17. Regulation 5(1) of the Act states that:

"Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request."

18. The Commissioner has considered whether HDC has complied with Regulation 5(1) and whether it was correct to say that no further information is held. Regulation 12(4)(a) provides the exception to the obligation to disclose information where no information is held, however in this case the council did provide information initially. The complainant believes that further information must be held.

19. During the course of the Commissioner's investigation, on 19 January 2017, the Commissioner asked HDC the following questions to determine whether further information is held relevant to the scope of the complainant's request:
- What searches have been carried out to check no information was held within the scope of the request and why would these searches have been likely to retrieve any relevant information?
 - Please describe thoroughly any searches of relevant paper/electronic records and include details of any staff consultations.
 - If searches included electronic data, which search terms were used and please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.
 - If no or inadequate searches were done at the time, please rectify this now and let me know what you have done
 - If the information were held would it be held as manual or electronic records?
 - Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?
 - If recorded information was held but is no longer held, when did the council cease to retain this information?
 - Does the council have a record of the document's destruction?
 - What does the council's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the council describe the way in which it has handled comparable records of a similar age?
 - Please provide a copy of the relevant section of your retention and deletion policy, highlighting where the section which you consider is relevant to the deletion/destruction of the requested information in line with the policy.
 - If the information is electronic data which has been deleted, might copies have been made and held in other locations?
 - Is there a business purpose for which the requested information should be held? If so what is this purpose?
 - Are there any statutory requirements upon the council to retain the requested information?
20. The Commissioner also asked HDC to give a specific response to each of the six points highlighted by the complainant in his request for review dated 29 June 2017 (outlined above at paragraph 5).
21. HDC responded on 15 February 2018. It initially indicated to the Commissioner that some information was exempted from disclosure under Regulation 12(4)(e) (unfinished documents). It also indicated that other information was deleted once SWAB decided to de-cluster in October 2017. This is after the request for information had been

received. It also said that other information was no longer held as a relevant officer's email profile had been deleted when he left the council. It said however that his profile had been retrieved and searched with no relevant information being found. Additionally another officer's email account had been searched for a record of any relevant email correspondence with this officer but no relevant information was found. It also confirmed the steps it had taken to confirm that no further information was held.

22. Further to this it argued that, as the officers for HDC were present only in an advisory/support capacity, advice was provided verbally. The only written records of this would be in any minutes produced by the parish councils/SWAB. It said that at the time of this request, HDC was preparing guidance on site assessments and this had not been finalised. It clarified that this guidance has now been distributed to all parishes. It said that this explains why further information was not held by it.
23. The complainant argues that a failure to make notes at the relevant meeting referred to in part 1 of the request would be a breach of the 'Probity on Planning' guidance issued by the Local Government Association, (which is available at <https://www.local.gov.uk/sites/default/files/documents/probity-planning-councill-d92.pdf>). Although the complainant's allegation may or may not be correct this is not a matter which the Commissioner is able to consider. She is limited to considering whether information is in fact held, not whether it should be.
24. HDC clarified that it does not hold relevant internal emails between officers at HDC given that it runs an open plan office. Where information needed to be provided to other officers prior to meetings this was generally done verbally. It therefore confirmed that no further information is held as regards part 2 of the complainant's further questions of 29 June 2017.
25. As regards part 5 of the complainant's additional points, it said that versions of documents disclosed by HDC might have differed from those subsequently published by SWAB because HDC was only acting in an advisory capacity and therefore was not responsible for changes to agendas etc made by SWAB or the parish council's subsequent to the information being provided to HDC.
26. The Commissioner noted that in some respects HDC's initial response did not accord with the responses which it initially provided to the complainant's request. The response suggested that information was held at the time that the request was received, that some information had been exempted from disclosure (but the complainant had not been

informed that this was the case), and that an officer's email profile had been deleted after the request had been received which may have held information relevant to the scope of the request.

27. The Commissioner therefore wrote back to HDC on 16 March 2018. She pointed out that in response to the request HDC had said that no information was held. It had not informed the requestor that some information had been exempted. She asked HDC to explain why it was now stating that some information had been exempted and asked it to clarify what that information was and whether that information was still held.
28. She also highlighted that the request was made prior to SWAB agreeing to de-cluster. She highlighted to HDC that if it had deleted information falling within the scope of the request *after* the parish council's had de-clustered then the information it had held would have been held at the time that the request was received and should therefore have been considered for disclosure.
29. The Commissioner therefore asked HDC to provide clear responses to these issues on the basis that the response had provided strong concerns that HDC had failed to comply with the requirements of the FOI Act and the Regulations, and that it may have deleted information relevant to the scope of an information request after the request had been received.
30. HDC responded on 28 March 2018. It clarified that its initial response had been in error and had failed to take into account information which had already been disclosed to the complainant or which was otherwise publicly available. It said that no information in connection with this request has been withheld and that no information has been destroyed that has not already been provided to the complainant. It said that some information was destroyed in 2017 after the SWAB had de-clustered but this was information which the complainant had already received.
31. It said that in 2016 a meeting was held between members of the SWAB group and HDC officers in 2016. At this meeting hard copy of information was passed to a HDC officer for him to review. This formed the basis for a further meeting as was set out in the information which has already been released to the complainant. It clarified that this hard copy information has been placed in the public arena and is available to view online at <http://www.swabneighbourhoodplan.org/previous-plans-and-surveys.php>, with further information available at <http://www.swabneighbourhoodplan.org/FAQ'S.php>.

32. It said that the hard copy which had been received by the officer had been deleted once SWAB had taken the decision to de-cluster, but it was aware that this information was already available to the public from the SWAB sites indicated. It confirmed with the officer that the information which had been provided to him by SWAB had not included any copy of the draft of the pre-submission document as requested in part 3 of the request.
33. Further to this HDC said that it uses a shared storage / filing system. Officers within Strategic Planning save relevant information in connection with their work on these files. This includes reports, studies and relevant correspondence including emails. This allows information to be retained after officers have left HDC and it is therefore possible for their email profiles to be deleted. It clarified that the officer who had left HDC had recorded any relevant emails in this file, and that that it has retained these in connection with the case. It apologised for not making this clear in its response to the Commissioner, and provided her with a copy of a screen print of the files which demonstrated that emails from the officer concerned relevant to the scope of this request remain on its files. It also clarified that this information has already been disclosed to the complainant in response to his request.
34. As regards the SWAB minutes dated 5 April 2017 which the complainant asked for in part 6 of his request, HDC provided him with a link to a document detailing the SWAB minutes of 19 April 2017. These minutes include notes relating to the meeting of 5 April 2017 however they are not the formal minutes to that meeting. The Commissioner therefore asked the council to clarify whether the minutes of the meeting of 5 April are held by it. She pointed out that she understands that formal minutes of that meeting were taken and that they do exist.
35. HDC clarified that *"It has always been our understanding that the notes presented at meeting report of the 19th April 2017 (attached for completeness) are the notes of the meeting on 5th April as reported back to the Parish at their meeting on the 19th April 2017. The Steering Group has however been formally disbanded so we cannot confirm this with them. We have undertaken a search of the 'meetings' folder in our SWAB files and this is the only information we hold other than files from meetings held in 2016 which predate this FOI."* It added that *"neighbourhood planning groups are generally prepared through the establishment of a steering group. The notes and discussions of any steering group meetings are then reported back to the Parish Council at their meetings (as it is the parish who are the legally constituted body for ratifying neighbourhood plan documents that may be produced). This is certainly the case for parishes preparing neighbourhood plans in Horsham District."*

36. In this respect therefore, even though these minutes appear to exist HDC has clarified that it does not hold a copy of these within its records.
37. Finally the complainant has suggested that HDC was a member of a 'Yammer' group, which allowed all parties to submit information onto an online file system which the other parties could then view. The complainant argues that if this is the case HDC would have access to the file system to retrieve information. He considers that it should therefore be under a duty to search this information for relevant information and to consider this for disclosure to him in response to his request.
38. The Commissioner therefore wrote to the council on 23 April 2018 and asked it to confirm whether a Yammer system is used by the council for these purposes and whether this was searched for relevant information.
39. The council responded on 1 May 2018. It confirmed that it does use a Yammer system, which parish councils can use to discuss and share information relating to the creation of neighbourhood plans. However it confirmed that the system had been set up in July 2017, after the receipt of the complainant's FOI request on 21 May 2017.
40. It also confirmed that neither SWAB of HDC have uploaded any information onto the relevant part of the Yammer system, and provided screenshots of the system to demonstrate this. It said that the forum was never actively used by SWAB. It confirmed therefore that no information is held on this system relating to the complainant's request.

Conclusions

41. 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 in that case 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 will apply in this case.
42. 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 the requested information is held on the balance of probabilities.

43. The Commissioner is also mindful of the case of *Ames v the Information Commissioner and the Cabinet Office (EA/2007/0110)*. In this case Mr Ames had requested information relating to the September 2002 "Iraq's Weapons of Mass Destruction" dossier. The Tribunal stated that the Iraq dossier was *"...on any view an extremely important document and we would have expected, or hoped for, some audit trail revealing who had drafted what..."* However, the Tribunal stated that the evidence of the Cabinet Office was such that it could nonetheless conclude that it did not *"...think that it is so inherently unlikely that there is no such audit trail that we would be forced to conclude that there is one..."*. Therefore the Commissioner is mindful that even where the public may reasonably expect that information should be held this does not necessitate that information is held.
44. In coming to a conclusion in this case the Commissioner has considered what information she would expect HDC to hold and whether there is any evidence that the information was ever held. In doing so the Commissioner has taken into account the responses provided by HDC to the questions posed by her during the course of her investigation.
45. HDC was working in an advisory capacity at the time that the request for information was made. As such it would not be expected to hold the amount of information which the members of SWAB would be likely to hold as its role would not, at that time, require it to do so. Whilst it would be expected to hold some information in relation to the plan its role would not require it to hold the extent of information which the complainant might consider that it would. This has been reflected in the council's responses to both the complainant and the Commissioner.
46. The council argues that no further information is held as the information which it did hold has already been disclosed to the complainant and is publically available. It argues that the hard copy documentation it did hold was destroyed after the SWAB group disbanded in December 2017 as it said that it had no reason to hold onto this data. SWAB had been de-clustered and the work which had been carried out to that point would need to be reconsidered and resubmitted by the individual parish councils as they further developed their own plans. It was also aware that that information remains publicly accessible to the complainant and has directed him to where he can obtain it.

47. HDC's initial response to the Commissioner's questions did raise concerns that it had failed to carry out adequate searches for information, and that it had failed to respond to the complainant's requests appropriately as required by the Regulations. However its subsequent clarification of its response to the Commissioner addressed the concerns which were raised and explained why these errors had occurred.
48. The Commissioner has therefore decided that on a balance of probabilities that the council does not hold any further information falling within the scope of the request. The council therefore complied with the requirements of Regulation 5(1) in its response to the complainant's request.

Right of appeal

49. 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

50. 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.
51. 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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