

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

**Date:** 8 June 2018

**Public Authority:** Bramber Parish Council  
**Address:** bramberparishclerk@gmail.com

**Decision (including any steps ordered)**

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1. The complainant has requested information relating to the development of a draft Neighbourhood District Plan (NDP) by Steyning, Wiston, Ashurst and Bramber Parish Councils (SWAB), a cluster of four parish councils which worked together to produce the plan. The cluster eventually broke up with the NDP partially completed. The complainant asked the council for information relating to the development of the SWAB Plan. The council argues that it holds no further information beyond that which it has already disclosed or which is publicly available from the SWAB website.
2. The Commissioner's decision is that on a balance of probabilities the council was correct to state that no further information is held. She has however decided that the council did not comply with Regulation 5(2) in that it did not provide a copy of the SWAB NDP to the complainant within 20 working days, for the reasons outlined later within this decision notice.
3. The Commissioner does not require the council to take any steps.

**Request and response**

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4. On 14 August 2017 the complainant wrote to council and requested information in the following terms:

*"1 Please let me have the most up to date version of the SWAB draft pre-submission document which sets out what development proposals the public was to be consulted on if the process had not been halted.*

*2 Going back as far as the first version of the "Wiston Estate Steyning Concept Note", which is believed to be February 2013– please let me have any file notes, memoranda, briefing papers, emails, other correspondence, and any other documentation exchanged between The Wiston Estate, the [REDACTED] Family or any consultants retained by them on the one hand and with SWAB and/or any of its constituent councils and/or any councillor and/or SWAB's consultants on the other hand which record any intentions or desires or plans concerning possible development at Bayards Fields including, but not limited to, the Wiston Whole Estate Plan whether in terms of content or in terms of intended publication.*

*3 Over the same period - please let me have any file notes, briefing papers, minutes, memoranda or other documents relating to any meetings or discussions in connection with parish council meetings, SWAB meetings and workings, or working parties, which may have taken place within or between parish councils, councillors or clerks concerning the Wiston WEP or concerning possible development at Bayards Fields or concerning the appointment of the SWAB consultants."*

5. The council responded on 8 September 2017. It stated that:
  1. The pre-submission document is an ongoing document which it hoped would be published before consultation. It therefore applied the exemption in section 22 of the Freedom of Information Act 2000 to the information.
  2. No other information is held beyond SWAB minutes and a copy of the Wiston Estate Concept proposal. No emails or other documents are held.
  3. The only documentation held by the council concerning Bayards Field is that which was available at the SWAB public consultation.
6. The complainant requested a review. He pointed out various statements in documents disclosed by SWAB, and various actions taken by it. He argued that on the basis of this evidence there must be further information held by the council given its input into the SWAB process as part of the SWAB cluster.

7. Following the internal review the council wrote to the complainant on 14 September 2017. It maintained its position that all information which it held had already been disclosed by it or by SWAB other than the draft SWAB NDP.

### **Scope of the case**

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8. The complainant contacted the Commissioner 18 September 2017 to complain about the way his request for information had been handled.
9. The complainant considers that further information must be held by the council. He also disputed the application of section 22 to the draft pre-submission report.
10. During the course of the Commissioner's investigation she wrote to the council and suggested that due to the nature of the requested information it was likely that the information should be have been considered under the EIR rather than under the FOI Act. The council therefore reconsidered its position and submitted arguments that the information it holds which previously been exempted under section 22 was exempt under Regulation 12(4)(d)(unfinished documents).
11. Following further correspondence between the Commissioner and the council, and following an unofficial disclosure of the SWAB draft NDP by a resident in another parish, the council agreed to disclose the draft SWAB NDP to the complainant. It did so on 15 May 2018. The council informed the Commissioner however that it stood by its view that the exception had been correctly applied to the SWAB NDP when the request was first received. It simply considered that events had moved forward over time to the point where the document could be disclosed.
12. The Commissioner has not therefore found it necessary to consider the councils application of the exemption on Regulation 12(4)(d) to the draft SWAB NDP. She has not therefore considered it further in this notice.
13. The remaining part of the complainant's complaint to the Commissioner is whether the council holds any further information falling within the scope of the request which has not been disclosed to him.

## Reasons for decision

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### Background to the complaint

14. Horsham District Council (HDC) is the district planning authority for the Bramber PC's area. Parish councils' falling within its area develop their own neighbourhood development plans (NDP's) and submit these to HDC for it to include within HDC's planning framework.
15. In 2014 four parish councils agreed to work together as a 'cluster' to prepare a single neighbourhood development plan for their respective area. 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.
16. The complainant says that SWAB was chaired by a Bramber Parish Councillor. He says that the Chairman of Bramber PC was also a member of the SWAB Steering Committee and the Clerk of Bramber also frequently attended its meetings and clerked them. SWAB hired consultants, AiRS, and another organisation to aid in the development of the neighbourhood plans for their area.
17. 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, Henfield Parish Council, regarding their neighbourhood development plan led to it being quashed by the courts. The complainant argues that SWAB's neighbourhood plan was subsequently halted. Following this, some of the councils within SWAB chose not to take the draft plan forward. They chose instead to work towards submitting individual neighbourhood development plans.
18. The complainant argues that this was because HDC was now reviewing the production of neighbourhood development plans more closely following the successful judicial review. HDC issued a statement referring the 'de-clustering' of the parish council's 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."*
19. The requestor is concerned that 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.

20. The parish councils formerly comprising of SWAB however argued that the work which has been carried out previously may still be of value and used as the individual plans move forward. For its part, Bramber PC indicated that the work which had been carried out to date could be used in the production of its own NDP.
21. 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"*.
22. Bramber PC was designated as a neighbourhood area in its own right by Horsham District Council on 26th February 2018 and is currently in the process of producing its own NDP. The complainant's request, however, relates to the development of the SWAB plan, not the subsequent work by Bramber PC on its own NDP.

Information not held - Regulation 12(4)(a)

23. The council argued that it does not hold any further information beyond that which it has already disclosed as part of SWAB, or which is available from the SWAB website. The complainant believes that further information must be held.
24. Regulation 5(1) of the EIR states that a public authority that holds environmental information shall make it available on request. Regulation 12(4)(a) provides an exception to that duty where the authority does not hold any information falling within the scope of the request.
25. 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 arguments. 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. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

26. The Commissioner made detailed enquiries to the council in order to assess whether further information is held. During the course of the Commissioner's investigation, on 26th January 2018, the Commissioner asked the council 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.
- Does the council have access to 'dropbox' or a similar document sharing system wherein the documents are held online, accessible by the council's formerly forming SWAB. If so then this information is held by the council for the purposes of the Regulations.
- 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?
- 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?
- Is the council aware whether any of the other councils formerly forming SWAB hold any relevant information?

27. The council responded on 13 February 2017. It clarified that searches were carried out by the representative on the SWAB project of their electronic and manual files associated with the project.

28. It said that consultations between the chairman of the council, the previous clerk to the council and the chairman of the SWAB project had been carried out. Searches had been carried out on individuals' email accounts, and SWAB folders, and included information on personal computers and on networked resources and emails.
29. It confirmed that the council had access to a file sharing system with the other councils involved in SWAB but said that the individuals involved had not had occasion to use it.
30. It confirmed that information could have been held in either electronic or manual form, that as far as it was aware no relevant information had been deleted or destroyed. It said that its records management policy was that records were retained at the council for a number of years and when appropriate the information would be transferred to a central storage site.
31. The council also confirmed that it is not aware of any statutory requirements for it to retain the requested information.

### Conclusions

32. 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.
33. 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.

34. 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.
35. The Commissioner has considered the council's response to her questions.
36. She is aware from her investigations in other associated cases that the council had access to two file sharing systems, a Dropbox facility referred to by Steyning Parish Council, and a Yammer file sharing system set up by HDC.
37. She has been provided with evidence that the council did not use the Yammer file sharing system. HDC confirmed that it set up a Yammer system in July 2017 which parish councils could use to discuss and share information relating to the creation of neighbourhood plans. It confirmed however that neither SWAB nor HDC had uploaded any information onto the relevant part of the Yammer system, and provided screenshots of the system to demonstrate this. It confirmed that this forum was never actively used by SWAB.
38. The Commissioner is also aware from another case that Steyning Parish Council confirmed that a Dropbox facility was in use. It confirmed that this holds reference material relating to the development of the SWAB plan.
39. The question for the Commissioner is therefore whether any of the information in the Dropbox is held by Bramber PC for the purposes of the Regulations.
40. The Commissioner's guidance on whether information is held by a public authority is available at [https://ico.org.uk/media/for-organisations/documents/1169/determining\\_whether\\_information\\_is\\_held\\_foi\\_eir.pdf](https://ico.org.uk/media/for-organisations/documents/1169/determining_whether_information_is_held_foi_eir.pdf). Paragraph 31 of this guidance refers to information held on file sharing systems and states:



*"Similarly there could be situations where a number of public authorities have contributed information to a central, electronic repository and could access each other's information, but on a read-only basis. For the purposes of FOIA and the EIR, only information that the public authority had put into the repository would be held."*

41. The council has clarified that it did not have cause to use the file sharing system. It also responded to the Commissioner's questions on what information was held on its own systems and confirmed that it holds no other information within its systems. It has not therefore downloaded any information from the drop box onto its own systems for its own purposes which was retained at the time of the request.
42. The Commissioner's decision is therefore that the information held on the drop box system was not held by the council for the purposes of the Regulations. She has also decided that Bramber PC was not under an obligation to download information uploaded by the other councils in order to consider if for disclosure in response to the request.
43. In coming to a conclusion in this case the Commissioner has considered what information she would expect Bramber PC 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 Bramber PC to the questions posed by her during the course of her investigation.
44. The majority of the information held by SWAB is available from the SWAB website. SWAB dealt with the majority of the work leading to the creation of the NDP, with the council providing administrative aid where required to do so. Although Bramber PC was an integral part of SWAB it confirms that the information it holds has been provided or is already publicly available from the SWAB website.
45. Although the complainant has provided some evidence that the council should hold further information, the question for the Commissioner is not what information 'should' be held, but what information is in fact held at the time that the request is received.
46. Given the responses of the council to her questions the Commissioner has decided that on a balance of probabilities the council was correct to state that no further information is held.

Regulation 5(2)

47. Regulation 5(2) provides that:

*"Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."*

48. The complainant made his request, including his request for the draft SWAB NDP on 14 August 2017. The council disclosed a copy of the draft SWAB NDP on 15 May 2018.

49. This falls outside of the 20 working days required by Regulation 5(2). The Commissioner has therefore decided that the council did not comply with Regulation 5(2) in this respect. She notes however that the council's disclosure followed the informal disclosure by another member of the public, which effectively negated its reasons for withholding the document further.

## Right of appeal

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50. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

51. 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.
52. 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**