

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 October 2024

Public Authority: Mid Devon District Council
Address: Phoenix House
Phoenix Lane
Tiverton
Devon
EX16 6PP

Decision (including any steps ordered)

1. The complainant requested information from Mid Devon District Council relating to a report produced by a working group into the lessons learned from 3 Rivers Developments.
2. The Commissioner's decision is that, on the balance of probabilities, the Council holds information within the scope of part 2 of the request and further information within the scope of part 3 of the request, beyond the list in the working group report.
3. The Commissioner requires the Council to take the following step to ensure compliance with the legislation.
 - Issue a fresh response to the request to the complainant, having carried out further searches to identify any information held within the scope of parts 2 and 3 of the request. These searches should not be limited to identifying existing lists, but should be designed to identify any information held within the scope of these two parts of the request including "building blocks" of information.
4. The Council must take this step within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 25 January 2024, the complainant wrote to the Council and requested information in the following terms (numbering added for ease of reference):

"Information Request – Arising from the Report of the Scrutiny Committee Working Group into the Lessons Learned from 3 Rivers Developments.

On the 18th December 2023 the Scrutiny Committee of Mid Devon District Council considered a report entitled "3 Rivers Development Ltd – Working Group, on behalf of Scrutiny Committee" – which had been prepared by a 'Working Group' made up of four members of the Scrutiny Committee and which resulted in 10 recommendations being put forward for 'Noting Only'.

The report states that "the Working Group was set up to examine documents and interview some of those involved and report back to the Scrutiny Committee".

1. I ask that Mid Devon District Council provides me with the following information in relation to the persons interviewed, in person, by the Working Group as part of their work in preparing this report.

- a) The names of any current Councillors who were interviewed;
- b) The names of any former (pre May 2023 election) Councillors who were interviewed;
- c) The names and/or Job Titles of any Officer (currently, or formerly, employed by MDDC) who were interviewed;
- d) The names and/or Job Titles of any persons from any outside body (including those employed by 3 Rivers Development Ltd.) who were interviewed.

2. Please provide the names of any Councillor or Officer (current or former) who were sent a letter from the Chief Executive, dated on or about the 10th October 2023, inviting them to submit a response to points raised in that letter, for consideration by this Working Group.

3. Please provide a list of the documents that were examined by the Working Group in preparing this report – if such a list is already in existence, or is easily constructed.”
6. The Council responded on 22 February 2024. It disclosed information in scope of parts 1a and 1d of the request. It withheld the information requested in parts 1b and 1d of the request under section 40(2) of FOIA (personal data). It stated the information requested in parts 2 and 3 of the request was “not available”.
7. Following an internal review the Council wrote to the complainant on 26 March 2024. It maintained its original position regarding section 40(2). It also confirmed that, for the information requested in part 3 of the request, a search was carried out and no information was found. It did not provide any clarification regarding what was meant by “information not available” in respect to part 2 of the request despite the complainant having requested this at internal review.

Scope of the case

8. During the course of the investigation the Council changed its position with respect to several parts of the request. It stated that no information was held within the scope of part 1b of the request. It disclosed the information requested in part 1d of the request.
9. It also amended its response to part 3 of the request to state that the information requested was exempt under section 21 of FOIA (information accessible to applicant by other means) as a list of documents is included in the Report of the Working Group into the Lessons to be learned from the 3 Rivers Development Ltd.
10. The complainant has advised the Commissioner that this list of documents the Council refers to does not include all of the information they requested. This list sets out types of documents, for example “council minutes” and “emails from stakeholders involved” rather than being a complete list of individual documents, which is what the complainant is seeking. The complainant also believes that the Council holds, or would have held at the time of the request, the information requested in part 2 of the request.
11. This notice will therefore consider whether the Council held further information within the scope of parts 2 or 3 of the request at the time of the request.

Reasons for decision

Section 1 – General right of access to information

12. Section 1(1) of FOIA requires that any person making a request for information to a public authority must be informed in writing by the public authority whether it holds information relevant to the request, and if so, to have that information communicated to them. This is subject to any exclusions or exemptions that may apply.
13. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds further information which falls within the scope of the request (or was held at the time of the request). For clarity, the Commissioner is not expected to prove categorically whether the information is held.
14. The complainant believes that the Council would have held the information requested in part 2 of the request at the time of the request as, "the letters were sent out on behalf of the Chair, and Vice-Chair, of Scrutiny Committee and were signed by the Chief Executive. It is inconceivable that the Assistant would have typed letters to a number of different persons, at different addresses without having been given some instruction."
15. The complainant also provided a copy of written responses to public questions in relation to a scrutiny committee meeting in October 2023. In response to one of the questions the chair confirms that they set the list of former councillors to receive the letter and that they were former leaders and the substantive portfolio holders.
16. The complainant argues that as the report of the working group in to the lessons learned from 3 Rivers Development Ltd was published in December 2023, and part of the information considered in producing the report were responses to questionnaires from those who were sent the letters, that the Council would have been likely to hold the names of those who were sent the letters when the request was made in February 2024.
17. The complainant added, "It is highly likely that the information requested could have been found by searching the mailboxes of the Chair of Scrutiny, the Vice-Chair of Scrutiny, the Chief Executive or the Assistant to the Chief Executive. As a last resort, the names on the questionnaires which were considered by the Scrutiny Committee Working Group, could have been used".

18. During the course of his investigation the Commissioner asked the Council to provide details of the searches it has carried out to identify any information held within part 2 of the request.
19. The Council stated that it had searched the electronic folders of the relevant department but had not been able to locate a list. It further stated that, due to turnover of management within the department the person who would have created a list cannot be contacted to establish whether one existed. It also confirmed that its retention schedule states that informal documents such as this can be destroyed once no longer in use. The Council therefore believes that if it previously held the list but it had been destroyed this would have occurred before the request was made.
20. The Commissioner accepts the argument made by the complainant that it appears a list of the recipients was created in order to organise the sending of the letters in October 2023. As to whether this list was still held at the time of the request, the Commissioner's view is that it is more likely than not that this original list had been deleted at some point between the letters being sent in October 2023 and the request being made in January 2024.
21. However, the Commissioner considers it more likely than not that the Council holds some information regarding who was sent the letters. The submissions provided by the Council focus on looking for a list specifically rather than any information in scope of this part of the request. For example, it has made no reference to checking whether copies of the letters sent were held, or indeed copies of correspondence received that specifically mention having been sent in response to the letter described in the request or could be clearly identified as such due to their content. Even if the original list is no longer held, the Commissioner is not convinced that, on the balance of probabilities, the Council does not hold information within the scope of part 2 of the request.
22. The Commissioner also asked the Council to provide details of the searches it has carried out to identify any information held within part 3 of the request, beyond the list of the types of documents that was included in the working group report. The Council stated:

"...searches were conducted and no formal list was found. While it may be possible to construct a list, this would be time consuming and data creation falls outside the scope of the freedom of Information. Again, at the time the request was made, the report had been completed for a number of months. Any lists would likely have been informal and deleted shortly after completion of the report."

23. The Commissioner's guidance on determining whether information is held¹ states:

"Sometimes a requester wants a list of documents, schedule of correspondence or a document summary rather than a particular document itself. Whilst you may not physically possess such a document, you would probably still hold the information, because you could compile or extract it from raw data that you possess.

If you have the "building blocks" necessary to produce a particular type of information, it is likely that you would hold that information unless it requires particular skills or expertise to put the building blocks together."

24. The Commissioner's view is therefore that it is more likely than not that the Council holds information within the scope of part 3 of the request given that it has stated that it may be possible to construct a list.
25. The Commissioner's decision is that, on the balance of probabilities, the Council holds information within the scope of part 2 of the request and further information within the scope of part 3 of the request, beyond the list in the working group report.
26. The Council must therefore carry out further searches to identify any information held within the scope of parts 2 and 3 of the request. These searches should not be limited to identifying existing lists, but should be designed to identify any information within the scope of these two parts of the request including "building blocks".

Other matters

27. The Commissioner has already advised the Council of his concerns regarding the particularly poor arguments provided in its correspondence with the complainant regarding its reliance on section 40(2). Although this information has now been disclosed the fact that this has required the intervention of the Commissioner has considerably delayed disclosure. The Council should ensure that its responses to requests for information and any subsequent internal reviews are of a suitable quality and demonstrate an appropriate understanding of the legislation.
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¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/determining-whether-we-hold-information/>

Right of appeal

28. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

29. 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.
30. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Victoria James
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF