

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 13 September 2016

**Public Authority:** East Devon District Council

**Address:** Council Offices  
Knowle  
Sidmouth  
Devon  
EX10 8HL

#### **Decision (including any steps ordered)**

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1. The complainant requested evidence used as a basis for comments made in a draft set of minutes which appeared on the council's website relating to a planning development. The council stated that the draft minutes had been published by mistake and removed the comments from the final minutes, however the complainant still requested the evidence upon which the comments were made. The council stated that no information was held.
2. The Commissioner's decision is that on a balance of probabilities no information is held by the council falling within the scope of the request. He has however decided that the council did not comply with section 10(1) in that its response to the request was not received within 20 working days.
3. The Commissioner does not require the council to take any steps.

## Request and response

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4. On 15 October 2015 the complainant wrote to the council and requested information in the following terms:

*"In the minutes of the Exmouth Regeneration Programme Board, held at Exmouth Town Hall on 15th September 2015, under item 10. 'Queens Drive update' the following comments have been redlined.*

*"There was a campaign amongst a small minority of Exmouth residents against the developments, but this had been opposed by a number of young people on social media who were supporting the Queens Drive proposals"*

*Why were the comments made (presumably by [name and initials redacted] is idicated [sic] as providing the update) and why were they redlined?*

*What evidence did the originator of these comments rely on to make the claim that there was an campaign against the plans amongst a "small minority of Exmouth residents".*

*What evidence was there that this (campaign against) "had been opposed by a number of young people on social media who were supporting the Queens Drive proposals."*

*Further, just how many young people were supposed to be supportive of the plans?*

*We are aware of one social media site that attracts many thousands of visitors each week, from a wide range of people in the community, and their history shows the greater majority by far are opposed to the plans - thus is at odds with the claims made by EDDC in the minutes referred to.*

*I trust the author of the EDDC comments can produce evidence, in the form of links to the comments to which she/he refers, and other source material, to verify their claims."*

5. The council responded on 18 November 2015. It said that the minutes as published initially were a draft copy, published in error, and that the red lines indicated where changes had been tracked. It said that the final minutes had now been published in their place. It further said that *"no recorded information is held in relation to the second part of your request"*.

6. The complainant wrote back to the council on the same date asking it to clarify precisely what the council meant by the statement *"I can confirm that no recorded information is held in relation to the second part of your request."* In a separate email he also asked for copies of all versions of the document and clarified that what he had asked for was essentially the evidence on which the statements which had now been removed from the minutes were made. He specified the sentences from the draft minutes which contained statements which he wished the background evidence for.
7. Following an internal review the council wrote to the complainant on 9 March 2016. It said that draft minutes are destroyed once the final version is agreed. Further to this it repeated that, as advised, no information was held in respect of the second part of his request.

### Scope of the case

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8. The complainant contacted the Commissioner on 15 February 2016 to complain about the way his request for information had been handled.
9. The Commissioner considers that the complaint relates to the failure to provide the information which he had requested, together with a complaint relating to the time it had taken the council to respond fully to his request and his request for review.
10. The complainant initially asked the Commissioner to consider whether the destruction of the draft minutes might be a criminal offence under section 77 of the Act. The Commissioner clarified to the complainant why the destruction of the draft minutes would not have been a criminal offence, which the complainant accepted. She has not therefore considered this further within this decision notice.

### Reasons for decision

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11. Section 1(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."*

12. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request). The Commissioner is not therefore expected to prove categorically whether the information was held; she is only required to make a judgement on whether the information was held on the balance of probabilities.
13. In these cases, 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 she will consider 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.
14. The Commissioner therefore wrote to the council asking it a number of questions relating to the searches it had carried out in order to determine whether relevant information is held.
15. In response the council explained that it does not hold evidence to back-up the quoted comments made during this meeting. The comments came about during general discussion among those present at the Regeneration Board regarding the differing views expressed in Exmouth about the redevelopment of Queens Drive. It said that this was an anecdotal discussion among a range of people with local knowledge and varied opinions. The reference is not attributed to any individual. Looking at it objectively, it must then be presumed that the person making the comments had themselves looked at social media to be able to make the comment but, as far as the Council is concerned, the comment was not based on any information held by the council.
16. It confirmed therefore that no information is held which constitutes the evidence upon which the comments referred to were made – it was simply a discussion in a meeting based upon anecdotal evidence and professional and local knowledge/experience.
17. In terms of searches made for this information, the council said that the officers attending the meeting, the Deputy Chief Executive and Member Services Officer, were all involved when considering the response to the request. The Commissioner understands from this that these officers provided the explanation regarding the nature of the discussion which took place in the meeting and confirmed that no evidence had been provided.

18. The Commissioner has considered the council's response to her questions. The council's response is that there is no recorded evidence which it holds to support the views expressed by individuals and recorded in the meeting. Insofar as the response under the Act is concerned, rights provided by FOIA relate to recorded information and in this respect the council has answered the complainant's request.
19. The Commissioner's decision is therefore that on a balance of probabilities no information is held falling within the scope of the complainant's request.

#### Section 10(1)

20. Section 10(1) of the Act provides that:

*"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."*

21. The complainant made his request for information on 15 October 2015. In its response to the request dated 18 November 2015 it confirmed that no information was held. This falls outside of the 20 working day period required by section 10 of the Act.
22. The Commissioner therefore considers that the council failed to comply with section 10(1) of the Act.

#### **Other matters**

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- (a) Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public authority failed to respond with the outcome of the review within twenty working days. Neither did the public authority respond with the outcome of the review within forty working days. The public authority should ensure that internal reviews are carried out promptly in future.

## Right of appeal

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23. 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)

24. 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.
25. 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 .....**

**Ian Walley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**