

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

Date: 30 September 2019

Public Authority: Rotherham Metropolitan Borough Council
Address: Riverside House
Main Street
Rotherham
S60 1AE

Decision (including any steps ordered)

1. The complainant has requested information regarding a waste collection consultation.
2. The Commissioner's decision is that on the balance of probabilities, Rotherham Metropolitan Borough Council has located all the information held in scope of the request. However it breached Regulation 5(2) in failing to respond to the request within 20 working days.
3. The Commissioner does not require any steps.

Request and response

4. On 22 January 2019, the complainant wrote to Rotherham Metropolitan Council ('the council') and requested information in the following terms:

"Thank you for the information received at 4.59pm today. One unanswered question remains. Please could I request the information I have outlined below:

[1.] A copy of the paper which was agreed in minutes of the 19th September 2017 Enforcement Working Group (section 5) to be written and go the Labour Group outlining the proposed options for household waste changes to go to consultation.

[2.] The attendees and extract from the minutes of 3rd October 2017 Labour Group where the report was discussed and subsequently a different option was agreed to go into the report to the Overview and Scrutiny Committee and public consultation. If the decision was not made at that meeting, please provide the meeting title, date, attendees and extract of the minutes of the meeting (not necessarily Labour Group) where the decision was made. (The decision must have then been made after 3rd October 2017 Labour Group and before 20th October 2017 when the Head of Procurement and Head of Human Resources approved the report that went to the Overview and Scrutiny Committee.)

You will already be aware from the information you have provided that the Enforcement Working Group Meeting of 19th September 2017 states various things will be included in a report to the Labour Group 'prior to a preferred option for consultation is agreed'. Hence none of the extracts of minutes provided answer my original request for the (extracts of) the minutes of the meeting where just one single option was agreed to go the Overview and Scrutiny Committee, Cabinet Meeting and Public. From what you have provided it is clear that as recent as 19th September 2017 plastic recycling WAS going to be included in the Public Consultation, yet that option had vanished by the 20th October 2017 when the report for the Overview and Scrutiny Committee was written."

5. The council responded on 14 March 2019 and refused to provide the requested information citing the following exception as the basis for doing so: EIR 12(4)(b) – manifestly unreasonable.
6. Following an internal review the council wrote to the complainant on 23 July 2019 and changed its response. In respect of each part of the information request it:

[1.] stated the information is not held: *"The "paper" mentioned in Part 1 of the request has never existed. The officer tasked with the job cannot recall preparing such a paper and the Labour Group's clerk states that no such paper was received or presented. The reviewer concludes that on the balance of probabilities the officer concerned was unable to comply with the directions set out in the minutes but instead provided an oral briefing to the Labour group..."*;

[2.] advised that the decision was made by the *"Cabinet and Commissioner decision making meeting"*. Furthermore that *"the Council ought to have sourced the minutes and agenda of, and reports to the relevant meeting of the Cabinet and provided these to the Applicant in respect of the second limb of Part 2 of the request"*.

7. The council confirmed to the Commissioner that it had omitted to include the documents referred to in part [2] of the internal review. It stated that the documents are public documents and that there was no intention to deliberately withhold. During the course of the Commissioners investigation, on 19 September 2019, the council sent the following documents to the complainant, named:
 - *13112017 1000 Cabinet and Commissioners Decision Making Meeting* (13 November 2017)
 - *Scrutiny Review Waste Management V3* (22 February 2017)
 - *Waste Option Consultation - control sheet – final* (13 November 2017)
 - *Waste Options Cabinet Report - V8 - 20 10 17* (20 October 2017)
8. The Commissioner notes, however, that the complainant was already aware of the above documents. Also, as the complainant has stated in response to the internal review, that they consider that the documents do not answer the information request.

Scope of the case

9. The complainant contacted the Commissioner on 25 July 2019 to complain about the way their request for information had been handled. Specifically that they believe the council holds more information in-scope of the request that would explain *"why the option the Enforcement Working Group proposed on 19th September 2017 (that included plastic recycling) was modified by 20th October 2017 so that the only option proposed to the Overview and Scrutiny Committee on 8th November 2017 for public consultation DID NOT INCLUDE plastic recycling...Also if the Head of Service Street Scene provided an oral briefing to the Labour group, then a record of the information to which it related must surely be held."*
10. Furthermore, the complainant states that the review is incorrect on point [2.]: *"The authority is incorrect in saying that the decision was made by the Cabinet and Commissioner decision making meeting [13 November 2017], given that the option for public consultation presented to them had already had plastic recycling removed from the option."*
11. The Commissioner considers that the scope of this case is to establish whether, on the balance of probabilities, the council holds any further information in scope of the request. Any procedural breaches will also be considered.

Background

12. Previously, the complainant raised a complaint regarding a request on the same matter, being the council's waste collection consultation. The Commissioner issued Decision Notice FER0748556¹. In that case the council withheld information on the grounds of a number of exceptions, and the Commissioner found in favour of a partial disclosure. On receiving the disclosures, the complainant considered that further information is held by the council, and that is the purpose of the request and complaint in this case.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2018/2614046/fer0748556.pdf>

Reasons for decision

Regulation 5(1) – Duty to make information available on request

13. Regulation 5(1) of the EIR states that: “a public authority that holds environmental information shall make it available on request.” This is subject to any exceptions that may apply.
14. 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 complainants’ evidence and argument. 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.
15. 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 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 applies in this case.
16. 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 further information is held on the balance of probabilities.
17. In response to the Commissioner’s questions regarding [1], the council:
 - stated that “*the information requested cannot be found and is not believed to have ever existed, despite the 19/9/17 Enforcement*

Working Group notes request for a paper to be written for Labour group. Equally there is no record of an oral briefing”;

- explained “*the Internal Reviewer’s reference to an oral briefing is meant to be a suggestion of what could have happened*”
 - stated that it could be phrased better as “*The reviewer concludes that on the balance of probabilities the officer concerned was unable to comply with the directions set out in the minutes, but instead they could have provided an oral briefing to the Labour group in lieu of such a paper. Either way there is no record of anything going to the Labour Group.*”
18. The complainant is of the view that the council “*is incorrect in saying that the decision was made by the Cabinet and Commissioner decision making meeting, given that the option for public consultation presented to them had already had plastic recycling removed from the option*”. In response the council maintains that “*The Commissioner / Cabinet Member Meeting of the 13 November 2017 made the decision on what options should go out for public consultation (page 11 of those minutes.*”
19. The Commissioner is mindful that the arguments in this case are predicated on a timeline of assumed or likely decision making events and information that ‘ought’ to be recorded. The EIR gives access rights only to actual recorded information held by an authority. The Commissioner asked the council for further detail on the searches undertaken to find information in scope of [1] and [2].
20. The council advised that it had searched the relevant areas to find information in scope of the request, which involved:
- conversations with the managers and officers in the relevant service areas (being Street Scene and Democratic Services);
 - searches of the Street Scene and Democratic Services personal records (electronic files and emails) and corporate documentation (recorded minutes and the audit trail of minuted meetings);
 - searches of hard copy files;
 - searches based on the relevant electronic folders which included looking for papers and minutes relevant to the labour group, waste officers groups and minutes relevant to the stated dates in the request.
21. The council confirmed that the identified service areas are the creators, or holders or publishers of any such relevant information that would be held by the council. It stated that “*The searches were undertaken by*

those relevant officers, but with additional direction from the Information Management Team and a council solicitor from Legal Team (who was the internal reviewer)."

22. The council advised the Commissioner that no information relevant to the request had been deleted.
23. The council concludes that it recognises that there was a reference in the "19/9/17 Enforcement Working Group notes" to produce to information being requested however the information was never produced. *"This information has been searched for several times...Additionally, if it had been created and gone to a meeting it would have been placed on an agenda and minuted. Democratic Services, the service responsible for maintaining and publishing minutes (and agendas, etc.) has also completed searches that have returned no results."*

Conclusions

24. In coming to her conclusion, the Commissioner has considered the complainants view regarding why further information should be held by the council. The complainant's position is that there is a gap in the trail of information and decision making, in the lead up to a change in the proposed options for household waste changes. The complainant is further frustrated by the minutes of the Enforcement Working Group notes which record a request for a paper to be written for the Labour Group.
25. The Commissioner has also considered the responses provided by the council during the course of her investigation. As previously stated she is mindful that the EIR are concerned with what information is actually held, rather than information that should have been recorded and held.
26. The Commissioner considers that the council has carried out adequate searches, in the appropriate service areas. It has explained why those searches were relevant and how they would have identified information in scope of the request. It has confirmed that no information, in scope of the request, had been destroyed. It has also responded to specific points made by the Commissioner which were related to the details of the complaint.
27. The Commissioner appreciates the matter is frustrating to the complainant. However, despite their assertions that further information should be recorded, the Commissioner does not consider there to be any evidence which undermines the council's position that it has provided all of the information it holds that is relevant to this request.

28. Taking all of the above into account the Commissioner is satisfied that, on the balance of probabilities, no further information in-scope of the request is held by the council.

Procedural matters

Regulation 5(2)

29. Regulation 5(2) of the EIR provides that in response to information requests under the EIR, information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
30. The complainant made their request for information on 22 January 2019. The council responded on 14 March 2019 and refused to provide the requested information citing the following exception as the basis for doing so: EIR 12(4)(b).
31. After the internal review, the council changed its response on 23 July 2019. It stated some information was not held but located some information in scope of the request. It failed to attach the information to the response, and subsequently provided the information on 19 September 2019.
32. The Commissioner therefore concludes that the council failed to comply with the requirements of Regulation 5(2) in the time it took to respond to the complainant's request for information. As the response has been provided no further action is required.

Right of appeal

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

34. 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.
35. 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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