

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

Date: 3 October 2019

Public Authority: Rochdale Borough Council
Address: Number One Riverside
Smith Street
Rochdale
OL16 1XU

Decision (including any steps ordered)

1. The complainant has requested information relating to the Heywood South Link Road J19 M62 planning application.
2. The Commissioner's decision is that on the balance of probabilities, Rochdale 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 31 January 2019, the complainant wrote to Rochdale Borough Council ('the council') and requested information in the following terms:

Subject: "Heywood South Link Road J19 M62 into Pilsworth Industrial Area

You will be aware that Planning Agreement was granted in respect of this project a while ago and recently tenders are being sought for its construction.

The report to the Planning and Licensing Committee featured comments from the Highway Officer stating that it was not practicable to consider two alternative/additional routes.

The alternative/additional routes proposed by objectors, into and from Pilsworth Industrial Estate, were via a redeveloped Birch Services possibility and a re-designed Junction 3 M66.

The reasons for their unsuitability are outlined by the Highway Officer, in the report to the P & L Committee, so I feel it unnecessary to give the background.

I should be grateful if you would kindly let me have all copies of correspondence, internally and externally, considering the proposed two alternatives, together with documents leading to the decision that the two alternatives proposed were unsuitable."

5. The council responded on 12 March 2019. It confirmed that it held information in scope of the request, that being (numbering added for reference):

"[1] The South Heywood Junction 19 Link Road, Appraisal of Alternative Road Alignments November 2016.

[2] Supporting Report dated 14/03/2018 entitled 'Response to Local Objectors comments'; and

[3] An email from the Highways, Property & Strategic Housing Section of the Council confirming that the 'Response to Local Objectors comments' report includes their comments."

The council provided the complainant with a copy of [1] and [3]. It cited the exception FOIA Section 21 – information accessible to applicant by other means for item [2] and provided a web link to access the information.

6. The complainant requested an internal review on 22 March 2019 on the grounds that further information must be held by the council.
7. Following an internal review the council wrote to the complainant on 1 May 2019. It upheld its position stating *"The Council has provided the recorded information it holds in relation to the matters considered with the planning application and the alternative routes considered. This is the exempted information under section 21 of the Freedom Of Information Act referred to in my letter to yourself of the 12th March 2109 and made accessible by the email link provided in that letter. The Council has therefore fulfilled its responsibility under the Act."*

Scope of the case

8. The complainant contacted the Commissioner on 1 May 2019 to complain about the way his request for information had been handled. Specifically, whether the council has provided all the information that is held regarding it's consideration of the alternative routes for the planning application.
9. 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.

Reasons for decision

Regulation 2(1) - Environmental Information

10. Information is 'environmental information' if it meets the definition set out in regulation 2 of the EIR. If the information satisfies the definition in regulation 2 it must be considered for disclosure under the terms of the EIR rather than the FOIA.
11. Regulation 2(1) of the EIR defines environmental information as information on:
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste...emissions...and other releases into the environment, likely to affect the elements referred to in (a);

- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;...”.
12. Information about a plan or a measure or an activity that affects or is likely to affect the elements of the environment is environmental information. The information in this case relates to a large planning application; as such it is information regarding plans and programmes that will affect the land and landscape.
13. The Commissioner therefore finds that the information is environmental information and should be considered under the EIR.
14. In view of this, the Commissioner has concluded that the council wrongly handled the request under the FOIA. However, as the grounds of the complaint are specifically regarding whether further information is held the Commissioner does not require the council to take any steps in this regard. She has gone on to consider the case in terms of the EIR.

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

15. 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.
16. 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 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.
17. 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.
18. 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.

19. Within the information request the complainant writes: *"The report to the Planning and Licensing Committee featured comments from the Highway Officer stating that it was not practicable to consider two alternative/additional routes."* The grounds of his complaint are that there should be further recorded information showing that the council had assessed the pros and cons of the alternative routes; or facts and figures showing why they were discounted in relation to the agreed route.
20. In response to the Commissioner's questions on this matter the council states that:
 - *"No information is held nor was created regarding pros and cons of the two alternatives or facts and figures showing why they were discounted in relation to the agreed route;*
 - *The council is not subject to any requirement to hold or create information considering the proposed two alternatives outlined by the complainant that was raised by objectors.*
 - *The planning officers report [referenced as 'the report to the Planning and Licensing Committee' in the request] states in paragraphs 19 and 37 the reasons why these options were dismissed at an early stage are that they are not practical due to either not being in the Rochdale Borough (junction 3 M66 option) or land ownership (Birch Services is owned by Highways England and franchised to a motorway services provider)."*
21. The Commissioner is mindful that the arguments in this case are predicated on information which the complainant feels should be held if *"the Officers of Rochdale Council, the Planners of Rochdale Council and the Planning Committee fully explored, and investigated, the alternative routes now proposed, and available"*.

22. The EIR gives access rights to recorded information that is held by an authority. The council has provided an explanation of why no further information in-scope of the request exists or was ever created. The Commissioner requested more detail from the council regarding how it had checked this position, particularly regarding any searches undertaken to locate any information that could be held in-scope of the request.
23. The council reiterated that it is not subject to any requirement to create *"correspondence, internally and externally, considering the proposed two alternatives, together with documents leading to the decision that the two alternatives proposed were unsuitable"*. Furthermore it stated that *"the council's Head of Planning and Assistant Director of Economy have been consulted and is clear that the council has not created and does not hold any such documents."*
24. The council advised that it is unable to identify any relevant records to search and *"is satisfied that the confirmation provided by the council's Head of Planning and Assistant Director of Economy is conclusive, insofar as this information is not held."*
25. It explained that if information were held *"it could be held as either manual or electronic records, within Project Case Files however this information was never created as the two proposals were dismissed at an early stage as they are not practical..."* Furthermore, as the information had never been created, no information in scope of the request had been destroyed.
26. The council confirmed that there is no business purpose nor statutory requirements for the requested information to be held. *"The council is not subject to any requirement to create correspondence considering the proposed two alternatives, or documents leading to the decision that the two alternatives proposed were unsuitable."*

Conclusions

27. In coming to her conclusion, the Commissioner has considered the complainants view regarding why further information should be held by the council. The Commissioner has also considered the responses provided by the council during the course of her investigation.
28. The Commissioner considers that the council has provided an explanation of how the alternative options were dismissed and why no further information exists for the two proposed routes. It has explained where such information would normally be held, but it has not carried out searches, as the information was never created. Additionally the

council has confirmed that there is no statutory or business reason for further information in-scope of the request to exist.

29. The Commissioner understands the importance of the request to the complainant, due to his concerns about the South Heywood Link Road programme. She appreciates why the complainant considers that further information should be recorded and understands that he wishes to be assured that the council *"have been assiduous, diligent and thorough in their duties by looking at, and considering, all options and alternatives in this particular project."* However, the Commissioner has not found 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.
30. 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)

31. 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.
32. The complainant made their request for information on 31 January 2019. The council responded on 12 March 2019 which is later than the statutory 20 working days.
33. 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

34. 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

35. 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.
36. 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