

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 8 October 2019

**Public Authority:** Rutland County Council  
**Address:** Catmose House  
Catmose Street  
Oakham  
LE15 6HP

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

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1. The complainant has requested information on the Chief Executive of the council's knowledge and advice in agreeing to sign a memorandum of understanding (an MOU) with the Ministry of Defence over St George's Park, Rutland. The council provided a copy of the MOU but said that it does not hold any further information falling within the scope of the request.
2. The Commissioner's decision is that on a balance of probabilities the council was correct to say that it does not hold any information falling within the scope of the request.
3. She has however decided that the council did not comply with the requirements of Regulation 14(3) when refusing the initial requests for information. She has also decided that it did not comply with the requirements of Regulation 9(2).
4. The Commissioner does not require the council to take any steps.

## Request and response

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5. On 6 March 2019, the complainant wrote to the council and requested information in the following terms:

*"Please accept the following FOI questions:*

- 1. Was [the Chief Executive] given any planning advice on, or prior to, her signing the MOU on Sept 9th 2017?*
- 2. If so, what was the advice given?*
- 3. By whom was any such advice given?*
- 4. Who was Head of Planning (or Acting Head of Planning) on Sept 9th 2017?*
- 5. Has there been any Planning advice given subsequent to Sept 9th 2017 regarding the legitimacy of the MOU?*
- 6. Was any of the above minuted, and / or recorded, if so please advise where the records are available."*

6. The council responded on 13 March 2019 and asked the complainant to clarify his request for information. It said that:

*"We would be grateful if you could please clarify the following in order for us to progress your request:*

*Please provide clarification on the matter referred to and the subject of the advice. There has been a large amount of Planning [sic] advice involved in the St George's project and the production of the Masterplan?*

7. The Commissioner notes that the council did not specify what exception it was refusing the request under, however the assumption is that this was under Regulation 12(5)(c) – that the request for information was formulated in too general a manner. Its response thereby sought to meet the requirements of Regulation 9 and assist in narrowing and specifying scope of the request.

8. The complainant responded on the same day stating:

*"To be direct, if I had the answer to your question it would by its very nature surely negate the need for the FOI request.*

*I did not mention St Georges project or the Masterplan, my questions only mentioned the MOU.*

1. Was [the Chief Executive] given any planning advice on, or prior to, her signing the MOU on Sept 9th 2017? **Yes or No**
2. If so, what was the advice given? **If Yes to 1 Header & file number(s) detail please**
3. By whom was any such advice given? **If Yes to 1 Name please**
4. Who was Head of Planning (or Acting Head of Planning) on Sept 9th 2017? **Name please**
5. Has there been any Planning advice given subsequent to Sept 9th 2017 regarding the legitimacy of the MOU? **Yes or No, if Yes Header & file number(s) detail please**
6. Was any of the above minuted, and / or recorded, if so please advise where the records are available. **Yes or No, if Yes file number(s) and location detail please**

*For your assistance and for expediency I have repeated my FOI request detail above and included the level of answers desired."*

9. The council responded again on 18 March 2019. It provided a response to the above questions but again asked the complainant to clarify parts 1-3 of his request. It said:

*"The request asking for planning advice, on or prior to, her signing the MOU is too broad. The Chief Executive would have necessarily taken much planning advice prior to signing the MOU. Please be more specific in the request to enable us to assist and locate the information that you are asking for."*

10. Again it did not specify the exception under which it was refusing to consider the request as it stood. However the fact that the council stated that the request was 'to broad' would indicate it was potentially seeking to apply either Regulation 12(4)(c) or alternatively, Regulation 12(4)(b) at this point (manifestly unreasonable requests). Again the council did not provide any specific assistance to the complainant o how he might reformulate or narrow his request further. It simply asked him to do so.
11. The complainant responded on 19 March 2019. He had again narrowed his request, asking:

1. Was [the Chief Executive] given any planning advice on, or prior to, her signing the MOU on Sept 9th 2017 regarding anything documented within the MOU?
2. If so, what was the advice given?
3. By whom was any such advice given?

*4. If there was no Head of Planning (or Acting Head of Planning), then then name of the person(s) responsible for any planning matters falling under the remit of RCC?*

*5. Were any of the above points, 1 through to 4 minuted and / or recorded, if so please advise where the records are available."*

12. The council responded on the same date directing the complainant to a copy of the MOU and highlighting in particular section 5 of the document. Section 5 of the MOU contains a table entitled "5. *Project indicative timeline*".
13. The complainant wrote back on 20 March 2019 arguing that the MOU does not contain a set of minutes, does not show attendance, dates of meetings, documented advice or which subject matter the planning policy manager gave advice to the Chief Executive on.
14. Following an internal review the council wrote to the complainant on 1 April 2019. It said that the Chief Executive to the council was provided with planning advice by the Planning Policy Manager. It said that the advice which was provided related to the timetable of the project, and that that advice is contained within section 5 of the MOU: "5. *Project indicative timeline*". It said however that the provision of this advice was not minuted and it is only held in recorded form insofar as it is held in section 5 of the MOU.
15. It clarified that none of the points 1-4 of the request were minuted, and the MOU was provided in response to his request purely for the purposes of ensuring that the council was acting transparently. It therefore argued that no further information was in fact held falling within the scope of the request.

### **Scope of the case**

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16. The complainant contacted the Commissioner 15 April 2019 to complain about the way his request for information had been handled. He argues that further information should be held by the council.

## Reasons for decision

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### Background to the complaint

17. Rutland Council has entered into a MOU with the Ministry of Defence in order to develop St George's Park, a former Army Base, for housing, associated infrastructure and also to extract minerals from part of the land.

### **Regulation 12(4)(a)- information not held**

18. Regulation 5(1) of the EIR provides that:

*"Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request."*

19. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that –

(a) it does not hold that information when an applicant's request is received;

20. The council argues that it does not hold any information falling within the scope of the request for information.

21. In cases where there is some dispute between the public authority and a complainant as to whether the information requested was held by the 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 public authority to check that the information was not held and any other reasons offered by it to explain why it was not held.

22. For clarity, the Commissioner is not 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 civil standard of the balance of probabilities.

23. The Commissioner asked the council a series of questions to determine whether any recorded information was held. This included questions about the searches the council had conducted to locate the requested information. She also asked for details about the possible deletion/destruction which might be relevant to the complainant's request. The Commissioner also asked the council to provide any

general explanations or arguments as to why it should not be expected to hold information relating to the request.

24. The council described the searches which it had conducted. It said that it has a dedicated Project Officer ('PSO') who supports all administrative aspects of the St George's Project. The Project Support Officer oversees all files relating to the project. The PSO searched the relevant folders within the files where all minutes are held. These are stored electronically.
25. It said that searches were carried out of each of the meeting record files. These are kept on council drives used specifically by key officials working on the project.
26. It said that the searches did not locate any information falling within the scope of the complainant's request for information of 19 March 2019.
27. It said that the requested information is not a type of record but a specific facet of advice. The records which are held relating to the matter have been retained under its records management policy, but they do not contain the information which the complainant has requested. It clarified that no relevant information has been deleted.
28. It clarified that: *"The Council's Planning Officers were included in the meetings where there were discussions on the topic of the request. As you are aware notes are not a verbatim record of all discussions that take place. The fact that there is no information of the type sought would indicate that there were no planning concerns raised in relation to the MOU but planning advice was clearly available to the Chief Executive in these meetings given the attendance list."*
29. In a telephone call between the Commissioner and a Director of the council on 2 October 2019, the Director clarified that whilst a planning officer had been present and could have provided advice if necessary, as the matters under discussion were legal matters; no planning advice was necessary, and therefore none was recorded.

#### The Commissioner's conclusions

30. The Commissioner has considered the above arguments. It is clear from the council's initial responses that advice was provided to the Chief Executive of the council. The Commissioner has however seen no specific evidence which would refute the council's argument that no specific planning advice was recorded as being provided to the Chief Executive *'regarding anything documented within the MOU'*.

31. It appears to the Commissioner that the narrowing of the scope of the requests for information resulted in the final wording being so specific to the point that no information falls within its scope of the request as specified. Whilst it is clear that this aspect represents the area of interest to the requestor, the Commissioner is also of the view that this could actually have been readily divined from the earlier submissions. The council has been too broad in their interpretation of the request and offered no advice and assistance to allow a natural refinement to be established. Instead, it was left to the requestor to reformulate the request several times in diminishingly small ways, leading to an understandably frustrating stand-off.
32. Regulation 9(2) requires that where a public authority decides that an applicant has formulated a request in too general a manner it shall ask the applicant as soon as possible to provide more particulars in relation to the request. Regulation 9(2)(b) requires that where this is the case the authority shall assist the applicant in providing those particulars. As such, the Commissioner finds a breach of regulation 9(2)(b). No steps are required as the request did eventually hit upon the aspect of concern to the requestor.
33. Notwithstanding the above, the Commissioner has also decided that, on a balance of probabilities, no further information is held falling within the scope of the request.
34. The council was therefore able to apply Regulation 12(4)(a) to refuse the request.

#### **Regulation 14 - Refusal to disclose information**

35. Regulation 14(1) provides that if a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of Regulation 14.
36. Regulation 14(3) provides that

*"The refusal shall specify the reasons not to disclose the information requested, including –*

*(b) any exception relied on under regulations 12(4), 12(5) or 13; and*

*(b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3)."*

37. The Commissioner has considered the councils initial responses to the complainant of 13 March 2019 and 18 March 2019.
38. As noted above, neither of these refusal notices specified the exceptions applied by the council to refuse the request.
39. They also did not specify the matters that the council considered in reaching its decision that the request should be refused. Whilst the council did specify that the requests were too wide, or too broad, it did not convey the reasons for that decision nor indicate what considerations it had taken into account. Nor did it specify what steps it had taken to determine the extent of the information falling within the scope of the requests (as they currently stood) before reaching its decision.
40. The Commissioner has therefore decided that the council did not comply with the requirements of Regulation 14(3) when responding to the complainant's requests for information.



## Right of appeal

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

42. 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.
43. 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**