

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

**Decision notice**

**Date:** 19 March 2012

**Public Authority:** New Forest District Council  
**Address:** Appletree Court  
Beaulieu Road  
Lyndhurst  
SO43 7PA

**Decision (including any steps ordered)**

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1. The complainant requested correspondence held by the authority which was produced or received by a councillor relating to a licensing application for holding public events in a converted barn in part of the New Forest. The council disclosed some information which it said it did hold. However it also claimed that it did not hold information in relation to the councillor's correspondence when she was not acting on behalf of the authority.
2. The Commissioner's decision is that the New Forest District Council was correct to state that it did not hold further relevant information in this instance. However it breached Regulation 14(3) when responding to the complainant as the information is environmental information and the council should therefore have responded under the EIR and applied Regulation 12(4)(a) (information not held).
3. The Commissioner therefore does not require the council to take any steps.

**Request and response**

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4. On 24 September 2010 the complainant wrote to New Forest District Council and requested information in the following terms:

*"I would like to examine the files of [name redacted] the NFDC Employment and Tourism Manager and his department and his*

*Portfolio Holder in matters relating to the New Forest Activity Centre"*

5. On 25 September 2010 he made a further request:

*"I also note that there are no notes or email correspondence disclosed between Cllr [redacted] and the Tourism Dept for which she is the Portfolio Holder for Tourism and Employment. I find that would be most unusual given the interest and involvement that Cllr [redacted] has shown over the whole episode. I believe that these should have been declared under my request"*

6. The complainant was not able to provide the Commissioner with a copy of the council's direct response to these requests. However he provided the Commissioner with a copy of the council's response to a further request dated 9 December 2010 and identified part 5 of that letter as the request which he wished to raise with the Commissioner. This states:

*"Para 5: The FOI Act applies to Public Authorities. Councillor [redacted], in her own right is not a public authority. NFDC is a public authority and communications that we hold from Councillor [redacted] are discloseable. Her communications to others outside of NFDC are not discloseable."*

7. This was the issue which the complainant's solicitors also took forward to internal review with the council.
8. The Commissioner therefore recognises that over time the issue had changed from one of overall disclosure to a question surrounding correspondence of the councillor.
9. Following an internal review the council wrote to the complainant's solicitors on 25 January 2011. It repeated that the information was the private correspondence of the councillor that it was not held by it for the purposes of the Act.

### **Scope of the case**

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10. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He argued that correspondence sent or received by the councillor relating to the property should be disclosed and that the capacity in which it was sent or received was not relevant as to whether the council held that information.

11. The councillor was a vocal opponent to the applications. She is also the Portfolio Holder for Tourism and Employment in the council as well as being part of the planning committee on the New Forest National Park Authority. The Commissioner understands that she did not however take part in a vote on the licence application due to a conflict of interests.
12. The Commissioner considers that the complainant's complaint relates specifically to the councillors correspondence. He has not therefore considered the overall request for information which the complainant made to the council but focused on this aspect of the request only.
13. The request is for information held by the authority relating to planning and licensing applications to allow a company to run tourist events from a barn in the New Forest. The applicant has a certificate of lawful usage for the site however when he sought to obtain a licence to hold events this was refused by the licensing authority on the grounds of noise and the additional traffic which would result.
14. Given the above, the nature of any information held would be environmental information for the purposes of the EIR. The applicant sought a licence to introduce a new activity to the area, however this was refused. Press reports have indicated that this was due to the additional noise and traffic which would be caused as a result of that activity.
15. The Commissioner's decision is that any information held would fall within the scope of Regulation 2. Regulation 2 defines environmental information and includes within that definition:

*(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, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment 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;*

16. The Commissioner considers that any correspondence caught within the scope of the request would relate to the licensing application to run activities at the centre, or planning applications to make amendments to the building. As such it would fall within the definition provided in Regulation 2(c).
17. The Commissioner therefore considers that the council's response should have been provided under the EIR. The council actually responded under the Act. As the Commissioner will agree that no information is held by the council this decision does not affect the complainant's access to information in this case. It does however affect the Commissioner's findings on the council's response.

## Reasons for decision

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### Substantive Procedural Matters

#### Regulation 5(1)

18. Regulation 5(1) states that:

*"5. - (1) 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. The Commissioner has considered whether the New Forest District Council has complied with Regulation 5.
20. The complainant asked for correspondence held by the council which was written or received by a councillor regarding his licensing application. The council argues that a councillor's private correspondence is not considered to be held for the purposes of the Act (or in this case the Regulations).
21. Solicitors acting on behalf of the complainant consider that any correspondence issued or received by the councillor acting in her role as councillor should be disclosed regardless of the capacity in which she was acting.
22. They argued that any information generated by a councillor will be discloseable under the Act based on the definition of authority provided by Section 3(1)(a) of the Act. This provides

"in this Act "public authority" means –

- (a) subject to section 4(4), any body which, any other person who, or the holder of any office which –
    - (i) is listed in Schedule 1, or
    - (ii) is designated by order under section 5, or
  - (b) a publicly-owned company as defined by section 6.
23. They argue that this information would be held because the councillor is an officer holder within the council. The situation would be the same under the Regulations as authorities caught under the Act are included with those caught within the scope of the Regulations.
24. Whilst the Commissioner agrees that the councillor is an office holder within the council he considers that where the councillor is acting in their representative or political role rather than as a representative of the council it is not held by the Act or the Regulations unless that information is also held by the council in its own right.
25. The Commissioner has produced guidance on the status of councillors' information which is available from [http://www.ico.gov.uk/for\\_organisations/sector\\_guides/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/fep109\\_information\\_produced\\_or\\_received\\_by\\_councillors\\_v1.ashx](http://www.ico.gov.uk/for_organisations/sector_guides/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/fep109_information_produced_or_received_by_councillors_v1.ashx). Some information which is held by councillors' will not fall within the scope of the Regulations because it is considered to be held by the council 'on behalf' of the Councillor rather than held by the council itself. This is the case even if the council provide administrative support to the councillor.
26. The Commissioner' guidance explains that individual councillors are not authorities for the purposes of the FOIA or the EIR. Information which they hold which relates to their political work, or work on behalf of their constituents will not always be held for the purposes of the Regulations.
- a. Correspondence between councillors or information held by a councillor for their own private, political or representative purposes will not usually be covered.
  - b. Information received, created or held by a councillor on behalf of the local authority will be covered, for example, where a councillor is acting in an executive role as part of a council cabinet.

- c. Information created or received by a councillor but held on a local authority's computer system or at its premises will only be covered if it is held for the authority's own business.
27. The council said that it had disclosed all correspondence which the councillor had issued or received in her position as Portfolio Holder for Tourism and Employment. It also explained that it has disclosed all of the information which it holds in its own capacity.
28. However it said that it does not hold private correspondence of the councillor of the type categorised in a) above. It stated:
- "the council is not privy to this correspondence, nor is it aware of the content of such correspondence."*
29. It explained that both the individuals living close to the premises and local councillors are able to object to licensing applications and that this is a right enshrined under the Licensing Act 2003.
30. As a local councillor, she was in correspondence with her constituents in formulating their objections to the Licensing Authority. This was in her capacity as an elected member representing her constituents. In doing this she was not representing the council.
31. The council argues that whatever was said between the councillor and her constituents in relation to lodging complaints to the Licensing Authority is a matter for them, and not the council. Hence it considers that any information of this sort would not be 'held' for the purposes of the Regulations.
32. However the council clarified that it has disclosed the councillor's formal objection to the licence application to the complainant in response to his complaint. As this had been received by the council it was held by it in its own capacity.
33. The Commissioner has considered the councils arguments further. The grounds are to an extent muddled because of the councillor's role, both as Portfolio Holder for Tourism and Employment, but also as a member of the Licensing Authority. In her capacity in both of these roles she could potentially influence the outcome of the licence application. Any information which she generated in this respect could be held for the purposes of the Act or the Regulations as it would have been generated when she was carrying out work on behalf of the council.
34. The council said that it has carried out extensive searches to discover whether any relevant information is held, and that it has disclosed all the information that it has found. It has not used any exemptions on the

information which it considers falls within the scope of the request, but has disclosed this to the complainant. This included information which the council held where the councillor was acting on behalf of the authority or where correspondence had been sent to the authority where she was acting in her representative role.

35. What it claims is not held is the councillors correspondence with her constituents – information generated or received in her representative role.
36. It is clear from statements made by the councillor in the press that she considers that information to be her personal and private information, generated as a result of her activities as a councillor, rather than her activities on behalf of the council. She considers that that information is separate to council information because it relates to the representative functions she carries out as a councillor. The Commissioner considers that this strengthens the arguments that this information is not held by the council for the purposes of the Act. Clearly both the council and the councillor consider that information to be separate to information held which relates to her formal role, and it is distinguished as such in the way these records are held by the council.

### Conclusions

37. The Commissioner has not asked the council to provide him with any information to make this decision. He does not need to consider the information directly because the complainant's solicitors specifically questioned the council's decision that information was not held where the councillor was not acting on behalf of the authority. The council has stated that everything else has been disclosed. As such the Commissioner can make a decision without recourse to any information itself as he need only make a decision as to whether this sort of information is covered by the Act or not.
38. The Commissioner recognises that information which is sent for private, representative or political purposes by the councillor is not held by the council unless that information was also sent to the council. The council may provide administrative support without information which is held relating to category a) above being considered to be information held by it.
39. The council has very clearly set out what sort of information it has disclosed, and what sort of information it believes is not held on its behalf. Information which was held where the councillor was acting on behalf of the council has been disclosed and has not been questioned by the complainant's solicitors.



40. Some information may be held by the council where the council has written to it representing her constituents, or making her views on the application known to the council as a formal representation against the property receiving a licence. The council has also considered this aspect and any information it holds in this respect had been disclosed.
41. This only leaves information where the councillor was acting for private, political or representative purposes.
42. The Commissioner is satisfied that this sort of information is not held by the council for the purposes of the Regulations.
43. The council's response to the request therefore complies with the requirements of the Act. The council is therefore correct to state that it holds no information in this instance.

#### Procedural Breach

44. The EIR is different to the FOI Act. Even where information is not held by an authority it must reply within 20 working days stating the exception upon which it is relying. The exception where information is not held is Regulation 12(4)(a). In this case, as the council considered the information under the Act rather than the EIR it did not do so. Hence the council breached Regulation 14(3) which states that the authority must "*specify the reasons not to disclose the information requested, including –*  
  
*(c) any exception relied on under regulations 12(4), 12(5) or 13;*"
45. The council therefore breached Regulation 14(3) in responding to the complainant. The Commissioner recognises that this was an error based purely on the fact that the council incorrectly applied the Act instead of the Regulations however, and in this case it did not affect the complainant's rights in any way.
46. The council did inform the complainant that it did not hold the information and so he was made aware of the council's reasons for not providing him with the information. It simply did not state that the exception applied.
47. The Commissioner therefore does not consider that he needs to order any steps in this instance.



## Right of appeal

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48. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

49. 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.
50. 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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