

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

**Date:** 7 July 2020

**Public Authority:** Sedgemoor District Council  
**Address:** Bridgwater House  
King Square  
Bridgwater  
Somerset  
TA6 3AR

**Decision (including any steps ordered)**

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1. The complainant requested environmental health and health and safety inspection reports for a specified holiday park. Sedgemoor District Council (the 'Council') provided the information it held (namely food hygiene reports) and initially said it could not provide any further information in relation to the health and safety inspection reports due to an ongoing investigation. Ultimately, the complainant confirmed he was only concerned with the health and safety information. The Council refused to confirm or deny that it held the requested information, citing the 'neither confirm nor deny' provision within the FOIA section 30(3) exemption for public authority investigations.
2. The Commissioner's decision is that the Council was correct to consider this request under FOIA. She also finds that section 30(3) of FOIA is engaged and that the balance of the public interest favours maintaining the exemption. Accordingly, the Council was entitled to rely on section 30(3) to refuse to confirm or deny whether it held the requested information. The Commissioner's position is largely set out in a confidential annex which will be provided to the Council only.
3. By failing to issue its refusal notice within the statutory 20 working days' time limit, the Council has breached 17(1) of FOIA.
4. The Commissioner does not require the Council to take any steps as a result of this decision.

## Request and response

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5. On 3 October 2019, the complainant wrote to the Council and requested information in the following terms:

*"Would you be able to disclose under the FOI Act/EIR the following please?"*

- *Any environmental health inspection reports concerning [named holiday park] for the last five years*
- *Any health and safety inspection reports concerning [named holiday park] for the last five years*

*If this information is publicly available I would be grateful if you could direct me to where this information is published. I would be grateful if you would supply the information as soon as possible. If you are able to supply some of this information more quickly than other items, please supply each item as soon as it is available."*

6. On 8 November 2019 the Council responded, late. It provided some information within the scope of the first part of the request (namely food hygiene inspection reports) but made no reference to the remainder of the request.
7. The complainant then made the following enquiry on 18 November 2019 and again, in the absence of any reply, on 2 December 2019:

*"For the avoidance of doubt can I confirm whether Sedgemoor council carry out any other health and safety inspections or environmental health inspections please?"*

8. On 4 December 2019, the Council responded with :

*"I understand that no further information can be provided as this is an ongoing investigation."*

9. That same day, and again on 9 December 2019, the complainant asked the Council:

*"Can you clarify please whether there are health and safety and environmental health inspection reports for the years requested, however the council is not disclosing these under my FOI request due to an ongoing investigation, or that there are no reports?"*

10. The Council replied on 10 December 2019 as follows:

*"Thanks [complainant's name redacted]; I cannot provide any further information because this is an ongoing investigation."*

11. The complainant requested an internal review on 10 December 2019. The Council provided its internal review, late, on 15 January 2020. It cited section 30 of FOIA, although it was not clear which subsection(s) it wished to rely on.

## Scope of the case

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12. The complainant initially contacted the Commissioner on 13 January 2020 to complain about the then outstanding internal review outcome. Following receipt of the review outcome, he submitted a further complaint to the Commissioner about the way his request for information had been handled.

13. His grounds of complaint of 24 January 2020 included the following:

*"I would like to continue to dispute the refusal on the grounds that we consider the release of any council inspection reports of this property is in the public interest. Our reasoning for this is that the necessary public scrutiny of this documentation outweighs it's [sic] value as reference documentation for investigatory purposes. I understand that these documents, if they exist, have previously been available for public scrutiny through this process, and it is only due to a council investigation that the claim of exemption is given."*

14. The complainant argued that there: *"is enhanced public interest in the history and level of regulatory oversight by the council concerning this premises"* and provided links to published articles relating to previous reports on the specified holiday park.

15. On 4 March 2020, the Commissioner contacted the Council to ask it to clarify its response to the request. Subsequently, on 31 March 2020, the Council confirmed that:

- It considered the request to fall under the FOIA as opposed to the EIR.
- It had provided all the information it held in relation to part one of the request (namely food hygiene inspection reports).
- It wished to rely on section 30(3), the 'neither confirm nor deny' provision within the exemption for investigations and proceedings conducted by public authorities, for part two of the request (namely health and safety inspection reports).

16. The Commissioner relayed the above to the complainant on 15 April 2020.
17. On 24 April 2020, the complainant confirmed he was now only concerned with the Council's response to part two of the request.
18. The Commissioner has considered whether the request was handled under the correct statutory regime and whether the Council was entitled to 'neither confirm nor deny' ('NCND') that it held the information requested in part two of the request, in accordance with section 30(3) of FOIA. She has also considered the time taken by the Council to deal with this request.
19. The Council has confirmed that there is currently an ongoing investigation in respect of the named holiday park. The NCND provision is therefore applied in respect of any health and safety reports about the premises which may, or may not, be held.

## **Reasons for decision**

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### **Applicable access regime – FOIA or EIR**

20. The complainant's request includes the wording: "*Would you be able to disclose under the FOI Act/EIR the following please?...*"
21. The Council responded to the request under FOIA. The Commissioner has first considered whether the requested information constitutes environmental information.

### **Regulation 2 - is any of the information environmental?**

22. Information is environmental if it meets the definition set out in regulation 2 of the EIR, namely "*...any information in written, visual, aural, electronic or any other material form 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, 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;*

*(d) reports on the implementation of environmental legislation;*

*(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*

*(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);”*

23. The Council said it did not consider the request to fall under the EIR. Its view was that the requested information remaining in scope, (namely health and safety inspection reports), did not fall within the definition of environmental information set out above. It provided examples of published decision notices where the Commissioner had classified health and safety reports as falling within the FOIA regime. (Two such examples can be viewed via the links below<sup>1</sup>).

24. The Council explained that health and safety inspection of a holiday park would incorporate the following:

*“For an inspection focus is on the high risk activities on site. This would typically include children’s play equipment, inflatable equipment (such as bouncy castles), activities such as go-karting, the swimming pool (training/staffing, activities, treatment, maintenance), workshops on site. While looking at any area we are also checking for indications of larger issues that could affect the whole park such as chemical handling, electrical maintenance, manual handling. Health and safety in the back of house catering areas tends to be noted during food inspections.”*

25. There is no focus, either in the request, or the information itself, on the state of the wider environment and the Commissioner therefore cannot identify any grounds under regulations 2(1)(a) to 2(1)(f) for the

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2173164/fs50687887.pdf> and <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014304/fs50644310.pdf>

withheld information meeting the definition of 'environmental information'.

26. The Commissioner is therefore satisfied that FOIA was the correct statutory instrument to apply to the request.

### **Section 1(1)(a) – confirming or denying that information is held**

27. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would in itself disclose sensitive or potentially damaging information that falls under an exemption. In these circumstances, the FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.
28. The decision to use an NCND response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
29. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is, in fact, held.
30. It is sufficient to demonstrate that either a hypothetical confirmation, or a denial, would engage the exemption. In other words, it is not necessary to show that both confirming and denying information is held would engage the exemption from complying with section 1(1)(a) of FOIA.
31. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would in itself disclose sensitive or potentially damaging information that falls under an exemption. In these circumstances, the FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.
32. The Council said that the information described in the request, if it was held, would be exempt from disclosure by virtue of sections 30(1)(a)(i), 30(1)(a)(ii), 30(1)(b), 30(1)(c), 30(2)(a)(i), 30(2)(a)(ii) and 30(2)(a)(iii).

## Section 30(3) – Investigations and proceedings conducted by public authorities

33. Sections 30(1)(a), (b) and (c) of FOIA state:

*"(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-*

*(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained –*

*(i) whether a person should be charged with an offence, or*

*(ii) whether a person charged with an offence is guilty of it.*

*(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or*

*(c) any criminal proceedings which the authority has power to conduct."*

34. Section 30(2) of FOIA states:

*"(2) Information held by a public authority is exempt information if -*

*(a) it was obtained or recorded by the authority for the purposes of its functions relating to –*

*(i) investigations falling within subsection 1(a) or (b),*

*(ii) criminal proceedings which the authority has power to conduct,*

*(iii) investigations (other than investigations falling within subsection 1(a) or (b)) which are conducted for the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment..."*

35. For information to be exempt under section 30(2) it must both relate to the public authority's investigations or proceedings **and** relate to confidential sources, as set out in section 30(2)(b):

*"(b) it relates to the obtaining of information from confidential sources."*

36. The Commissioner considers that for the purposes of section 30(2), a confidential source is a person who provides information on the basis that they will not be identified as the source of that information. As a rule, confidential sources will be third parties. An authority's own officers are unlikely to be considered confidential sources, the exception being police officers and others working for law enforcement bodies working undercover.



37. Additionally, confidential sources can also include witnesses who only provided information about a particular crime on the understanding that their identity would not be revealed and have declined to give a formal statement.
38. Section 30(3) of FOIA provides an exclusion from the duty to confirm or deny whether information is held in relation to any information which, if it was held, would fall within sections 30(1) or 30(2) of FOIA.
39. Consideration of section 30(3) of the FOIA involves two stages; first, the information described in the request must fall within the classes described in sections 30(1) or 30(2). Secondly, the exemption is qualified by the public interest. This means that, if the public interest in the maintenance of the exemption does not outweigh the public interest in confirming or denying whether information is held, then confirmation or denial must be provided.

*Is the exemption engaged?*

40. The Commissioner has first considered the Council's reliance on section 30(1) in relation to its section 30(3) NCND response. She has issued guidance on section 30<sup>2</sup> which states that section 30(1) can only be claimed by public authorities that have a duty to investigate whether someone should be charged with an offence, or the power to conduct such investigations and/or institute criminal proceedings. Her guidance also states that section 30 is class based and that information which has been held at any time for the purpose of these investigations and proceedings may be exempt.
41. The Commissioner considers that the phrase "*at any time*" means that information can be exempt under section 30(1) if it relates to a specific ongoing, closed or abandoned investigation. The Commissioner considers that the information requested (if held) must be held for a specific or particular investigation and not for investigations in general.
42. As a local authority, the Council clearly has a duty to investigate offences and allegations of offences within its remit, such as those falling under the Health and Safety at Work Act ('HASWA'). Information held for the purposes of an investigation will generally fall within the description at section 30(1)(a)(i) and (ii) of FOIA. In this case, the

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf>



complainant has requested any health and safety reports at a named holiday park within a five year period.

43. The Commissioner accepts that the information described in the request, if it was held, would be held by the Council for the purposes of an investigation and so would fall within the class described in section 30(1)(b) and 30(1)(c). The Commissioner has set out further considerations in a confidential annex attached to this notice.
44. The Commissioner is therefore satisfied that the exemption provided by section 30(3) of FOIA by way of section 30(1) is engaged. For this reason, she has not found it necessary, at this stage, to consider whether the cited subsections of 30(2) are also engaged in relation to this request.

*The public interest test*

45. Section 30(3) is subject to the public interest test. Although the exemption may be automatically engaged where the information described in a request would be exempt under either subsection (1) or (2), it may only be maintained in the public interest if confirmation or denial would interfere with the effective conduct of the investigations or proceedings.
46. In accordance with her guidance, when considering the public interest in maintaining exemptions, the Commissioner considers that it is necessary to be clear what they are designed to protect.
47. The purpose of section 30 is to preserve the ability of the Council (and other applicable public authorities such as the police) to carry out effective investigations. Key to the balance of the public interest in cases where this exemption is found to be engaged, is whether the disclosure of the requested information (here the provision of a confirmation or denial) could have a harmful impact on the ability of the Council to carry out effective investigations. Clearly, it is not in the public interest to jeopardise the ability of the Council to investigate crime effectively.
48. The Council did not provide any specific arguments for or against the public interest. Instead it told the complainant that:

*"I have therefore applied that test and am satisfied that the public interest in conducting the investigation outweighs the public interest in disclosing any information during the ongoing investigation. It is important to recognise that the purpose of the exemption is to protect the effective investigation and prosecution of any offences (if applicable). In weighing up the public interest, I have taken into account the stage of the investigation, the extent to which information is in the public domain and the significance of any information."*

*Public interest arguments in favour of confirming or denying whether the requested information is held*

49. The Commissioner recognises that the public may be interested in any investigation findings associated with any health and safety inspection reports held. This is particularly the case where it is known that there is an ongoing investigation and any health and safety reports, if held, may be of relevance to that investigation.

50. She also recognises the importance of public confidence through the public scrutiny of any such reports, if held.

51. Public authority transparency and accountability are also key.

*Public interest arguments in favour of maintaining the exclusion of the duty to confirm or deny*

52. The Commissioner recognises the importance of publicly confirming or denying the existence of any information which may impact on a current, ongoing investigation. This could risk significant prejudice to that investigation and could have a damaging effect on any proceedings being conducted by the Council.

53. Further rationale has been included in the confidential annex and cannot be cited in this notice.

*Balance of the public interest*

54. In reaching a conclusion on the balance of the public interest, the Commissioner has considered what public interest there is in the Council confirming or denying whether or not it holds any information of the type requested by the complainant. The Commissioner has also considered whether such confirmation or denial would be likely to harm any investigation, which would be counter to the public interest, and what weight to give to these competing public interest factors.

55. The purpose of section 30 is to preserve the ability of the Council and other applicable public authorities to carry out effective investigations. Key to the balance of the public interest in cases where this exemption is found to be engaged, is whether the act of confirming or denying whether the requested information is held could have a harmful impact on the ability of the Council to carry out effective investigations. Clearly, it is not in the public interest to jeopardise the ability of the Council or any public authority to investigate crime effectively.

56. Set against this, the Commissioner recognises the importance of the public having confidence in those public authorities tasked with upholding the law. Confidence will be increased by allowing scrutiny of

their performance and this may involve examining the decisions taken in particular cases.

57. The Commissioner considers that there is clearly a public interest in the transparency and accountability of public authorities. She recognises that confirming or denying whether the requested information is held would meet this.
58. In this case, the complainant has referred to the existence of information in the public domain and there is reference available to the ongoing investigation. In weighing up the public interest, the Commissioner has taken into account the stage of the current investigation, the extent to which information is in the public domain and the significance of any other information which may, or may not, be held.
59. In the circumstances of this case, the Commissioner has accorded significant weight to the arguments surrounding the public interest in protecting the ability of the Council to conduct an effective investigation. In that respect, she has taken into account that disclosing whether or not it holds any health and safety reports about the named premises could have a direct impact on that investigation. She is unable to elaborate on this view without revealing the contact of the confidential submission which the Council has provided to her.

### *Conclusion*

60. Having considered the issues in this particular case, the Commissioner's view is that the public interest arguments in favour of maintaining the refusal to either confirm or deny whether information is held outweigh those in favour of the Council issuing such a confirmation or denial.
61. Therefore, the Commissioner finds that the Council was entitled to rely on the refusal to confirm or deny provided by section 30(3), by virtue of section 30(1) of FOIA. She has not found it necessary to consider any reliance on section 30(3) by virtue of section 30(2).

### **Section 17 – Refusal of request**

62. Section 17(1) provides that if a public authority wishes to refuse a request it must issue a refusal notice within the 20 working day time limit for compliance, citing the relevant exemption(s).
63. The Commissioner considers that the Council has breached regulation 17(1) as it took longer than 20 working days to inform the requester that it was relying on an exemption.

## Other matters

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64. The Council has advised that Health and Safety inspection reports are not routinely published, but once an investigation is completed, the report will usually be released in response to information right's requests.

### *Internal review*

65. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA.
66. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
67. The Commissioner is concerned that it took 22 days for an internal review to be completed.
68. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft "Openness by Design strategy"<sup>3</sup> to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"<sup>4</sup>.

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<sup>3</sup> <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

<sup>4</sup> <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

## Right of appeal

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69. 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)

70. 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.

71. 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 .....**

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