

Dear Mr Clark,

As discussed separately, despite MSDC's delay in responding to this request, I feel it is not in the public interest that I exercise my right to take this directly to the ICO. I therefore respond to you.

I apologise for taking a while to respond – I did want to ensure the points of appeal are aligned fully with the guidance provided by the ICO on the various topics for the use of local authorities. Since I am sure you will be fully conversant with these, therefore I have not included them although I do quote from them in some places.

As noted in separate email chain, my interest (and that of the community on behalf of whom I filed the FOI request originally) is in order for us to understand what, on the face of it, seems to be a strange outcome of a decision process. There is no interest or intent in holding any particular elected councillor or officer to account for this, simply to bring about good governance.

I note that some of the information requested is already in the public domain and the links are appreciated. I did try to locate the relevant documents prior to filing the FOI request and I thank MSDC FOI for providing these.

As this email contains url links, I that this, in turn, does not go into a junk folder. I shall in any case send a plain text email to you to let you know that this full response has been sent.

I have interspersed my answers between the individual responses from the FOI team.

In doing so, I note that some of the responses (more accurately, the refusal to respond) relies on provisions within the Environmental legislation and some from the FOIA. It is unclear why this should be so and it is, frankly, hard to escape the conclusions that whoever replied is taking the provision most helpful to their refusal and applying that. Be that as it may, I have responded on the basis of the exemption claimed in each case, whilst reserving my right to identify that the original submission was filed under the FOIA.

I would hope that this appeal will result in the provision of all of the documents originally requested. Should this not be the case, then naturally the next step will be an appeal to the ICO. However, as we are aware form a previous issue with another authority, who decided to take the route of having the ICO forced disclosure, it may have a detrimental effect on local authorities' FOI group's standing, which we would rather avoid.

We eagerly await these documents and information.

Yours sincerely

Robin Walker
On behalf of Theobalds bridleway users and residents

From: Freedom of Information

Sent: 29 March 2021 17:16

To

Subject: RE: Freedom of Information Request - MSDC's decision process related to the Burgess Hill to Haywards Heath link Our Ref:166477

Dear Mr Walker,

Thank you for your request. We have been through your document and pulled out the relevant requests that we can see. Our response is as follows:

4.2.1.1 - The agenda/ minutes are in the public domain available at <http://midsussex.moderngov.co.uk/CeListDocuments.aspx?CommitteeId=137&MeetingId=463&DF=12%2f02%2f2013&Ver=2>. The attendance at the meeting is shown in the minutes. Please note, certain sections of the minutes were exempt as these contained commercially sensitive information. These are not released in the public domain.

I refer you to the guidance from the ICO. <https://ico.org.uk/for-organisations/section-43-commercial-interests/#:~:text=The%20ICO%20has%20produced%20specific,or%20any%20other%20legal%20entity.>

As a reminder, this issue relates to strips of land purchased by MSDC in 2013 at the cabinet meeting identified. The topic was clearly discussed *at the time* in camera. It could be argued that it was against public interest for any budget level agreed at that meeting to have been released into the public domain at that time (particularly as one of the strips of land in the centre of the strips purchased by MSDC was purchased by a third party the day before MSDC purchased the rest). However, that was eight years ago.

Let me point out why I am interested now and what the issue was (as far as can be gleaned) at the time. I also refer to the points made by the ICO in the attached document. Also, let me point out what is in the public domain.

- a. The ICO document on Commercial Interests (Section 43) of the FOIA contains the following points. If this case is referred to the ICO, it is, therefore, reasonable to assume that they will follow their own guidelines on the matter.
 - a. 43 (1) contains an exemption from disclosure for something that is a trade secret. I cannot see how this could possibly apply – it could not really have applied at the time and certainly does not apply now. From the explanation of the way the ICO interprets the exemptions, it is so unlikely that MSDC FOI could make any viable assertion under this provision that it can be eliminated.
 - b. 43 (2) contains an exemption from disclosure for something that is, or could be argued to be, commercially prejudicial to the owner of the information (to wit, MSDC). The fact that MSDC purchased the strips of land for £20,000 plus VAT is in the public record, on the land registry. Therefore it is not confidential commercial information and, in fact has not been so for many years, given that Land Registry transfers are usually posted within a few months transaction. Perhaps MSDC may have considered that its budget for the strips of land might be considered prejudicial at the time. It cannot be so considered now. Even if this were to be the case, we explicitly used the purchase price of the strips of land as an example of something that we would accept to see redacted. Therefore, for an exemption under 43 (2), it is similarly, from the explanation of the way the ICO interprets the exemptions, so unlikely that MSDC FOI could make any viable assertion under this provision that it can also be eliminated.
 - c. Commercial – Policy development, also under 43 (2). Note that, whatever the reason for this purchase (see below), the unavoidable fact is that MSDC would have to concede that the land is not used at present, and never has been used. Given the 8 years since the transaction, I cannot see there could be any viable policy still being

developed that would enable the exemption to be applied. Again, given the guidance of ICO interpretation, this is not a viable reason for an exemption to be granted.

- d. Prejudice Test. For MSDC to succeed in claiming this exemption, if the ICO guidance is used as instruction, it must be able to demonstrate a causal link between the disclosure and the consequences of that disclosure. MSDC now owns the land, in free title. As will be demonstrated below, it can effectively secure access to it via fencing and/or adjacent enclosing land ownership. Therefore, it is vanishingly unlikely that MSDC could possibly be able to demonstrate any potential harm, let alone a causal link to it.
- b. Given the above, it seems that an appeal on this issue is overwhelmingly likely to result in an instruction to disclose. That it was originally discussed in camera is irrelevant. MSDC FOI does not get to “mark its own homework” on what it does and does not consider to be subject to the FOIA, whether or not it was discussed in camera eight years ago.
- c. In any case, we specifically made the point that the actual sum of money paid for the strips of land was not the issue, not least because the land was purchased and the sum paid is in the public record. Our whole interest has been the *relative* viability – of the “central” route compared with the “western” and “eastern” routes, given that the “central” route is, as a matter of simple fact, the shortest, flattest, most direct route, and, therefore, all other issues being equal, *must* be the one preferred. The discussion of what was described as an “interurban cycleway” at the time, linking Burgess Hill town centre with Haywards Heath, started around 2015/16. MSDC has stated in previous response that the purchase of these strips of land was unrelated to the creation of a between-town link (in fact that it pre-dates it). Let us now evaluate (given that we are not privy to the information and MSDC is desperate to prevent this) what the reason for this purchase might have been.
 - a. This is highly relevant and in the public interest because the issue of creating a between-town link has been mooted, and as noted herein that a “central route” would be optimal.
 - b. The two strips of land subject of this request consist of a southern part, running from the footpath at the southern boundary of the Bedelands Nature Reserve up to the river at the Valebridge viaduct. This land is not used for any purpose where it lies between the railway and Furze Common field. It does not appear ever to have been used for any purpose and certainly is not used at present. This continues northwards lying to the east of Upper and Lower Plantation and Valebridge Common field, where it is visible from the map as lying to the east of the Bedelands Nature Reserve. This land is thus entirely enclosed by Network rail property to the east and Bedelands Nature Reserve to the west. The northern part lies to the north of Rocky Lane just to the North of the underpass and runs alongside the field owned by Heaselands Estate to the east and Network Rail to the west. It is difficult to see, given the scale of the Land Registry maps, whether this is now contained within protective fencing erected by Network Rail, or whether it is currently farmed by Heaselands Estate Trust. Again, therefore, it is within private property
 - c. Between these two strips is a connecting middle strip, purchased by the Reza family, the day before MSDC purchased the strips either end. MSDC contends these two events were not related. We cannot comment on whether the ICO would consider this remarkable coincidence in the same light.
- d. From the above, it is clear that MSDC could have made these two strips available for a “central route”. There is an unallocated strip of land alongside the Reza strip which might be pursued for such a route, or MSDC could have approached Heaselands Estate back in 2015/6. An accommodation with Heaselands Estate would be necessary for any of the “western” routes in any case, so either no route was possible or a proactive engagement

concerning a “central route” would surely have been less intrusive (and thus more likely to succeed) than the western routes pursued. Therefore, given that it did not do so, the reason is of significant public interest.

- e. MSDC has not explained its motivation, and seeks to keep this hidden from the public, despite, as argues above, it being vanishingly improbable that it would be able to argue that commercial issues still apply. We should therefore consider broad categories for MSDC to have made this purchase:
 - a. MSDC has no particular reason to make this purchase – in which case it is of legitimate public interest for this to be disclosed
 - b. MSDC had another active reason for the purchase of the strips of land (i.e. it wished to occupy them or use them for the public good). Given that they are not in use and never have been, it is of legitimate public interest for this to be disclosed
 - c. MSDC felt the need to purchase these strips of land to prevent their being used by a third party, given that they had, for whatever reason, been released by Network Rail. We understand from informal discussions with at least one councillor this might have been a consideration, possibly related to concerns about Traveller use, which may or may not be accurate. However, we can see from c) b) above this is unrealistic, as the strips are essentially either fully enclosed by other land or could be blocked off (as the northern part has been) with a simple fence. Again, this is of significant public interest.
- f. Therefore, should this be referred to the ICO, it seems, again, vanishingly unlikely that they would support MSDC given the public interest – at this stage – in the strips being used for a valid public purpose – to wit, a re-invigorated “central route”.

4.3.1a – This appears to be a matter for WSCC – foi@westsussex.gov.uk

We do not disagree with this being for WSCC FOI. However, unlike MSDC, WSCC is open and clear about its plans and purposes and is not attempting to hide things. For the avoidance of doubt, given that the strategy identified in 4.3.1a was available to MSDC at the time, the question was, *why did MSDC choose not to align with that public plan?* This is NOT a question for WSCC. It is a question of legitimate public interest directed at MSDC.

4.3.1b - Any discussions about which routes to progress through Place and Connectivity were made through the Growth Programme Governance. We will not be releasing this information under the EIR - exception 12 (4) (e). We believe that it is in the public interest that public authorities have a space within which to think in private as recognised in the Aarhus Convention. The Information Commissioner also recognises that authorities need to have a safe space in which to develop ideas, debate live issues and reach decisions away from external interference and distraction.

Before we start to review this, we can consider the response made to the previous FOI request, and what is in the public domain, what has been asked, and what presentations of fact have gone unchallenged by MSDC.

We know that at some point, the result of some activity within MSDC was to bring forward two (and only two) alternatives for a sustainable transport link between the two towns. At the time, it was represented that this was MSDC acting in response to requirements in both towns’ Town/Neighbourhood plans. The strong implication was that this was considered to be of import (i.e. that it was supported at Policy level). We have

already demonstrated this to be a mis-representation of the facts by MSDC, and that it was MSDC who drove the policy-level identification of this plan.

Note that this link would take an unspecified (but possibly significant) proportion of the almost £22 Million of either tax-payers' money (50%) or S106 proceeds (which should be allocated for infrastructure reflecting the greatest local public good). As such, it is inconceivable that the ICO would not consider how those decisions came to be made to be of significant public interest, and complete opacity combined with indifference to facts, data and information that was available – in the public domain, let alone what additional information should have been available to the working groups and elected councillors – is unlikely to be accepted as a reason to avoid disclosure.

We have also identified that no objective demand analysis was carried out to support this policy (however see 4.9.2), and that the one-row multi-dimensional analysis provided earlier includes conclusions which are incorrect. MSDC has not challenged this. We therefore consider that from an objective point of view, MSDC has not demonstrated that it has made any real effort to determine whether or not such a between-town link is a viable use of public money. In fact, it has not even used the information that it could freely access.

This notwithstanding, some sort of sustainable transport link between the towns was considered positively during the last round of public input on the matter. We also happen to consider it would be a good idea (though of lesser import than establishing proper, safe, sustainable transport links into the towns from their current and new residential and commercial quarters, and within each of the towns themselves). The question is which route and what decisions were taken, when, about the various options, and what information was provided to the people taking those decisions (whose good faith efforts on the information provided we are not, ab initio, suggesting were in any way at fault).

We do not know what routes were ever reviewed, nor by whom. We do not know what information was provided to the members of the Place and Connectivity Growth Programme Governance team. What we do know, is that an initial report on options was presented by Sustrans (see 4.5.1 a) at some stage – we are aware it was circulating in 2015/2016. We do not yet know what this contained. We do, however, know that Sustrans' high level design criteria places significant emphasis on developing the "shortest, flattest, most direct, traffic-free route available".

The "central route", the majority of which was already in MSDC ownership (see above related to potential other reasons for purchasing it), is, without any risk of factual challenge, the shortest, most direct, traffic-free (except for a single road crossing) route. It is very likely also to be the flattest one, though it might be argued that some of the various options on the Western routes might match it in this sense.

Both the Eastern route and the Western route could not be achieved without some agreement with one or more private land owners. The Central route also requires the agreement of a private land owner (Heaselands Estate (HE) - coincidentally, the same as the western set of routes). We are confident that we could make the objective case to the ICO that it is unlikely, from a view of maps, that the extent of access to HE necessary for a central route is equally (and certainly not more) extensive than for a central route. Therefore, whilst it is naturally unreasonable to expect any details of any dealings between MSDC and Heaselands Estate should be disclosed (which we have never requested), we did ask whether or not MSDC had approached HE concerning a "central route".

The simple fact is that no route is realistically achievable without the consent of some element of private landowner agreement. It is also clear that the eastern route would never be achievable without significant access to private land, despite the fact that it

follows public highways or an ancient bridleway, as it is of insufficient width and could not be made suitable for year-round use because of insufficient drainage. It is also excessively hilly and partly on public highways, as well as very indirect and of excessive length, this meaning it fails five out of five of Sustrans' high level criteria.

We also know that at the steering group meeting in 2018, the "central route" was "de-emphasised". This clearly implies to any reasonable person – and it will surely be viewed by the ICO in this light – that (a) a "central route" had been considered prior to this stage, but that it was rejected –either prior to or at that meeting – and only the "Western" and "Eastern" routes were carried forward as options into the public domain and thereafter back to Sustrans for their feasibility analysis in 2019.

Thus, we know for a fact that a (or several) "central route(s)", to the extent it, or they were considered, was, at that point, rejected wholly. This is more than three years ago. The suggestion that the reasons for rejecting requests to see the evidence provided to the people making those decisions – which, after all, resulted in the best route on MSDC's consultants, Sustrans' own high level criteria being rejected – is identified as EIR regulation 12 (4) (e).

Let us leave to one side for the present that the request was filed under FOIA and not EIR, it is now relevant to evaluate that defence based upon the evidence and the interpretation that ICO states in its helpful document it would apply. This document can be found at

https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

This deals at length on the definitions of internal information and then moves onto The Public Interest Test. (para 42 et seq).

Para 46 states "Regulation 12 (2) specifically provides that public authorities should apply a presumption in favour of disclosure. This means that a public authority will have to disclose some internal communications, even though disclosure will have some negative effect on internal deliberation and decision making processes."

As we demonstrate above, this topic is closed. It is no longer live in the form it was in 2018. Therefore, unless MSDC's decision-making processes were, and continue to be, extremely unsound (in which case, it is inappropriate to make a defence that it is against the public interest that this be known), the decision making process (including the evidence base provided for those decisions) cannot possibly cause any negative effect on internal deliberation.

Para 47 states "There is no automatic public interest in withholding information just because it falls within this class-based exception. Neither should there be a blanket policy of non-disclosure for a particular type of internal document.

Para 48 states "Arguments about protecting internal deliberation and decision making processes will often relate to preserving a "safe space" to debate issues away from external scrutiny, and preventing a "chilling effect" on free and frank views in future. The weight of these factors will vary from case to case, depending on the timing of the request and the content and context of the particular information in question.

There follows a careful and detailed explanation of both "safe space" and "Chilling effect" arguments.

Given your argument against disclosure above was

Quote

authorities need to have a safe space in which to develop ideas, debate live issues and reach decisions

Unquote.

You have yourselves identified three separate tests:

1. Are the ideas related to the three routes still being developed, within the context of the request (i.e. for the decisions that led to the 2019 publication of only the eastern and western routes). The clear answer to this is NO.
2. Are the issues that led to the decision still live? Given that you say yourselves that the decision was reached in 2018, that answer, again is clearly NO
3. Are the documents and information we are requesting related to a decision that has not been reached? Given that the 2019 route options excluded any "central route" options? Again, the only possible answer is NO.

It is worth recognising at this point MSDC, having invested a considerable amount of time, effort and unidentified sums of public money in investigation of the eastern and western routes, have apparently discovered what they were told two years earlier concerning the eastern route – that it is unsuitable as it cannot be made suitable for year round use due to it being flooded (being in a local depression, in clay, with limited fall on a river system). We are now told that "other routes, including others brought forward during public engagement, are under active consideration".

We do not ask for any information relating to this, specifically as this is "safe space" and we respect the need for that space. However, when the present author pointed out at a virtual MSDC Council meeting in July, 2020, that MSDC owned the strips of land making up the majority of a potential "central route" it was clear from the faces of the elected councillors that this information was new to them. It was not, however, new. In fact MSDC had already owned the land for 8 years.

Likewise, given the need to find an alternative to a route that went via the Rocky lane underpass, when, again, the present author pointed out that it was perfectly possible (in fact, extremely attractive and interesting) to create a foot/cycle path pair using the dual set of arches within the Valebridge Viaduct, this seemed to be news. The Viaduct is Network Rail property, and therefore a Government body whose remit would reasonably be expected to reflect Government policies related to sustainable transport.

It seems no-one had thought of this. Despite all the experts, reports, consultants and surveyors, it took a non-expert to ask the obvious question. We understand the idea has now been floated with Network Rail and there may be other reasons it would not work. On the face of it, though, it must surely be an attractive and interesting route and help improve public access to Bedelands Nature reserve to the residents of southern Haywards Heath. The point is not that we are attempting to intrude on the safe space for the current set of investigations, but to understand (and, thus, ensure the relevant members of current work groups have access to) the full information related to why the "central" options were rejected originally.

To return to the ICO advice document for public authorities.

Safe Space Arguments

You have quoted from Para 49 above, claiming the need for "safe space"

Para 50 states "The need for a safe space will be strongest when the issue is still live. Once a public authority has made a decision, a safe space for deliberation will no longer be required and the argument will carry little weight" (my emphasis).

It is unfortunate that MSDC's FOI team managed to quote from Para 49 without bothering to read Para 50. As noted above, the decision was made. The issues are no longer live. We suggest the ICO will therefore, being able to read Para 50, come to the conclusion that the safe space argument does not apply.

Para 51 states "Public authorities may also need a safe space for a short time after a decision is made in order to properly promote, explain and defend its key points". The decision was taken in 2018. The policy was presented in 2019. The fact that MSDC has arguably not defended it on the basis of facts is irrelevant. It has had plenty of time to do so.

Chilling Effect Arguments

You have not made any argument on the basis of "chilling effect". Nevertheless, it is relevant to consider this since, as noted above, we are aware that MSDC, having finally recognised reality, have removed the eastern route from contention (but only publicly on the basis of cost-effectiveness, despite the fact that 94% of all responses to the latest round of public engagement was against the plan). What is and what is not still being considered is not public. We have not requested the disclosure of any documents related to this new investigation. However, since it is clear already (and may well become more so once these documents are put in the public domain), that MSDC did not provide the full information to the elected councillors on the working group in the past, it is relevant to consider this.

Para 52 defines chilling effect as "disclosure of internal discussions would inhibit free and frank discussions in the future, and the loss of frankness and candour would damage the quality of advice and lead to poorer decision making".

We believe we have demonstrated that the outcome of that decision making process led to the proposal of two route sets (one since, finally, discounted), neither of which could be considered optimal, whilst rejecting what seems on the face of it to be the best route altogether. This can hardly be held up as a paragon of high quality decision making.

Para 53 states "On the other hand, civil servants and other public officials charged with giving advice are expected to be impartial and robust in meeting their responsibilities, and not easily deterred from expressing their views by the possibility of future disclosure. It is also possible that the threat of future disclosure could actually lead to better quality advice."

We cannot but agree; given the fact that the whole decision on the route or routes seems to have led to one route being rejected on the basis of information available at the time it was adopted, whilst the other set of routes are still dependent upon agreement with HE, whose agreement could equally be sought for a "central route", it seems entirely reasonable that MSDC should take into consideration the high probability of a future FOI request on the decision making process, once the safe space phase is over. It is hard to see how the outcome could be worse.

In summary, related to the specific, limited documents and information requested in the FOI, concerning MSDC and those charged with the decision making process that led to the two routes (and only the two routes) being put forward:

They did have that space.

They developed a policy – completely.

They published that policy – an "eastern" route and a network of "Western" routes.

There were no "central route " options at that point.

This was published in September 2019 on the basis (we have been told) of a decision taken at a meeting in 2018.

The free space to evaluate resulted in what on the face of it seems to be a choice between either an option that fails every high level criteria (the "eastern route") or one that requires significant support from HE, who had publicly stated that support would not be forthcoming. Yet a "central" route – most of which was already within MSDC ownership and was not being used for any other purpose – was definitively rejected.

This was the outcome of the specific task. A definitive, final decision which did specifically excluded what might objectively be considered the optimal outcome.

The overall project will carry on for a considerable time, and free space should be provided for current topics within it. This topic, however, was finalised at some stage prior to the publication of the route map in September 2019.

The above is based upon facts in the public domain.

The guidance published by the ICO clearly states that "safe space arguments no longer apply to it and would carry little weight.

We continue, therefore to ask for full disclosure.

4.4.2

The MSDC District Plan Evidence Base is publicly available information on the MSDC website at:

<https://www.midsussex.gov.uk/planning-building/mid-sussex-district-plan/>

Minutes and agenda of all Council meetings where the District Plan was discussed and approved is publicly available information on the MSDC website at:

<http://midsussex.moderngov.co.uk/uuCoverPage.aspx?bcr=1>

Information on Neighbourhood Plans is publicly available information on the MSDC website at:

<https://www.midsussex.gov.uk/planning-building/neighbourhood-plans/>

We thank MSDC FOI for these links which we are currently digesting.

We would draw your attention (in the context of 4.5.1a below) to the specific documents at <https://www.midsussex.gov.uk/planning-building/mid-sussex-district-plan/examination-library/>

These are the documents proffered up to the examiner as part of the evidence base for the Mid Sussex District Plan. This includes multiple documents, some of which are identified as "draft". Therefore, it is not against MSDC policy to publish, or indeed rely upon, draft documents.

4.5.1a This report is still in draft form. Draft reports are not issued to the general public until they are agreed via the relevant governance process and issued into the public domain through agreed channels. No such instruction was issued and the report remains

in draft form. We will not be releasing the report under EIR exception 12 (4)(d) – the request relates to information still in the course of completion, unfinished documents or to incomplete data. At this point in time a publication date has not yet been determined.

We will frame our response based upon the guidance contained in the ICO document specifically related to this identified exception at <https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/refusing-a-request/#:~:text=If%20a%20request%20relates%20to,time%20the%20request%20is%20made.>

This is the “First Sustrans Report”. We know this exists and we know that it was used to frame policy. I should at this point make clear that when we met up with Sustrans’ representative (Mr Young) to “walk the route” (the eastern route in this case) he was quite open and clear that Sustrans had submitted the report some time before as a separate project to the feasibility report he was being asked to prepare and that it had been used to inform the decision making about which routes to bring forward to

So, given that, let us now analyse the reasons offered as a refusal to provide this.

- a. **“no instruction was issued”** rather implies that MSDC regards what of its documents are, and are not, ultimately public documents is for it to decide, without reference to the statutes and guidance provided. We do not accept that MSDC can “mark its own homework” in this way, given that there is no statutory basis for this action. I can see no argument that it is not in the public interest to see why MSDC came to decide the routes it did, and what other options were proposed, and what the reasons were for rejecting them. From past engagements I have had with the ICO, I cannot see the ICO considering this is not in the public interest, either.
- b. **“the report remains in draft form”**. As noted above, MSDC is happy to rely on (and publish) draft documents as part of the evidence base in other cases, and therefore MSDC’s own actions confirm the fact that it is “in draft form” is entirely irrelevant. I cannot see how the ICO would accept that a council who relies on draft documents as part of its evidence base in other cases, and puts the said documents into the public domain can realistically rely on the fact that it is still a draft as a reasonable reason to withhold it.
- c. **“Information still in the course of completion, unfinished documents”**. We do not know what route options were contained in the first Sustrans report. What we do know is that a set of route options was prepared, and that at the meeting in 2018 this was reduced to the two, specific “eastern” and “Western” route sets. These were the only two options to be put in the public domain and the process used to arrive at those two (and only those two) was completely opaque. However, those two were the only options presented, and they were presented as the only two alternatives. Therefore, to suggest this is “Information still in the course of completion” after at least three years is risible. That MSDC FOI should suggest it implies such a poor level of subcontractor management – that no-one in MSDC requested the original report be finalised after 3 years – that this in itself raises concerns about the robustness of MSDC’s processes, and this the level of public interest in reducing the opaqueness under which MSDC considers it has a right to operate at present.
- d. **“Incomplete data”** In what way could MSDC possibly argue the data contained in this report are incomplete? There are two options here; either the report was known to be incomplete when submitted, in which case it is a fair public interest question to ask (a) why is this still the case and (b) what was MSDC doing taking

decisions on knowingly incomplete data? – or the data as submitted were complete, in which case this does not apply.

- e. **“At this point a publication date has not yet been determined”** – again, as in (a) above – why not? I cannot see that the ICO would accept that a report submitted some time prior to 2018 (as far as we understand), that was used to determine which route options would be carried forward (and, clearly which would be dropped, including the one Sustrans’ own high level design criteria should have placed as the optimal route (the “central option”), and which led to the feasibility study – also by Sustrans – that has been published – should remain buried.

4.5.1b, c, d – There is no information on file.

For the avoidance of doubt, the information requested here is:

4.5.1 b: what information was provided to Sustrans by MSDC for their first report. MSDC FOI is actually telling us there is no record on file of what was provided to Sustrans by MSDC? Is the Council saying that its engagement with sub-contractors is so poorly managed that no information was provided, or that it simply has failed to keep and maintain the records as required by statute? This is an entirely implausible proposition – we hope. If it is genuinely correct that MSDC kept no records of what – if anything – it provided then that is of significant public interest.

4.5.1 c: This related to whether MSDC informed Sustrans that MSDC owned the majority of the “central route”. Note that in the second Sustrans report (feasibility study), the author made a point of stating that Land Registry titles had been retrieved for all routes, however, this was a feasibility study level. It may therefore have been that Sustrans either did not consider land ownership at all in the first report (which would be very strange, given its first order impact on deliverability), or they did this themselves. However, we would suggest the ICO would say it is unarguably a public interest issue if MSDC did not provide this critical piece of information, since the strips they own were not used for any other purpose.

4.5.1 d: This refers to the minutes where the first Sustrans report was discussed and the decisions taken on which recommended routes to carry forward. In this regard, we know that two routes were carried into the public domain. We know that these, plus some sort of central route (possibly) were contained in the Sustrans report. We know that a decision to drop the central route was taken in 2018. Therefore, the report must have been used to select the priority routes. That MSDC are stating that no records of the meeting(s) at which these decisions were taken exists either means the first Sustrans report was never presented (and we know from speaking to councillors that it was) or the required records of this meeting were either never made or not retained. I believe the ICO would find this both hard to accept, and in any case, an insufficient excuse. This is not a question of MSDC marking its own homework, it is MSDC saying it couldn’t be bothered even to do it, and this is being presented as a reasonable and sufficient excuse.

We do not consider any of these to be acceptable and reiterated our demand that the documents be provided.

4.6.1 - With regard to steering group meetings, the Council is entitled to apply an exemption if it believes one exists. In this particular case we believe that the EIR - exception 12 (4) (e). This exemption is subject to the public interest test. In this particular case it is considered that the public interest in releasing the information does not outweigh the public interest in withholding the information. The working group need to have a safe space in which to debate issues and reach decisions away from external

interference and distraction. Any conclusions that the group reach will be made public in the form of reports to a committee.

We do not wish to re-iterate what has gone before regarding safe space arguments. For the avoidance of doubt, we are not requesting recent steering group meetings, which we would consider should be subject to safe space arguments at this stage. We are asking about a decision taken in July 2018, so almost three years ago, which resulted in the central route being de-selected, and which was not carried forward into the public domain as an option for discussion. So, - for the avoidance of doubt. Unarguably this decision process was completed in 2018. It does not therefore qualify as current according to the interpretation placed upon the rules by the ICO. Nor can it be considered incomplete as no central route was ever brought into the public domain for scrutiny, so this was closed (finished) at that point. Thus, as previously noted, we cannot see that the ICO will accept any "safe space" or "Chilling effect" arguments. Once again, MSDC seems to consider it can mark its own homework by stating that the public interest in understanding what was included, what was excluded, and for what reasons, and on what basis and with what evidence, is less than the public interest in – what, precisely?

There was no external interference. The central route had been considered (because at this stage it was "de-prioritised"). The eastern and western routes, and ONLY these two, were carried into the public domain by an entirely opaque process.

I remind you that the eastern route has recently (December 2020) been rejected, officially on the basis that the cost to drain it and the cost to maintain it render it non-cost-effective. The knowledge that the route is frequently flooded in winter has been common knowledge in the local community since time immemorial and certainly for the last fifty years or so. The fact that the route is surrounded on both sides by ancient hedgerow and trees (and therefore there would be a significant cost to maintain the route) has also been known for at least a century. The fact that it is indirect, partly along roads and therefore less attractive is also obvious immediately from a map. The fact that our calculations indicate only 8 commuter cyclists would use it (it is already widely used by both pedestrians and equestrians) came from the 2011 census – public domain data.

So, with all this evidence and information readily available to MSDC, they still came to a decision to include the eastern route, in fact to suggest it was the preferred option – in 2019. I believe the ICO, when provided with all the information that was available at the time to MSDC in the public domain (let alone whatever proprietary information MSDC might have had) – would agree with us that the public interest in finding out why such a decision should be made, and then changed, significantly outweighs the public interest in ensuring total opacity in how those decisions were taken.

4.7.2 – Please see response to 4.6.1 above

Please see our response to your response in 4.6.1 above. We are confident the ICO guidelines strongly indicate that there is no "commercial interest" remaining in this decision.

4.8.2 – The report in question belongs to WSCC and you would need to contact them regarding this, foi@westsussex.gov.uk.

MSDC FOI is (apparently) wilfully misunderstanding our question, which, for the sake of clarity, relates not to the WSCC report, which is in the public domain, but as to why, and how, MSDC, having access to this report and its recommendations, decided to ignore it. This is NOT in the public domain. It led, as seen above, to some poor decision making (some of which has since been rescinded, as noted in 4.6.1 above) and we believe the ICO would not consider it is not in the public interest to understand why.

4.9.2 – At the meeting held with the residents association (noted in the request that it was only stated that it is known what the Census data shows) and it has only ever been quoted in its available form from the Census 2011. It has not been presented in any public domain documents or used as a basis for demand analysis given it is based on current difficult conditions.

We find this, frankly astonishing. For the avoidance of doubt, you are confirming that no objective, fact-based demand analysis was EVER carried out by MSDC and that the numbers presented from the 2011 census at the meeting with the Residents' Association were the **first time** that MSDC *actually looked at what the real demand would be* – despite multiple years on developing the various route options, spending who knows how much public money on plans, surveys, consultants and all the rest, investing weeks and weeks of council officers' time, not to mention elected councillors?

This data has been in the public domain since well before the first ideas of the plans were even developed. It took this author, a complete amateur, *three weeks* to learn how to extract the data and to do an objective analysis, also to ensure that these would be up to date by correlating with the Sport England annual sustainable travel report to ensure travel attitudes were unchanged. This is incompetence on an almost majestic scale. A person failing to do such simple, basic, easy, quick analysis in private industry would not expect to retain their job for long.

Yet, this is what MSDC is stating. Somehow – for the avoidance of doubt – MSDC FOI is claiming that the public interest is best served by such information being withheld, that decision-making processes and meeting minutes which give rise to such poor decision making should be kept hidden. We do not see that the ICO would buy such logic, given the outcomes that there have been.

End of appeal notes

If for whatever reason you are unhappy with our response you are entitled to pursue any dissatisfaction, in the first instance, by contacting Tom Clark, Solicitor to the Council, [REDACTED]

[REDACTED] email:, quoting your Reference Number, and if an exemption/exception has been applied, stating your reasons why you believe the public interest is best served by the release of the withheld information.

If you still remain dissatisfied with the response you can complain to the Information Commissioner - details available at: <https://ico.org.uk/concerns/>.

Information provided under the FOI Act 2000 or the Environmental Information Regulations 2004 may be not be re-used, except for personal study and non-commercial research or for news reporting and reviews, without the permission of the Council. Please see the Council website <https://www.midsussex.gov.uk/about-us/open-government-licence/>, for further information or contact the FOI Team on 01444 477422.

yours sincerely,

FOI/DPA Team

Digital and Technology

[REDACTED]
foi@midsussex.gov.uk

<http://www.midsussex.gov.uk/my-council/freedom-of-information/>

Working together for a better Mid Sussex

OFFICIAL

From: Robin Walker

Sent: 19 February 2021 15:31

To: Freedom of Information

Cc: Tom Clark 'Theobalds Road'

Subject: Freedom of Information Request - MSDC's decision process related to the Burgess Hill to Haywards Heath link

Dear sirs,

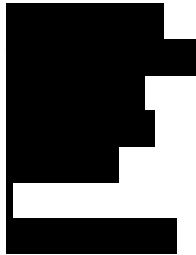
Please find attached the FOI request document appended.

We look forward to your full response within the required timeline.

Kind regards

Robin Walker

For and on behalf of the Theobalds bridleway users and residents group

A large black rectangular redaction box covering the signature and name of the sender.