

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

Decision notice

Date: 2 November 2020

Public Authority: Liverpool City Council
Address: Cunard Building
Water Street
Liverpool
L3 1AH

Decision (including any steps ordered)

1. The complainant requested from Liverpool City Council (the Council) information in relation to two planning applications. The Council provided the complainant with what it stated was all the information it held within the scope of the request. However, the complainant was not satisfied with the amount of the information received.
2. The Commissioner's decision is that, on the balance of probabilities, the Council is correct when it says that it holds no further information within the scope of the request. However, the Commissioner found that the Council breached regulation 5(2) of the EIR by failing to provide information it held within 20 working days.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 31 January 2020, the complainant wrote to the Council and requested information in the following terms:

"I would like to see electronic copies of the following three documents

- *the case officer report to planning application reference 14F/2269,*
- *the case officer report to planning application reference 17F/0318,*
and
- *the elevation drawing received 3/12/14 referred to in condition (2) on the decision notice granting planning permission for planning application reference 14F/2269.*

The above documents are not currently available for public view on the Council website."

5. On 9 March 2020, the Council responded. It provided the complainant with the information it considered to fall within the scope of part 1 and part 2 of the request. In relation to the information requested in part 3 of the request, the Council informed the complainant that it was held in an off-site archive storage and was in the process of being retrieved but that it had not been retrieved by the date of this response.

6. Remaining dissatisfied with the response received, on 10 March 2020 the complainant wrote to the Council requesting an internal review. He stated:

"Both documents attached to your letter are available on the Council website and while I appreciate they are named as 'Officer Report Delegated ...' they are in fact draft versions of the decision notice and not actual case officer reports."

7. Following the Commissioner's involvement, the Council provided the complainant with the outcome of its internal review on 4 June 2020. The Council changed its position in relation to the applicable access regime, and in its internal review found that the request should have been dealt with under the EIR rather than the FOIA. The Council admitted that it failed to provide the complainant with a response to his initial information request within the statutory deadline due to the challenges emerging from the Covid-19 outbreak and offered him an apology. In relation to part 1 and part 2 of the request, the Council amended its position and stated that all the information held within the scope of these requests was accessible through the Council's planning portal. At this stage, the Council also provided a copy of the document requested in part 3 of the information request, that is the elevation drawing received on 3 December 2014.

Scope of the case

8. The complainant contacted the Commissioner on 27 March 2020 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation, the complainant confirmed that the additional information provided in the outcome of the Council's internal review, satisfied part 3 of his information request. However, he maintained that the Council should be in possession of further information regarding part 1 and part 2 of his information request.
10. The following analysis determines whether the Council complied with regulation 5(1) of the EIR, when it stated that it held no further information within the scope of part 1 and part 2 of the request beyond what was already disclosed in its planning portal.

Reasons for decision

Is the requested information environmental?

11. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (a) *the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
 - (b) *factors, such as substances, energy, noise, radiation or waste, 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)...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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*

12. The Commissioner considers that, as the information requested in this case is related to planning matters, it is highly likely to affect the elements and factors of the environment as defined at regulations 2(1)(a) and 2(1)(b). She is therefore satisfied that the information falls within the definition of environmental information at regulation 2(1)(c) of the EIR.

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

13. Regulation 5(1) of the EIR states that *“a public authority that holds environmental information shall make it available on request.”* This is subject to any exceptions that may apply.

14. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. She will also consider the actions taken by the authority to establish what information within the scope of the request it held, and any other reasons offered by the public authority to explain why further information is not held. She will also consider any reason why it is inherently likely or unlikely that further information is not held.

15. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072) in which it was stated that *“there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records”*. It clarified that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test that the Commissioner has applied in this case.

16. In discussing the application of the balance of probabilities test, the Tribunal stated that, *“We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the*

existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed." The Commissioner has therefore taken the above factors into account in determining whether or not further information is held, on the balance of probabilities.

17. As part of her investigation, the Commissioner wrote to the Council requesting submissions in respect of a number of questions relating to the concerns raised by the complainant. The Commissioner's questions were focused on the Council's endeavours in providing the requested information to the complainant, its searches conducted in relation to the complainant's request, and whether any of the information falling within the scope of the requests was deleted or destroyed.
18. The Council informed the Commissioner that in preparing the response to the complainant its relevant officers in its Planning & Regeneration Departments and Legal Services were asked to provide their inputs. The Council stated that *"In addition, email and telephone contact was made with the Head of Planning, Planning Team Leaders for City Centre, North and South Liverpool together with the named Case Officer who dealt with this specific issue."* The Council also stated that, in relation to this matter, it made contact with its Environmental Health Officers, Building Officers, Planning Enforcement Officers and Legal Services. The Council confirmed that the report issued, that is accessible through its planning portal, is the final and only version of the requested report.
19. The complainant told the Commissioner that he compared the documents provided in response to his request with case officer reports from other cases that the Council dealt with unrelated to his request. The complainant argued that the other case reports were more detailed and extensive. For the purpose of illustrating this difference the complainant provided the Commissioner with a copy of a different unrelated planning application.
20. In response to the complainant's argument above, the Council provided the following explanation:

"The wide ranging nature and differing extent of Applications for Planning Permission received by the City Council are reflected in Case Officer Reports of varying length, detail and complexity reflecting the specific issues to be considered for each development, each of which is also considered on its own merits."
21. The Council stated that the relevant planning officers are qualified with requisite qualifications, knowledge and experience on the local and

national planning frameworks and based on their considerations they decide the amount of information they include in the documents that they produce.

22. The Council confirmed that the case officers reports relevant to the complainant's information request that were uploaded in its planning portal are sole and final reports and they are entirely professional assessments.
23. The Council told the Commissioner in its efforts to identify the information held within the scope of the complainant's request, it conducted a combination of manual and electronic searches. Initially, searches were focused in the Council's *Planning Explorer* facility using a range of search terms, such as "14F/2269", "2269", "17F/0318", "0318", "339 Smithdown Road", "339&Smithdown", " L15 3JJ", "Greenbank Galleries".
24. The Council stated that the Head of Planning and Legal Services held a discussion with the leader of the relevant planning team on this matter. Following this, *"a total of 27 Officers conducted electronic searches of their personal folders and mailboxes utilising the search terms including '14F/2269', '2269', '17F/0318', '0318', '339 Smithdown Road', '339&Smithdown', 'L15 3JJ', 'Greenbank Galleries'".*
25. In addition, the Council undertook additional examination of physical records held within the Planning Department, Legal Services, Building Control and Environmental Health departments. The Council confirmed that *"No additional information or prior/subsequent versions of the reports were identified."*
26. The Council told the Commissioner that following her investigation letter, the above searches were repeated, but did not produce a different result.
27. The Council stated that information of this type would normally be held in electronic format. Nevertheless, for completeness it carried out searches on all the potential forms in which the requested information may have been held.

28. The Council provided the Commissioner with a link to its Retention Schedule and Policy¹ and it stated that the type of information requested (case officers reports) would be retained for 15 years from the date of receipt.
29. The Commissioner asked the Council whether any information within the scope of the information request had been deleted or destroyed. The Council stated that *"all relevant information is retained and has been reviewed."*
30. The Commissioner asked the Council about the legal requirements and business purpose of holding information of the type sought by the complainant. The Council stated that as a local planning authority, in processing and dealing with planning applications it is bound by the requirements of the Town and Country Planning Acts and Local and National Planning Policy Frameworks. The Council explained that it ensures that the above requirements are complied with in the processes of gathering and assessment of submissions. That extends to the production of case officer reports which are produced and retained as above.
31. In concluding its response to the Commissioner's investigation letter, the Council confirmed that *"no further information of relevance is held nor is there an alternative category or type of information which we could offer."*
32. The Commissioner has carefully examined the submissions of both parties. She has considered the searches performed by the Council, the information it disclosed, the Council's explanations as to why there is no further information held and the complainant's concerns.
33. Having considered the scope of the request, the Commissioner is satisfied that the Council carried out appropriate searches to identify all relevant information that was held at the time of the request.
34. The Commissioner appreciates the complainant's concerns, however, in the absence of evidence to the contrary, the Commissioner is satisfied that the Council has provided the complainant with all of the relevant information which it held, falling within the scope of the request.

¹ <https://liverpool.gov.uk/media/1356960/lcc-retention-and-disposal-schedule-v6-2-2020.pdf>

35. Consequently, the Commissioner is of the view that, on the balance of probabilities, the Council did not hold further information within the scope of the request.

Regulation 5(2) of the EIR – Time to respond

36. As explained above, Regulation 5(1) requires a public authority to provide information it holds when requested. Regulation 5(2) of the EIR requires this information to be provided to the requestor within 20 working days following receipt of the request.
37. The complainant requested the information on 31 January 2020 and the Council provided part of the information held on 9 March 2020.
38. Additional information held was provided to the complainant on 4 June 2020, with the outcome of the Council's internal review.
39. This is a period of more than the required 20 working days. Therefore the Commissioner finds that the Council breached regulation 5(2) of the EIR.
40. However, as the Commissioner's conclusion above was that, on balance of probabilities, the Council has disclosed all the information held relevant to the complainant's information request, the Council is not required to take any further step.

Right of appeal

41. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Ben Tomes
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