

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

Date: 11 July 2022

Public Authority: Brighton & Hove City Council
Address: Bartholomew House
Bartholomew Square
Brighton
BN1 1JE

Decision (including any steps ordered)

1. The complainant has requested information concerning a redevelopment project. At the date of this notice, Brighton & Hove City Council (“the Council”) had failed to carry out a reconsideration (internal review) of its original response.
2. The Commissioner’s decision is that the Council has breached Regulation 11 of the EIR.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Reconsider how it responded to the original request and inform the complainant of the outcome of that reconsideration in accordance with Regulation 11 of the EIR.
4. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Freedom of Information Act and may be dealt with as a contempt of court.

Request and response

5. On 30 November 2021, the complainant wrote to the Council and requested information in the following terms:

“We request to see details of 300 sequential items of all email and written correspondence on planning matters between BHCC and the Berkeley/St William Group relating to the Gasworks site in the (unspecified) period ending on and immediately prior to May 31 2020.

“This should include all correspondence in both directions, and include relevant dates and content.

“The start date of the correspondence would obviously need to relate to when the first of those 300 items of correspondence was sent. This is not a date we are able to specify without knowing details of the correspondence.”
6. The Council failed to respond to the request within 20 working days and the Commissioner was required to issue decision notice IC-148704-L9R0 in order to get the Council to comply with its obligations under EIR.
7. The Council finally issued its response on 23 March 2022. It relied on Regulation 12(4)(b) of the EIR (manifestly unreasonable) to refuse the request.
8. The complainant requested a review on 6 April 2022, but the Council had not completed its review at the date of this notice.

Scope of the case

9. The complainant contacted the Commissioner on 15 June 2022 to complain about the failure, of the Council, to complete an internal review.
10. In line with his usual practice, the Commissioner contacted the Council on 16 June 2022 to highlight the outstanding response. He requested that the Council complete its reconsiderations within 5 working days.
11. The Council responded to the Commissioner on 23 June 2022. It indicated that it may be able to disclose some information, but argued that it needed more time to consult third parties. It asked for an extension until 8 July 2022. Given that issuing a decision notice would not have required the Council to respond any sooner, the complainant agreed to this extension.

12. On 8 July 2022, the Council contacted the complainant and the Commissioner once again. It asked for a further two weeks in order to consult third parties.
13. The Complainant contacted the Commissioner on the same day to request a decision notice considering the Council's compliance with the EIR.
14. The scope of the Commissioner's investigation is to determine whether the Council has complied with Regulation 11 of the EIR.
15. For the avoidance of doubt, the Commissioner has not yet considered and therefore takes no position on, whether the Council was entitled to rely on Regulation 12(4)(b) of the EIR to refuse the request.

Reasons for decision

16. The Commissioner set out, in decision notice IC-148704-L9R0, why he considered the requested information to be environmental.¹ He does not repeat that analysis here.

Reconsideration/Internal Review

17. Regulation 11 of the EIR states that:
 - (1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.
 - (2) Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.
 - (3) The public authority shall on receipt of the representations and free of charge—

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4019642/ic-148704-l9r0.pdf>

- (a) consider them and any supporting evidence produced by the applicant; and
 - (b) decide if it has complied with the requirement.
- (4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.
- (5) Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of—
 - (a) the failure to comply;
 - (b) the action the authority has decided to take to comply with the requirement; and
 - (c) the period within which that action is to be taken.
- 18. From the evidence presented to the Commissioner in this case it is clear that, in failing to carry out an internal review within 40 working days the Council has breached Regulation 11 of the EIR.
- 19. The Commissioner is particularly disappointed that this is the second decision notice he has had to issue to require the Council to comply with its EIR obligations in respect of this request.

Other Matters

- 20. The Council has indicated that the delays in completing its internal review have been caused by the need to consult third parties. The Commissioner recognises that it is always desirable to consult any affected parties about disclosure and a public authority may be unable to apply some EIR exceptions without input from the parties affected.
- 21. However, if a public authority does need to consult, it must set clear deadlines for the response to be provided. Furthermore, the public authority should make it clear that, once the deadline has expired, it will be making its own decision on disclosure, with or without third party input. There should be a clear onus, on the third party, to justify any objections in a timely manner so that the public authority can meet its statutory obligations.
- 22. The legal obligation to respond, to disclose information or withhold information under EIR lies, at all times, with the public authority.

Right of appeal

23. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

24. 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.
25. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF