

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 6 July 2022

Public Authority: London Borough of Ealing
Address: Perceval House
14/16 Uxbridge Road
Ealing
W5 2HL

Decision (including any steps ordered)

1. The complainant has requested information held by the London Borough of Ealing (the council) about a particular planning matter.
2. The council advised the complainant that some of the requested information was to be withheld under regulation 12(5)(b) - the course of justice, regulation 12(5)(e) - commercial confidentiality, and regulation 12(5)(f) - interests of the information provider, of the EIR.
3. During the Commissioner's investigation the council then stated that it had now found that it did not hold any additional information that was relevant to the request.
4. It is the Commissioner's decision that the officer's notes recently provided to him by the council fall within the scope of the request. However, he accepts that, on the balance of probabilities, the council does not hold any other information relevant to the request.
5. As the council failed to issue a refusal notice, and its internal review response, within the required statutory time periods, the Commissioner has found there to be a breach of regulation 14, and regulation 11(4), of the EIR.
6. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the complainant in relation to the officer's notes.

7. 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 FOIA and may be dealt with as a contempt of court.

Request and response

8. On 23 December 2020, the complainant wrote to the council and requested information in the following terms:

'Question 23 of the planning application to redevelop Perceval House, in which the London Borough Ealing is a joint applicant, asks whether assistance or prior advice has been sought from the Local Authority. The answer given is that a 'Series of pre-application meetings (were) held between March 2019 and June 2020 to discuss the proposed development and provision of written pre-application advice in letter dated 17th June 2020'.

I would be grateful if you would provide me with a full record of all of these meetings (whether they were held face to face or electronically) including the dates they were held, all the participants, their agendas and the full minutes, records or notes taken by the Local Authority or by its individual officers. I would also be grateful for complete copies of the notes and records of all one-to-one discussions between the applicants and the Local Authority whether they took place face to face or by telephone.

Given that the Borough selected Galliford Try as its development partner in June 2017, and agreed a development agreement with them in December of that year it is surprising to read on the planning application form that no assistance or prior advice was provided to the applicants by the Local Authority prior to March 2019.

I would be grateful for your confirmation that this was in fact the case. If it was not, I would be grateful for the full records of all discussions to do with the development in which the Local Authority was involved before that date.

Given that the development plans have been further amended since the 17th June 2020, I would be grateful for the full records of all discussions to do with the development in which the Local Authority has been involved since that date.

Please treat this request as having been made under the provisions of the FoI and Environmental Information Regulations.

I therefore look forward to receiving your response within 20 working days.'

9. On 17 February 2021, the council provided the complainant with some explanations about matters relating to the request. It also provided a link to information published on its website; this included details of the pre-planning engagement set out within the planning statement submitted by the planning applicant, and a copy of the local planning authority's written feedback.
10. The council then went on to confirm to the complainant that it was withholding information under regulation 12(5)(b), regulation 12(5)(e), and regulation 12(5)(f), of the EIR.
11. On 18 February 2021, the complainant requested an internal review, and on 22 April 2021, the council provided its response, upholding its original decision.

Scope of the case

12. The complainant first contacted the Commissioner on 8 April 2021, to complain that the council had failed to provide its internal review response.
13. On 5 May 2021, the complainant raised concerns about the internal review response that they had by then received.
14. Following receipt of the Commissioner's letter of investigation, the council confirmed that it had reviewed its handling of the request, and on 16 May 2022, it issued a revised response to the complainant.
15. The council explained why Galliford Try had not approached the planning authority for pre-application advice before March 2019. It then went on to say that, upon further review, it had now found that it did not hold any additional information that was relevant to the request.
16. The complainant has said that they are not satisfied with the council's revised response to their request, stating that they believe that additional information is held.
17. The complainant has said that the council has failed to provide most of the information they have requested relating to pre-application meetings and discussions that took place between the planning authority and the applicant. They state that, given that certain controversial changes were made to the proposals, recorded information must be held about this, including the names of the attendees at the meetings, the agendas and

full minutes, records and notes taken by the officers, as well as all telephone and direct discussions that took place.

18. The Commissioner will decide whether, on the balance of probabilities, the council has provided the complainant with all the information that is held that is relevant to the request.

Reasons for decision

Regulation 5(1) of the EIR – duty to make environmental information available on request

19. 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.
20. 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 arguments. He will also consider the actions taken by the public authority to establish what information within the scope of the request it held, and any other reasons offered to explain why further information is not held. He will also consider any reason why it is inherently likely, or unlikely, that further information is not held.
21. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

The complainant's position

22. The complainant has stated that, given that at least 22 pre-application meetings took place, the council must, at the very least, hold records relating to these, and also the one to one discussions that took place with the planning applicant.
23. The complainant goes on to say that the planning statement refers to 'pre-application feedback' and that parts of the plan had been explained by the applicant's design team during pre-application discussions.
24. The complainant has referred to one example of a change to the original proposals for the site; the planned height of one building increased from 20 to 26 floors. The complainant has said that this change had been extremely controversial, and argues that recorded discussions between parties must have taken place about this.

The council's position

25. The council has said that, upon receipt of the complainant's request, the information governance team consulted with the relevant service area and was advised that the information requested was 'subject to an exception'.
26. The council then goes on to say that, following receipt of the Commissioner's letter of investigation, searches were conducted in order to identify what information was held that was relevant to the request. It has confirmed that this included a search of electronic records using the site address of 'Perceval/Perceval House', and that the relevant planning case file has also been checked.
27. The council has also advised that further checks were made to ascertain whether officers involved with the relevant planning matter hold any information on their email accounts, or any written notes.
28. The council has explained that Perceval House, which is the council's central office in Ealing, forms part of the development of the site which is relevant to the complainant's request. It states that in preparation for its closure, and also as a result of the onset of the Covid-19 pandemic (which it has said occurred around the same time), officers were required to clear the relevant areas of anything which it was not necessary to retain.
29. The council has gone on to say that one officer has retained a notebook which does contain some information about the relevant planning application. The council has provided the Commissioner with a copy of some extremely brief notes that are contained within the notebook – the dates of these notes coincide with the dates of six of the pre-planning meetings that took place.
30. The council has advised that this information has been provided to the Commissioner for the purposes of transparency, as the sole purpose of the notes had been to 'aid recording any relevant information onto the case file.'
31. The council has also confirmed that there is no policy to take notes at pre-application meetings, although officers may take their own notes, as an aide memoire, where it is appropriate and helpful; for example, to assist with their drafting of the formal pre-application advice letter to the planning applicant.
32. The council has said that it does not hold a record of the destruction of any formal recorded information relating to the relevant planning application. It goes on to say that the only information that would have

been destroyed would be personal notes taken by officers, which would have been disposed of when they were no longer required.

33. With regard to any formal record of the attendees of pre-application meetings, the council states that these are a matter for 'Officer discretion according to the individual circumstances of the case', indicating that there is no policy in place which would require the attendees at such meetings to be recorded.

The Commissioner's view

34. With regard to the notes that the council has now identified, it is the Commissioner's view that, whilst they are extremely brief, they do form recorded information that would fall within the scope of the request.
35. Given this, it is the Commissioner's decision that the council should now issue a fresh response with regard to this information, and either disclose the information, or issue an appropriate refusal notice, to the complainant.
36. With regard to the question as to whether any additional information is held, it should be noted that the Commissioner is not required to consider whether a public authority should hold information that has been requested but rather whether, on the balance of probabilities, it does, or does not, hold it.
37. The Commissioner is satisfied that the council has provided a reasonable explanation as to why no other information is held; in particular, he considers it to be pertinent that there is no requirement to take minutes or hold formal records of pre-planning advice meetings or the attendees, and that any informal notes that may be taken about any discussions are destroyed by officers once they are no longer required.
38. There is no evidence that has been made available to the Commissioner that would indicate that any further information relevant to the complainant's request is likely to be held by the council. Having considered the information that was disclosed, the Commissioner does not note any direct reference to other information that has not been disclosed.
39. The Commissioner is therefore satisfied that, with the exception of the notes that have recently been identified, on the balance of probabilities, the council has provided all the information that it holds that is relevant to the request.
40. However, the Commissioner has found that the council has breached regulation 14 of the EIR, as it failed to issue its refusal notice to the complainant within the required 20 working days. The Commissioner has

also determined that there has been a breach of regulation 11(4) of the EIR, as the council slightly exceeded the 40 working day time period when issuing its internal review response.

Other matters

41. The Commissioner regards it to be necessary to formally record his concerns about the council's poor handling of this request.
42. The council has said that it was advised by the relevant service area that the further information in addition to that which was disclosed was held and that this information was subject to the exceptions cited in its original response to the complainant. It is not clear how the service area formed this view, or how the internal reviewing officer then came to reach the same conclusion.
43. The internal review process provides an opportunity for a public authority to correct any failings that may have occurred at the time of the initial response to the request. However, in this instance, it was only at the stage of the Commissioner's intervention that it would appear that a full and proper search was conducted, and that it was confirmed that no additional information was held. Even that further assurance was incorrect in relation to the officer's notes.
44. The Commissioner would not expect a large public authority like the council to handle an information request so badly. Its responses were misleading, and led the complainant to believe that significant additional information was held, when it later transpired that this was not the case.
45. The council must now conduct a proper review of its processes, and take any action necessary to prevent a repeat of the failings that have occurred in this case. It must ensure that upon receipt of an information request it thoroughly establishes what information within the scope of the request is held, prior to citing any exception. The receipt of similar complaints in the future may lead the Commissioner to revisit this matter.

Right of appeal

46. 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

47. 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.
48. 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

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