

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

**Decision notice**

**Date:** 5 April 2018

**Public Authority:** London Borough of Merton  
**Address:** Civic Centre  
London Road  
Morden  
SM4 5DX

**Decision (including any steps ordered)**

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1. The complainant has requested information relating to a planning application. The Council released a large volume of information in response and additional information was released at the internal review stage. Believing there was still more information held, the complainant complained to the Commissioner. During the Commissioner's investigation some further information was identified and disclosed.
2. The Commissioner's decision is that the Council has now released all the information captured by the request save for some very minor redactions that were made to protect personal data. However as the information was not communicated within the time limits set out in the legislation the Commissioner finds the Council has breached regulation 5(2) of the EIR.
3. The Commissioner does not however require the public authority to take any further action in this matter.

**Request and response**

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4. On 25 June 2017 the complainant requested information of the following description:

"... I would like to request all correspondence and notes on file you have in relation to the planning application 16/P1092.

I am particularly interested in any correspondence between planners, elected council officials and the applicant."

5. The Council acknowledged receipt of this request on 26 June 2017. Having not received a response the complainant chased the Council's FOI team on 24 July 2017 and on the same day made the following, similar, request to the Council's planning department:

"I am interested in all the file notes, discussion notes and all emails and documents related to application [reference number of specific planning application], not including those documents already available on the portal...."
6. The Council provided her with a large amount of information on 27 July 2017.
7. On 28 July 2017 the complainant wrote to the Council identifying correspondence which she believed to be missing from this information. This resulted in some additional information being provided on 4 August 2017. At this stage the Council were dealing with her request under the FOIA and some information was withheld from those emails under section 40(2) of the Freedom of Information Act 2000 (FOIA) on the basis that it was the personal data of third parties. The Council also explained that some of the information that had been requested may be held in the email accounts of officers who had since left the Council and that it was attempting to access their email accounts.
8. On 7 August 2017 the complainant emailed the Council arguing that the information it had provided was still incomplete. The Council responded on 10 August 2017. It did provide some further information, which again had been redacted to remove personal data. The Council advised the complainant that it was continuing to try and access the email accounts of the two officers who had left. On the 14 August 2017 the complainant chased the Council for its final response and also queried the lack of any correspondence from a named architect and a named planning consultant.
9. The complainant contacted the Commissioner on 21 August 2017 to complain about the Council's handling of her request and this led to the Commissioner writing to the Council and advising it to conduct an internal review of how it had responded to the request. The Council completed its review on 28 September 2017. It now recognised that the request should have been considered under the EIR and that therefore where it had previously referred to withholding information under section 40 of FOIA it should have referred to the equivalent regulation, regulation 13, of the EIR.

10. By the end of the internal review the Council had accessed the email accounts of the two officers who had left its employ and provided the complainant with some additional information from those accounts.
11. In respect of other information which the complainant believed to be held, the council advised her that no such information had been found and that it had concluded this information was not held.

### **Scope of the case**

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12. Following the internal review the complainant contacted the Commissioner on 5 October 2017 to complain about the way her request for information had been handled. The complainant believed that there was still missing information. In particular she provided evidence that there was a gap in one particular email chain which the Council had provided her with and believed there may be additional correspondence to and from two named councillors involved in the planning application. During the course of the investigation she also queried whether she had received all the correspondence to and from another named councillor and whether the Council had disclosed all the attachments referred to in the emails which had already released. Finally she queried whether the Council had sent her an email chain in response to her request that she obtained as part of a separate complaints procedure.
13. The Commissioner considers the matter to be decided is whether the Council has now identified and released all the information captured by the request, save for the very limited amount of information (for example personal mobile telephone numbers) that has been withheld under regulation 13 on the basis that it is the personal data of third parties. The requirement to provide information upon request is set out in regulation 5(1)
14. The Commissioner will also consider whether the Council complied with regulation 5(2) which requires a public authority to disclose information within 20 working days of a request being received. To avoid any confusion, the Commissioner considers that the original request made on 25 June 2015 is broad enough to capture all the information referred to in the complainant's request of 24 July 2017. Therefore when considering the application of regulation 5(2) the Commissioner considers the twenty working days commences the day following the receipt of the first request on 25 June 2017.

### **Reasons for decision**

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**Regulation 5(1) - the duty to make the environmental information held available on request.**

15. Regulation 5(1) states that, subject to the application of various exceptions a public authority that holds environmental information shall make it available on request.
16. Where there is a dispute about the amount of information held the Commissioner is required to make a decision whether any additional information is held based on the civil standard of proof, i.e. whether on the balance of probabilities the public authority holds any additional information. In line with this approach the Commissioner considered each of the complainant's arguments and put these to the Council. In addition the Council explained what searches it had undertaken to locate the information captured by the request.
17. The first issue raised by the complainant was an apparent gap in a particular chain of emails. Immediately following a meeting of the Council's Planning Applications Committee a member of the public emailed the Committee's chairperson, (a councillor) with a complaint. That complaint ultimately led to a planning officer responding to the member of the public. When providing that response he included a copy of the member of public's email of complaint that had originally been sent to the committee's chair person. It follows that at some point the chairperson had forwarded the email of complaint on to the planning officer. However the complainant could not find the chairperson's email forwarding the email of complaint to the planning officer within any of the information which the Council had disclosed. She believed it may contain directions from the chairperson to the planning officer on how to respond to the complaint.
18. The Council easily identified a copy of the missing email and explained that it believed it had already been disclosed. The Commissioner notes that the copy of that email which was provided to the Commissioner had been annotated at the time the internal review was being carried to indicate that the reviewing officer thought it had been disclosed. However in light of the complainant's representations, the Council sent her a copy of the email during the Commissioner's investigation. The forwarding email in question is very short, a simple note from the chairperson asking the planning officer to respond to the member of the public's complaint. The planning officer did respond to the member of the public twelve days later, after making a site visit which was necessary to deal with the matter in question. The Council has said that it is entirely plausible that the planning officer would not have needed to correspond with the chairperson during the intervening period. The Commissioner accepts this explanation and is satisfied that are no other links missing from that particular email chain and that the Council has dealt with this element of the request.

19. The complainant is also concerned that there were missing emails from three councillors. This seems to be based on the fact that the email chains which included emails from these councillors had all been forwarded to the team collating the requested information from council officers, rather than being provided by the councillors themselves. This led the complainant to query whether the individual councillors had been asked to search their own email accounts.
20. The Commissioner first asked the Council to explain the role the named councillors had in the planning matter which is the focus of the request. This was necessary to ensure that any information they held was in fact held by them on behalf of the Council as opposed to being held in their capacity as ward councillors. The Commissioner understands that all the councillors were acting in their capacity as members of the Planning Application Committee and therefore she is satisfied that the emails they held would be held by the Council. The Council explained that two main councillors had been asked to search their email accounts as part of its initial response to the request and again at the internal review stage. In addition it is understood that they searched their private email accounts. As part of the Commissioner's investigation they both carried out a third search which located one additional email and this was the email sent to the complainant. The Commissioner also noted that at the start of one of the email chains between the councillor and a member of the public there was reference to an earlier email. The Commissioner therefore queried the existence of the email referred to. Although the Council was unable to locate the email in question it went on to provide details of the searches conducted by the councillor. These included searches by reference to the email address of the member of the public concerned as well as just their name. The Commissioner is satisfied that in the circumstances these searches would have identified any email from that member of the public and so concludes that the email referred to is not held.
21. The complainant only challenged the existence of further emails from the third councillor towards the end of the Commissioner's investigation. It became apparent that this councillor played a more peripheral role in the planning issue that is of concern to the complainant. Following further searches that the councillor conducted during the Commissioner's investigation an additional email chain was discovered. This consisted of a very short exchange of emails between the councillor and a member of the public. This was subsequently provided to the complainant. The Council also explained the councillor's working practices when dealing with planning issues. As with the other councillors, because of his role on the Planning Application Committee he is prohibited from expressing opinions on applications prior to them being heard by the committee. He is only allowed to hear the concerns or views of members of the public, meetings are kept brief and records of such meetings are not made. In light of the role played by the

councillor in this case the Commissioner accepts that on the balance of probabilities the Council has now disclosed all the emails he received or sent about the planning application which is the focus of the request.

22. The complainant also questioned whether she had been provided with all the attachments to the emails which she had been provided with as part of both the Council's initial response and at the internal review stage. Such attachments would clearly fall within the scope of her request. The complainant's request captures not just correspondence but any file notes. Even if the request's focus had been solely on emails, this would still have captured any attachments to those emails.
23. The Commissioner identified a number of attachments referred to in the emails that had already been released and provided the Council with a list of them. The Council has now identified the attachments in question and released them to the complainant, copying the Commissioner into that disclosure.
24. The complainant has also received a set of emails through a different complaint process. Included in them was an email chain between councillors and a member of the public which had not been included in that sent to her directly from the Council despite the fact that it would have been captured by her request. When she initially contacted the Commissioner about this the Commissioner was under the impression that the chain had already been disclosed. This was because at the start of her investigation the Commissioner asked the Council to provide her with a duplicate set of all the documents it had disclosed to the complainant and, within that duplicate set of information, was a copy of the email chain in question. Nevertheless the Commissioner raised the issue with the Council and it transpired that, due to some administrative error, that particular email had not been disclosed to the complainant. Even though the complainant clearly had obtained the chain from another source, the Council agreed to forward her a copy directly for completeness.
25. In the circumstances the Commissioner considered it wise to seek confirmation from the Council that, apart from that one email chain, it had in fact provided the complainant with all the other documents that it had disclosed to the Commissioner. In a phone call the Council said that it was confident that it had. However to make sure this was the case and that there had not been any other administrative errors that may have resulted in the Council believing it had provided information when in fact it had not, the Council offered to send the complainant a copy of all the documents it had provided to the Commissioner. The complainant confirmed that she wanted the Council to take those steps and the Council proceeded to provide her with a copy of those emails.

26. During the investigation the Commissioner has pursued the existence of particular emails identified as missing by the complainant, required the Council to undertake further searches for emails sent or received by councillors, ensured any attachment to the emails previously disclosed were also provided and sought confirmation from the Council that it had in fact released all the documents that it had found and which had been provided to the Commissioner as part of her investigation. As well as dealing with these specific issues, at the outset of the investigation the Commissioner asked the Council to explain what searches it had conducted in order to identify the requested information.
27. It is noted that in her second request the complainant made it clear that she was not seeking information which was already publicly available through the Council's planning portal. Therefore the Commissioner's investigation has focussed on any information that is not held on the formal, public, planning file. The Commissioner understands that such information would comprise of email discussions between officers, between officers and councillors and between either officers and councillors and members of the public linked to the planning application and their representatives. The Commissioner has included any attachments to such emails in her investigation for completeness even though it is possible that some of these attachments would also form part of the public file.
28. The Council has explained that it searched the email accounts of the officers who were involved in dealing with the planning matter at the centre of this information request. This includes the Development Control Manager, in effect the chief planning officer. Two of the five officers involved had left the Council by the time the Council responded to the request. In respect of the three remaining officers it is understood that they searched their own accounts. Permission had to be sought from senior officers to search the email accounts of the two officers who had since left the Council and this caused delays in providing any emails held only on those accounts. The Commissioner understands that the search terms used included the address of the property to which the planning application related as well as just the name of the street. The Council has explained that one would expect that in respect of a planning matter a search by the address of the property would be sufficient to return all relevant information.
29. These searches have been carried out a number of times as each time information was sent out to the complainant she expressed dissatisfaction resulting in further searches being carried out. The Commissioner notes that the complainant was only placed in the position of having to raise queries with the Council because of gaps she had identified in the information provided and that the subsequent searches did result in additional information being released.

30. When first raising concerns over the handling of her request one of the issues the complainant focussed on was the apparent absence of emails from two councillors who sat on the Planning Application Committee including its chairperson. Later the complainant also suggested there might be additional emails from a third councillor, who was also a member of the Planning Application Committee. In respect of the two councillors who the complainant was concerned about initially, the Commissioner understands that they both searched their email accounts in response to the request when it was first received, again at the internal review stage and finally in response to the Commissioner's investigation. As explained at paragraph 20 when one councillor was challenged over the existence of a particular email that councillor conducted further searches. These included searches by reference to the email address of the member of the public concerned as well as just their name. The third councillor referred to by the complainant had a more limited role in the planning issue and as explained in paragraph 21 the Commissioner is satisfied by the searches he carried out. The Council has advised the Commissioner that all searches carried out by both officers and councillors were carried out diligently.
31. In light of the above the Commissioner is satisfied that, on the balance of probabilities, the Council has now provided the complainant with all the information it holds falling within the scope of her request.
32. Having viewed the information that the Council provided to the Commissioner over the course of the investigation she notes that there is some personal data within that information relating, in particular to a member of the public. There is also information which would constitute the personal data of the complainant. Strictly speaking information about an applicant is not accessible under the EIR, an applicant would be required to exercise their rights under the subject access provisions of the Data Protection Act. Personal data of third parties, the member of the public in this case and their representative, would be exempt under regulation 13 if its disclosure would breach any of the data protection principles set out in the DPA. However in this particular case the Council has exercised its discretion as it recognised that the complainant already knows the identity of the member of the public concerned and therefore redacting such details would serve no practical purpose. Similarly it has chosen to include the complainant's own personal data in its response for completeness. If the request had been received from an individual not so closely involved in the issues at the centre of the request, both the Council and the Commissioner would have had to consider the application of regulation 5(3) – which excludes the personal data of an applicant from the EIR and regulation 13 – which protects the personal data of third parties, more closely.

### **Regulation 5(2) – time for responding**

33. Regulation 5(2) provides that information shall be made available as soon as possible and no later than 20 working days after the receipt of the request.
34. The request was made on 25 June 2017 and the initial response was not sent out until 27 July 2017. This in itself is outside the 20 working days allowed, if only by three days. Further information was disclosed following the completion of the internal review on 28 September 2017 by which time the email accounts of the two planning officers who had left the Council had been accessed. Still more information was disclosed during the Commissioner's investigation, including, on 28 March 2017, a disclosure of the full set of emails which the Council had provided to the Commissioner as part of her investigation. It is clear therefore that the Council failed to provide all the information to which the complainant was entitled within the 20 working days allowed. The Commissioner is satisfied that this finding stands even if account was taken of any personal data issues referred to in paragraph 32 above. It follows that the Council has breached regulation 5(2). However as the Commissioner is now satisfied that the Council has addressed the points raised by the complainant through the Commissioner and on the balance of probabilities has provided the information to which she is entitled, the Commissioner does not require the Council to take any further action in this matter.

## **Right of appeal**

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35. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

36. 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.
37. 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**

**Rob Mechan**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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