

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 1 October 2018

Public Authority: Lewisham Borough Council
Address: Lewisham Town Hall
1 Catford Road
Catford
London, SE6 4RU

Decision (including any steps ordered)

1. The complainant has requested information about the siting of telecommunications equipment on Forsythia House. Following the Commissioner's involvement Lewisham Borough Council ('the Council') released some information and its position, which the complainant disputes, is that it holds no further relevant information.
2. The Commissioner's decision is that, on the balance of probabilities, it is likely that further information is held, and that the Council has failed to fully consider and respond to the request in accordance with its obligation at regulation 5(1) (duty to make environmental information available on request).
3. In addition, as the responses were not communicated within the time limits set out in the legislation, the Commissioner finds the Council has breached regulations 5(2) and 11(4) of the EIR.
4. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation:
 - Carry out further searches for information falling within the scope of the request focussing on the period November 2015 to March 2016, and any '*previously rejected applications from other telecommunications provider*'. If information which falls within the scope of the request is found, disclose this to the complainant or issue a refusal notice specifying an exemption.
 - If no information which falls within the scope of the request is found, outline the further searches undertaken and formally confirm to the complainant that no further information is held.

5. 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 Act and may be dealt with as a contempt of court

Background

6. In November 2015 Cornerstone Telecommunications Infrastructure Ltd (CTIL) sent its notification to the Council's Planning Department to install mobile telephone apparatus on the roof of Forsythia House as a permitted development under Part 16 of the Town and Country Planning (General Permitted Development)(England) Order 2015 (the Order).
7. The Order is effectively a national grant of planning permission. It operates by giving deemed planning permission for certain developments without the developer having to make a formal application to the local planning authority for planning permission.
8. In March 2016 the lease between CTIL and the Council was signed and the installation began in July 2016.
9. Local residents objected to the installation due to lack of consultation, the masts were unsightly in a conservation area and posed a radiation health risk.
10. A judicial review was sought. In February 2018 the Court, in granting the judicial review, held that the Council had wrongly interpreted the Order. The central support poles were masts and, as the apparatus was within 20 metres of the highway, express planning permission was required from the Council.

Request and response

11. On 1 April 2017 the complainant requested the following information:
'Any internal or external written correspondence of any kind (including emails, letters, memorandums, meeting notes etc) associated with the installation of telecommunication equipment at Forsythia House, Pendrell Road, SE4 2PA, including any previously rejected applications from other telecommunications providers (the "Information").'
12. After the intervention of the Commissioner on 20 July, the Council responded to the complainant on 4 August 2017. The Council refused to provide all correspondence relating to the installation of telecommunication equipment at Forsythia House applying Regulation 12(4)(b) of the EIR (request is manifestly unreasonable). It explained:

'the Council would need to search numerous databases in various departments such as Planning, Property Assets and Corporate Complaints, as well as all of the email accounts for the officers working in those departments.'

13. The Council also explained that some information would be exempt as it would be personal data, Regulation 13.
14. The Council referred the complainant to its planning website: *'Any information which is held by the Planning Department and that would not be considered as personal information, can be accessed via Lewisham Council's planning website:*
<http://www.lewisham.gov.uk/myserVICES/planning/find-comment-planning-applications/Pages/default.aspx>*'*
15. The Commissioner notes that this website link (to application DC/15/094643) includes the notification to the Council from CTIL to utilise permitted development rights under the Electronic Communications Code Regulations 2003 at Forsythia House, dated November 2015. It also includes the unsigned response dated 26 December 2015: *'The Council confirms that the proposed installation is Permitted Development/The required period of one (calendar) month has now expired without the Local Planning Authority wishing to make comment.'*
16. In order to advise and assist the complainant, the Council provided a copy of the contract between CTIL and the Council dated 3 March 2016, redacting references to any financial information as commercially sensitive (Regulation 12(5)(e)).
17. The complainant requested an internal review on 13 August 2017. He disputed the time needed for a search as *'Database searches require very little user time. It would be very straight forward to conduct an appropriate search of each database and the Council's e-mail server for relevant entries.'*
18. After the intervention of the Commissioner on 19 September the Council provided the outcome of its internal review on 2 November 2017. The Council had conducted another search for information and was *'satisfied that all information which can be released to you and held by our planning department has been disclosed to you via the link to the planning portal. The only other information that they hold would be complaints which would be exempt from disclosure under Regulation 13 of the EIR (personal information).'*
19. The Council explained that further correspondence held in their 'I casework' system would be a mixture of complaints and MP enquiries and was therefore exempt as personal information. The Council system did not allow for searches to be conducted by key words:

'When a request, enquiry or complaint is received into the Council it is logged under the complainants/requesters name and a unique reference number is generated for all further correspondence therefore the level of search you suggest would not be possible and we maintain it would be manifestly unreasonable to carry out this search.'

20. The Council also stated that it was currently investigating what, if anything, is held in officers' email accounts.
21. On 13 November 2017 the complainant expressed his surprise at the Council's inability to search for the requested information and that there was no other information outside of that held on the planning portal: *'Can I take this to mean that there was no pre-planning communication at all for the site and specifically, the site was never discussed by the planning team as a possible location for equipment?'*
22. The complainant suggested that *'an alternate route to the information would be from the lease. I have a copy of the lease, but with only CTILs signature on it. Please would you identify the officer in the council that signed the lease and also conduct a search on that officer's email and other files for information on the decision to proceed with the lease or about the planning conditions for the telecommunication equipment.'*
23. During December and January, there continued to be communications from the complainant and the Commissioner requesting the expected further response from the Council. On 29 January 2018 the complainant expressed his view that the Council was deliberately delaying its response as there was a judicial review into this issue about the telecommunications installation on 6 February 2018.
24. On 1 February 2018, the Council provided the complainant with 16 documents retrieved from the mailboxes of officers in the planning department who had since left the Council. The Council also stated that there was one further set of information *'that we are considering exempting under the act'*.
25. The complainant replied to the Council on the same day that the correspondence supplied *'was exclusively after the date of my request'*.
26. He also commented that *'You have not identified which officer signed the lease nor what information that officer had to legitimise that action.'*

'I am clearly expected to believe that an unnamed official in Lewisham Council is in the habit of signing leases over council buildings and giving the go ahead to massive telecommunications installations without a single piece of correspondence documenting anything to do with it. If this truly is the case please can you confirm explicitly?'

Scope of the case

27. The complainant initially contacted the Commissioner on 15 May 2017 to complain about the way his request for information had been handled. On 20 March 2018 he wrote to the Commissioner that he had not yet received the expected further response from the Council.
28. The focus of the Commissioner's investigation is to determine whether the Council handled the request in accordance with the EIR.
29. Having viewed the disclosed information from 1 February 2018, the Commissioner notes that the majority of the documents are out of scope as they postdate the request of 1 April 2017. There are a limited number of documents within the scope of the request: one dated 23 March 2017 which questioned the speed of the planning approval with a response stating that the telecommunications mast did not need planning permission, an FOIA request dated 29 March 2017 and a group of emails from July 2016 where the local residents objected to the mast installation.
30. The Commissioner also notes that on 4 August 2017 the Council provided a link to its planning portal and provided the contract between CTIL and the Council. The complainant has not disputed the application of Regulation 12(5)(e) to withhold commercially sensitive information from the lease. He has not disputed the application of Regulation 13 (personal data) to withhold the complaints to the Council about the installation of the telephone equipment.
31. The Commissioner initially wrote to both parties on 17 April 2018 to outline the scope and particular focus of her investigation: Regulation 5(1), the duty to make environmental information available on request and Regulation 12(4)(b), the request is manifestly unreasonable.
32. On 10 May 2018 as part of its supporting arguments to the Commissioner on Regulation 5(1), the Council stated that:

'there was no formal pre-application advice, as such there was no formal advice note / letter given prior to the submission of the 'Prior Approval' application DC/15/094643. The recorded correspondence relating to that application, except where relating to the ongoing legal challenge arising (consent has been sought from the Court of Appeal to challenge the recent decision of the High Court on the development in question), has been disclosed.'

'Correspondence and emails relating to enquiries following the installation of the telecommunications equipment has been disclosed, again except where it relates to the ongoing legal challenge'

(Emphasis added by the Commissioner)

33. The Commissioner raised a number of follow up queries with the Council: why the lease is unsigned, whether the name on the lease had been used to check his/her emails and whether the outstanding information from paragraph 24 had been disclosed.
34. In particular she questioned whether all relevant information had been disclosed as the phrase *'except where relating to the ongoing legal challenge'* indicated that there may be further withheld information.
35. On 23 May 2018 the Council responded that it was withholding information *'but only information with specific reference to gaining legal advice being sought in relation to the judicial review and current application for consent to challenge at court of appeal, rather than the exploration of the suitability of this site for telecommunications equipment or the reaching of the Council's original decision regarding the status of the apparatus (ie nothing directly related to the "installation of telecommunication equipment at Forsythia House"...'*

'In response - no pre-planning communication for the site and notes of discussions (by the planning team) of the site for the placement of telecommunications equipment has been withheld.'

36. On 1 June 2018, the Council provided an explanation on the lease:

'The lease was completed in counterpart. This means that the tenant signed one copy and the Council signed another copy. Following completion, the copies would have been exchanged so we hold the part signed by the tenant and the tenant holds the part signed by the Council. That is why the part we have is not signed by the Council. This is completely standard practice.'

'The legal work for the lease was carried out by external lawyers. The only involvement of legal services was to arrange for the lease to be sealed and signed when it was sent up to us.'

37. On 1 June, the Council disclosed 2 further documents to the complainant. These included an email from CTIL with detailed design drawings in January 2016. The Council provided the Commissioner with a number of documents withheld under Regulation 13. On viewing the documents, the Commissioner suggested that 3 emails were not personal data and these were also disclosed to the complainant. (On 2 July 2018)
38. On 19 June, the Commissioner again asked for clarification as it sounded as if there is some information that has been withheld. She requested a copy of this withheld information and details of any exemption that is being applied.

39. On 22 June, the Council replied that:

'The limited material not disclosed does not relate at all to the discussion regarding the installation of the Mast. It relates only to legal advice sought in regard to potential, and then submitted judicial review, and now submitted application for leave to appeal to the Court of Appeal.

The outcome of the Judicial Review was to essentially make the closed Planning Enforcement Investigation reopened, which is now under consideration again, and no final recommendation or course of action has been agreed.'

40. The Council considered that the legal advice relating to the status and consideration of the telecommunication installation at Forsythia House, which is central to the current consideration of the enforcement case related to material comprising unfinished documents (Regulation 12(4)(d)), internal communications (Regulation 12(4)(e)) and the course of justice, (Regulation 12(5)(b)).

41. On 27 June, the Commissioner asked the Council to provide its supporting arguments on these additional exemptions. The Council contacted the Commissioner stating that it intended to have a case conference to establish what information is held and what exemptions apply.

42. On 6 September 2018, the Council provided the Commissioner with 16 documents. Five documents concerned complaints and were withheld under Regulation 13 (personal data) and 11 documents were withheld under Regulations 13 and 12(4)(e), (internal communications).

43. The Council retracted the earlier application of Regulations 12(5)(b) and 12 (4)(d).

44. The Council also confirmed that it continued to apply Regulation 12(4)(b) - manifestly unreasonable - to potential information contained within their casework system and which would likely be complaints and therefore personal information:

'We are satisfied that all recorded information which is not subject to any exceptions previously referred to has been provided to the requester. The only exception to this is any information which could held [sic] on our I casework system. As previously stated, this system contains a mixture of MP enquiries, Corporate Complaints and FOI/EIR requests. It is not possible to search for a particular type of request or conduct a keyword search on this version of the system. There are approximately 68,000 cases held so to carry out the task of searching for cases where for instance Forsythia House is mentioned and then determining if the case would be a complaint or MP Enquiry (which would be likely to be exempt under personal information) or an FOI/EIR

request and then ascertaining if it falls within the scope of the request would far exceed the time/cost limit and makes the task manifestly unreasonable.'

45. The Commissioner examined the provided withheld information and considered that the 16 documents mostly related to complaints from June/July 2016 about the installation of the telecommunication equipment at Forsythia House, some of which overlapped with the information disclosed to the complainant in February 2018. One document from March 2017 mentioned the summary code on 'Acolaid' and one document was out of scope as it referred to another development.
46. She contacted the complainant who confirmed that he was not interested in the complaints from local residents about the installation. He wanted to know how the installation happened – *'how was the installation a permitted development after a previous petition and decision had ruled that Forsythia House was not to be considered as a location?'* He considered that there must be some correspondence at the time of the notification and when the lease was signed.
47. The complainant confirmed that the focus of his complaint is not the Council's application of particular exceptions to some of the information, but that the Council holds additional relevant information.
48. As the complainant has confirmed that he is not interested in the complaints from local residents about the installation, the Commissioner does not intend to investigate the Council's application of Regulation 12(4)(b) - manifestly unreasonable - to refuse to search the Council's casework system for potential information which would likely be complaints and therefore personal information.
49. The Commissioner's investigation has therefore concentrated on whether, on the balance of probabilities, the Council has released all the relevant information it held at the time of the request and has complied with its obligation under regulation 5(1) of the EIR.

Reasons for decision

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

50. Regulation 5(1) of the EIR says that a public authority that holds environmental information must make it available on request.
51. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities.
52. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
53. As is the practice in a case such as this, the Commissioner asked the Council a number of questions to confirm/establish if further information is held and a number of questions to establish what searches had been carried out for information falling within the scope of the request. The Council liaised with 3 service areas: Planning, Regeneration and Asset Management and Lewisham Homes.
54. The Council stated that it had *'searched accessible operatives emails, the property file in the Councils shared drives and documents on the Councils share point website...Officers involved with the request were asked to search files (electronic or physical) including emails for relevant information. Information is stored primarily electronically, and otherwise in paper form.'*
55. The Planning service area stated that *'All electronic data held by Planning department staff is held on networked resources / emails'* and *'Terms relating to the address 'Pendrell Road' 'Forsythia' were used.'*
56. The Regeneration and Asset Management service area stated that *'there were no personal computers used to our knowledge and we couldn't have searched them when this FOI came in had there been as the Key official had left the Council'* and the *'search terms were telecoms/ telecommunication & forsythia'*.
57. The Lewisham Homes service area stated that it searched Networked folders on their system and information is held on *'telecoms by installation'* so the search term would have been Forsythia house.

58. The Commissioner asked questions on whether any recorded information ever held relevant to the scope of the request had been destroyed.
59. The Regeneration and Asset Management and the Lewisham Homes service areas answered '*Not that I am aware of*' and the Planning service area stated: '*No (not following the receipt of the request at least, I cannot answer the question whether there may have been something relevant to a request that had not yet been made)*'
60. The Commissioner asked if there is a business purpose for which the requested information should be held. The Planning service area responded in full:

'Information relating to pre-application advice submissions is held to help inform a subsequent planning or related application, to set out what work had already been undertaken to give a view on a development, and whether any advice given has been acted upon.

Information relating to planning or related applications are held to describe the subject development / matter, and to define what was or was not given permission or consent if either was given.

Information relating to development already carried out is held as part of recording and responding to those enquiries, including the investigation of enforcement investigations, or in the monitoring of approved permission or implemented development.'

(Referring to the request)

'And in this instance there was no formal pre-application advice, as such there was no formal advice note / letter given prior to the submission of the 'Prior Approval' application DC/15/094643. The recorded correspondence relating to that application, except where relating to the ongoing legal challenge arising (consent has been sought from the Court of Appeal to challenge the recent decision of the High Court on the development in question), has been disclosed.

Correspondence and emails relating to enquiries following the installation of the telecommunications equipment has been disclosed, again except where it relates to the ongoing legal challenge.'

61. The Commissioner asked if there is a statutory requirement upon the Council to retain the requested information.
62. The Regeneration and Asset Management service area stated that '*The request was for All correspondence to my knowledge we are not required to keep this – we do have copies of the legal documentation and contracts of our representatives.*'

63. The Planning service area responded: *'Yes, defined document types as set out within the Openness of Local Government Regulations 2014, s69a of the Town & Country Planning Act 1990 would apply.'*
64. The Commissioner asked if there is information held that is similar to that requested and whether the Council considered that it had given appropriate advice and assistance to the complainant in line with the duty contained at regulation 9 of EIR.
65. The Regeneration and Asset Management and the Lewisham Homes service areas answered *'No – provided all'*. The Planning service area responded *'No. All applicable information has been provided.'*
66. Having considered the Council's responses to the Commissioner's investigations, the Commissioner is not fully satisfied that on the balance of probabilities, the Council does not hold any further recorded information within the scope of the request.
67. The Commissioner notes that these arguments from the Council were provided to the Commissioner on 10 May 2018. After further enquiries from the Commissioner the Council undertook further searches and found further information which it provided to the Commissioner in September 2018. These 16 documents (mostly complaints from June/July 2016) were withheld as personal data. (see paragraph 45 above) and taken out of the scope of this complaint.
68. The Commissioner is aware that some information has been disclosed to the complainant and some information has been withheld as personal data. However, having examined the disclosed and withheld information and having considered the complainant's and Council's submissions, the Commissioner considers that it is possible that there is further correspondence from the time of the notification in November 2015 to the signing of the lease in March 2016.
69. The Commissioner notes the Council's reference to disclosure of all information *'except where relating to the ongoing legal challenge'*. Despite the Council's citing of additional exemptions (later retracted) and their case conference in June/July 2018 to investigate what information is held, the Council only provided the Commissioner with information from July 2016 about complaints from the local residents and the responses. It did not cover the decision making period from November 2015 to March 2016. There was one document from March 2017 which mentioned the summary code on 'Acolaid' and the Commissioner would ask if this is another system that could be searched.
70. The Commissioner also notes the email (disclosed to the complainant on 1 June 2018) from CTIL with detailed design drawings in January 2016

(see paragraph 37 above). This indicates that there was some correspondence on this issue between the interested parties.

71. The Commissioner notes that the Council has not addressed the part of the request that referred to '*previously rejected applications from other telecommunications provider*'.
72. The Commissioner also considers the complainant's comments to be important as someone from the Council signed the lease in March 2016 and that the legal services were involved in the arrangement for the lease to be '*sealed and signed when it was sent up*' (see paragraph 36 above). In February 2018 the complainant asked '*which officer signed the lease... what information that officer had to legitimise that action.*' It is the Commissioner's view that no information has been disclosed to answer this question (see paragraph 26 above).
73. The Commissioner considers that weight should also be given to the following comment from the complainant: '*I am clearly expected to believe that an unnamed official in Lewisham Council is in the habit of signing leases over council buildings and giving the go ahead to massive telecommunications installations without a single piece of correspondence documenting anything to do with it. If this truly is the case please can you confirm explicitly?*' (See paragraph 26 above.)
74. The Commissioner will always give weight to factors which favour the disclosure of information which increase the public's understanding of the actions taken by a Council and of the processes by which it makes its decisions. Such disclosure of information increases transparency and provides accountability of public authorities.
75. The Commissioner considers that, despite the considerable correspondence on this case, the Council has failed to demonstrate that it has fully considered and responded to the information request in accordance with its obligation at regulation 5(1) (duty to make environmental information available on request).

Procedural matters

Regulation 5(2): Statutory time frame

76. Regulation 5(2) of the EIR states:

"Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request"

77. The complainant made his request on 1 April 2017 and the Council issued a response, after the intervention of the Commissioner on 4 August 2017.
78. The Commissioner therefore finds that the Council breached regulation 5(2) of the EIR.

Regulation 11(4): Internal review timeframe

79. Regulation 11(4) of the EIR states:

"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."

80. The complainant wrote to the Council to express his dissatisfaction on 13 August 2017 and after the intervention of the Commissioner, the Council provided its response on 2 November 2017.
81. The Commissioner therefore finds that the Council breached regulation 11(4) of the EIR.
82. Such delays are excessive and unreasonable and the Commissioner expects the Council to ensure that improvements are made.

Other matters

83. The Commissioner reminds the Council that the EIR contains specific provisions and if the Council was unsure of the meaning of the request at any point then a public authority is required to consider whether it has a duty to assist the requestor in clarifying the request. The Commissioner refers the Council to her guidance '*Regulation 9 – Advice and Assistance*', available at: <https://ico.org.uk/media/2013834/eir-advice-and-assistance-regulation-9.pdf>

Right of appeal

84. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

85. 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.

86. 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

Pamela Clements
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