

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

Date: 25 November 2024

Public Authority: Elmbridge Borough Council
Address: Civic Centre
High Street
Esher
Surrey
KT10 9SD

Decision (including any steps ordered)

1. The complainant requested information about a specific planning complaint. Elmbridge Borough Council (the "Council") disclosed some information and withheld other information under the exception for internal communications (regulation 12(4)(e)). At the internal review stage the Council withdrew its reliance on this exception and confirmed that the information was not actually held.
2. The Commissioner's decision is that, on the balance of probabilities, the Council does not hold the requested records of the internal decision making process and that regulation 12(4)(a) of the EIR applies.
3. The Commissioner does not require further steps.

Request and response

4. On 13 February 2024 the complainant wrote to the Council and asked for the following information:

"INV/2022/0363 – 59 Winchester Road, Walton-On-Thames

This should included (but not restricted to) the decision process in deciding not to pursue the matter after a planning officer was refused entry to measure the structure height – including email correspondence and records of conversations between planning department, and the owner of the hose property and/or her agent. We also respectfully, would like records of the internal decision making process within the planning department concerning this matter."

5. The Council responded on 23 April 2024 and disclosed some information. It withheld other information under the exception for personal information. It also withheld information relating to "records of the internal decision making process..." under the exception for internal communications (regulation 12(4)(e)).
6. Following an internal review the Council wrote to the complainant on 10 June 2024. It stated that it was withdrawing its reliance on regulation 12(4)(e) and confirmed that its new position was that the information was not held.

Scope of the case

7. On 31 July 2024 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that his investigation would consider whether the Council had correctly confirmed that information relating to the decision making process identified in the request was not held.

Reasons for decision

Would the requested information be environmental?

9. 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);
10. If held, the information in this case relates to decisions regarding planning matters. The Commissioner, therefore, considers that the information relates to measures as defined in regulation 2(1)(c). For procedural reasons, he has therefore assessed this case under the EIR.

Regulation 5 – duty to make environmental information available on request

- 11. Regulation 5(1) of the EIR requires a public authority that holds environmental information to make it available on request.
- 12. In this case the request relates to a complaint regarding an alleged breach of planning in respect of a specific planning application. The relevant section of the request identifies a specific case reference and asks for records of the internal decision making process regarding the complaint which falls within this case reference. The complainant disputes the Council's position that the information is not held.
- 13. Where there is a dispute between a public authority and a complainant as to whether all requested information falling within the scope of a request has been provided, the Commissioner, following the lead of a

number of First-tier Tribunal decisions, must decide the matter based on the civil standard of on the balance of probabilities.

14. In order to reach a decision in this regard the Commissioner asked the Council to provide details of searches it carried out for relevant information.
15. The Council explained that its Compliance and Trees Team Leader was the relevant case officer dealing with the case and initial searches carried out involved their email inbox, M3 case notes and Idox document management system relating to the case reference (INV/2022/0363).
16. The Council confirmed that these are the relevant locations for the case investigation file so any information held would be here. It explained that employees in the compliance team, admin and legal team were also asked to provide any contact information/notes/emails/documents that they had.
17. The Council has also confirmed that it carried out a wider search for relevant information, encompassing other case references beyond that identified in the request. It has confirmed that no relevant information was located.
18. The Commissioner also asked the Council to clarify the reasons for the change in its position from the original response (which suggested information was held) to its internal review response, which confirmed that the information is not held. The Council explained that this is likely to be due to information regarding an entirely different complaint being wrongly ascribed to the complaint identified in the request. In other words, the initial response was an error.

The Commissioner's decision

19. The Commissioner is not required to decide whether the Council ought to hold specific information in circumstances such as these, he is only required to determine whether, on the balance of probabilities, any information is held and whether adequate searches for the requested information have been conducted.
20. Having reviewed the Councils position, the Commissioner is satisfied that, on the balance of probabilities, it does not hold information falling within the scope of this element of the request.
21. He, therefore, finds that regulation 12(4)(a) (relating to information not held) applies.

22. Technically, regulation 12(4)(a) contains a public interest test. However, the Commissioner cannot conceive of a public interest argument that would require a public authority to disclose information that it does not hold.

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.

Christopher Williams
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Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF