

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 20 December 2024

Public Authority: London Borough of Redbridge
Address: Lynton House
255-259 High Road
Ilford
IG1 1NN

Decision (including any steps ordered)

1. The complainant has requested information held regarding an investigation into buildings works. London Borough of Redbridge (the Council) has advised it does not hold information within the scope of the request.
2. The Commissioner's decision is that the Council should have considered the request under the EIR, rather than FOIA. However, he is satisfied that on the balance of probabilities, the Council holds no further recorded information relevant to the complainant's request.
3. The Commissioner does not require further steps.

Request and response

4. On 29 September 2023, the complainant wrote to the Council and requested information in the following terms:

"For completeness I am seeking FOI request for enquiries at (address provided) investigations.

I have also raised issue with HSE (Health and Safety Executive) months ago and they advised it is LBR remit. I have reported HSE for failures to deliver file in previous request. ICO are taking forward the complaint.

The pollution team at LBR state they were not previously made aware of the concerns raised on silicon dust and pollution and asbestos at the demolition/ construction site and concerns to neighbours and school children.

Therefore I am requesting the file under FOI, please.”

5. The Council responded on 27 October 2023. It stated that it did not hold a file regarding an investigation into possible silicon dust or other pollutants at (address provided).
6. Following an internal review the Council wrote to the complainant on 24 November 2023. It stated that:

“Your original request received on 29 September 2023 asked for information on what investigations had taken place at (address provided) specifically around construction dust and unsafe working practices. I can see that the stage 1 response and the response to Iain Duncan Smith found that both officers are of the opinion that the responsibility of the management of construction dust and, safe on-site working practices rests with the HSE, and I can confirm that this is correct.

It should be noted that following your FOI request your email was forwarded to the Council’s Pollution Team to enquire if the issues warranted an investigation. I have contacted the team and can report as follows: prior to the team receiving the email an investigation was opened in September 2023 in response to your complaint about construction dust. On 14 September 2023, a Technical Officer from the Pollution Team had sent you an email advising you to keep a nuisance diary sheet of the dust activities taking place. Subsequently a site visit was made on 10 October 2023 and met with yourself and (name redacted) on separate occasions.

In his email to you that same day he advised that at the time of his visit he was not able to witness any dust nuisance. However, following a discussion with (name redacted) and his builder, they were advised, and agreed, to take reasonable measures to minimise the amount of dust escaping from the boundary of the site. Additionally, on their part they had shown images and informed (name redacted) that they are using dust shields and keeping a record of their own activities in the form of a media diary.

The Building Control team are overseeing the development works at (address) in respect of compliance with the Building Regulations and have no concerns so far.

In conclusion, the HSE are the body to investigate complaints about construction dust and unsafe building practices and contact details were provided. The outcome of the Pollution Team as mentioned above is that they had investigated your complaint and advised you that (names redacted) have been taking precautions to minimise dust from the site."

Scope of the case

7. The complainant contacted the Commissioner on 7 June 2024 to complain about the way their request for information had been handled.
8. The Commissioner would not normally accept a complaint after this amount of time however, in this case the Commissioner accepted that there were extenuating circumstances which justified him taking on this complaint despite the delay.
9. During the course of the investigation, the Commissioner advised the Council that the requested information, if held, would be likely to be "environmental" within the definition set out in the EIR.
10. The Commissioner considers that the scope of his investigation is to determine, if held, the information would be environmental, and determine if, on the balance of probabilities, the Council holds any information within the scope of the request.

Reasons for decision

Regulation 2(1) – definition of environmental information

11. Regulation 2(1) of the EIR provides the following definition of environmental information:
 - "...any information in written, visual, aural, electronic or any other material form 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) (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) and (b) as well as measures or activities designed to protect those elements...”
12. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
 13. The Commissioner has produced guidance¹ to assist public authorities and applicants in identifying environmental information. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
 14. The Commissioner notes that in this case the requested information relates to building works and the impact of those works on the environment, specifically dust pollution and, would relate to both measures and activities affecting the environment.
 15. The Commissioner is therefore satisfied that the information, if held, would fall within the definition at regulation 2(1)(c) and, that the request should have been considered under the EIR.
 16. In such cases, the Commissioner may require a public authority to issue a fresh response to the requester under the correct regime. However, in this case, he has first considered whether the requested information is held by the Council.

Regulation 12(4)(a) – information not held

17. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.

¹ <https://ico.org.uk/for-organisations/eir-and-access-to-information/guide-to-the-environmental-information-regulations/receiving-a-request/>

18. The complaint under consideration in this part of the notice relates to the Council's assertion that no further information within the scope of the request is held beyond that which it has already disclosed.
19. In cases where there is a dispute over whether information is held, the Commissioner applies the civil test of the balance of probabilities in making his determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held, in cases which it has considered in the past.
20. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether the information is held, and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is held.

The complainant's view

21. The complainant believes that the Council and HSE are passing the responsibility of an investigation to one another. They state that complaints varying in nature have been made about the building works.
22. In their request for an internal review the complainant said:

"I am seeking a review of this and persist in seeking all relevant information under FOI. HSE and LBR have played a cat and mouse role of stating each other has the burden of investigation dust and pollution including silicon dust and asbestos. As I have referred HSE to ICO, I shall do the same with LGO. The 20 day is overdue and I will refer the matter to the ICO next week.

Further with all complaints and evidence and photographs I am seeking formal investigation into the failures and delays to refer this matter as a formal complaint on why regeneration team and building control failed to refer this matter to the pollution team.

Sir Ian Duncan Smith has also written of this matter to your CEO the police and there are 3 police reference numbers on this matter and anti social behaviour warning given. I also called your anti social behaviour team were contacted over August bank holiday weekend noise recordings exist and will go to LGO. The pollution and lack of protective sheeting have alluded your alleged visits by building control. Antisocial working hours with mechanical diggers and prolonged digging with 801 JCB digger. Over the bank holiday weekend and photographic evidence of it being removed has been captured on CCTV and camera.

Only recently have further dust protections being put in situ at the demolition building site and yard. My house inside is smothered in this dust and can be used as evidence by appropriate specialist company for reporting. I therefore seek FOI file for building control cheques also.

I will contact LGO and seek a reference number and from LGO next week and this matter will need to go to LGO and ICO with input from police references and Sir Ian Duncan Smith's communications with your executive office."

The Council's view

23. The Council has explained that it acknowledges a complaint was made about dust pollution from a building works at a specific property and subsequently the Council visited the site. Following this it found no cause for an investigation.
24. The Council further explained in their internal review response that "HSE are the body to investigate complaints about construction dust and unsafe building practices and contact details were provided. The outcome of the Pollution Team as mentioned above is that they had investigated your complaint and advised you that (names redacted) have been taking precautions to minimise dust from the site".
25. The Council explained that as it had found no cause for an investigation, no investigation was carried out therefore, it does not hold any further information relating to an investigation at the site.

The Commissioner's decision

26. The Commissioner's remit is to establish whether, on the balance of probabilities, the Council holds information within the scope of the request.
27. It is not for the Commissioner to determine whether or not the Council 'should' hold information within the scope of the request. It is also not for the Commissioner to determine if it is the responsibility of the Council or the HSE to conduct investigations of this nature.
28. The Commissioner acknowledges the complainant's position that they have raised concerns about dust pollution in relation to building works at a specific address. However, he is satisfied with the Council's explanation that subsequent visits to the site did not lead to any further investigation.
29. The Commissioner is satisfied with the Council's explanation that it does not consider any investigation has taken place and, therefore it is the Commissioner's opinion that, on the balance of probabilities, the Council

does not hold any further information other than that which has already been provided.

Other matters

30. The Commissioner notes that in their request for an internal review the complainant said "I therefore seek FOI file for building control cheques also." The Commissioner considers this to be a new and separate request for information which the Council has not responded to.
31. The Commissioner understands that the Council is now in the process of responding to the request and the Commissioner will consider the handling of that request via a separate case.

32. Right of appeal
33. 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

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
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