

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 9 March 2021

Public Authority: London Borough of Enfield
Address: Thomas Hardy House
9 London Road
Enfield
EN2 6DS

Decision (including any steps ordered)

1. The complainant requested copies of correspondence exchanged between the Leader of the Council and its Chief Executive. The London Borough of Enfield ("the London Borough") initially withheld some information before informing the complainant that it held no relevant information.
2. The Commissioner's decision is that the London Borough did not disclose all the information to which the complainant was entitled within 20 working days and therefore breached Regulation 5(2) of the EIR. However, she considers that it has disclosed all the information it holds in recorded form. The London Borough also breached Regulation 11(4) of the EIR because it failed to complete its internal review (reconsideration) within 40 working days.
3. The Commissioner does not require further steps.

Request and response

4. On 8 October 2019 the complainant requested information of the following description:

"Can you please forward me correspondence between Ian Davis [Chief Executive] and Cllr Nesil Caliskan [Council Leader] on the subject title 'Waste collection press coverage' during February and March 2019. Regard this as a Freedom of Information request."

5. On 6 November 2019, the London Borough responded. It relied on section 41(1) of the FOIA to withhold the information it held within the scope of the request.
6. The complainant requested an internal review on 12 December 2019. He challenged the London Borough's reliance on section 41 and, because he was already aware that the Chief Executive had emailed the Leader, noted that he was particularly interested in the Leader's response.
7. The London Borough sent the outcome of its internal review on 15 June 2020. It revised its position and said that it did not hold a response from the Leader.

Scope of the case

8. The complainant contacted the Commissioner on 25 August 2020 to complain about the way his request for information had been handled. He was convinced that the Leader would have responded to the Chief Executive and was concerned that the London Borough was not admitting to holding the information. He also disputed the reasons given by the London Borough for withholding the information it had admitted it possessed.
9. At the outset of her investigation, the Commissioner wrote to the London Borough on 23 December 2020 to seek its submissions as to why it considered it had identified all relevant information. She noted that, as the request related to internal discussions, any relevant information was unlikely to have been obtained, by the London Borough, from a third party and therefore unlikely to be covered by section 41. She also noted that there appeared to be grounds for believing the information to be environmental and sought the London Borough's views on the matter.
10. Regrettably, the London Borough did not respond to the Commissioner's letter and she was forced to issue an Information Notice to compel a response. The London Borough complied with the Information Notice within the deadline.
11. As the complainant is most interested in the existence of information and this does not affect other considerations, the Commissioner will look first at whether the London Borough has identified all relevant information. She will then go on to determine the correct information access regime before concluding with an examination of the procedural handling of the request.

Reasons for decision

Held/Not held

12. 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. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, she will consider any reason why it is inherently likely or unlikely that information is not held. The process she follows is the same, regardless of the access regime the request was dealt under.
13. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she 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 view

14. The complainant was already aware that the Chief Executive had sent an email to the Leader regarding media coverage of the London Borough's waste management strategy. He noted that the Leader had subsequently forwarded a copy of that email to her Cabinet colleagues to seek their views. In her covering email forwarding the correspondence, the Leader states that:

"I intend on responding to [the Chief Executive] and [redacted] but wanted to give you the opportunity to feedback your comments."

15. The Commissioner noted that the Leader did appear to have set out a clear intention to feed back correspondence, but had not been definitive about the manner in which that would be done. She therefore asked the complainant if he had any specific reason to believe that any feedback had been provided in recorded form.
16. The complainant admitted that he had no definitive evidence to suggest information did or did not exist, but he felt that it was likely that the Leader had responded because:

"[the Leader] has demonstrated time and again that she is rather rash to put things in writing and rarely holds back."

17. The complainant also noted that the procedural handling of the request had increased his suspicions that the London Borough was attempting to prevent embarrassing correspondence from being disclosed.

The London Borough's position

18. The Commissioner posed her standard questions to the London Borough to establish how it had gone about searching for relevant correspondence.
19. The London Borough explained that it had consulted the private offices of both the Leader and the Chief Executive. Both offices had been asked to search for emails, sent in the relevant time period, with the subject title identified in the request. These searches had only uncovered a single email (the original email from the Chief Executive) which it agreed to disclose to the complainant – although the Commissioner notes that the complainant already had a copy.
20. Given the content of the information it did hold, the Commissioner also asked the London Borough if it could explain why it should not be expected to hold further relevant information and to consult both private offices for their version of events.
21. The Leader's Office confirmed that it had searched without success and was confident that it held no relevant information. The Chief Executive's office confirmed that it held no correspondence under that subject title regardless of the time period (other than that already disclosed). Whilst the Chief Executive could not recall the exact events, he considered it likely that any feedback would have been provided verbally, probably during their regular one to one meetings. He held no other recorded information covering any feedback.

The Commissioner's view

22. On the balance of probabilities, the Commissioner considers that the London Borough holds no further information within the scope of the request.
23. It is not the Commissioner's role to determine if, when or how the Leader followed through on her promise to provide feedback – only to determine whether relevant information exists in recorded form.
24. Whilst the Commissioner accepts that the Leader's correspondence to her colleagues did indicate an intention to collate feedback to be passed to the Chief Executive, the correspondence does not indicate the form that this would take. It is far from unusual for the leader of a council to meet regularly with its chief executive (or equivalent) on an informal basis and these meetings are usually unminuted.
25. The most likely explanation is therefore that any feedback the Leader gave was provided verbally. In such a case, no recorded information would exist.

26. The complainant set out very specific parameters to his request. The London Borough appears to have carried out searches which are appropriate to those parameters but it also appears to have interpreted the request more purposively to see whether any other relevant information might exist. These searches have failed to uncover relevant information.
27. It is unfortunate that the London Borough's procedural failings (discussed in more detail below) have undermined the complainant's confidence in the rigour of its searches. However, the Commissioner has not seen any definitive evidence that would suggest further information is held.
28. Whilst the Commissioner can rarely prove beyond doubt that information does or does not exist, on the facts of this case, she is satisfied that, on the balance of probabilities, no further information is held.

What information access regime should be used?

29. 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);

30. The Commissioner has had the opportunity to consider the content of the information that the London Borough did disclose. This correspondence, as its title suggests, covers the way the London Borough had handled its waste management strategy.

31. The Court of Appeal in *Department for Business, Energy and Industry Strategy v. Information Commissioner and Henney* [2017] EWCA Civ 844 set out the tests for determining when information is environmental. The Court noted that:

"It follows that identifying the measure that the disputed information is "on" may require consideration of the wider context, and is not strictly limited to the precise issue with which the information is concerned...or the document containing the information...It may be relevant to consider the purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way."

32. The London Borough argued that the email reflected:

"more about the political discussions and legal considerations surrounding the introduction of changes to waste collection and management and therefore we took a view that it was covered by the Freedom of Information Act."

33. The Commissioner considers that the London Borough's waste management strategy would undoubtedly be a "measure" likely to affect "factors" (waste) affecting the elements of the environment. The question is thus whether this information is information "on" that measure.

34. The email disclosed does indicate that the London Borough was considering its broader approach to relations between its Cabinet and senior officers. However, this was placed in the context of the way that the waste management strategy had been handled and the way the London Borough should scrutinise "projects of this type."

35. The Commissioner is therefore satisfied that this email would, to a certain extent, inform the public about the waste management strategy and inform the public's ability to participate in future environmental decision-making by the London Borough. She is therefore satisfied that

it is information "on" the measure and would therefore fall under the Environmental Information Regulations.

36. As to whether further information, if it existed, would be environmental information, it is always difficult for the Commissioner to determine whether hypothetical information would or would not be environmental.
37. The complainant has provided the Commissioner with copies of some of the feedback that Cabinet members had sent to the Leader. Some of these specifically raised matters relating to the waste management strategy and others raised matters relating to the relationship with council officers.
38. The Commissioner considers that it is likely that matters relating to the waste management strategy would have formed part of any feedback (if it existed in recorded form), she therefore considers that any further information would be likely to have at least an element of environmental information and therefore the EIR would be the most appropriate regime.
39. However, the access regime used would have had absolutely no bearing on the Commissioner's finding that no further relevant information was held.

Procedural Matters

40. Regulation 5(2) of the EIR states that information that has been requested shall be made available "*as soon as possible and no later than 20 working days after the date of receipt of the request.*"
41. The London Borough did not make available information relevant to the request (the email from the Chief Executive) within 20 working days and therefore breached Regulation 5(2) of the EIR.
42. Regulation 11 of the EIR states that:
 - (1) *Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.*
 - (2) *Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.*

- (3) The public authority shall on receipt of the representations and free of charge—
 - (a) consider them and any supporting evidence produced by the applicant; and*
 - (b) decide if it has complied with the requirement.**
 - (4) 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.*
 - (5) Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of—
 - (a) the failure to comply;*
 - (b) the action the authority has decided to take to comply with the requirement; and*
 - (c) the period within which that action is to be taken.**
43. From the evidence presented to the Commissioner in this case it is clear that, in failing to carry out an internal review within 40 working days the London Borough breached Regulation 11 of the EIR.

Right of appeal

44. 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@justice.gov.uk

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

45. 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.
46. 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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