

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 30 June 2022

Public Authority: London Borough of Lambeth
Address: Lambeth Town Hall
Brixton Hill
London
SW2 1RW

Decision (including any steps ordered)

1. The complainant has requested information about the Cressingham Gardens regeneration. London Borough of Lambeth (the Council) denied holding any information specific to the scope of the request.
2. The Commissioner's decision is that the Council has breached regulation 5(1) of the EIR due to its failure to obtain an objective reading of the request. The Commissioner, therefore, also finds that the Council has breached regulation 9 by not seeking clarification from the complainant and subsequently providing appropriate advice and assistance on the interpretation of the request. Further, the Commissioner's decision is that, on the balance of probabilities, the Council is incorrect when it says that it holds no information within the scope of the request, therefore, regulation 12(4)(a) is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the request, based on the interpretation set out in paragraph 43 of this decision notice. The Council should inform the complainant whether it holds any information within the scope of this interpretation of the request and, if it does, it should either disclose that information or issue a refusal notice that complies with regulation 14 of the EIR.
4. The public authority 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 31 January 2021, the complainant wrote to the Council and requested information in the following terms:

“Please provide all copies of documents and emails that deal with the analysis and decision to choose Ropers Walk as Phase 1 of the Cressingham Gardens regeneration.”
6. The Council responded on 25 February 2021. It stated that it does hold the requested information, but that it was exempt from disclosure by virtue of section 12 (cost of compliance exceeds the appropriate limit) of FOIA.
7. Following an internal review the Council wrote to the complainant on 30 March 2021. It stated that it was maintaining its reliance on section 12 of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 6 April 2021 to complain about the way their request for information had been handled, in particular they disagreed that the work required to comply with their request would exceed the cost limit.
9. The Commissioner asked the Council for further explanation of its application of section 12 of FOIA, including details of any sampling exercise carried out to reach a reasonable estimate of the costs it would incur to meet the request in full. He also asked the Council to consider if the requested information was environmental, and should have therefore been considered under the EIR instead of FOIA.
10. The Council responded to the Commissioner and stated the following:

"Ropers Walk/Trinity Rise¹ isn't part of phase 1 of Cressingham Gardens. It is part of the 'Small Sites Programme'.

Nonetheless we consider that attempting to respond to this request would exceed the cost/time limits."

11. The Commissioner wrote to the Council and again asked it to set out its position in respect of which information access regime it considered the request should be handled under. The Commissioner also asked the Council to explain exactly what information it is that the Council considers it would need to search for which would take it beyond the cost for compliance, if it knows that Ropers Walk is in fact not phase 1 of the Cressingham Gardens regeneration at all.
12. The Council responded to the Commissioner and withdrew its reliance on section 12 of FOIA, and stated that the information was in fact not held.
13. The complainant expressed their dissatisfaction with the Council's amended position, and pointed the Commissioner to publicly available documents which appear to suggest that Ropers Walk had initially been labelled as phase 1 of the Cressingham Gardens regeneration but was referred to as being part of the small sites project in later documentation, leading the complainant to believe that the Council does hold information within the scope of their request.
14. The Commissioner served an Information Notice on the Council on 16 February 2022, ordering it to furnish him with information in respect of the points highlighted in the above documents by the complainant, as well as information about any searches which it had carried out to establish whether or not it holds information within the scope of the request. The Commissioner also asked the Council again to confirm which information access regime it considered the request should be handled under.
15. In its response to the Information Notice the Council maintained that it does not hold information within the scope of the request, and clarified that given the nature of the information being sought the request should have been considered under the EIR. However, in the Council's answers to the further questions set out in the Information Notice it omitted to consider the information highlighted in the two documents raised by the complainant.

¹ For clarity, Trinity Rise is another name used by the Council for the Ropers Walk rebuild, due to its geographical location.

16. The Commissioner asked the Council to revisit the questions in the Information Notice and provide answers which took into consideration the highlighted publicly available documents.
17. The Council responded to the Commissioner, detailing the change in the status of Ropers Walk/Trinity Rise from Phase 1 to a small sites project, but providing no information regarding the decision and analysis to label it as phase 1 to begin with which is what was sought by the request. It stated:

"Please see the the attached documents, these show that the Ropers Walk/Trinity Rise development was referred to as Site F, Cressingham Gardens (Phase 1).

The 2020 Business Plan also refers to the Trinity Rise development as Cressingham Gardens Phase 1.

The progress update given through the March 2021 Joint Delivery Plan cabinet report refers to the Trinity Rise development as a standalone project to reflect the position taken by Planning in February 2021.

So it would seem that it was during development of the project that it should progress as an application in its own right and be considered on its own merits, which is what happened."

18. After various communications from the Commissioner in pursuit of a response from the Council which was relevant to the actual scope of the request, on 26 May 2022 it provided the Commissioner with answers to the questions set out in the Information Notice. The Council maintained its position that it does not hold information within the scope of the request, and provided further background information and explanations of the terminology used within the highlighted documents.
19. The scope of the Commissioner's investigation has been to determine whether, on the balance of probabilities, the Council holds any information falling within the scope of the request.

Reasons for decision

Would the requested information be environmental?

20. The Commissioner has first considered whether the requested information would constitute environmental information as defined by regulation 2(1) of the EIR.

21. 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).

22. The Commissioner is satisfied that the requested information, if it was held by the Council, would fall within the measures identified by regulation 2(1)(c) and also potentially regulation 2(1)(e).

23. During the course of the investigation, the Council accepted that it should have dealt with the request under the EIR, however the Commissioner notes that this would not have made a difference in terms of the information it held within the scope of the request.

Regulation 5(1) and regulation 12(4)(a) of the EIR

24. Regulation 5(1) of the EIR states that a public authority which holds environmental information shall make it available on request.

25. 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".
26. 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.
27. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether information within the scope of the request 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

28. In the complainant's submissions to the Commissioner regarding the Council's amended response, from the cost of compliance would exceed the appropriate limit to the information not being held, they stated that early documentation regarding the development and regeneration referred to Ropers Walk as "phase 1", but was changed in later documentation to be included as part of the small sites programme, therefore leading the complainant to believe that the Council would hold information about why it was initially forecast as phase 1. The complainant provided the Commissioner with documents which they believed supported their position that the Council does hold the requested information.
29. The first document is the Homes for Lambeth Business Plan 2020-23² which carries a table on page 14 which refers to "Phase 1 Cressingham (Trinity Rise)".
30. The second document is the Homes for Lambeth Joint Delivery Plan 2021-22³, in which it states on page 2 that "The projects at Fenwick

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https://assets.ctfassets.net/czz8fk2tplu5/6L9cx2w1A6RzLiuEghOSRU/6b64e619583f6345a6024926a811f7c2/HfL_business_plan_2020_to_2023-min.pdf

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https://assets.ctfassets.net/czz8fk2tplu5/1hDhYq6nhsp1lOvQeW0Fet/98f16ac18a55b976ef2f5573a1111326/Appendix_A_-_Council_and_HFL_Joint_Delivery_Plan.pdf

Place, Roman Rise and Trinity Rise are stand-alone projects which have now achieved resolution to grant planning consent. Identified as Phase 1 of Central Hill, Cressingham and Fenwick estates in the previous forecast, they are now formed as projects in their own right and are being brought forward as part of HfL's 'small sites' programme".

The Council's position

31. In its final submissions to the Commissioner, the Council provided a timeline and relevant documents to explain the background and key terms used in reference to the Cressingham Gardens redevelopment. It started by clarifying that in March 2016 a Cabinet Decision was made to rebuild the Cressingham Gardens estate. As Ropers Walk is contained within the estate, it was necessarily include within the overall plan.
32. In May 2019 Homes for Lambeth was asked by the Council to bring forward several 'small sites' with the aim of building more affordable homes for Lambeth residents waiting on the council's housing lists. A Small Projects Commissioning report identified a number of small projects which could potentially be brought forward independently of the wider estate regeneration initiatives, and this report included the Ropers Walk/Trinity Rise site (which was referred to as 'Site F, Cressingham Gardens Estate (Phase1)' within this report).
33. In March 2020 the Homes for Lambeth Business Plan 2020-2023 was published, which included a table on page 14 which refers to Phase 1 Cressingham Gardens (Trinity Rise).
34. In March 2021, the Council and Homes for Lambeth Joint Delivery Plan 2021-2022 stated on page 2 that "The projects at Fenwick Place, Roman Rise and Trinity Rise are stand-alone projects which have now achieved resolution to grant planning consent. Identified as Phase 1 of Central Hill, Cressingham and Fenwick estates in the previous forecast, they are now formed as projects in their own right and are being brought forward as part of HfL's 'small sites' programme".
35. The Council sought to provide clarification in its submissions to the Commissioner regarding the context in which it uses "phase 1" to refer to Ropers Walk/Trinity Rise. It stated that the use of the term refers to the first site on the Cressingham Gardens Estate to be developed, but that this is not part of a wider regeneration of the estate. It also stated that there is no overarching masterplan for the Cressingham Gardens programme and, therefore, no phasing decisions or plans for the overall redevelopment. The Council further stated:

"The label 'Phase 1' was not intended to indicate that Trinity Rise was the first part of the estate to be rebuilt as part of the wider plan to

rebuild the whole estate; no such plan for the rebuilding of the estate exists.”

The Commissioner's analysis

36. The Commissioner wishes to express his disappointment with the lack of clarity provided by the Council in relation to this case, having changed its position more than once and repeatedly providing contradictory statements.
37. From the Council's convoluted submissions, the Commissioner is satisfied that the project at Ropers Walk/Trinity Rise has been considered as a 'small sites' standalone project since before the complainant submitted their request for information and that no wider masterplan or phasing plan for the overall redevelopment exists, however, the fact remains that documents in the public domain and widely referred to by both the Council and the complainant throughout the course of this investigation do refer to Ropers Walk/Trinity Rise as Phase 1.
38. The Commissioner accepts the Council's explanation of the context in which it uses the term 'phase 1' in relation to Ropers Walk/Trinity Rise, but he remains dissatisfied with the Council's interpretation of the request for information.
39. The Commissioner cannot see that the complainant has indicated at any point that their request relates to any wider masterplan, and furthermore, the complainant has explained that their understanding of Ropers Walk/Trinity Rise being 'phase 1' of the regeneration merely stemmed from the Council and Homes for Lambeth's use of the term in the published documents highlighted within this notice.
40. Whilst the wording included in the 2021-2022 Joint Delivery Plan may have been misleading in terms of it suggesting that Ropers Walk/Trinity Rise had changed from being Phase 1 of Cressingham Gardens to a small sites project in its own right, that does not affect the original wording of the request which only refers to the analysis and decisions relating to the Council's labelling of Ropers Walk/Trinity rise as phase 1. The scope of the request does not include any information regarding the decision and analysis for Ropers Walk/Trinity Rise to be a small sites project.
41. The Commissioner is, therefore, of the view that the Council should have interpreted the request in the context in which the Council itself had used the term 'phase 1' in relation to Ropers Walk/Trinity Rise, i.e. the first site on the Cressingham Garden estate to be developed, but not part of a wider regeneration masterplan for the overall estate.

42. The Commissioner is also disappointed to note that, despite asking it several times, along with its extensive experience of handling requests for information, the Council has made no attempt to conduct or evidence any appropriate searches, as explained in the Commissioner's published guidance⁴, to satisfy both the Commissioner and the complainant that it does not in fact hold any information within the scope of the request.
43. The Commissioner's decision is that the Council should revisit the request for information, and it should reconsider it based on its own intended interpretation of the term "phase 1"– i.e. Provide all copies of documents and emails that deal with the analysis and decision to choose Ropers Walk as the first site on the Cressingham Garden Estate to be developed. The Council should conduct thorough and appropriate searches to determine if it holds information within the scope of the request, and it should provide a fresh response or refusal notice which is compliant with the legislation.

Other matters

44. The Commissioner wishes to comment more generally on the way the Council has handled this request for information. Firstly, the Commissioner is disappointed that the Council did not deal with the matter of which was the appropriate access regime to handle the request under more expeditiously when it was raised by the Commissioner. The Commissioner should not have to prompt the Council several times before it considers if it has relied upon the correct regime according to the nature of the information being requested.
45. The Council's correspondence to the complainant on 30 March 2021 setting out the outcome of the internal review, was limited to one sentence, "I write to confirm we maintain reliance on our previous response for this request." The FOIA section 45 Code of Practice provides guidance to public authorities on their responsibilities under the FOIA⁵. Paragraphs 5.8 – 5.10 explain that the internal review procedure should provide a fair and thorough review of procedures and decisions

⁴ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/determining-whether-we-hold-environmental-information/>

⁵

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

taken in relation to the FOIA. It says that the public authority should "in all cases re-evaluate their handling of the request and pay particular attention to concerns raised by the applicant".

46. While the Council may have conducted a thorough internal review, the cursory nature of the correspondence it has had with both the complainant and the Commissioner, does not demonstrate this.
47. The Commissioner has set out on his website the positive benefits for public authorities of conforming with the section 45 Code of Practice⁶. These include improved public perception of an organisation, saving of staff time and potentially less resource being spent on dealing with complaints to the Commissioner.
48. The Commissioner is also disappointed in the quality of the engagement the Council has had with his office. Whilst the Commissioner attempts to restrict the information required to that necessary to reach a decision, he expects public authorities to provide comprehensive answers to all of his questions and to provide the necessary evidence to back up any assertions. The Commissioner has had to ask the Council several times for the same information.
49. The Commissioner also wishes to highlight that if a public authority chooses to amend its position in relation to a request during the Commissioner's investigation, it is the responsibility of that public authority to notify the complainant and provide them with the updated response. This is explicitly stated to the public authority at the start of the investigation. The Commissioner should not have to chase a public authority several times to ensure that this gets done.
50. The above concerns will be logged and used by the Commissioner when considering the overall compliance of the Council.
51. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. This will align with the goal in his draft Openness by design strategy⁷ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA and EIR enforcement

⁶ <https://ico.org.uk/for-organisations/section-45-code-of-practice-request-handling/>

⁷ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

activity through targeting of systemic non-compliance, consistent with the approaches set out in his Regulatory Action Policy⁸.

52. Should the complainant have cause to complain about the fresh response to this request which the Council has now been ordered to provide, the Commissioner will expect the Council to have carried out appropriate searches to identify any relevant information, and to have documented those searches so that they can be provided in evidence to his investigation.

⁸ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

53. 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

54. 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.
55. 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

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