

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

Decision Notice

Date: 21 February 2019

Public Authority: Royal Borough of Kensington and Chelsea
Address: The Town Hall
Hornton Street
London
W8 7NX

Decision (including any steps ordered)

1. The complainant requested information regarding planning issues at a particular property. The Royal Borough of Kensington and Chelsea (the Council) initially handled the request under the FOIA. Following the Commissioner's intervention it reconsidered the request under the EIR. The Council disclosed most of the requested information and withheld the remainder in reliance on the exception at regulation 12(4)(e) of the EIR.
2. The Commissioner's decision is that the public authority failed to respond to the request in accordance with the EIR. However she does not require any remedial steps in respect of this request.

Request and response

3. On 15 December 2017 the complainant requested the following information, relating to a specified property, from the Council:
 - *The legal opinion obtained by RBKC regarding the above property;*
 - *All emails, letters, and notes of telephone conversations to and from officers relating to any potential planning issues at the above property;*
 - *Any internal correspondence between officers relating to the above site; and*
 - *Any views or opinions as to how the planning condition included in the planning consent for the property that no nuisance or annoyance be caused which may injuriously affects the amenities of*

the surrounding neighbourhood" impacts the use of the garden of the property.

4. The Council acknowledged receipt of the request on 18 December 2017. The complainant contacted the Council on a number of occasions between 18 January 2018 and 14 March 2018 since he had not received a response to his request. The Council advised the complainant on 14 March 2018 that it was finalising a response to his request.
5. Following a number of further chasers, the Council responded to the complainant on 19 April 2018. At this stage the Council disclosed most of the requested information to the complainant.
6. The complainant contacted the Council on 7 May 2018 to advise that the requested legal advice had not been disclosed to him.
7. The Council advised the complainant on 31 May 2018 that it was withholding the legal advice in reliance on the exemption at section 42 of the FOIA. The Council stated that this correspondence, an email, should be read as a refusal notice (although the subject line indicated that it was an internal review). The Council did however include contact details for the ICO.

Scope of the case

8. The complainant contacted the Commissioner on 23 July 2018 to complain about the handling of his request. The complainant asked the Commissioner to make a decision as to whether or not the withheld information ought to have been disclosed to him.
9. On considering the correspondence it appeared to the Commissioner that the request was for environmental information. Therefore the Commissioner advised the Council that it ought to have considered the request under the EIR rather than the FOIA.
10. Following the Commissioner's intervention the Council issued a revised response to the complainant on 28 January 2019. It disclosed most of the previously withheld information and cited the exception at regulation 12(4)(e) in respect of the remaining withheld information. The withheld information comprised legal advice.
11. The complainant accepted that the remaining withheld information was exempt from disclosure. However the complainant asked that the Commissioner issue a decision notice to record the Council's handling of the request.

Reasons for decision

Access regime

12. As set out above, the Council responded to the request under the FOIA. However, on inspection of the correspondence the Commissioner was of the opinion that the request was for environmental information. Therefore she considered that the request ought to have been dealt with under the EIR rather than the FOIA.
13. Environmental information is defined at regulation 2(1) of the EIR. The requested information relates to planning matters, and the Commissioner is satisfied that it is information on (concerning, relating to, or about) a measure which is likely to affect the elements of the environment as set out in regulation 2(1)(a).
14. Regulation 5(2) of the EIR requires that a public authority respond to a request for environmental information within 20 working days. Any information that is not exempt from disclosure must be disclosed within this time.
15. Regulation 7 provides that the authority may extend the time for compliance from 20 to 40 working days if it believes that the complexity and volume of the information requested means it is not practicable to comply sooner. However regulation 7(3) is clear that the authority must advise the applicant of this as soon as possible and certainly within the standard 20 working days.
16. In this case the Council initially handled the request under the FOIA rather than the EIR. The FOIA does not provide an equivalent to regulation 7, so under the FOIA the Council would have been obliged to respond within 20 working days. However the Council did not in fact issue a substantive response until four months after the request was submitted. Accordingly the Commissioner finds that the Council failed to comply with regulation 5(2) in that its response was issued well beyond the statutory time for compliance.
17. The Commissioner also notes that the Council disclosed further information to the complainant on 29 January 2019, following her intervention. Again this information was disclosed outside the 20 day time for compliance, therefore the Council failed to comply with regulation 5(2).
18. Regulation 14 of the EIR requires that a public authority issue a refusal notice in respect of any information it wishes to withhold in response to a request. The Council advised the complainant that its correspondence of 31 May 2018 was a refusal notice, and it cited the exemption at

section 42 of the FOIA. However the Commissioner observes that the Council issued a previous response on 19 April 2018 that did not clarify that it was withholding some of the requested information. Nor did it cite any exceptions to disclosure. Therefore the Commissioner finds that the Council failed to comply with regulations 14(2) and 14(3) of the EIR.

19. The Commissioner considers that the Council's letter of 31 May 2018 should be interpreted as the outcome of an internal review, since it was effectively a reconsideration of its original response of 19 April 2018. However, the Council still failed to recognise that the request ought to have been dealt with under the EIR rather than the FOIA. Therefore the Commissioner finds that the Council failed to conduct an internal review in accordance with the requirements of regulation 11 of the EIR.
20. The Commissioner understands that the Council, like many public authorities, has competing priorities and a substantial workload. However, compliance with the FOIA and EIR is a statutory requirement which must be met by public authorities. Failure to do so is likely to undermine public confidence in that authority's commitment to information rights, as well as openness and accountability generally.

Right of appeal

21. 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

22. 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.
23. 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

Sarah O’Cathain
Senior Case Officer
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