

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 3 August 2022

Public Authority: Westminster City Council

Address: Westminster City Hall

64 Victoria Street

London

SW1E 6QP

Decision (including any steps ordered)

1. The complainant submitted a request to Westminster City Council ("the Council") requesting instructions given to broadband providers.
2. The Commissioner's decision is that, on the balance of probabilities, the Council does not hold any recorded information falling within the scope of the request. However, in failing to respond to the request and internal review within the statutory timescale, the Commissioner has determined that the Council has breached regulations 5(2) and 11(4) of the EIR.
3. The Commissioner does not require the Council to take any further steps.

Request and response

4. On 26 June 2021, the complainant wrote to the Council and requested information in the following terms:

“Now I make a formal request to be sent the information that confirms that you did indeed instruct the fibre/cable installers on the blindfold (sic) estate to ask for permission to enter about 50 gardens. Did you so instruct? please send me any information you have that confirms this.”

5. The complainant chased up a response on 26 July 2021.
6. The Council responded on 23 August 2021 confirming that it did not hold the requested information.
7. The complainant requested an internal review on 23 August 2021, disputing the timeliness and outcome of the response.
8. Following intervention by the Commissioner, the Council provided its internal review response in two tranches on 21 December 2021 and 6 January 2022 and maintained its original position.

Scope of the case

9. The complainant contacted the Commissioner on 28 November 2021 to complain about the way their request for information had been handled.
10. In line with his usual practice, the Commissioner contacted the Council on 15 June 2022 to confirm whether it holds any information within the scope of the request and what searches had been undertaken to confirm this.
11. The scope of the Commissioner's investigation is to consider whether the Council has complied with its obligations under regulation 5(1) of the EIR.

Reasons for decision

12. 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);
13. The Commissioner is satisfied that the requested information, if it were held by the Council, would fall within the measures identified by 2(1)(c).

Regulation 5(1) – Duty to make available environmental information on request

14. Regulation 5(1) of the EIR states that 'a public authority that holds environmental information shall make it available on request.' This is subject to any exceptions that may apply.
15. 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. He will also consider the actions taken by the public authority to establish what information within the scope of the request it held, and any other reasons offered to explain why further information is not held. He will also consider any reason why it is inherently likely, or unlikely, that further information is not held.

16. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he 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 position

17. In their internal review, the complainant states that it appears that the Council holds the information based on its use of the word 'instruction' in its initial response.
18. In submissions to the Commissioner, the complainant highlights the fact that the information requested "was apparently confirmed as existing (and certainly not confirmed as NOT existing) but still has not been sent".
19. The Commissioner understands the complainant has had previous concerns regarding receiving permission to access their land.

The Council's position

20. In its initial response, the Council explained that "the instruction is through the citywide wayleave which authorises said contractor to provide services to a number of estates".
21. In its internal review, the Council did admit that the use of the word 'instruction' may have been misleading for the Council does not instruct work but approves work based off the citywide wayleave.
22. At this point, the Commissioner believes that an explanation of the term 'wayleave' may have helped the complainant understand that the Council does not hold the information.
23. In submissions to the Commissioner, the Council explains that no "specific instruction is given to the contractors" to access the gardens on the estate.

The Commissioner's view

24. As there is a citywide wayleave in place, which grants access rights to broadband providers to carry out infrastructure work, it would appear that the Council would not hold the specific instruction that the complainant has requested.
25. However, the Commissioner does agree with the complainant that this could have been made clearer either via stating the information is not held or quoting the relative exception from the EIR.

26. Having considered the above, the Commissioner has concluded that, on the balance of probabilities, the Council does not hold any information falling within scope of the complainant's request.

Regulation 5(2) – Duty to make environmental information available on request

27. Regulation 5(2) of the EIR says that the public authority must make the information available as soon as possible and no later than 20 working days after the date of receipt of the request.
28. In this case, the Council failed to respond in full to the request within 20 working days. The complainant submitted their request for information on 26 June 2021 and the Council provided its substantive response on 23 August 2021.
29. Whilst noting the Council's explanation that it had viewed the initial correspondence, sent on 26 June 2022, as a formal complaint and that it was only when the complainant sent his request to the FOI email addresses that it was treated as such. However, even as the Council admitted itself, is not a mandatory requirement for a request for information to be sent to the correct correspondence address.
30. Therefore, the Council has breached regulation 5(2) of the EIR.

Regulation 11-representations and reconsideration

31. Regulation 11 of the EIR states that:

“(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.”

32. 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 Council has breached regulation 11 of the EIR.

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.

Signed

Phillip Angell
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF