

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 October 2015

Public Authority: London Borough of Bromley
Address: Civic Centre
Stockwell Close
Bromley
BR1 3UH

Decision (including any steps ordered)

1. The complainant requested a draft report and any amendments made to it by a clerk at the London Borough of Bromley in relation to a planning application.
2. The London Borough of Bromley disclosed an early version of the draft report but claimed not to hold any further information.
3. The Commissioner's decision is that the London Borough of Bromley has disclosed all the information it holds within the scope of the complainant's request based on a balance of probabilities.
4. The Commissioner does however find that the London Borough of Bromley has breached Regulation 5 of the EIR but does not require it to take any steps.

Request and response

5. On 16 October 2014 the complainant wrote to the London Borough of Bromley (the Council) and requested information in the following terms:

Planning Application No: 14/01561/OUT

'In respect of Planning Application No: 14/01561/OUT (213 Kings Hall Road, Beckenham BRF3 1LL) please provide:

1. *A copy of the draft report submitted to the Chief Planner or other officer for approval by the Case Officer, (name redacted).*
2. *Confirmation of the date the draft report was submitted for approval if this is not apparent from the copy supplied.*
3. *A copy of any "tracked changes" copy of the report or any other note or memorandum from the Chief Planner or other officer requiring amendments to the draft report and/or approving it.*
4. *A copy of the hand-over notes prepared by (name redacted) on leaving employment with Bromley Council.*
5. *Confirmation of the date of those hand-over notes if this is not apparent from the copy supplied.'*
6. The Council responded 12 November 2014. In relation to questions 1 to 3 of the request the Council stated that the 'draft report' would be exempt under section 36(2) of the FOIA with the public interest balanced in favour of maintaining the exemption. In relation to questions 4 and 5 of the request, the Council stated that the information was not held.
7. On 20 November 2014 the complainant requested an internal review.
8. The Council responded on 18 December 2014 and upheld its application of section 36(2) of the FOIA.
9. The complainant wrote to the Council again on 5 January 2014 and requested the identity of the "qualified person" who had given the opinion under section 36(2) and clarification as to whether the request had been referred to him for his specific consideration.
10. The Council responded on 12 January 2015 and provided the identity of the qualified person who it said had applied section 36(2) of the FOIA to the specific request.

Scope of the case

11. The complainant contacted the Commissioner 24 January 2015 to complain about the way his request for information had been handled.
 12. On 27 February 2015 the complainant confirmed that the scope of the Commissioner's investigation could be restricted to the Council's response to questions 1, 2 and 3 of the request.
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Chronology

13. On 3 March 2015 the Commissioner contacted the Council by email and invited it to reconsider the complainant's request under the Environmental Information Regulations 2004 (the EIR) on the basis that the information requested was 'environmental' within the definition of Regulation 2(1)(c).
14. The council acknowledged the Commissioner's email on 10 March but as neither he nor the complainant had received a response by 5 May 2015 he email the Council again.
15. The Council responded on 27 May claiming that it had responded to the complainant direct on 20 April 2015 but acknowledged that its communication may have gone astray.
16. The Council provided the Commissioner with a copy of its response to the complainant on 27 May 2015 in which it cited Regulation 12(4)(d) of the EIR on the basis that the draft report was an 'unfinished document'.
17. On 29 May 2015 the Commissioner provided the complainant with a copy of the Council's response dated 20 April 2015.
18. The complainant responded to the Commissioner on 31 May 2015 and said he was dissatisfied with the Council's response as it was late and did not refer to a public interest test.
19. As the complainant was dissatisfied with the Council's response he requested an internal review under Regulation 11(1) of the EIR on 20 June 2015.
20. On 28 July 2015 the Council contacted the Commissioner direct and stated it was normal practice for drafts to be over-written in producing a final report, so there was no copy available.
21. The Commissioner replied to the council on 28 July 2015 asking it to clarify whether it was now stating that the requested information it had withheld (initially under section 36(2) of the FOIA and subsequently under Regulation 12(4)(d) of the EIR) was in fact not held at all. He also asked the council to respond to the complainant's internal review request direct clarifying what searches and enquiries it had carried out to identify and locate the requested information.

22. The Council responded to the complainant direct on 28 July 2015 indicating that the requested information was not in fact held but without specifying what searches and enquiries it had carried out.
23. The Commissioner contacted the Council again on 31 July 2015 and invited it to specify what searches and enquiries it had carried out to identify and locate the requested information. He also asked it to provide details of its document retention and disposal policy.
24. The Council responded on 10 and 17 September 2015 and stated that it did not carry out any searches when the request was received. However, it pointed out that searches carried out subsequently had revealed an earlier 'draft' report which it disclosed to the Commissioner but nothing else.
25. On 11 September 2015, the Commissioner made the complainant aware of the Council's comments and provided him with a copy of the draft report it had located.

Reasons for decision

Regulations 5(1) and 5(2) of the EIR – Duty to make available environmental information on request

26. Regulations 5(1) and 5(2) of the EIR provide a general right of access to recorded environmental information held by public authorities. Public authorities should make environmental information available as soon as possible and no later than 20 working days after receipt unless a valid exception applies.
27. 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 argument. He will also consider the actions taken by the authority to check that the information was not held and he will consider if the authority is able to explain why the information was not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held. He is only required to make a judgement on whether the information was held "on the balance of probabilities".¹

¹ This approach is supported by the Information Tribunal's findings in *Linda Bromley and Others / Environment Agency* (31 August 2007) EA/2006/0072

28. In this case the Council has explained why the only information it holds falling within the scope of the complainant's request is the one draft report which it shared with the complainant.
29. In relation to the searches and enquiries it carried out, the Council informed the Commissioner that no search was carried out at the time of the request. It said the view was taken that any drafts should not be disclosed under section 36 of the FOIA or Regulation 12(4)(d) of the EIR and the refusal notice was issued on that basis. The Council said it now recognised that this was the wrong approach and said in the future it would carry out a search when a request is first received to see if it actually holds any of the information requested.
30. The Council went on to explain that its planning section draft their committee reports electronically and overtype them as they are reviewed so that there is only one electronic version and, at the end of the process, it is the final version which goes to committee. It said this meant that earlier drafts were therefore not actually destroyed, just updated. The Council added that the management approach within Planning was to discourage the printing and retaining of copies of earlier drafts since they had limited storage space for hard copy files – which were kept indefinitely. However, it clarified that some officers did still print copies and put them on file, although the majority did not.
31. The Council said that generally the only search that can be carried out is a search of the hard copy file. Reports are prepared and stored on common drives (either Uniform in the report format or Word) so other officers have access to the drafts for commenting purposes. Comments are generally applied by overwriting drafts and not by e-mailing details since it is far quicker simply to amend in track changes. If any officer did print a copy and make manuscript amendments, this version would be thrown away once the case officer had added the comments to the centrally held electronic version since there is no point in keeping old marked up drafts – only the final report matters. Former officers' document folders were retained and the folder belonging to the clerk, who was the subject of the request, had been checked. The Council did find a Word version of the report in draft in that folder, which it disclosed to the Commissioner, who subsequently shared it with the complainant. The Council said it appeared that this was the final draft which was then put on to the Uniform report format. It said that internal meetings were not minuted and were more likely to be conversations than formal meetings.
32. The Council confirmed that it had carried out detailed searches for the hard copy file to see whether it contained any draft reports but said these had not resulted in it being found.

33. As stated above, the Commissioner will consider disputes over whether information was held "on the balance of probabilities". The Commissioner found the Council's representations, although submitted sometime after the request was made, to be persuasive. The Council has been able to explain the searches and enquiries it undertook and it appears that these were appropriate and adequate. Furthermore, the council has been able to give a reasoned account as to why further information was not held based on the fact that draft reports are generally overwritten electronically and a search for the hard copy file had been unsuccessful.
31. As noted above, since the Commissioner started his investigation the Council had located one draft report and made it available to the complainant. The failure to provide this initially was a breach of Regulations 5(1) and 5(2) of the EIR. However, the Council maintained that no further information is held.

Other matters

34. The Commissioner would like to take this opportunity remind the Council of its obligations under Regulations 5, 11 and 14 of the EIR and draw its attention to his guidance to the EIR² on the Information Commissioner's website.
35. In relation to Regulation 5, the Commissioner would like to point out that the first step for a public authority when it receives an information request is to ascertain whether it actually holds the information requested in a recorded format. If it does, it should disclose it to the requestor unless an exception applies, in which case it should issue a refusal notice under Regulation 14.
36. In relation to Regulation 14, the Commissioner would like to remind the Council that if it is refusing a request for environmental information it should do so in writing as soon as possible and no later than 20 working days. Also, the refusal notice should specify the reason for not disclosing the information with reference to the exception or exceptions being relied upon and the matters considered in reaching its decision with regard to the public interest test.

² https://ico.org.uk/media/for-organisations/documents/1641/guide_to_environmental_information_regulations.pdf

37. In relation to Regulation 11(2), the Commissioner would like to point out to the Council that any request for an internal review should be considered and responded to as soon as possible and no later than 40 working days after its receipt.

Right of appeal

38. 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

39. 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.
40. 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

Rachael Cragg
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SK9 5AF