

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

Decision notice

Date: 26 May 2016

Public Authority: London Borough of Hammersmith & Fulham
Address: Hammersmith Town Hall
King Street
London
W6 9JU

Decision (including any steps ordered)

1. The complainant has requested information from the London Borough of Hammersmith & Fulham ("the Council") broadly relating to affordable housing and new developments given planning consent by the Council. The Council has dealt with the requests under the FOIA and stated that parts of the requested information is not held, provided other parts, and explained section 21 applied to the remaining information. The complainant disputed the Council's assertion that some of the requested information was not held and that some information was reasonably accessible on the Council's website. The Commissioner's decision is that the information being requested is environmental information and therefore the EIR and not FOIA is the applicable access legislation. He therefore requires the Council to issue a new response to the requests under the EIR.
2. The Council 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 the Act and may be dealt with as a contempt of court.

Request and response

3. On 17 June 2015, the complainant wrote to the Council and requested information in the following terms:

"Under the Freedom of Information Act, please provide me with information concerning affordable housing and new developments given planning consent by your authority.

1) For each calendar year since 2011 (to include 2011 to date), I would like a list of each development (by name) given planning consent comprising 10 dwellings or more with the following details:

2 a) for each development proposal, net totals of affordable housing by type (Social rent/key worker/intermediate rent/shared ownership and discounted market sale and any other types of housing deemed affordable by your authority)

b) for each development proposal, gross totals of affordable housing by type (Social rent/key worker/intermediate rent/shared ownership and discounted market sale and any other types of housing deemed affordable by your authority)

c) together with the total number of housing units for open market sale in the development.

d) if any developer has provided or promised to provide a commuted sum for off-site provision,

e) where a developer has provided or promised to provide a commuted sum for off-site provision

i) please detail this in terms of the amount

ii) how many housing units

iii) of what type will be financed by the developer contribution.

iv) Is the housing to be provided in borough or outside?

3) Could you also let me know what your authority's target is for the provision of affordable housing in developments of 10 or more housing units."

4. The Council responded on 15 July 2015 and provided the complainant with a spreadsheet which included a breakdown of all applications granted planning permission that included a development of 10 or more dwellings. The Council further advised that in terms of the breakdown of the information that had been requested, it was not straightforward enough to present this information in a spreadsheet. It subsequently referred the complainant to its website where he could search the relevant application number to view each of the Section 106 agreements that contain the specific information that has been requested.

5. The Council also explained:

"I can confirm that in rare cases where developers have provided an offsite contribution it is intended that it will be used to provide affordable housing within the borough. However it is impossible at the present time to define how many by any specific contribution".

6. With regard to 3), the Council explained that the Council's affordable housing target is including in the Revised London Plan. It advised the complainant to view a copy of this policy which was available on its website.
7. The complainant subsequently asked for an internal review on 27 July 2015. He explained that the information that had been provided was not in the format he had requested. The complainant also explained that the information available on the Council's public portal did not capture all planning reports. In addition to this, he believed that this information should be readily available to the Council due to the need to monitor progress against its local plan and the London Plan.
8. The Council sent the outcome of its internal review on 17 November 2015. The Commissioner will set out the Council's response to each request below.
9. For request 1) the Council explained that this information had been provided in the form of a spreadsheet in its initial response.
10. For requests 2a) the Council confirmed that this information is held and it is available in the specific section 106 agreements which are available to view on the Council's planning web page. It further advised that a more limited analysis was available in the Council's Annual Monitoring Reports which are published on the Council's Planning Policy web pages. It subsequently provided a link to this page.
11. Similarly to request 2a), the Council advised the complainant that he could access the information sought in request 2b) and 2d) on the Council's website.
12. For request 2c) the Council confirmed that the total number of housing units for open market sales was not held. However, it advised that:
- "...the figures can be calculated by doing a comparison between the numbers provided in the planning application description for the total number of residential units that the development application is for, minus the numbers provided in the section 106 agreement for the net total of affordable housing".*

13. With regards to 2e), the Council referred to its previous response in which it advised the complainant that *"it was impossible at the present time to define how many by any specific contribution"*. In its internal review response, the Council clarified its position. For request 2e i), the Council explained that this information was held and it was available in the specific section 106 agreements which are published on the Council's website.
14. For requests 2 e ii) and 2) e iii), the Council confirmed that this information was not held.
15. With reference to 2 e iv) the Council confirmed that the location of the housing units that will be financed by the commuted sum for off-site provision is not held by the Council. However it explained that currently there are no known plans for any housing to be provided outside of the borough.
16. For request 3), the Council referred the complainant to a website where he could locate this information.

Scope of the case

17. The complainant contacted the Commissioner on 18 November 2015 to complain about the way his request for information had been handled.
18. The complainant disputed the Council's handling of his request. He argued that the Council had not provided him with the information he sought and instead referred him to numerous legal agreements. He explained that he did not wish to know the details of each scheme but rather the summary totals. He provided the Commissioner with arguments as to why this information should be readily available to the Council.
19. The complainant also directed the Commissioner to the Council's disclosure log. He explained that the Council has previously provided identical information to that he has requested except it covers a different time period. He believed that the Council were being inconsistent by not providing him with the information he sought.
20. He further argued that he was aware of at least one application number that had not been included in the spreadsheet provided in response to request 1 but it had been to committee. He therefore argued that the Council was *"wrong to claim that these details appear on the public access part of their site"*.

21. To conclude, the complainant stated that he had made the request to 32 London Boroughs and the vast majority had responded properly and provided him with the information he sought. He also stated that at least 24 had provided him with the information in a way which allowed him to calculate the totals.
22. In light of this, the Commissioner has had to consider whether the Council has handled the request in accordance with the relevant legislation.
23. The starting point for the Commissioner when investigating any information rights complaint is establishing whether the appropriate legislation has been applied by an organisation. In this case, it means the Commissioner has begun by looking at whether the Council should have used the EIR or FOIA with respect to the requests. His analysis of this issue follows.

Reasons for decision

24. FOIA and the EIR both give rights of public access to information held by public authorities. The regimes are, however, distinct from one another. The EIR derived from European Union law and exclusively covers environmental information. FOIA, on the other hand, will apply to most other types of official records held by public authorities. A determination on the piece of legislation that should be used with regard to the processing of a request must be based on an objective assessment of the information that has actually been asked for.
25. 'Environmental information' is defined at regulation 2(1) of the EIR. In accordance with the European Council Directive 2003/4/EC from which the EIR derives, it is the Commissioner's view that the definition should be interpreted widely; an approach borne out by the wording of regulation 2(1), which states that environmental information is "any information...on" the factors described at paragraphs (a) – (f). Importantly, the Commissioner considers that it is not necessary for the information itself to have a direct effect on the environment, or to record or reflect such an effect, in order for it to be environmental.
26. Upon receipt of the complaint, the Commissioner contacted the Council and asked it to reconsider its handling of the request. He initially asked the Council to consider whether the requested information fell under the FOIA or the EIR.
27. The Council considered that the request did not clearly fall within either of the regimes; some of the information requested may be more one than the other and vice versa. However, it argued that it was reasonable

to consider that information around affordable housing policies is covered by FOIA rather than EIR as whether a property is classed as affordable housing or not is unlikely to affect the state of the elements of the environment. The Council referred to a First-Tier Tribunal decision to support its view.¹

28. Similarly to the related case FS50601532, the Commissioner disagrees with this position. Instead, he considers that the requested information falls within the definition of environmental information set out in regulation 2(1)(c) of the EIR.
29. Regulation 2(1)(c) of the EIR provides that information is environmental information where it is on:

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) and (b) as well as measures or activities designed to protect those elements

30. The Commissioner's guidance 'What is environmental information?'² explains at paragraph 32 that the term 'affecting' in the definition means the effects on the elements of the environment, or factors such as those listed in regulation 2(1)(b), has already occurred, or is current or ongoing. It follows from this that 'likely to affect' means there is a likelihood the elements of the environment, or factors such as those listed in regulation 2(1)(b), would be affected if the measure went ahead. This likelihood does not have to be more probable than not, but does have to be real and significant and substantially more than remote.
31. Information relating to planning matters will often be environmental information because of the likely effects that the development of a site will have on the environment. By extension, any decision on whether to accept a planning application, and the particular form of the development that should be allowed, will therefore be environmental information because of its bearing on the implementation of that proposal.

1

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i1279/London%20Borough%20of%20Southwark%20EA.2013.0162%20\(09.05.14\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1279/London%20Borough%20of%20Southwark%20EA.2013.0162%20(09.05.14).pdf)

² https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

32. The Commissioner considers that broadly speaking figures and totals of affordable housing relates to the development of affordable housing which in turn has a direct effect on the environment. By way of illustration, the Commissioner considers that an agreement on the gross/net totals of affordable housing would shape the wider development plans which would subsequently have a profound effect on the land and landscape.
33. On this basis, the Commissioner has decided that the information is environmental information as defined by regulation 2(1)(c). As such, the request should have been dealt with under the EIR. The Council is therefore required to provide a fresh response to the requests in accordance with this legislation.

Right of appeal

34. 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

35. 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.
36. 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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