

**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 relating to a statement given by the London Borough of Hammersmith and Fulham (the Council). This said that a series of renegotiations on property deals had secured more than £50 million of extra funding for borough residents, part of which would be used to deliver 231 new affordable homes. The Council has dealt with the requests under FOIA and stated that parts of the requested information is not held, provided other parts, and withheld financial figures relating to two developments pursuant to the 'commercial confidentiality' (section 43(2)) exemption to disclosure in FOIA. The complainant has disputed both the Council's use of section 43(2) of FOIA and its assertion that some of the requested information is not held. 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 public authority must take this step 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 14 June 2015, the complainant wrote to the Council and requested information in the following terms:

The council has claimed that it has renegotiated an extra £50 million from developers to fund 231 affordable housing units^[1]. Which property schemes were renegotiated and how much extra funding in each was obtained by the council as planning gain. Has the council identified the schemes where the affordable housing is to be built – if so where are these, how many units will be provided and what type of affordable housing will they be. Have any affordable units been provided to date funded directly by the renegotiated deals, if so which schemes and how many units of each type. What was the contract sum for any schemes to date.

What are the future programme details of affordable housing units provided under this initiative – which sites, how many units, estimated cost, practical completion estimates. When does the council expect this funding to have been fully utilised.

4. The Council responded on 10 August 2015. It stated that four property schemes had been renegotiated but refused to confirm how much funding was obtained in each case on the basis that the information was covered by the 'commercial confidentiality' (section 43(2)) exemption to disclosure. The Council also clarified that it had not yet identified the sites for the building of the affordable housing using the extra funds that had been renegotiated.
5. On 10 August 2015 the complainant wrote to the Council and expressed his dissatisfaction with both the Council's decision to withhold information and its assertion that a programme to provide the additional housing units had not yet been developed. An internal review was therefore carried out by the Council and the outcome provided to the complainant on 19 October 2015.
6. The reviewer revised the original position of the Council by disclosing the amount of extra funding it had obtained as planning gain in respect of five property schemes. It also disclosed the total combined amount renegotiated on three land contracts (Town Hall and King Street, Fulham

¹ <https://www.lbhf.gov.uk/articles/news/2015/03/council-wins-over-%C2%A350m-extra-funding-borough-residents-after-renegotiating-property-deals>

Town Centre, and Thames Tideway Tunnel) but considered that a breakdown of the figure by development should be withheld under section 43(2) of FOIA. With regard to the complainant's contention that a programme to provide affordable housing had been developed, the reviewer maintained that the requested information was not held. The complainant was though provided with a table of the section 106 agreements relating to the sites where affordable housing will be located.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. His complaint had two parts:
 - A. The complainant challenged the Council's use of section 43(2) of FOIA to withhold the funding obtained with regard to each of the relevant three sites referred to the internal review (Town Hall and King Street, Fulham Town Centre and Thames Tideway Tunnel).
 - B. The complainant considers that the Council does hold information recording where, when and what type of additional affordable housing units were being funded by the additional £50 million savings cited.
8. The Commissioner wrote to the Council on 10 December 2015 to notify it of the complaint that had been made. He introduced the possibility that the EIR rather than FOIA was the relevant legislation for the requests before asking the Council to set out its position with respect to A and B.
9. The Council failed to respond to the Commissioner within the initial 20 working day deadline specified or the extension subsequently granted. Accordingly, on 23 March 2016 the Commissioner deemed it necessary to serve under section 51 of FOIA an Information Notice that required the Council to provide its response to his questions. The first part of the Council's response was received on 22 April 2016 and the second part on 29 April 2016.
10. The Council firstly informed the Commissioner that it considered FOIA was the correct statute for processing the requests for information.
11. With regard to complaint A, the Council decided in consultation with the developer that the financial contribution for the Town Hall and King Street development could be disclosed. It continued to rely on section 43(2) of FOIA to withhold the financial contributions provided in relation

to the other land contracts (Fulham Town Centre and Thames Tideway Tunnel).

12. In relation to complaint B, the Commissioner had provided the Council with the following clarification given to him by the complainant as a means of illustrating the information he was seeking:

My second question relates to proposals being funded by this initiative. The Council has provided a list of schemes in its internal review response which are those which have already been given planning consent and have been consented on the basis that the developers provide some affordable housing. The figures given to me do not relate to affordable housing units. The figures given to me do not relate to affordable housing units being funded by the renegotiated developer contributions of £50 million – these units were already being provided. My question therefore has been sidestepped as I specifically wanted to know where, when and what type of additional housing units were being funded by this extra £50 million.

I strongly suspect that the programme has been formulated. I have searched previous years planning approvals known as "Fr3s" where the Council is the developer/applicant. There are 14 planning consents in place to provide affordable housing in several locations. What I do not know is if these have been completed or are going ahead.

In addition the Council's Cabinet met and approved an outline programme in July this year and my reading of the report indicates to me that firm proposals have been drawn up. I attach a copy of this report. In addition the following is a list of planning application reference numbers which I believe are part of this programme/initiative. They are: 2011/04079; 2012/01820; 2012/02177; 2012/02178; 2012/02698; 2012/02855; 2013/00599; 2013/00598; 2013/00600; 2013/01865; 2013/04712; 2013/04504; 2014/02322; and 2014/02567.

I therefore do not accept the Council's statement that no proposals exist to utilise the extra £50 million renegotiated.

13. In its reply to the Commissioner, the Council stood by the explanations provided in response to the complainant that the requested information was not held.
14. 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

The relevant legislation – FOIA or the EIR?

15. 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.
16. '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.
17. In asking the Council to visit the complaint issues on 10 December 2015, the Commissioner said that he understood the requests related to negotiations linked to development proposals and on this basis suggested there were grounds for assuming that the requested information was environmental information for the purposes of the EIR. He considered that this position would seem to find support in a previous decision notice served by him on Hertfordshire County Council (FS50549434, 6 November 2014)². In the Hertfordshire example, the Commissioner considered a request for correspondence from Hertfordshire Council's legal team in respect of money made available to the authority from agreements made under section 106 of the Town and Country Planning Act 1990 (as amended). The Commissioner found

² https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1042588/fs_50549434.pdf

there that the information fell within the definition of environmental information set out at regulation 2(1)(c) of the EIR, which refers to information on activities affecting or likely to affect the elements or factors of the environment.

18. The Commissioner further highlighted to the Council the potential similarity between the current requests and requests made for financial viability assessments. These are normally produced by developers seeking to demonstrate that plans for the regeneration of a site could not be delivered within the planning authority's targets for the percentage of affordable housing or other public realm improvements. Differently constituted Information Tribunals have decided that viability assessments should be dealt with under the EIR. For example, this view was reached by the First-Tier Tribunal in *The London Borough of Southwark v The Information Commissioner* (EA/2013/0162, 9 May 2014)³, although the Tribunal also cautioned that there may be a tendency to overuse the EIR (paragraph 29).
19. The Council considers that the financial contributions which developers have agreed to pay, and by extension the use of these contributions, are not environmental information and FOIA is therefore the correct statute. The Commissioner disagrees with this position, however. Instead, he considers that the requested information falls within the definition of environmental information set out at regulation 2(1)(c) of the EIR.
20. 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

21. The Commissioner's guidance 'What is environmental information?'⁴ 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

³[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)

⁴ https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

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.

22. The guidance clarifies that when the measure under consideration is something that is proposed for the future, public authorities should consider whether, if the measure were to go ahead, it would be likely to affect the environmental and factors specified. The likelihood of a plan actually coming to fruition is not a relevant consideration. Rather, the guidance explains that once it is established that there is an intention to initiate a plan or to develop a policy, then this is sufficient to bring information which will contribute to the preparation of that plan within regulation 2(1)(c).
23. The requests in this case were generated by a statement made by the Council which said that it had renegotiated more than £50 million in extra funds on property deals. The statement continued by clarifying that the extra money would be invested in the arts and other infrastructure and community improvements, putting a greater number of police onto the streets, and, the focus of the information requests here, delivering 231 new affordable homes.
24. The context in which these renegotiations took place was referred to in a report⁵ produced by the Director for Planning, Growth and Regeneration of the Council for the Policy and Accountability Committee (30 June 2015). This explained that 'Planning obligations (or "section 106 (s106) agreements") are an established and valuable mechanism for securing planning matters arising from a development proposal. They are commonly used to bring development in line with the objectives of sustainable development as set out in relevant local, regional and national planning policies' (paragraph 4.1). The report continues by saying that 'Planning obligations can be provided by developers "in kind" (where the developer builds or provides directly the facilities necessary to fulfil the obligation), by means of a financial payment, or in some cases a combination of both.' Following the May 2014 election, officials met with developers and secured extra benefits in relation to the s106 agreements within the heads of terms that may have already been agreed.

⁵ <http://democracy.lbhf.gov.uk/documents/s66092/Item%208%20-%20S106%20agreements.pdf>

25. Increasing demand for housing, combined with an intensifying pressure on space and a deficit in the number of homes being built, has created the need for affordable housing, particularly in London. 'Affordable housing' includes social rented, affordable rented and intermediate housing provided to specific eligible households whose needs are not met by the market. The common uses of planning obligations are to secure affordable housing within particular developments. In this case, however, the savings produced by the renegotiations have seemingly led the Council to commit to the delivery of additional affordable homes in future projects
26. 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.
27. The Commissioner is of the view that the savings accrued by the Council were an intimate part of the planning process connected to the eight developments cited by the Council. The Council's response does not explain to what extent, if at all, the progress of the planning applications was dependent on the savings being made. Nevertheless, the Commissioner considers that the renegotiations would have been significant in terms of the way that the Council engaged with the developer's proposals. Developing this point, the Commissioner acknowledges that the focus of some of the requests is on the way in which the savings will be utilised in the future, specifically with regard to affordable housing. The Council's intention to construct 231 new affordable homes using the extra funding would, if delivered, have a profound effect on the land and landscape.
28. As stated, in the context of regulation 2(1) of the EIR the likelihood of a plan coming to fruition is not a relevant consideration but instead it is only necessary to establish that there is an intention to initiate a plan. In the view of the Commissioner, this requirement is satisfied by the commitment made by the Council to the delivery of the affordable homes in its public statement.
29. For these reasons, 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. When doing so, the Commissioner would encourage the Council to respond to the clarification provided by

the complainant in respect of part B of his complaint (quoted above at paragraph 12).

Right of appeal

30. 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

31. 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.
32. 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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