

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 9 December 2022

Public Authority: London Borough of Croydon
Address: Bernard Weatherill House
8 Mint Walk
Croydon
CR0 1EA

Decision (including any steps ordered)

1. The complainant submitted an eight part request for information about a planning application. The London Borough of Croydon ("the Council") refused parts [1] to [6] and part [8] of the request under regulation 6(1)(b) of the EIR, as the Council maintained that the information was reasonably available and accessible to the complainant via the Council's online planning portal. In response to part [7] of the request the Council provided a narrative response.
2. The Commissioner's decision is that all of the information held by the Council within scope of parts [2] to [6] of the complainant's request is readily available on the planning portal, therefore the Council is entitled to rely on regulation 6(1)(b) to refuse the request. The Commissioner considers that information within the scope of part [1] of the request was not readily available on the planning portal, therefore regulation 6(1)(b) does not apply. In respect of part [7] of the request, the Commissioner considers that further information is unlikely to be held by the Council. The Commissioner has not made a finding in respect of part [8] of the request in the absence of clarification from the complainant with regards to the information sought.
3. The Commissioner does not require any steps.

Request and response

4. On 8 February 2021, the complainant wrote to the Council and requested information in the following terms:

"Dear Croydon Borough Council

You are already in receipt of my FOI and subject access request about the assessment of privacy issues to which you have failed to respond - now into the third month.

Please provide

[1] Full dimensions of the planters

[2] Fully evidenced and diagrammatic assessment which proves that there is no overlooking of any of my land (front, back, or side) from any part of the development including the top floor. It is very clear when viewing from my property that the balcony will, irrespective of planters, provide full views over and into my property in clear beach of the HRA.

[3] Fully evidenced and diagrammatic assessment which proves that there is no visibility over or into my skylights

[4] Fully evidenced explanation of the parking issues I have raised repeatedly - the statements you have provided so far are irrational

[5] Fully evidenced assessment of the noise and nuisance studies which you have failed repeatedly to respond to

[6] Full explanation of how the reduction in sunlight will be addressed.

[7] Full evidence that the actual Certificate B was served on me on or before 26th September 2019 and to which you have concluded that it was correctly served.

[8] All of the documents which you have been withholding in breach of both FOI and Data Privacy legislation.

Yours faithfully,

[name redacted]"

5. On 3 May 2021 the complainant contacted the Commissioner to complain about the Council's failure to respond to their information request. The Commissioner wrote to the Council on 1 June 2021 instructing it to provide a response to the complainant's request within 10 working days.
6. The Council responded on 17 June 2021. It explained that all of the information held within scope of parts [1] to [6] and part [8] of the request was publicly available and easily accessible to the complainant via the online planning portal, therefore it was relieved of its duty to communicate the requested information to the complainant separately.

In respect of part [7] of the request, the Council provided a narrative response.

7. On 22 July 2021 the complainant requested an internal review, stating that the Council had failed to provide any of the requested information.
8. Following an internal review the Council wrote to the complainant on 6 September 2021. It stated that:

“The Council considers the requested information in respect of the assessment of the impact of the proposal regarding your concerns regarding the size and design of the proposal and the impact upon your privacy, access and noise levels, are contained within the information that is available online in respect of this application.”

9. In respect of part [7] of the complainant’s request, the Council explained that this issue had already been considered as a stage 1 and 2 complaint under the Council’s internal complaints process, and had been responded to on 19 March 2021.
10. The complainant sent 10 further items of correspondence to the Council in which they disputed the Council’s internal review response.
11. On 14 January 2022, the complainant contacted the Council in regards to the details of the planters requested at point [1] of their request. The complainant stated that the Council held planning visualisations dated 20 January 2020 which had been disclosed to a third party. The complainant maintained that the visualisations had existed at the time of the request, therefore the Council were incorrect to withhold them.

Scope of the case

12. The complainant contacted the Commissioner on 6 September 2021 to complain about the way his request for information had been handled.
13. In an email to the Commissioner the complainant provided their grounds of complaint as follows:

“The Council continues to refer me back to documents that do not contain the information requested. This is a planning application on my land about which I was never consulted and where no notice under the Town and Country Act was given – an offence.

In relation to the Certificate B, the Council continues to say it would be an offence if notice was not provided – yet continues to cover up the fact that no notice was given prior to the application being submitted. It either needs to provide the information requested or to say that it does not have evidence of notice being served prior to the application being

made. The latter means that an offence was committed – which they have continued to cover up. They know that this is going to judicial review and appear to be frustrating efforts for this to happen. I understand that this is one of many Information Requests from residents that the Council is refusing to provide.

In relation to the other parts of this request – for example access, noise studies – the data is not available in the documents to which they refer yet they made decision apparently based on assessment of data. Their response is a fudge. Again, if they don't have the information – or it is exempt – they need to say so."

14. The complainant provided the Commissioner will copies of the planning visualisations produced by the developers as referred to at paragraph 12 above.
15. The Commissioner understands the complainant's position to be that that information falling within the scope of all parts of the request is not held on the planning portal; that they consider that no evidence of service of a Certificate B notice has been provided, and; that planning visualisations were withheld from them without any explanation.
16. The Commissioner contacted the complainant requesting clarification of part [8] of the request. The complainant did not respond.
17. The Commissioner considers the scope of the case to be whether the Council are entitled to rely on regulation 6(1)(b) to refuse the request, and whether further information (planning visualisations) was held by the Council at the time the request was made.

Reasons for decision

Is the requested information environmental?

18. 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;

19. The Commissioner considers that, as the requested information is for planning applications, it falls under regulation 2(1)(c), due to the information relating to plans likely to affect the element and factors referred to in 2(1)(a). The Commissioner therefore considers that the request should be dealt with under the EIR.

The Council's position

20. The Commissioner contacted the Council and asked it to explain what information falling within the scope of parts [1] to [6] and part [8] of the request was publicly available and easily accessible to the complainant at the time the request was made. The Commissioner asked the Council to direct him to where on the planning portal it considered the information within scope to be contained.
21. The Council provided the Commissioner with a link to its planning portal. For the purposes of this investigation, the Commissioner can only consider documents submitted to the portal that precede the complainant's information request of 8 February 2021. There are 64 documents available to view with a publishing date that precedes the complainant's request, which include the application form, daylight and sunlight studies, design and access statements, drawings of the building plans and the officer's report. This list of contents is not exhaustive.
22. The Council's position is that all of the information it holds within scope of the request is available on the planning portal. In respect of the specific issues raised by the complainant, the Council considered that these are addressed in the officer's report.
23. In respect of the planning visualisations that were separately provided to a third party the Council explained that these were provided to the requestor by the planning service in January 2022. The Council provided the Commissioner with a copy of an email exchange between the planning service and the requestor in which the planning service explain the following:

"I attach copies of the 'imagery' and 'planter detail' as requested below – these were illustrative visuals provided as part of an on-going negotiation. You will not that they are not the final scheme as consulted

upon (for example do not show louvres and show terraces on floors that were subsequently removed) so they will not be uploaded to the website. If we did, it would cause confusion as it is not the scheme being determined tomorrow night.”

24. The Council explained that officers within the planning service had checked their case management and email systems and had concluded that nothing further was held within scope of the request.
25. In respect of part [7] of the complainant’s request, the Council explained that it considered these matters to have been addressed within its stage 1 and 2 complaint responses to the complainant. The Council provided the Commissioner with copies of the responses.
26. Finally, the Council stated that:

“It is considered that where the requested information is not held it amount to a difference of viewpoints as to the merits of an application, and the professional judgement of the officers assessing an application.”

The Commissioner’s position

Regulation 6(1)(b) – publicly available and easily accessible

27. Regulation 6(1)(b) of the EIR states that:

“Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless -

(a) it is reasonable for it to make the information available in another form or format; or

(b) the information is already publicly available and easily accessible to the applicant in another form or format.”

28. In the Commissioner’s view, regulation 6(1)(b) should be understood in the context of regulation 4 of the EIR which places an obligation upon all public authorities to make progressively available as much of the environmental information they hold as possible.
29. The EIR place an obligation upon public authorities, but they also provide public authorities with some protection. Where environmental information has already been made available, public authorities can shield themselves from some of the burden of responding to requests – either because would-be requesters have already found the information for themselves or because the public authority can, when a request has been made, simply point to the information already available. Therefore

Regulation 6(1)(b) exists in part to protect public authorities from having to re-provide the same information continually – it also acts as an extra incentive for public authorities to make the environmental information available in the first place.

30. The Commissioner has reviewed the documents provided to him and those available on the Council's planning portal, and is of the position that the recorded information that the Council holds that falls within scope of parts [2] to [6] of the request is publicly and easily available via the planning portal. The Commissioner therefore considers regulation 6(1)(b) to apply to these parts of the request.
31. In respect of part [1] of the request, concerning the "planter detail", the Commissioner finds that this information was not publicly and easily available via the planning portal at the time of the request, per submissions made by both the Council and the complainant. Therefore, the Commissioner finds that regulation 6(1)(b) does not apply to this part of the request. As the Council had been withholding the information from publication, the correct approach would have been to provide the complainant with a refusal notice in respect of the information sought at part [1] of the request that is compliant with the EIR. As the complainant is now in possession of the requested information, the Commissioner does not require the Council to take any remedial steps in respect of part [1] of the request.

Regulation 12(4)(a) of the EIR – Information held/not held

32. Regulation 5(1) of the EIR requires a public authority that holds environmental information to make it available on request.
33. Regulation 12(4)(a) of the EIR allows a public authority to refuse to provide the requested information if it does not hold it at the time of the request being received.
34. In respect of part [7] of the request, regarding the service of a "Certificate B", the Commissioner's position is that, based on the civil standard of the balance of probabilities, the Council is unlikely to hold any information further to that provided by the Council in its stage 1 and 2 response. The Commissioner notes that the narrative given by the Council in its response to the information request is manifestly the same as that given in its stage 1 and 2 internal complaints responses. Therefore, he concludes that further information is not held.
35. In respect of part [8] of the request, the Commissioner contacted the complainant to request clarification of what recorded information was sought by "All of the documents you have been withholding in breach of both FOI and Data Privacy legislation". The complainant did not provide

clarification and the Commissioner has not made a finding in respect of this part of the request.

36. Finally, the Commissioner is inclined to agree with the Council's submission that where information is considered not to be held, this amounts to a difference of opinion regarding the merits of the application and the judgement of the officers involved.

Right of appeal

37. 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

38. 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.
39. 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

Jonathan Slee
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