

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 31 October 2022

**Public Authority:** London Borough of Croydon  
**Address:** 2 Borrowdale Drive  
South Croydon  
CR2 9JS

#### **Decision (including any steps ordered)**

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1. The complainant has requested information from Croydon Council ("the Council") relating to consideration of a light dimming policy.
2. The Council have provided some information they have located but are unable to find any further information that relates to meetings about this policy as outlined in the request.
3. The Commissioner's decision is that the Council has demonstrated that, on the balance of probabilities, it does not hold any further information within the scope of the complainant's request and Regulation 12(4)(a) of the EIR is engaged. Therefore, the Commissioner requires no steps to be taken in respect of this Decision Notice.

## **Request and response**

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4. The complainant wrote to the Council on 22 June 2021, making the following request:

“Q1 Please provide a list of named Councillors who have considered options to introduce a light dimming policy within the PFI light replacement contract programme.

Q2 When were these considerations made?

Q3 What decisions were made on each occasion and where can they be found on the public record?”

5. The Council responded to the request on 19 July 2021, and provided the names of two councillors, Councillor Bee and Councillor Watson, a date of 2015 and confirmation a decision was not made about the policy.
6. The complainant contacted the Council on 30 July 2021 to request an internal review, expressing they believed the response might be incomplete. The complainant explained to the Council that they were aware Councillor Bee was no longer a Councillor. The complainant queried if the response was complete as they were aware Councillor King was now the portfolio holder and they queried what decisions or considerations he had made relating to the scheme.
7. The Council did not provide an internal review within the usual timeframe; therefore, the complainant contacted the Information Commissioner's office on 20 October 2021. The Commissioner wrote to the Council to request the internal review be expedited within 20 days.
8. An internal review was completed on 23 November 2021. The Council provided the same information as they had provided in their initial response, and stated Councillor King was not involved in the considerations of the scheme in 2015.

## **Scope of the case**

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9. The complainant contacted the ICO on 25 November 2021, to express dissatisfaction with the internal review response. The complainant explained that the response was incomplete and that they believed the Council held further information in relation to their request.

10. The Commissioner has considered the information provided by the complainant to support the view the response is incomplete. The Commissioner has also considered the handling of the complainant's request by the Council, in particular whether, on the balance of probabilities, the Council holds further recorded information within the scope of the complainant's request.

### **Regulation 12(4)(a) – information not held at the time of the request**

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11. Regulation 12(4)(a) of the EIR provides an exception from the duty to make information available if the authority does not hold the requested information at the time of the request. The Commissioner considers the information to be environmental, which is why he has considered this exception under the EIR.
12. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities.
13. 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.
14. In this case, the Commissioner has sought to determine whether, on the balance of probabilities, at the time of the request, the Council held further information within the scope of the request.
15. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. He will also consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, he will consider any other information or explanation offered by the public authority which is relevant to his determination.

### **Reasons for decision**

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16. As is his practice, the Commissioner asked the Council to revisit its handling of the request under consideration in this case. He also asked it to explain what enquiries it had made in order to reach the view that it does not hold further information within the scope of the request.

17. The Commissioner did so with a series of detailed questions and some telephone discussions. The questions included asking about the searches that had been undertaken and the search terms used. He also asked whether any recorded information was ever held relevant to the scope of the complainant's request but deleted or destroyed.
18. In its submission the Council informed the Commissioner they were only able to locate the information they provided to the complainant. One of the meetings included in the response, had no actual recording of any kind and was included from the memory of a councillor.
19. Whilst the Council accept the complainant believes a further meeting to have taken place with Councillor King in 2018, no record is held by the Council of this meeting from the searches completed and enquiries made to date. Furthermore, there is no diary record of a meeting on the date provided. The Council continued to make enquiries of both Directors and Council members, but searches have not produced a Council record of a meeting about the policy in 2018.
20. The Council informed the Commissioner that most records are held electronically. The records searched included emails, database records and emails of specific staff and council members who would be involved in such discussion. The Council expressed historically; some smaller meetings may have been noted by Councillors with minutes not always recorded on the system.
21. The Council confirmed that all staff who have had any involvement with the scheme, have been approached and asked if they hold any records unfortunately, none were found.
22. The Council have now conducted three separate searches in relation to this request without finding any additional information. It is possible, Councillors who have left may have made their own notes of meetings, but these are not accessible.

### **The Commissioner's view**

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23. The Commissioner's role is not to consider whether a public authority should hold information that has been requested but whether, on the balance of probabilities, it does or does not hold it.
24. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that the public authority holds no further relevant information. However, as explained earlier in this notice, the

Commissioner is required to make a judgement on whether further information is held on the civil standard of the balance of probabilities.

25. In reaching his decision in this case, the Commissioner has taken account of all submissions and explanations provided.
26. The Commissioner accepts that the requested information is clearly of interest to the complainant. They have evidence, which they shared with the Council after their request for information to demonstrate that a meeting took place in 2018, with Councillor King in attendance.
27. However, the Commissioner considers it is likely the Council itself does not hold this record or has not retained this record. In order to respond to a request under the EIR, the Council is only needs to provide the information it holds at the time of the request.
28. Having considered the Council's response, and based on the evidence provided to him, the Commissioner is satisfied that, on the balance of probabilities, at the time of the request, the Council did not hold further information falling within the scope of the complainant's request.

## Right of appeal

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29. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

30. 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.
31. 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**