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Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 6 February 2023

Public Authority: Royal Borough of Kingston Upon Thames

Address: Guildhall 2
High Street
Kingston upon Thames
KT1 1EU

Decision (including any steps ordered)

1. The complainant has requested information regarding resident's responses to a planned development.
2. The Commissioner's decision is that Royal Borough of Kingston Upon Thames (the Council) does not hold the information within the scope of questions 1-4, but, on the balance of probabilities, holds information within the scope of question 5.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Conduct fresh searches for the requested information and disclose the emails it has already identified (and any further information it identifies as a result of the fresh searches) or provide a refusal notice that complies with regulation 14 of the EIR.
4. The public authority 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 27 April 2022, the complainant wrote to the Council and requested information in the following terms:

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"Under the Freedom of Information Act, I would like to request the following information relating to the consultation, in each case split between those people who live in Canbury and those who live in Tudor wards and lastly people who live outside of these areas:

1. Breakdown of number of people in each category who responded to each question asked in the consultation
2. All specific comments and representations made for and responses given in whatever form and by whatever means for each question asked in the consultation
3. Total number of people who responded to the consultation
4. Total number of people who responded by each question asked.

Lastly, I would like to request:

5. Any information in whatsoever form it exists, including but not limited to reports, comments, or correspondence between any of the Council officers, members, the North Kingston Forum and any other third parties, in any combination, relating to the Regulation 14 consultation of the North Kingston Forum Neighbourhood Plan and to the results of that consultation."
6. The Council responded on 27 May 2022. It stated that Questions 1-4 were refused under regulation 12(4)(a), as the Council does not hold this information. In relation to question 5, the Council advised the information was exempt under Section 22 as it was intended for future publication.
7. Following an internal review, the Council wrote to the complainant on 13 July 2022. It stated that it was upholding its original decision.

Scope of the case

8. The complainant contacted the Commissioner on the 18 July 2022 to complain about the way their request for information had been handled.
9. After being contacted by the Commissioner, the Council contacted the complainant revising its position for questions 1 – 4. The Council advised it was now relying on Section 21, as the information was reasonably accessible to the complainant. The Council also provided relevant attachments to answer question 5 of the request.
10. The Commissioner has considered whether the Council holds any additional information within the scope of the request.

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Reasons for decision

Is the information environmental

11. The Commissioner has first considered whether the information is environmental in accordance with the definition given in regulation 2(1) of the EIR: "any information in written, visual, aural, electronic or any other material form 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) and (b) as well as measures or activities designed to protect those elements..."

12. Although the Commissioner has not seen the requested information, he considers that planning and changes to the use of the land is a 'measure', as defined by regulation 2(1)(c), which is likely to affect the elements of the environment referred to in regulation 2(1)(a), namely land and landscape. As the request relates to planning, consultations with members of the affected area and the use of the land, the Commissioner considers that the request would fall under the EIR.

Regulation 12(4)(a) – information not held.

13. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information "to the extent that it does not hold that information when an applicant's request is received.

14. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, makes a decision based on the civil standard of the balance of probabilities. In other words, to determine such complaints, the Commissioner must decide whether, on the balance of probabilities, a public authority holds any

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further information which falls within the scope of the request (or was held at the time 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, where applicable, 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.
16. 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.
17. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of 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.

The complainant's position

18. The complainant advised the Commissioner, that the Council only sent three sets of emails between them and the Forum. The complainant therefore believes that the Council must not have disclosed some information. They explained that the Forum must have shared some information relating to its Neighbourhood plan and consultation, which falls into their request.
19. The complainant also advised that they had not been sent the Council's response to the Forum's consultation document, which is referred to in the first and second email exchange. The complainant went on to advise that the third email referenced a deadline for the Council's response and that the Forum will submit its Neighbourhood Plan to the Council. The Complainant stated that no exchange between the Council and the Forum on this matter has been disclosed.

The Council's position

20. The Council advises in relation to question 5, the North Kingston Neighbourhood Plan has not yet been submitted to the Council. The Forum has also not given a date for when it will be submitted to the Council.
21. The Council advised that the consultation in question was not run by the Council, but by the Forum, a resident local group. The Council clarified

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that the requested information is not held by the Council, but is publicly available via the Forum's website.

22. The Council explained that it had spoken to the planning policy team to look for information relating to question 5 of the request. The Council confirmed that emails located were reviewed and the relevant emails were disclosed.
23. The Council informed the Commissioner that a Google folder (owned by the Forum) was shared with the Planning policy team during the consultation, however the Council no longer has permission to view this information. The Forum is the data controller of that information and permission was only permitted for a short period of time. The Council concluded it was not sure when permission to the folder was removed.

The Council's relationship with the Forum

24. The Council explained to the Commissioner that it does not provide any clerical or administrative support to the Forum. It also does not control any of the Forum's information.
25. The Council confirmed that it does not handle enquires about the Forum's information, nor does it have any costs for holding information on behalf of the Forum.

The Commissioner's Decision

26. The Commissioner is satisfied that, on the balance of probabilities, the Council does not hold any information within the scope of questions 1-4, other than that which is already published. This is because the consultation was carried out by a separate body.
27. The Commissioner is not satisfied that the Council has disclosed all the requested information in respect of question 5. In its submission to the Commissioner the Council referenced two emails from 12 June 2021 and 22 October 2021. Despite the Council's searches locating these emails, it did not disclose the relevant emails to the complainant nor has it provided reasoning as to why the emails cannot be disclosed.
28. Due to the above, the Commissioner requires the Council to conduct fresh searches for the requested information and disclose the emails it has already identified (and any further information it identifies as a result of the fresh searches) or provide an appropriate refusal notice.

Right of appeal

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
Website: 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF