Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **20 February 2019**

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

Decision (including any steps ordered)

1. The complainant has requested information about a specific planning pre-application.

2. The Commissioner's decision is that the London Borough of Croydon ("the London Borough") has failed to provide her with the appropriate reasons and evidence to support its position. She therefore finds that the London Borough was not entitled to rely on Regulation 12(4)(b) of the EIR (Manifestly Unreasonable) to refuse this request. It also failed to carry out a reconsideration within 40 working days and thus breached Regulation 11(4) of the EIR.

3. The Commissioner requires the London Borough to take the following steps to ensure compliance with the legislation.

    - Issue a fresh response which does not rely on Regulation 12(4)(b)

4. The London Borough 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

5. On 27 January 2018, the complainant wrote to the London Borough and requested information relating to a particular planning application in the following terms:

> *"The letter from case officer to applicant [Aventier] dated 13 October 2017, refers to a "... previous pre-application query (Ref:17/00985/PRE) at this site. ..." .*
>
> *"At the Committee meeting on 25 January 2018, the applicant's agent confirmed that there had been two, pre-application submissions.*
>
> *"Please provide any information relating to the first, pre-application submission [17/00985/PRE] , including but not restricted to copies of what was submitted by the applicant, any consultee comments, the minutes of any meeting[s] and the officer's advice letter[s] or email[s]."*

6. The London Borough responded on 20 July 2018. It provided some redacted information and relied upon Regulations 12(3) and 13 of the EIR (Third Party Personal Data) to do so. It also noted that some of the information was publicly available in another form or format and so refused to provide this information citing Regulation 6(1)(b) of the EIR.

7. Following an internal review the London Borough wrote to the complainant on 29 October 2018. It changed its original position and now stated that it wished to rely on Regulation 12(4)(b) of the EIR to refuse the request as it considered the request to be Manifestly Unreasonable.

Scope of the case

8. The complainant contacted the Commissioner on 14 May 2018 to complain about the way his request for information had been handled. At that point, no response had been issued and the Commissioner was required to issue a decision notice, compelling a response. As the timeliness of the response has already been addressed, the Commissioner will not revisit this element.

9. The Commissioner was then required to intervene once again on 5 October 2018 in order to get the London Borough to issue an internal review – an issue which she will return to later.

10. The complainant then contacted the Commissioner again on 1 January 2019 to ask her to investigate the London Borough's use of the exception at Regulation 12(4)(b) to refuse the request.

11. As the complainant had made numerous complaints to the Commissioner about the London Borough, the Commissioner decided to deal with them in batches. As the Commissioner was already investigating a batch of three cases which the London Borough had refused as Manifestly Unreasonable, she decided to add this complaint to that batch. This was done for the purposes of avoiding the duplication of effort on behalf of all parties.

12. At the outset of her investigation, the Commissioner asked the London Borough to provide detailed submission as to why it had applied the exception to these complaints. She also asked for evidence to support the arguments. In line with her usual practice, she requested that this information be supplied within 20 working days. The London Borough acknowledged the correspondence but failed to respond within the deadline.

13. On 5 February 2019, as she had still not received a response, the Commissioner wrote to the London Borough to make it clear that she would be issuing a decision notice the following week – regardless of whether she had received submissions or not.

14. No response was received from the London Borough and the Commissioner takes the view that it would be unfair on the complainant if he were required to wait any longer before receiving a decision.

15. The scope of the Commissioner's investigation has been to determine whether the requests were Manifestly Unreasonable.

Reasons for decision

Was the information environmental?

16. 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;

17. The Commissioner considers that any information within the scope of the request would relate to planning matters. It would therefore be information on a "measure" likely to affect the elements of the environment and therefore the EIR is the correct access regime.

Was the request Manifestly Unreasonable?

18. Regulation 5(1) states that: *"a public authority that holds environmental information shall make it available on request."*

19. Regulation 12(4)(b) of the EIR provides an exception from disclosure if the request is Manifestly Unreasonable and the public interest favours maintaining the exception.

20. Following the lead of the Upper Tribunal in *Craven v Information Commissioner & DECC* [2012] UKUT 442 (AAC), the Commissioner considers that there is, in practice, no difference between a request that is vexatious under the FOIA and one which is Manifestly Unreasonable under the EIR – save that the public authority must also consider the balance of public interest when refusing a request under the EIR. The analysis that follows looks at vexatiousness as, if the request is found to be vexatious, then it will also be Manifestly Unreasonable and hence Regulation 12(4)(b) will be engaged.

21. The term "vexatious" is not defined within the FOIA. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that "vexatious" could be defined as the *"manifestly unjustified, inappropriate or improper use of a formal procedure*". The Upper Tribunal's approach in this case was subsequently upheld in the Court of Appeal.

22. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.

23. *Dransfield* also considered four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the

requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained the importance of: "…adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests." (paragraph 45).

24. The Commissioner has published guidance on dealing with vexatious requests, which includes a number of indicators that may apply in the case of a vexatious request.[1] However, even if a request contains one or more of these indicators it will not necessarily mean that it must be vexatious.

25. When considering the question of vexatiousness, a public authority can consider the context of the request and the history of its relationship with the requestor, as the guidance explains: *"The context and history in which a request is made will often be a major factor in determining whether the request is vexatious, and the public authority will need to consider the wider circumstances surrounding the request*."

The London Borough's position

26. The London Borough's position, as set out in its internal review, is that the request was Manifestly Unreasonable. However, as it failed to provide a submission in support of its position, the Commissioner has not been able to take account of its arguments as on this point or on the balance of the public interest.

The complainant's position

27. The complainant was able to provide a submission to the Commissioner as to why his requests were not Manifestly Unreasonable. As the complainant took the time to do this, the Commissioner considers it reasonable to summarise the main arguments below.

28. The complainant argued that his requests were neither "scattergun" nor "unfocused." He stated that he was concerned about so-called "windfall" development sites (where large, single-dwelling buildings are converted into multiple flats) and wanted to ensure that the process for considering such applications was being carried out properly, that the

[1] https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatiousrequests.pdf

proper advice was being sought and provided by planning officers and that relevant material objections were being properly considered when applications were approved.

29. The complainant pointed to local concern about "overdevelopment" in the area and argued that it was imperative that such developments be subject to scrutiny. He also stated that a considerable amount of the information was not in the public domain (which he believed it should be) and therefore the EIR was his only tool for accessing it.

30. The complainant disputed the burden that his requests were imposing upon the London Borough and argued that some of the burden had been created as a result of its failings to handle his requests adequately.

The Commissioner's view

31. The Commissioner's position is that it is always the responsibility of the public authority to justify why it wishes to withhold information – and not on the complainant to justify why the information should be provided.

32. The Commissioner is concerned that the London Borough did receive a number of information requests within a short period of time and that these requests would have imposed a burden on a relatively small number of individuals. In investigating these complaints, she wished to balance that burden against the arguments that the complainant had put forward – but as the London Borough has failed to make its case, she has no option but to find that the exception is not engaged. In light of this finding it has not been necessary for her to go on to consider the balance of the public interests. The conclusion of the Commissioner is that the London Borough was not entitled to rely on Regulation 12(4)(b) to refuse the request.

Reconsideration (Internal Review)

33. Regulation 11 of the EIR states that:

> *(1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.*
>
> *(2) Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.*

(3) The public authority shall on receipt of the representations and free of charge—

(a) consider them and any supporting evidence produced by the applicant; and

(b) decide if it has complied with the requirement.

(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.

(5) Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of—

(a) the failure to comply;

(b) the action the authority has decided to take to comply with the requirement; and

(c) the period within which that action is to be taken.

34. From the evidence presented to the Commissioner in this case it is clear that, in failing to carry out an internal review within 40 working days the London Borough has breached Regulation 11 of the EIR.

Other matters

35. The Commissioner is today issuing five decision notices finding that Regulation 12(4)(b) is not engaged because the London Borough has failed to put forward a submission or supporting evidence.

36. The Commissioner has several further complaints relating to the same complainant and the same exception which are pending investigation. Whilst she will determine each of those investigation on the facts presented to her, the London Borough should be prepared to provide timely submissions in those cases.

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: 0300 1234504
    Fax: 0870 739 5836
    Email: GRC@hmcts.gsi.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 .....

Ben Tomes
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