

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 27 May 2020

Public Authority: Liverpool City Council
Address: Cunard Building
Water Street
Liverpool
L3 1AH

Decision (including any steps ordered)

1. The complainant submitted a five-part request for information regarding infill at the northern end of West Waterloo Docks in Liverpool. Liverpool City Council (the Council) provided some information in response to the request and confirmed that some information was not held. However, the Commissioner finds that the information provided by the Council did not fall within the scope of the request.
2. The Commissioner's decision is that, on the balance of probabilities, the Council did not hold any information within the scope of the request. The Commissioner also finds that the Council breached regulation 14(2) of the EIR by failing to provide a refusal notice within 20 working days and it breached regulation 11 of the EIR by failing to conduct an internal review within 40 working days.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 26 April 2019, the complainant wrote to the Council and requested information in the following terms:

"At the city council Planning Committee on April 9 2019, council planners referred to (historic) partial infill at the northern end of West Waterloo Dock, Central Docks.. Can you please inform me:

- 1. When was this infill carried out?*
 - 2. Who carried out the infill*
 - 3. Were local residents advised of the plans in advance?*
 - 4. Was planning permission sought and granted for the infill to take place?*
 - 5. If yes, who gave such planning permission – Planning Reference and date"*
5. The Council responded on 4 June 2019 and provided information that it considered fell within the scope of the request. Specifically, in relation to parts one, four and five of the request it provided details of nine planning applications and stated that the applications were considered by the Council in its capacity as Local Planning Authority. In relation to part two it provided names of two contractors and in relation to part three it stated *"Yes in line with statutory protocols"*.
 6. On 12 June 2019 the complainant requested an internal review. He argued that most of the planning applications provided by the Council did not relate to infill at the location in question and those that did were either withdrawn or refused. Consequently, he was not satisfied that the information provided answered his five questions.
 7. Following an internal review the Council wrote to the complainant on 30 September 2019 and apologised for the delay in addressing the review. The Council revised its position for parts one, two and four of the request, but did not make any comments in relation to parts three and five of the request.
 8. The Council clarified that no information was held in relation to parts one and two of the request, it stated:

"With regard to the identification of individual contractors or dates of work, it is clear as a result of the above referenced searches that information is not held or retained by the City Council. [...] The identification of individual contractors for projects was and remains neither a statutory or operational requirement for consideration as part of the determination of planning applications, and instead is a matter for individual Applicants with regard to the progression of their applications, once approval is in place."

9. In relation to part four of the request, the Council revised its position by limiting the information provided. It stated that it agreed with the complainant's assessment that its initial response did not provide sufficient clarity as to which planning applications related specifically to infill. While the Council initially provided information relating to nine planning applications, in its internal review response it reduced this and only provided information relating to two applications.

Scope of the case

10. The complainant initially contacted the Commissioner on 20 August 2019 to complain about the Council's failure to respond to his internal review request. After the Council provided its internal review response, the complainant contacted the Commissioner again on 1 October 2019 as he was not satisfied that the information provided by the Council answered his request.
11. The scope of this case and the following analysis is to consider whether, on the balance of probabilities, the Council held any information in the scope of the request. The Commissioner will also consider whether the Council responded to the request and the internal review request within the statutory time limits.

Reasons for decision

Regulation 2 – Is the requested information environmental?

12. Environmental information must be considered for disclosure under the terms of the EIR rather than the FOIA.
13. Regulation 2(1)(c) of the EIR defines environmental information as any information 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 [2(1)](a) and (b) as well as measures or activities designed to protect those elements.*"
14. The request in this case is for information, including details regarding planning permission, relating to historic infill at West Waterloo Dock. The Commissioner is satisfied that the requested information is on a measure that would or would be likely to affect the environmental elements listed in regulation 2(1)(a) and is, therefore, environmental under regulation 2(1)(c).

Regulation 5(1) – Duty to make environmental information available on request

15. Regulation 5(1) of the EIR states that “*a public authority that holds environmental information shall make it available on request.*” This is subject to any exceptions that may apply.
16. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request the Commissioner will consider the complainant’s evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held, and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held.
17. For clarity, the Commissioner is not expected to prove categorically whether the information was held, she is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities. This is in line with the Tribunal’s decision in *Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)* in which it stated that “*there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority’s records*”. It clarified that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities.
18. It is also important to note that the Commissioner’s remit is not to determine whether information should be held, but only whether, on the balance of probabilities, the requested information was held by the Council at the date of the request.

The complainant’s view

19. The complainant told the Commissioner that, at the time he made his request, the Council was considering a planning application which proposed the infill of dock space at the northern end of the West Waterloo Dock.
20. The complainant explained that recent policy statements by the Council’s planning department claimed that the only grounds for the infill of existing dock water spaces was where historic infill had already taken place. He quoted a particular piece of guidance issued by the Council which stated that the Council was generally opposed to dock infill and that the only exception was instances where permission had previously been granted for partial infilling. The complainant also explained that in a report to the Council’s Planning Committee on 9 April

2019, a senior planning case officer stated that issues surrounding infill at the West Waterloo Dock were less serious because historic infill had already taken place at the north end of the dock.

21. As a result, the complainant believed it was essential to establish whether any such historic infill at the site in question complied with planning law.
22. The complainant argued that the Council failed to answer his request. With regard to the two planning applications which the Council confirmed were held after the internal review, the first was withdrawn by the applicant and the second was refused by the Council. Therefore, to complainant's view was that neither of those planning applications answered his request. The complainant believed that if the Council did not have the information to prove that the historic infill at the north end of West Waterloo Dock was carried out legitimately and legally, it should be required to confirm that that was the case.

The Council's view

23. The Council described the searches it carried out to determine whether information within the scope of the request was held. The Council also explained why these searches would have been likely to retrieve all of the relevant information it held.
24. The Council considered that it carried out a comprehensive and in depth examination of all records held in relation to the planning process and specifically relating to this location. A combination of manual and electronic searches were undertaken. The Council stated that the time and resource of a large number of officers was utilised in conducting searches and it is satisfied it has taken every possible and proportionate step to identify whether any information of relevance was retained.
25. The Council confirmed that electronic searches were conducted of its Planning Explorer facility¹, as well as the personal folders and mailboxes of 39 officers in Planning and Legal Services. These searches were completed using a range of search terms, including "infill", "waterloo", "West Waterloo", "dock" and "historic dock".
26. The Council explained that it also examined all retained hard-copy records relating to applications received relating to the areas in and

¹ <http://northgate.liverpool.gov.uk/PlanningExplorer17/GeneralSearch.aspx>

around the Waterfront and historic dock network, which required the retrieval of records from off-site storage.

27. The Council stated that any relevant records found during its searches were then reviewed to identify any information within the scope of the request. Aside from the two planning applications which were retrieved when searching the Planning Explorer facility, the Council confirmed that no further information was identified.
28. The Council explained that matters relating to planning applications were retained for 15 years from the date of receipt. In view of the age of the canal referenced, the Council considered that any application associated with its construction would have been received and determined during or prior to 2004 and that information from that time would no longer be held by the Council.
29. With regard to comments made by officers regarding historic infill at the location in question, either at Planning Committees or in reports, as referred to in the request, the Council stated that it was "*a matter of long term public record that infill has previously occurred within the area of this historic dock*". However, it stated this did not indicate or reflect that additional information was retained by the Council.

The Commissioner's decision

30. The Commissioner has examined the submissions of both parties. She has considered the searches performed by the Council, the information disclosed, the Council's explanations as to why information was not held and the complainant's concerns.
31. The Commissioner is satisfied that the Council carried out adequate and appropriately-targeted searches to locate relevant information within the scope of the request. She notes that the Council consulted relevant departments and used a variety of suitable electronic search terms. The Commissioner considers that such searches would have located any relevant information.
32. The Commissioner accepts the Council's reasoning that, in view of the age of the canal at the West Waterloo Dock and in line with the Council's retention policy for planning applications, it is possible that information may previously have been held but is no longer held by the Council.
33. The Council's position in relation to parts one and two of the request was that no information was held. In its internal review response the Council confirmed that there was no statutory or operational requirement for it to hold information relating to contractors, as requested at part two. When considering this explanation alongside the searches undertaken by the Council, the Commissioner agrees that, on

the balance of probabilities, it does not hold the information requested at parts one and two of the request.

34. It is the Commissioner's view that the two planning applications which the Council provided in response to part four of the request do not fall within the scope of the request. Given that one of the planning applications was withdrawn by the applicant and the other was refused by the Council, the Commissioner considers that neither can relate to the historic infill which is the subject of the complainant's request.
35. The request is framed as a series of questions and while the Council answered questions three and five, in its submissions to the Commissioner it confirmed that the only information identified as part of its searches was the two planning applications. As a result the Commissioner considers that, on the balance of probabilities, the Council does not hold any recorded information in relation to parts three and five of the request.
36. The Commissioner therefore concludes that, on the balance of probabilities, the Council does not hold any of the requested information.

Regulation 14(2) – Refusal to disclose information

37. Regulation 14(2) of the EIR states that a public authority is required to provide the requester with a refusal notice "*as soon as possible and no later than 20 working days after the date of receipt of the request*".
38. In this case the Council provided a refusal notice for parts one and two of the request after conducting its internal review, which was considerably later than the 20 working day time limit, and failed to provide a refusal notice for the remaining parts of the request.
39. The Commissioner has therefore determined that the Council has breached regulation 14(2).

Regulation 11 – Representations and reconsideration

40. Regulation 11(4) of the EIR states that once a public authority has received a request for an internal review it must respond as soon as possible and no later than 40 working days after it receives the internal review request.
41. In this case, as the internal review request was made on 12 June 2019, the Council should have provided the outcome of its internal review by 9 August 2019. However, it did not provide the outcome of its internal review until 30 September 2019. In failing to carry out an internal

review within 40 working days the Council has breached regulation 11(4) of the EIR.

Other matters

42. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her "Openness by design strategy"² to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"³.
43. Should evidence suggest that the Council has systemic issues that are preventing it from responding adequately and on time to information and internal review requests, the Commissioner will consider what action it may be necessary to take in line with the aforementioned policy.

² <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

³ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

44. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. 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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