

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice**

Date: 2 December 2020

Public Authority: Trafford Metropolitan Borough Council
Address: Trafford Town Hall
Talbot Road
Stretford
M32 0TH

Decision (including any steps ordered)

1. The complainant has made several requests for information to Trafford Metropolitan Borough Council (the Council) relating to a planning condition which he believes affects his property.
2. The Commissioner's decision is that the Council complied with its obligations under regulation 5(1) (duty to make available environmental information on request) of the EIR. However, she found that the Council breached regulation 11(4) (representations and reconsiderations) of the EIR as it did not carry out the internal review and notify the complainant of the outcome within the required timescale.
3. The Commissioner requires no steps as a result of this decision.

Background

4. The complainant has explained to the Commissioner that his property is part of a housing development which is close to a busy railway line. The planning permission for the development contained a condition (the planning condition) which required that certain properties be constructed with sound insulation measures, to reduce the noise from the railway line.
5. The complainant believes that his property lies in an area of the development which was covered by the planning condition, but the

required sound insulation was not incorporated into its construction. It follows that he believes that the property was built in contravention of the planning condition.

6. The Council disagrees. It says that it is satisfied that the property is not affected by the planning condition and that this position "...has been endorsed when considered by the Ombudsman on three occasions, by the Council's external auditors and by [the complainant]'s own QC [Queen's Counsel]".
7. The complainant and the Council have been in dispute about the matter for some years.

Request and response

8. The complainant has made three requests for information in quick succession. Due to their linked nature, the Commissioner is considering them under a single decision notice.
9. Each request comprises several questions. For brevity, only the questions where the complainant has expressed dissatisfaction with the Council's response are reproduced below.
10. On 6 August 2019, in the course of wider correspondence, the complainant made the following request for information to the Council:
 1. *[Corporate Director] sent me an email on the 25th November 2016, explaining that he would not fulfil my request to view case file H/ARM/55664. I would like to see site [sic] of this file. Additionally, I would also like to see file H/OUT/41981 and items 1 and 2 listed in part 2 Particulars of Decision. I had previously requested this in 2012 but was not provided with this information.*
 2. *On the 27th February 2019 a meeting took place with the directors of Trafford Council regarding my property / case. I would like to know who was in attendance at this meeting and I would also like to see the minutes of this meeting in its entirety. I would also like to know who the decision maker on Critical planning condition 10 was at this meeting. As stated on a email from MP Graham Brady my case was a priority at this meeting."*
11. On 16 August 2019, the complainant submitted another request for information to the Council, for:
 1. *The Section 106 agreement between the developer Redrow Homes and TMBC [the Council] regarding [complainant's address] and Critical Planning Condition 10."*

12. Then, on 21 August 2019, the complainant submitted a further request for information to the Council, asking:

"2. Whether Conditions were varied by agreement?"

3. Has the Environmental Officer reported on the scheme?"

13. The Council responded to all three requests on 28 November 2019, as follows.

Request dated 6 August 2019

1. The Council said that both of the case files specified in the request were available to view on the planning portal on the Council's website, and that further relevant documents would shortly be added to the files. It said that items 1 and 2 listed in part 2 Particulars of Decision was in fact the whole file for H/ARM/55664.
2. The Council said that it had been unable to identify a meeting of directors on the date specified which covered this matter.

Request dated 16 August 2019

1. The Council said that Critical Planning Condition 10 would not form part of a section 106 agreement.

Request dated 21 August 2019

2. The Council said that planning conditions could not be varied by agreement.
 3. The Council said that the Environmental Health Officer (EHO) did comment on the acoustic survey submitted to comply with the condition and confirmed they were happy with its contents.
14. The complainant wrote to the Council on 19 December 2019 about the ongoing dispute regarding the property, and he raised specific concerns about its responses to the above requests, which he felt conflicted with information he had previously been given.
15. He then requested an internal review on 5 February 2020, and also asked about the further information which the Council had said it was going to add to the online case files. The Council acknowledged the internal review request on 20 February 2020. It provided a web link to the additional documents (including a section 106 agreement) that it had added to the online planning files.

16. The Council provided the outcome of its internal review on 5 June 2020. It maintained its original responses.

Scope of the case

17. The complainant contacted the Commissioner on 8 June 2020 to complain about the way his requests for information had been handled by the Council.
18. Having considered the information he provided, the Commissioner then agreed with the complainant that her investigation would consider the Council's responses to those parts of the requests set out in paragraphs 10, 11 and 12, above.
19. The analysis below has considered whether the Council complied with regulation 5(1) (duty to make available environmental information on request) of the EIR in respect of these requests. The Commissioner has also considered its compliance with regulation 11(4) (representations and reconsiderations) of the EIR, with regard to the time it took to conduct the internal review.

Reasons for decision

Is the information environmental information?

20. Environmental information must be considered for disclosure under the terms of the EIR rather than the FOIA. 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."

21. The request in this case is for information about a housing development and the planning condition relating to noise reduction. The Commissioner is satisfied that the requested information is on a measure that would, or would be likely to, affect the factors listed in regulation 2(1)(b) and is, therefore, environmental information within the meaning of regulation 2(1)(c) of the EIR.

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

22. 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.

Request dated 6 August 2019

23. The Council told the complainant to access the information requested in part (1) of this request (two planning files) via its online planning portal. The complainant told the Council that he had tried to open the documents on his computer several times, and had failed. The information was therefore not accessible to him.
24. During the Commissioner's investigation, the Council sent further instructions to the complainant on how to open the documents. It also offered to provide hard copies of the files to the complainant if he remained unable to view them online. Following this, the complainant reported that he was now able to open and view the files on his computer, and that he did not require hard copies.
25. The Commissioner has visited the planning portal and has been able to view the individual documents listed under the files. She is satisfied that the requested information is publicly available and accessible via the planning portal. In view of the fact that the complainant is now able to access the information, she has not further considered the question of whether the Council facilitated reasonable access to the information.
26. Turning to part (2) of the request (for the attendees at, and minutes of, a meeting on 27 February 2019 about the complainant's property) the Council told the Commissioner it had been unable to locate the information described in the request.
27. In cases where a dispute arises over the amount of recorded information that was held by a public authority at the time a request was received, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public 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 the requested information is not held.
28. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is 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 civil test of the balance of probabilities.

29. It is also important to note that the Commissioner's remit is not to determine whether the requested information *should* be held, but only whether, on the balance of probabilities, the information *was* held by the Council, on the date the request was received.
30. As is customary when investigating such matters, the Commissioner asked the Council a series of questions about its reasons for believing that it did not hold any information about a meeting held on 27 February 2019, to discuss the complainant's property.
31. The Council provided the following description of the searches it had conducted to locate any information about such a meeting:

"We checked the Outlook diary of our Corporate Director for Place (which Planning comes under). The only meeting that day which might have discussed this case was the Directorate Management Team Meeting. We checked the minutes of that meeting and no reference to this case was found.

We also checked diary [sic] of our Corporate Director for Governance & Communities as she is the single point of contact for this case. No relevant meeting was found that day.

These are the only Corporate Directors we would expect to have involvement in the case and therefore feel that these are reasonable searches to carry out.

We also searched our email archive for correspondence with the MP's office that would suggest a meeting had taken place that day but again found nothing.

...

Directors' meetings are managed by their PAs and recorded in their Outlook calendar. No corresponding meeting was found in either Corporate Director's calendar that day and therefore no minutes would exist.

...

The only meeting around this time which related to [the complainant]'s complaint was that specified in our response to question 3 of this request, between Corporate Director [name redacted] and the Senior Planning Officer involved in the case. This was not a minuted meeting."

32. 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 it holds no relevant information. However, as set out in paragraph 28, above, the Commissioner is required to make a finding on the balance of probabilities.
33. In this case, she is satisfied that the searches the Council has carried out would be expected to have located any information falling within the scope of the request, if such information was held. Indeed, it has identified that a meeting did take place on the date specified by the complainant (the Directorate Management Team Meeting) but the minutes show that there was no discussion of matters connected to the complainant or his property.
34. The complainant's reason for believing that his case was to be discussed at the meeting apparently stems from an email from his MP which gave him to believe that the matter was a priority for the meeting. The Commissioner has not seen that email so she cannot comment on whether the complainant's understanding of it was correct. She has seen other correspondence between the complainant, the MP and the Council, and it does not appear to her that the MP was involved in any discussions or decisions regarding the matter. It may therefore have been that there was a mis-communication about the agenda for the meeting of 27 February 2019.
35. The Commissioner accepts that it is possible that another meeting might have been held, at which the complainant's case was discussed. However, if it was, there is no evidence that any recorded information is held by the Council about it. On that point, the Commissioner notes the Council's comment that a meeting between senior staff on 20 February 2020, which discussed the complainant's case, was not minuted (this was revealed in its response to another request from the complainant, which he has not complained about).
36. As set out at paragraph 29, above, it is not for the Commissioner to decide whether such information *should* be held, but only whether, on the balance of probabilities, the information requested *was* held at the time the request was received.
37. Taking all the above into account, the Commissioner is satisfied that, on the balance of probabilities, the Council does not hold the information described in part (2) of the request of 6 August 2019, and that it has complied with its duty under regulation 5(1) of the EIR in respect of this part of the request.

Request dated 16 August 2019

38. The complainant said that he had not been provided with the information requested on 16 August 2019 (the section 106 agreement between the developer, Redrow Homes, and the Council, which covered his property and the planning condition). He said that the section 106 agreement documents which had so far been disclosed were for a more recent Affordable Housing scheme, and for retail units. He said he wanted the section 106 agreement for Phase One of the development (completed in 2005), which covered his property.
39. On that point, the Council's Head of Planning has advised the Commissioner as follows:

"Both S106 agreements associated with this development have been provided to [the complainant] in the planning files. There are no other S106 agreements to provide. The S106 agreements are legal agreements between the developer and the Council to provide certain planning obligations to make the development acceptable in planning terms. They relate to the entirety of a development. In respect of the outline application ref. H/OUT/41981, which was for 645 dwellings, the obligations relate to highway works, a financial contribution to offsite junction improvements, the provision of open space within the site, and a financial contribution to offsite public facilities. An agreement and supplemental agreement was made to the original S106 agreement at the time of the approval of the reserved matters application H/ARM/55664, which was for 253 dwellings. This amended some of the terms of the original S106, provided for an additional community contribution and made provisions in relation to open space and affordable housing.

The S106 agreements will not have clauses or obligations which relate directly to [the complainant]'s property. They are concerned with overarching mitigation which is required to make a development acceptable in planning terms but which cannot be lawfully secured by a planning condition – most commonly the payment of a financial contribution to secure off site works, or for affordable housing."

40. The complainant believes that his property falls in an area of the development covered by the planning condition, and that a section 106 agreement from the earliest phase of the development would show this. However, the Council says that section 106 agreements are concerned with top-level agreements, and set out overarching obligations which cannot be dealt with via a planning condition. As such, the Council's position is that it does not hold a section 106 agreement that matches the description in the complainant's request because that is simply not the function of section 106 agreements.

41. Since the request relates specifically to the planning condition as it affects the complainant's property and the Council has explained that section 106 agreements are not concerned with planning conditions, the Commissioner is satisfied that, on the balance of probabilities the Council holds no other section 106 agreement which falls with the request's scope.
42. The Commissioner is therefore satisfied that the Council complied with its obligations under regulation 5(1) of the EIR in respect of the request.

Request dated 21 August 2019

43. The complainant asked two questions:

"2. Whether Conditions were varied by agreement?"

3. Has the Environmental Officer reported on the scheme?"

44. The Council told the Commissioner that it did not consider these to be valid requests for information under the EIR. Rather, it considered them to be questions which required an answer. Nevertheless, it said it had given the complainant clear answers to both of the questions.
45. The Council provided the Commissioner with a detailed overview of the planning condition, how it had been satisfied, and why it believed the complainant's property was, in any case, not covered by it:

"Planning conditions relating to this development were not varied by agreement. They can be varied but it is a formal process requiring a further application to the Local Planning Authority. An application is required under either S73 of the Town and Country Planning Act 1990, if that change is material, or S96a of the Town and Country Planning Act 1990, if that change is not material. The only two planning applications made that relate to [the complainant]'s property are the original outline application (H/OUT/41981), and the subsequent reserved matters application (H/ARM/55664), the latter of which contains Condition 10 which is of concern to [the complainant]. There have been no subsequent planning applications of any type, including S73 applications to vary any of the conditions. The Council has searched its statutory planning register for this information. It would not be contained anywhere else.

There is no information on the planning file that would suggest that the conditions were varied by agreement and nothing to indicate that a statement suggesting that there had been a variation by agreement had ever been communicated to anyone in relation to the application. However, as indicated above, any such 'variation' would have been unlawful and the original condition would still stand. [The complainant] has access to the full planning files.

...

Condition 10 [the planning condition] reads as follows with [A] and [B] inserted to cross reference to the explanation further down. [A] and [B] are not in the original wording of the condition.

[A] Prior to the commencement of the development hereby approved, the developer shall submit full details of a suitable scheme of sound insulation measures that will achieve the internal noise guidelines of the World Health Organisation which are 30db inside bedrooms at night and 40db inside living rooms during the day. This is to be achieved by the use of acoustic glazing, noise barriers or a combination of both.

[B] The development shall be implemented in accordance with the details as approved by the Local Planning Authority unless otherwise agreed in writing.

Reason: In order to protect the residential amenity of future occupiers, having regard to Proposal D1 of the Trafford Unitary Development Plan.

The Environmental Health Officer did confirm that she was happy with the contents of the scheme for sound insulation. There is no other information the Council holds which contradicts this and this does not conflict with other information given to [the complainant].

To discharge this planning condition the developer was required to do two things. Firstly, they had to submit a scheme for sound insulation to the Local Planning Authority, using certain parameters. This is part [A] of the condition above. It is the developer's submission under this part of the condition that the EHO had confirmed was satisfactory. This is the information held on the planning file.

Once this confirmation has been given, the developer then moves on to their obligations under part [B] which is to implement that scheme in accordance with the agreed details. The scheme as agreed set out the following relevant requirements: -

5.4 Bedrooms

In order to ensure that noise levels within bedrooms do not exceed 30db up-rated glazing comprising 4mm glass – 6.4mm acoustic laminate glass will be required for the bedrooms overlooking the railway in the plots relating to receptor Locations 1-2 and 6-10.

5.6 Standard thermal double-glazing (i.e. 4mm glass – nominal (6-20mm) air gap – 4mm glass) and standard slot vents will provide adequate attenuation for all remaining bedrooms.

The plan on page 9 of the report clearly indicates the position of Locations 1-2 and 6-10 which all fall to the south side of [road name] and do not include [the complainant]'s property [address].

It is therefore clear that [the complainant]'s property does not require any acoustic glazing under the requirements of condition 10."

46. The Council said that if the complainant had asked for a copy of the EHO's report, it would have considered whether this could be disclosed. As it was, the complainant asked only to know whether the officer had reported on the scheme, and this it had confirmed. It therefore considered that it had complied with both parts of the request, in that it had answered both of the questions put to it.
47. Rather than asking the Council for recorded information, the complainant has asked it two specific questions. The Commissioner considers that a request in the form of a question will be a valid request for information under the EIR, provided it describes distinguishing characteristics of the requested information. She considers that the questions in this case met that benchmark. However, she also accepts that many requesters who ask questions just want a simple answer, not all the recorded information held by a public authority. The Commissioner acknowledges that it can be frustrating for a requester to receive a formal and lengthy response under the EIR, when this does not answer their simple question.
48. While the Commissioner disagrees with the Council's assessment that these were not valid requests for information, she is nevertheless satisfied that it has provided a reasonable response to them, and that the end result for the complainant was the same as if it had considered the requests under the EIR.
49. With regard to part (2) of the request, the Council told the Commissioner that planning conditions could not be varied by agreement. Rather, any variation to a planning condition would need to be applied for, via a formal process. It confirmed that no such applications had been submitted in respect of this development.
50. The request was to know whether the planning condition had been varied by agreement. The Council's response was that planning conditions could not be varied in that way. The Commissioner considers it implicit in the response that the planning condition had therefore not been varied by agreement. She is therefore satisfied that the Council complied with its obligations in respect of regulation 5(1) of the EIR, in respect of part (2) of the request.
51. Turning to part (3) of the request, the Commissioner is satisfied that, although the Council holds recorded information in the form of the EHO's report, the request was simply to know whether the EHO had reported

on the scheme. She notes that on learning that the EHO had reported on the scheme, the complainant has not gone on to ask to see a copy of that report or complained to the Commissioner that it has not been provided to him.

52. The Commissioner is therefore satisfied that the Council complied with its obligations in respect of regulation 5(1) of the EIR in respect of part (3) of the request.

Regulation 11 - representations and reconsideration

53. Regulation 11(1) of the EIR provides the right for requesters to request a review of the handling of their request.
54. Regulation 11(4) states that once a public authority has received a request for a review it must respond as soon as possible, and no later than 40 working days after it receives the internal review request.
55. In this case, the complainant wrote to the Council on 5 February 2020 and asked for an internal review. Although the Council acknowledged this request, and provided some interim information, it did not notify the complainant of the outcome of the review until 5 June 2020, 83 working days later.
56. The Council therefore did not comply with the requirements of regulation 11(4) of the EIR, in that it did not provide the outcome of its review within 40 working days.
57. The Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function. This aligns with the goal in her draft "Openness by design"¹ strategy 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"².

¹ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

² <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Other matters

58. In the latter stages of the Commissioner's investigation, the complainant specified a number of items of information that he said he hoped to receive which, the Commissioner notes, were not covered by the scope of the requests considered in this decision notice (namely: searches relating to the Environment Agency for his property, planning conditions for properties eliminated from conditions on site, local council disputes, any issues resolved and "LLC1 + CON29").
59. Should he still wish to pursue access to that information, the complainant would need to make a new request for it.
60. The Commissioner has produced guidance to requesters on how to make clear and effective requests for information at: <https://ico.org.uk/your-data-matters/official-information/>.

Right of appeal

61. 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

62. 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.

63. 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

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