

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 31 July 2019

Public Authority: Brighton and Hove City Council

Address: Bartholomew Square
Bartholomew House
Brighton
BN1 1JE

Decision (including any steps ordered)

1. The complainant has requested information with regards to a hotel. Brighton and Hove City Council (the council) provided some of the requested information and advised that other information was not held.
2. The Commissioner's decision is that the requested information is environmental information and that the council holds no further information falling within the scope of the request.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 30 August 2018 the complainant requested the following information from the council relating to alterations made to Westbourne Hotel and the planning permissions:

"As you are aware, I have been in correspondence with officers and members of the Council since January 2018. The information I have had has been, at times, contradictory and, at other times, I have been told that I cannot have information on the grounds of confidentiality; however, this has not been

expanded upon. I require, therefore, under the provisions of the Freedom of Information legislation, the following:

- 1. Details of correspondence and/or complaints received by the Council since the alterations were carried out - in one of your earlier emails to me you referred to 'multiple complaints'. Specifically, I would like to know how many complaints you have received and in relation to what, i.e. the change of use to the front floor room, the installation of air con units or the illuminated sign on the front elevation of the building. Please note that I am NOT asking for details of who has complained, but an overview of the number and type of complaints made.*
- 2. Details of contact and/or correspondence, including emails, between officers and members and, if applicable, officers and members of the public. In his email to me of 17th April 2018 Cllr. [name redacted] stated that he had carried out an inspection of the premises and found no problems, and that this had been confirmed by an officer. I assume that a file note will have been kept of this and so would like to see a copy of that.*
- 3. Details of phone calls to and contact with the Westborne, as well as the dates when members visited the premises, along with contemporaneous file notes.*
- 4. When was this matter first drawn to the department's attention and the case allocated?*
- 5. In his email of 13th July 2018 Cllr. [name redacted] stated that he had 'been advised by the lawyer that there is no breach of Planning permission...' I would like to see a copy of this decision."*
5. The council responded on the 25 October 2018 providing some information and advising other information is not held.
6. The complainant requested an internal review on the 3 November 2018 stating that the council had not provided him with all the information requested.

7. He then contacted the council further on the 18 November 2018 as he had not received any acknowledgement of his internal review request from the council.
8. The council provided its internal review response on the 9 January 2019. It identified that the complainant was not satisfied with its initial response to two parts of his information request. These parts being:
 - i. *"In his email to me of 17th April 2018 Cllr. [name redacted] stated that he had carried out an inspection of the premises and found no problems, and that this had been confirmed by an officer. I would like to see a copy of the file note about this."*and
 - ii. *"In his email to me of 13th July 2018 Cllr. [name redacted] stated that he had been advised by the lawyer that there is no breach of Planning permission; I would like to see a copy of this decision."*
9. For 'i.' the council advised the complainant that no file note was held. It also stated that correspondence provided in its response included relevant email correspondence between Cllr [name redacted] and the Planning Department concerning the matter and representations made by the Councillor, in his capacity as a ward member, to the department.
10. The council has not been able to determine if Cllr [name redacted] holds anything further outside what the council officers' hold.
11. For 'ii.', the council advised the complainant that it has not been possible to determine whether additional information is held by the Councillor. No record of a decision of advice of the type requested has been identified by the council's Legal Services team.

Scope of the case

12. The complainant contacted the Commissioner on 14 January 2019 dissatisfied with the amount of information provided.
13. The Commissioner considers the scope of the case is to determine whether the information requested is environmental information and if so, will consider the case under the EIR.
14. Then the Commissioner will determine whether the council holds any other information falling within the scope of the request.

Reasons for decision

Is the requested information environmental information?

15. The Commissioner has first considered whether the requested information would constitute environmental information as defined by regulation 2(1) of the EIR. Regulation 2(1)(c) with (b) is relevant in this case. The information requested is with regards to alterations being made to a hotel and the planning permissions. This type of information, renovations to a hotel, would be measures affecting, or likely to affect the elements of the environment, namely the landscape.

Regulation 5(1) of the EIR – Information held/ not held

16. Regulation 5(1) of the EIR states that:

"Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request."

17. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes 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. The Commissioner must decide whether on the balance of probabilities the public authority holds any further information which falls within the scope of the request (or was held at the time of the request).
18. The two parts that the Commissioner has focused on in determining whether any further information is held are the two parts identified at the internal review stage as to what information the complainant considers outstanding. These being the items (i) and (ii) identified at paragraph 8 above.
19. In response to the Commissioner's investigation, the council has told the Commissioner that planning applications, correspondence and complaints are held in a single case within a structured database and information of this type is recorded electronically.
20. It has searched the property address, unique property reference and planning application reference in this database which all returned the same case records. These results were searched on both the planning permission and complaints about alleged violations of the planning conditions.

21. The council has stated to the Commissioner that email searches have also been carried out by its Property Law team and Principal Planning Officer to determine if any relevant information was received and not filed into the council's database, however no further correspondence was found.
22. The council also advised the Commissioner that it contacted its Planning Department and Legal Services team including the lawyer mentioned in the complainant's request. This being a senior solicitor at the council who has confirmed that there is no recorded decision on the matter to which the request relates.
23. The council has also stated that no information has ever been deleted or destroyed relevant to this request.
24. The council has told the Commissioner that on 4 and 25 October 2018 it made efforts to determine whether the councillor, referred to in the request, held any other information outside of the council. However the councillor was in the process of withdrawing from his councillor duties at the time and not regularly checking his emails.
25. The council contacted him further on the 3 January 2019 and received a response on the 14 January 2019 and although the ex-councillor addressed the substance of the complainant's complaint about planning permission, he did not respond on whether any information was held.
26. With regards to the 'file note', that has been requested, the council has stated to the Commissioner that Cllr [name redacted] did not involve the Planning Department in seeking advice. But a council solicitor has explained that he did raise the matter informally in conversation following a Council Committee meeting but there was no formal legal advice sought or given.
27. The council has told the Commissioner that if a 'file note' referencing legal advice had been created a copy, if held, would be held by both the planning and Legal Services department. The council's solicitor has stated the following in relation to this matter:

"I do recall a conversation with him about a hotel and use but can't recall the details apart from the point that consideration would need to be given to whether a use was ancillary or in a separate planning unit and means of access/connection were relevant to the separate unit question.

I have nothing in writing on this. I've also checked with [name redacted] who doesn't recall any advice given to Cllr [name redacted] on this matter, and has nothing in [their] emails."

28. The Commissioner asked the council in what capacity the councillor was acting in with regards to the requested information. The council has told the Commissioner that it understands, from the correspondence between the councillor and the Planning Department, that the councillor inspected the property in their capacity as a private citizen on the basis that he knew the owner of the hotel. Therefore, by his account, his inspection was not in the capacity of a local member or Planning Committee member.
29. The council, however, also states that the Ward the councillor represented at the time encompassed the hotel so there may be some doubt about the capacity in which he attended the hotel that day.
30. The council reiterate that the Cllr did not involve the Planning Department in seeking legal advice in this issue other than the informal conversation had, as mentioned previously.
31. With regards to whether there are any business purposes or statutory obligations on the council to create or retain this type of information, the council has told the Commissioner that records of planning applications, complaints and investigations concerning compliance with planning conditions are created and retained as evidence of performance of the council's functions under the Town and Country Planning Act 1990. The same applies to any legal advice which may be sought or obtained from the council's lawyers.
32. In this case, the council maintain that it holds no further information falling within the scope of the request.
33. The Commissioner has considered the responses provided by the council. It appears to have carried out relevant searches and discussed the case with the most relevant officers in the council.
34. The councillor mentioned in the request is no longer a councillor and there may be some uncertainty as to what capacity he was acting in in relation to this issue. However, it seems he was most likely acting as an individual or in his Ward capacity, rather than on behalf of the council itself.
35. The Commissioner can see how the complainant would consider that this legal advice may be held, but if the Cllr had sought his own independent advice or he was referring to an informal conversation he had had, then this information, if never provided to the council in recorded form, is not held.
36. On consideration of the above, the Commissioner is satisfied with the council's explanations and finds that on the balance of probabilities, no

further information is held by the council falling within the scope of the request.

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@justice.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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF