

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

**Date:** 14 October 2022

**Public Authority:** London Borough of Hillingdon  
**Address:** Civic Centre  
High Street  
Uxbridge  
Middlesex  
UB8 1UW

**Decision (including any steps ordered)**

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1. The complainant has requested information from the London Borough of Hillingdon ("the Council") in relation to the Council's implementation of policy 5.9 of the London Plan 2011 and 2016. The Council provided explanations and information for the first two parts of the request and refused the final part under Regulation 12(4)(b). Following refinement of the request, the Council maintained its position.
2. The Commissioner's decision is that the Council has complied with Regulation 5(1) in providing information in response to the first two parts of the request but the Commissioner finds a breach of Regulation 5(2) as the response was outside the time for compliance. The Commissioner also finds that the Council has failed to demonstrate that Regulation 12(4)(b) is engaged in relation to the refined request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Issue a fresh response to the refined request which does not rely on Regulation 12(4)(b).
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 the Act and may be dealt with as a contempt of court.

## **Request and response**

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5. On 27 November 2020 the complainant made a request to the Council for information in the following terms:

"I would [therefore] like to request information on how the council has been implementing policy 5.9 of the London Plan 2011 and London Plan 2016, since 2011. I would also like information on how the council intends to implement this policy in the future. This policy covers overheating and cooling in planning applications.

Policy 5.9 also requires boroughs to "develop more detailed policies and proposals to support the avoidance of overheating and to support the cooling hierarchy" within their LDFs. Can the council provide information to show that such detailed policies and proposals have been developed by the council since 2011?

Of all major planning applications for residential developments since 2011, how many of these show evidence that (i) the planning officer's report and (ii) the applicant have considered and implemented London Plan policy 5.9?"

6. The Council responded on 19 January 2021 stating it had been informed the complainant was engaging with their landlord in this as a private matter. The Council therefore considered the information needed could be obtained directly from the landlord and additional information on the Council's implementation of planning policies was available in its yearly planning reports published on its website. The Council concluded the request was manifestly unreasonable under Regulation 12(4)(b) of the EIR.
7. The complainant requested an internal review of this decision on 29 January 2021, providing clarification on what they were seeking with regard to each part of the request.
8. The Council conducted an internal review and responded on 31 March 2021. The internal review appeared to reference another information request also refused as manifestly unreasonable and combined the two requests into one response.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 29 March 2021 to complain about the way their request for information had been handled.
10. During the course of the Commissioner's investigation, following initial enquiries around the application of Regulation 12(4)(b) of the EIR, the Council stressed it was open to compromise and settling matters amicably. On 3 March 2022 it provided the complainant with a 'fact sheet' consisting of 29 pages which it believed answered all the requests for information.
11. The Commissioner discussed this matter with the complainant and the complainant explained that:

"I believe that the more recent response (2 March 2022) to my information requests to be highly selective and not a comprehensive response to my detailed requests for planning and building control information. There were actually two planning applications at this development, an initial application in 2014 and substantially revised new planning application in 2016. They do not reveal whether any pre-application advice was given for the 2016 planning application. It is clear to me that some advice was provided to the developer as none of their planning applications ever mentioned a communal heating system. I suspect that they were instructed to install such a system by the council at a later stage."
12. The Commissioner therefore wrote again to the Council focusing his attention on the final part of the information request – the number of planning applications showing evidence that policy 5.9 had been considered and asked the Council to confirm if it was reverting back to its original position of considering it to be manifestly unreasonable to comply with the request. The Council confirmed this to be the case.
13. As such the Commissioner considers the scope of his investigation to be to determine if the Council has correctly refused to respond to the request in full on the basis of Regulation 12(4)(b) of the EIR.

## **Reasons for decision**

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### **Regulation 12(4)(b) – manifestly unreasonable**

14. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request is manifestly unreasonable. Where it is found to be engaged, regulation 12(4)(b) of the EIR is also qualified by the public interest test.

15. Although there is no definition of 'manifestly unreasonable' within the EIR, the Commissioner's opinion is that 'manifestly' implies that a request should be obviously or clearly unreasonable.
16. Regulation 12(4)(b) of the EIR is designed to protect public authorities from exposure to a disproportionate burden or an unjustified level of distress, disruption or irritation in handling information requests. In effect, it works in similar regards to two exemptions within FOIA; section 12, where the cost of complying with a request 'is too great', and section 14, where a request is vexatious.
17. There are no appropriate cost limits under the EIR, and the considerations which are associated with the application of regulation 12(4)(b) on the grounds of costs are broader than those relevant to section 12 of FOIA. Under the EIR, the public authority must consider the proportionality of the burden or costs involved, and decide whether they are clearly and obviously unreasonable.
18. The Commissioner considers the appropriate cost limits relevant to section 12 of FOIA to serve as a useful guide when considering whether a request is manifestly unreasonable on the basis of costs. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations) confirm that the costs associated with the activities required to deal with the request should be worked out at a standard rate of £25 per person; for local authorities, the appropriate limit is set at £450, which is the equivalent of 18 hours work.
19. The Council refused to provide any further information in relation to the request, on the basis of cost and the burden on its resources.
20. The Council argues that the fact sheet it provided was an extensive explanation of how the Council implements the London Plan Policy 5.9. The Council did however consider whether it could provide further information. It explained that during the period 1 January 2011 to 31 December 2020 it had received 23,233 applications for planning permission and any one of these could potentially trigger the application of Policy 5.9.
21. The Council informed the Commissioner that all planning applications submitted since 2008 are available on the Council's website but unfortunately the software does not have a function enabling searches by keywords ie 'overheating'.
22. The Council strongly argues that to expect it to divert resources from frontline services and to interrogate over 23,000 planning applications to establish if Policy 5.9 is relevant would be manifestly unreasonable.

Even allowing for just half an hour for officers to review the documentation on a planning application the entire task would take in excess of 11,500 hours. The Council therefore continues to consider that it is manifestly unreasonable to require it to comply with this request.

23. The complainant in his request for an internal review had already conceded it would be unreasonable to expect Council staff to scrutinise every planning application and officer's report since 2011 and had suggested a sample would be sufficient, for example looking at all initial planning applications considered by the major applications committee in their first two meetings of July of each year.

24. Given that both parties accept that the originally worded request

"Of all major planning applications for residential developments since 2011, how many of these show evidence that (i) the planning officer's report and (ii) the applicant have considered and implemented London Plan policy 5.9"

Would be manifestly unreasonable under regulation 12(4)(b) due to the timeframe involved and the amount of information that would need to be searched; the Commissioner has no reason to challenge this and accepts that this part of the request would be manifestly unreasonable to respond to.

25. However, given that the complainant attempted to refine his request the Commissioner has considered whether the Council had responded to this new refined request. In the 29 page 'fact sheet' sent to the complainant the Council explained it had undertaken the sample as suggested. The Council was able to examine July planning reports of the past three years within a reasonable timeframe to reduce the burden. The Council provided details of the case, the Committee minutes, and a summary section where an answer is given on whether overheating is included in the final report.

26. The Council considered this to be a fair and reasonable response and provided enough detail to be a representative sample. It considers the commentary on each application provides an explanation as why overheating is or is not cross-referenced in the reports.

27. The Council states that it looked through hundreds of pages of reports to respond for these three years. It stresses that overheating is just one London Plan policy and points to table 1 of the 'fact sheet' listing all the policies in the latest 2021 London Plan, showing over 100 planning policies. As a result the Council explains that planning reports do not seek to comment on every one of the 100 planning policies – they will

focus on key issues for the Committee to consider when determining individual applications.

28. The Council was keen to stress that the fact that a report does not explicitly contain text on overheating does not mean it was not considered when the application was determined as all major planning applications involve a consultation with the Council's sustainability officer who will look at the overheating reports submitted with applications.
29. The 2011 and 2016 London Plan similarly involved very long lists of planning policies of similar length. The Council advised that full details of the reports and plans of each of the cases highlighted in the 'fact sheet' could be looked up on the Council's website through the planning search function or via the Council's Major Planning Application Committee archives.
30. The Council's sampling exercise had resulted in the estimate of half an hour per file to produce the information it disclosed in the fact sheet. For a three year sample of just applications from July this amounted to 17 applications. If the 30 minute estimate is used this would be 8.5 hours of work to collate the information so far. To extend this to the remainder of the years, just sampling from the month of July, would increase the resource time needed to over 25 hours.
31. However, the Commissioner has looked at this estimate in more detail. The 'fact sheet' provides links to all of the documents available for each meeting. For example, for the 2021 July Major Planning Committee links are provided to the attendance sheet, agenda front sheet, printed decisions and printed minutes. Clicking the link for printed decisions brings up the three decision relevant in this case – this is an overview stating the name of the application, a brief description and the recommendation (approval or rejection). The minutes then provide more detail as to the discussion leading to this decision. The information produced in this 'fact sheet' is, as far as the Commissioner can tell, a 'copy and paste' from the decisions and minutes sections.
32. However, none of this information actually answers the question of whether the planning officers report included consideration of London Plan policy 5.9. This information is then in a 'summary' section in which the Council states whether there is any references to overheating in the report. The Council states hundreds of pages of reports were examined to respond for these three years.
33. The Commissioner firstly must stress the request asked how many of all the major planning applications for residential developments since 2011 showed evidence that the planning officer's report and/or the applicant

considered and implemented London Plan policy 5.9. This was then refined to only considering applications received in July for each of the years covered.

34. Whilst the Commissioner appreciates the Council have attempted to provide further information on each application to provide explanation as to why overheating is or is not cross-referenced in reports this is not entirely necessary to comply with the request. It would be sufficient to simply provide a number, for example of 17 applications the Council could simply give the number of applications where the planning officers report or the applicant had considered London Plan policy 5.9.
35. The Commissioner acknowledges this would still require reading through the reports to make this determination but it is not clear that this would be as time consuming as the Council has suggested. Even if the reports are hundreds of pages each it is likely there will be standardised wording and sections that would not need to be examined so it is highly unlikely every word on every page would need to be read to determine if policy 5.9 had been considered in each application.
36. The Commissioner considers 30 minutes to be an excessive amount of time to review each report given the above. Based on his calculations the Commissioner had estimated if the 30 minutes was accepted it would require more than 25 hours to sample all reports from the month of July since 2011. Anything over 18 hours of staff time for a public authority such as a Council can be considered, based on circumstances, to be excessive and overly burdensome in terms of time. However if the 30 minutes was halved, which in this case seems more reasonable and possibly still more time than needed for some reports, then the total time needed reduces to just under 13 hours.
37. On this basis the Commissioner would have to accept that to comply with the refined request would not be manifestly unreasonable and the Council should now respond to this part of the request.

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

38. 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.
39. 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. He will also consider the actions taken by the public authority to establish what information within the scope of the request it

held, and any other reasons offered to explain why further information is not held. He will also consider any reason why it is inherently likely, or unlikely, that further information is not held.

40. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

41. For the other parts of the request the Commissioner has considered whether the Council has provided information to answer the requests.

42. The first part was as follows:

"I would therefore like to request information on how the council has been implementing policy 5.9 of the London Plan 2011 and London Plan 2016, since 2011."

43. In his request for internal review the complainant stated that he could not be more specific about what documents he required without having knowledge of how the planning department is organised but he assumed the Council would hold internal documents for the purpose of training planning staff and committee members, that there may be internal policy documents, template documents for pre-application advice, or documents on how planning policy will address adaptation to climate change. The complainant stressed he found it hard to believe that pre-application advice and planning application officer reports were prepared on an ad hoc basis and that Council officers would have read the London Plan 2011 and 2016 and not commented on this in internal documents, including comments on Policy 5.9.

44. The Council explained that:

"Since 2011 the Council has requested energy assessments be submitted with major applications (applications over 10 residential units or over 1000 sq.m floorspace). Energy or energy and sustainability assessments will normally cross reference overheating and cooling, either by simply covering matters directly pertinent to policy 5.9 or under a specific heading which cites the policy. Any application since 2011 which has been referable to the Mayor of London will have GLA stage 1 comments. These normally have a comment on the energy assessment as the GLA has an energy team.

The Council from 2011 referred major applications to the EPU (Environment Protection Unit) team who would look at energy assessments. From 2014 a sustainability officer has been consulted on major applications. The case officer will have taken account of comments received on the energy report from the above highlighted



officers. It should be noted that even the GLA energy team might put greater focus on energy efficiency when considering the energy report than other considerations such as the specific considerations of policy 5.9. This is because consultees will often focus on what they consider to be the key matters.

The simple answer to the question is the planning team have been consulting specialist officers who are qualified to assess energy reports and who understand the policy since 2011, whose comments are then taken into account as part of the application determination process."

45. Whilst this response does not provide specific documents as suggested by the complainant it does, in the Commissioner's view, provide the information requested in that it gives an explanation as to how the Council has been implementing Policy 5.9 since 2011.
46. The second part of the request was for:

"I would also like information on how the council intends to implement this policy in the future. This policy covers overheating and cooling in planning applications."
47. Again, the complainant indicated his belief that the above information would be held in similar documents to those for the first part of the request as Council officers and committee members would read the London Plans and comment on it, including comments on climate change adaptation policies and how to complement these policies in the local plan.
48. The Council explained it was awaiting publication of supplementary planning guidance from the Mayor of London that was expected would be included in updated guidance for London Borough Planning Teams on dealing with overheating. The Council anticipate the guidance would enable easier implementation of the application of planning policy SI4 of the London Plan 2021 when determining applications. In particular, it was set to include best practice guidance which the Council were intending to look closely at before considering what changes it might need to make to how the planning team applies policy SI4.
49. The Commissioner would again agree that this does answer this part of the information request as it explains how the Council intends to implement the policy in the future.
50. The final part of the request to be considered was for:

"Policy 5.9 also requires boroughs to "develop more detailed policies and proposals to support the avoidance of overheating and to support the cooling hierarchy" within their LDFs. Can the council provide

information to show that such detailed policies and proposals have been developed by the council since 2011?"

51. The complainant again considered this would be held in similar types of documents as for the other parts of the request.
52. The Council explained that:

"As outlined in Paragraph 47 of the National Planning Policy Framework (NPPF) (2021), Planning law requires that applications for planning permission be determined in accordance with the development plan, unless material considerations indicate otherwise. The development plan for the London Borough of Hillingdon includes both the London Plan and the Local Plan.

Policy 5.9 of the previous London Plan provided a policy to assessing the matter of overheating and cooling in new development. The Council deemed that this policy was sufficient in covering this issue and that a requirement for more detailed policies on this matter was not necessary. This approach was supported by the draft London Plan, which was published in December 2017, and removed the suggestion that local planning authorities should develop more detailed policies on this matter.

Following public examination, this approach was still accepted and the new London Plan (2021) was adopted without a suggestion that local planning authorities should develop their own more detailed policies on overheating. The Local Plan: Part 2 – Development Management Policies (2020) therefore did not contain further policies on overheating and cooling. Following its own public examination, this approach was accepted and it was adopted without any further policies than those already held within the development plan."

53. The Commissioner considers this is essentially a 'not held' response. The complainant asked for information to show that detailed policies had been developed by the Council since 2021 and the Council's explanation is that it did not consider it needed to develop further policies. Therefore no recorded information is held within the scope of this part of the request.
54. Having considered the above, the Commissioner has concluded that, on the balance of probabilities, the Council has complied with its obligation under these parts of the request by providing the information requested or confirming it is not held.

**Regulation 5(2) – Duty to make environmental information available on request**

55. Regulation 5(2) of the EIR says that the public authority must make the information available as soon as possible and no later than 20 working days after the date of receipt of the request.
56. In this case, the Council failed to respond in full to the request within 20 working days. The complainant submitted their request for information on 27 November 2020 and the Council provided its substantive response on 19 January 2021.
57. Therefore, the Council has breached regulation 5(2) of the EIR.

## Right of appeal

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58. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

59. 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.
60. 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 .....**

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**