

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 17 February 2022

Public Authority: Westminster City Council
Address: 64 Victoria Street
London
SW1E 6QP

Decision (including any steps ordered)

1. The complainant requested from Westminster City Council ("the Council") information relating to a specific residential property. The Council stated that it does not hold any further information other than already provided to the complainant.
2. The Commissioner's decision is that on the balance of probabilities, the Council does not hold any further recorded information within the scope of the request. Therefore, the Commissioner does not require the Council to take any steps as a result of this decision.

Background

3. The Council provided the Commissioner with background information for further context to this request. It stated that the building specified in the request is not a council property, nor used by the Council for housing purposes. It said that "*as a result, the Council would be unlikely to hold information unless required for statutory purposes such as planning permission etc.*"

4. The Council explained that following the complainant's initial request on 26 November 2020, it had received another request (WCC reference 18738229) on 7 January 2021 for similar information, but it specified departments/officers. Further to our intervention with that case, a decision notice¹ was served which required the Council to issue a substantive response to the complainant. On 25 June 2021, the Council responded and disclosed to the complainant information which it held relating to the request "*(specifically Building Control)*" and that this included; "*emails to and from the applicant in respect of an issue they had raised about the building, and the resulting survey report*".
5. The Council said that it therefore considered whether there is any further information held other than that already provided to the complainant on 25 June 2021.

Request and response

6. On 26 November 2020, the complainant wrote to the Council and requested information in the following terms:

"Please provide copies of all correspondence, reports, demands, requests and documents sent to, or received from,

(a) the freeholder (56 ST GEORGE'S SQUARE MANAGEMENT LIMITED) or its officers or agents (all documents);

(b) Marler & Marler property agents (insofar as the same relates to 56 St George's Square);

(c) T Markham Limited property agents (insofar as the same relates to 56 St George's Square);

(d) Child & Child Solicitors (Allium Law Limited) (insofar as the same relates to 56 St George's Square);

(e) Tenants or leaseholders at 56 St. George's Square (insofar as the same relates to 56 St George's Square);

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2021/2619956/ico-102411-n4b9.pdf>

(f) your own sub-contractors or agents (including but not limited to FM Conway) (insofar as the same relates to 56 St George's Square),

in each case since 1st January 2020. For any documents you are unable to provide for reasons of confidentiality or otherwise, please provide a brief description of the same and the reasons for which you consider you are unable to provide them."

7. On 16 December 2020 the Council responded. It explained that the property in question is not a council property and therefore, the Council does not hold the requested information.
8. On 17 December 2020 the complainant asked the Council for an internal review.
9. On 7 January 2021 the Council provided its internal review response and maintained its original position. It stated that the Council had undertaken searches for any information in relation to the specified property for the time frame given and that no results had been returned.

Scope of the case

10. The complainant contacted the Commissioner on 7 January 2021 to complain about the way his request for information had been handled. Specifically, the complainant is of the view that the Council had not carried out searches in relation to part (f) of his request (sub-contractors). He also believes that the Council had not carried out searches relating to its Defective Structures or District Surveyors departments, and therefore considers that the Council holds more information than it had provided.
11. The following analysis focuses on whether the Council holds any further recorded information within scope of the request of 26 November 2020.

Reasons for decision

Regulation 2(1) - Is the requested information environmental?

12. Regulation 2(1) of the EIR provides the following definition of environmental information:

"...any information in written, visual, aural, electronic or any other material form 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) and (b) as well as measures or activities designed to protect those elements..."
13. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
14. The Commissioner has produced guidance² to assist public authorities and applicants in identifying environmental information. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
15. In this case, the requested information relates to correspondence between third parties and the Council concerning the potential structural instability on the property in question.

² <https://ico.org.uk/for-organisations/regulation-2-1-what-is-environmental-information/>

16. The Commissioner is satisfied that the information is environmental within the definition at regulation 2(1)(c), since it is information on measures such as policies, plans and activities which are likely to affect environmental elements and factors referred to in regulation 2(1)(a) and/or 2(1)(b). He has therefore, considered the issue of whether information is held under the EIR.

Regulation 12(4)(a) - information held/not held

17. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that it does not hold that information when the applicant's request is received.
18. 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 authority to check that the information was not held, and any other reasons offered by the public authority which is relevant to her determination. He will also consider any reason why it is inherently likely or unlikely that the requested information was not held.
19. For clarity, the Commissioner is not expected to prove categorically whether or not the information was held, he 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.
20. 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 position

21. The complainant argued the Council's response that it does not hold any further information to his request. He strongly believes that the Council holds "*more information*" than it has provided. He said that the Council had performed a narrow search and information was not found, therefore, he considered that the Council was not "*entitled to take such a narrow view of the search.*"

22. The complainant also stated that one of the Council's sub-contractors FM Conway deals with more than just highways and that their Structures Division also provides support to the Council. He said that "*It is the Structures Division (and not the Highways department) to which my request related.*" The complainant is of the view that the Council had not dealt with his request "*properly*". He believes that the Council could have asked him for the context or for further information concerning his request, in order to search the appropriate areas. The complainant argued that the requested information exists, and said that he has copies of correspondence which refers to it. He also stated that a representative of FM Conway - the sub-contractor, informed him that "*following his report he would be writing to the freeholder in relation to the significant cracking to under-pavement vaults.*" The complainant specified that he expected information regarding these points to be included in the response to his request.
23. During the course of the investigation, the complainant responded to the Commissioner and set out his concerns about the Council. He is of the view that "*the Council did not undertake a proper search, confining its search to four sources that were not appropriate to unearth the information I requested.*" The complainant stated that he already has some documents that satisfy the scope and nature of the request. He said however, that he required information relating to correspondence between the Council's representatives (the sub-contractor) and the Freeholder, and that this concerned the structure of the building and to instruct urgent repairs. The complainant therefore considers that this did not happen and explained that he is "*trying to discover the internal paper-trail to understand where this fell off the radar*".
24. Following the Council's response regarding information not held, the Commissioner wrote to the complainant in an attempt to resolve this case informally. The Commissioner had considered the Council's explanation, he was satisfied that appropriate searches had been undertaken that would retrieve information relevant to this request. Therefore, the Commissioner's preliminary conclusion was that on the balance of probabilities, the Council does not hold the information requested. However, the complainant did not accept the Commissioner's initial findings. The complainant reiterated that he already had in his possession copies of information, and provided by way of example, two sets of emails which he considered "*clearly satisfy the criteria of the request, but have not been disclosed*" and which he believes demonstrates that the information does exist.

25. The complainant maintained the view that the Council does hold the information requested, and therefore asked for a decision notice. He stated his reasons for not withdrawing his complaint, he believed that the Council had initially ignored his subsequent request of 7 January 2021 which resulted in a decision notice, case reference: IC-102411-N4B9, and he also believed that the Council "*failed to actually look for the information.*"

Correspondence and further searches

26. The emails which the complainant had presented to the Commissioner as a way of example, consisted of information relating to structural issues of the complainant's flat. Within the first set of emails, the first correspondence of 30 June 2020, the complainant raised concerns about the demise of two under-pavement vaults, and included a copy of a surveyors report (wall inspected on 23 July 2019) for the Council to view. The complainant asked the Council for any advice on the issues which he raised concerning the adjoining vault's walls.
27. Another email was sent on 22 January 2021 by the complainant to the Council's District Surveyors with the subject field titled "*Building Control: Possibly Dangerous/Defective Structure.*" This email referred to the complainant's previous email of 30 June 2020 (described in the above paragraph) and that FM Conway had been instructed by the Council to attend his flat. It also informed the Council of the two visits by the surveyors, and about their concerns regarding the structural issues "*and that remedial action would be required.*" The complainant had not received any response from the Council surrounding the surveyors' visits, and therefore he presumed that there was no further action required at the property.
28. The second set of emails which the complainant presented to the Commissioner, contained correspondence (1 July 2020) which were written prior to the emails described in the above paragraph. These were between the complainant and an engineer from the Structures Division of FM Conway. The emails confirmed discussions about the sub-contractors proposed work on the complainant's property, and the confirmation date of the expected survey visit.

29. In view of this, the Commissioner contacted the Council and discussed the complainant's concerns and his clarification of the request. The Council subsequently offered to conduct a further search for the information requested. With regard to the complainant's clarification of his request ("*to discover the internal paper-trail*") which was about the structure of the building and instruction of urgent repairs, the Council confirmed within its response to the Commissioner, that it had consulted further with Building Control.

The Council's position

30. The Council considered the complainant's clarification of the request and the reason for seeking the information, and noted that it relates to issues that he had personally raised with the Council and for which it appears he had not received a response. The Council said that as a result it believed that "*there is an element of a request for personal data here which was not described in the original request...*" (paragraph 6).
31. The Council stated that it had consulted further with Building Control, and Building Control confirmed that in relation to the correspondence of 22 January 2021 (paragraph 28) which comprised a number of emails relating to different issues with the property, a response from Building Control had been provided to the complainant. This was sent on the same day and the Council provided a copy of the response email to the Commissioner.
32. The Council said that the response was "*that the work was not the responsibility of WCC.*" It reiterated that it has required several departments to undertake searches relating to the original request. The Council also said that previous disclosure of information held by Building Control which satisfied section (f) of the request, was dealt with in response to a separate request under "WCC reference 18738229".
33. The Council stated that in providing the information, it believes it has addressed the clarification which alludes to personal correspondence with the Council on a matter relating to the property.
34. The complainant was informed of this response from the Council and he expressed his dissatisfaction with the outcome. He disputed that further searches which related to the request had been conducted, because the Council had not provided the Commissioner with the documents that he stated he has copies of.

35. The Council maintained its original position that it does not hold information relating to the request. The Council repeated that the building specified in the request is not a council property, nor used by the Council for housing purposes. Therefore, the Council considers that *"it would be unlikely to hold information unless required for statutory purposes such as planning permission etc."*
36. The Council was asked by the Commissioner to provide its response to a series of questions to determine whether any further recorded information is held. The Council listed the departments which were contacted to confirm whether they held the information requested; Housing, Planning, Corporate Property, Highways and Public Protection and Licensing. The Council also described the searches of relevant paper/electronic records and details of staff consultations.
37. With regard to its own sub-contractors (part (f) of the request), the Council said that the Highways department confirmed that FM Conway is used for road works etc and therefore, they would not be contracted by that department to work on a private property, like in this case. As there was no reason for the department to hold information about the property in question, the Council said that no further searches were required.
38. The Council further explained that as the specified building is a private property, any contact with the planning department would have been under statutory purposes such as planning permission, i.e. it would have been available to the public via the planning portal. In response to our intervention, the Council confirmed that *"a check was made with Building Control, as (for example) reporting Dangerous Structures is done via a different process to the above."* The Council explained that concerns regarding (potentially) dangerous structures are reported to Building Control. It said *"These come under the purview of the Council's Building Control department, as there is no 'Dangerous Structures' department."* This appears to be an assumption by the complainant based on his email from FM Conway's Dangerous Structures department.
39. The Council also confirmed that all such information held in respect of an application made to Building Control (in 2020) which related to the property, and a survey carried out, had already been disclosed to the complainant. This, it said was in response to the complainant's other request (WCC reference 18738229) and in line with the Decision Notice IC-102411-N4B9.

40. The Council confirmed that there is no further information held about the property in question which has not been provided to the complainant under the other case reference, or as available on the online planning portal.
41. The Council provided the Commissioner with evidence of the extent of its enquiries and searches taken. This included searches made against the property in shared drives/information repositories and the main database for the department. The Council said that each department confirmed the response originally given to this request. It also said that if the information was held it considered that this information would be held electronically. The Council reiterated that there is no reason for it to hold information about the property in question as it is not a council concern.

The Commissioner's decision

42. The Commissioner has examined the submissions of both parties. He considered the complainant's concerns/arguments, and also the searches conducted by the Council and its explanations as to why further information was not held.
43. From viewing the correspondence from Building Control to the complainant, the Commissioner notes that it had received a collection of emails from the complainant regarding the structural concerns. The Commissioner is of the view that this response letter of 22 January 2021 from Building Control to the complainant, appears to be a blanket letter in response to the complainant's various emails. The letter stated that Building Control were unsure if one of its surveyors attended the property regarding the structural concerns, and that it would be arranged for one of the surveyors to attend.
44. With regard to the copies of correspondence the complainant provided to the Commissioner as supporting evidence to his argument, the Commissioner's view is that the emails do not contain details which demonstrate that the information requested is held by the Council. The Commissioner notes that one of the emails relates to the complainant's home and the surveyor's report regarding damage to the property. A second email refers to FM Conway and their representative's visits to the complainant's home. It also states that the surveyor had concerns regarding the structural damage, and that the complainant asked the Council about further action required at the property.

45. The Commissioner accepts that the complainant would assume that the Council holds information relating to FM Conway sub-contractors. However, the Commissioner notes that the Council explained that a check was made with Building Control regarding reporting "Dangerous Structures" and it stated that the process is recorded differently and is not available via the planning portal. The Council also said that an application was made in 2020 to Building Control in relation to the property in question, a survey had been carried out accordingly and that all such information held in this respect had been disclosed to the complainant in line with the Decision Notice issued on 25 June 2021.
46. The Commissioner was provided by the Council (a screenshot) with the details of the information which it held, and had disclosed to the complainant in accordance with the Decision Notice. The information included; emails to and from the complainant in respect of an issue he had raised about the building, a referral and the resulting survey report. The Commissioner notes that this information was in response to the complainant's other request of 7 January 2021 (WCC reference 18738229).
47. The Commissioner also notes that subsequent concerns raised by the complainant, post-dates the original request and internal review. Therefore these matters cannot be considered to be within the original scope of the request.
48. The Commissioner asked the Council questions about Building Control and its "Dangerous /Defective Structures" and "District Surveyors" departments with regard to searching for the information requested. The Council said that Building Control and its Defective Structures division had already been contacted and confirmed information is not held. Regarding the District Surveyors department, the Council stated that it is a different process used. However, the Commissioner understands from discussions with the Council that Building Control encompasses these departments and these terms are interchangeable. Although District Surveyors have a separate email address, the Building Control team would deal with structural concerns. Therefore, the searches carried out for the information requested would have also included searches within this division of the Building Control team.

49. The Commissioner acknowledges that the requested information is clearly of interest to the complainant, and the complainant considers that further information should be held. However, the Commissioner is satisfied that the Council carried out adequate and appropriately-targeted searches in response to the request, which would have been likely to retrieve information if it was held. He notes that all the relevant departments were consulted (albeit several times) and reasonable searches undertaken. The Commissioner considers that such searches would have located related information. There is no evidence that the Council had attempted to conceal information from the complainant.
50. The Commissioner is satisfied that on the balance of probabilities, the Council does not hold any further information falling within the scope of the request to that which it subsequently identified and disclosed to the complainant. Therefore, the Commissioner does not request the Council to take any steps as a result of this decision.

Right of appeal

51. 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: 0116 249 4253

Email: grc@justice.gov.uk.

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

52. 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.
53. 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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