

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **6 February 2023**

Public Authority: **London Borough of Southwark**
Address: **PO Box 64529**
London
SE1P 5LX

Decision (including any steps ordered)

1. The complainant has requested information from London Borough of Southwark (the Council) relating to road closures in the Dulwich area.
2. The Commissioner's decision is that, on the balance of probabilities, the Council does not hold information within the scope of the request, therefore regulation 12(4)(a) of the EIR is engaged. However, the Commissioner finds that the Council breached regulation 14(2) of the EIR as it failed to provide its refusal of the request within the statutory timeframe.
3. The Commissioner does not require the Council to take any further steps as a result of this decision notice.

Request and response

4. On 12 October 2021, the complainant wrote to the Council and requested information in the following terms:

"Please provide copies of any correspondence between Southwark Council and the London Ambulance Service NHS Trust regarding experimental orders for road closures in the Dulwich area (including please all pertaining or alluding to Calton Avenue, Dulwich Village, Court Lane, Melbourne Grove, Grove Vale, Lordship Lane, East Dulwich Grove, Goose Green, East Dulwich Road, Elsie Road and Derwent

Grove) under the London Streetspace Programme and 'low traffic neighbourhoods' (LTN) schemes. Please include copies of any attachments.

I am conscious of Southwark Council's particular duty to advise and assist under regulation 9 of the Environmental Information Regulations and with that in mind, I am only asking for the email exchanges for the month of November 2020 and the month of March 2021."

5. The Council responded on 3 December 2021. It refused to comply with the request, citing regulation 12(4)(b) (manifestly unreasonable) of the EIR.
6. Following an internal review the Council wrote to the complainant on 14 January 2022. It withdrew its reliance on regulation 12(4)(b) to refuse to comply with the request, and conceded that its cost calculations and supporting arguments were incorrect for this request. It explained that it had now conducted searches for the two specific months, but those searches had returned no results. Therefore, the Council stated that it does not hold the requested information.

Reasons for decision

Regulation 12(4)(a) – information not held at the time of the request

7. Regulation 12(4)(a) of the EIR provides that a public authority may refuse to comply with a request for information to the extent that it does not hold that information when it receives the request.
8. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
9. 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.
10. During the Commissioner's investigation the Council detailed the searches it had conducted in order to determine whether it holds information within the scope of the request. It confirmed that no paper records are held.

11. In terms of its electronic records, searches were conducted on the devices of the four Council officers who were identified as having contact with the London Ambulance Service. Searches were made on the team tracker, MS Outlook and Teams for any individual or team messages, as well as the Highways mailbox. The Council confirmed that it used various relevant search terms such as 'emergency services', 'LAS', and 'ambulance'. Searches were also conducted for emails sent to, and received from, the main point of contact at the London Ambulance Service.
12. Based on the information in paragraphs 10 and 11, the Commissioner is satisfied that the Council carried out appropriate and proportionate searches to determine whether or not it holds information within the scope of the request.
13. The Commissioner notes the complainant's view that the Council has "gone to every length to ensure that the requested information would never be disclosed." However, in the Council's internal review it advised that although it had located no information for the two months specified within this request, this did not prevent the complainant from making further requests for information for other months or time periods.
14. The Commissioner further notes that in continued correspondence between the Council and the complainant after the internal review outcome, in an email dated 25 January 2022, the Council explained that "meetings were held virtually and all issues were discussed verbally during each meeting. No minutes were taken by council officers at the meetings. However, the London Ambulance Service (LAS) recorded all issues on a spreadsheet, which the council officers had sight of and commented on before the meetings, but it is the LAS who updated and retained the spreadsheet with comments/actions discussed. In light of this, you may wish to ask LAS for a copy of this log, which you can do here: [https://www.londonambulance.nhs.uk/talking-with-us/freedom of information/](https://www.londonambulance.nhs.uk/talking-with-us/freedom-of-information/)."
15. Based on the information in paragraphs 13 and 14, the Commissioner is not persuaded that the Council has been intentionally obstructive, and that it has in fact provided the complainant with appropriate advice and assistance in gaining access to information which may be relevant to their concerns.
16. The Commissioner accepts that the requested information is clearly of importance to the complainant, and that they consider that the Council should hold information within the scope of their request. However, the Commissioner has found no evidence to believe that the Council does, as a matter of fact, hold information for the two months specified within the request.

17. As a result, the Commissioner has reached the conclusion that, on the balance of probabilities, the Council does not hold any recorded information within the scope of the request.
18. Although regulation 12(4)(a) is a qualified exemption, the Commissioner's position is that it is not necessary to consider the public interest. To do so would be illogical because the public interest cannot favour disclosure of information which is not held.
19. The Commissioner is therefore satisfied that regulation 12(4)(a) is engaged, and he does not require the Council to take any further steps in this case.
20. Regulation 14(2) of the EIR provides that a refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request. As the Council failed to issue its refusal notice within 20 working days, the Commissioner finds that it breached regulation 14(2) of the EIR.

Other matters

21. The Commissioner wishes to acknowledge some of the other concerns which were raised by the complainant within their correspondence to him about this case. Firstly, the matter of the Council's record keeping and whether or not it should have taken notes at meetings with the London Ambulance Service. Whilst the Commissioner appreciates why this is a valid concern to the complainant, he does not have the authority to dictate when or how a public authority chooses to record information.
22. The complainant also raised concerns regarding the Council changing its position between its initial response and its internal review outcome. Whilst it is always preferable for a public authority to deal correctly with a request at the first time of asking, the whole purpose of an internal review is for a public authority to have the opportunity to reconsider its original handling of the request and to recognise and put right anything which it had previously done incorrectly.
23. Finally, the "tone" of wider correspondence from certain Council officers surrounding the matter of the road blocks. The Commissioner is not responsible for the content of the information a public authority discloses, only whether the public authority has identified the relevant information that it holds. Concerns of this nature should be raised directly with the Council itself via its internal complaints procedure.

Right of appeal

24. 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

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

25. 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.
26. 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

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