

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

Decision Notice

Date: 8 September 2021

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

Decision (including any steps ordered)

1. The complainant requested information relating to a planning application submitted to Westminster City Council. The Council stated that it did not hold the requested information.
2. The Commissioner's decision is that the Council does not hold the requested information, nor is it held on the Council's behalf by another person. The Commissioner does not require any steps to be taken.

Background

3. In March 2016 the Commissioner issued a decision notice requiring the Council to disclose a viability report regarding a development site in London.¹
4. The viability report had been produced by Gerald Eve LLP (GE) on behalf of the Council. Page 46 of that report discussed the effect of Right of Light compensation on the viability of the proposed development:

GE requested evidence of this number and were provided with a Rights of Light specialist (GIA) report anticipating an assumed Right of Light payment could be c.£5.365m, which was actually higher than the £4.2m as originally estimated. GE have included £5.365m in the FVA which reflects the upper end of the range. However, if a lower Right of Light cost is achieved, the Scheme will be more viable.

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1623781/fs_50587175.pdf

Request and response

5. On 10 June 2020 the complainant requested the following information from the Council:

1. In FOI 990414 WCC released the viability assessment (attached) for planning application 14/11837/FULL. The ICO ruled it was in the public interest to release the Viability Assessment to understand why WCC granted planning permission to themselves for a development with 0% social housing. On page 46 of this viability assessment it states the following:

The above report referenced should have been included in the viability assessment to justify the figures (as Gerald Eve have done throughout the addendum for all the figures). Please provide this report from GIA.

2. A 3D model of the development has been used to assess rights of light compensation. Please provide a copy of this 3D model in digital format. I have the technical computer expertise to examine it myself. The 3D model can be obtained from Stuart Gray who represented many leaseholders for rights of light compensation (you can quote my name)

3. Please provide the total amount of rights of light compensation paid out, broken down by flats, I do not need to know flat numbers or peoples names (to avoid GDPR) but I do need to see the total and the breakdown.

6. The Council responded to the complainant on 10 July 2020, stating that it did not hold the requested information.
7. The complainant requested an internal review on 13 July 2020. He pointed out that the planning application related to a site for which the Council was the freeholder. The complainant suggested that if the Council did not hold the information, it should contact GIA to obtain it.
8. The Council conducted an internal review and communicated the outcome to the complainant on 18 September 2020. The Council maintained its position that it did not hold the requested information.

Scope of the case

9. The complainant contacted the Commissioner on 20 September 2020 to complain about the handling of his request. The complainant disputed the Council's position that it did not hold the requested information, which can be summarised as follows:

- i. The Rights of Light specialist (GIA) report.
 - ii. The 3D model of the development used to assess rights of light compensation.
 - iii. The total amount of rights of light compensation paid out, broken down by flats (but not including flat numbers or people's names).
10. The Commissioner is of the opinion that the requested information, if held, would be environmental information within the meaning of regulation 2(1)(c) of the EIR. This is because the proposed development is an activity that would be likely to affect the elements of the environment such as land and landscape, as well as factors such as noise and waste. The requested information would be "on" the development, therefore in the Commissioner's view it would fall squarely within regulation 2(1)(c). Neither the complainant nor the public authority has disputed this, therefore the Commissioner has considered the complaint under the EIR rather than FOIA.
11. Accordingly the scope of the Commissioner's investigation was to determine whether or not the Council held the information requested by the complainant. The Commissioner also considered whether the requested information was held by another person on behalf of the Council.

Reasons for decision

Regulation 3(2): information held by the public authority

12. Regulation 3(2) of the EIR states that:

(2) For the purposes of these Regulations, environmental information is held by a public authority if the information –

(a) is in the authority's possession and has been produced or received by the authority; or

(b) is held by another person on behalf of the public authority.

13. The Council advised the complainant following the internal review that it did not hold the requested information since it had not been provided to the Council, or held by the Council in association with the planning application.

14. The Council stated that Rights of Light were a civil matter rather than a planning issue. Rights of Light reports were not required during the planning application stage. Therefore the Council would not normally expect to hold related information, although it did advise the complainant and the Commissioner that some information relating to daylight and sunlight could be accessed via the planning portal. This included 3D views of the development.
15. With regard to the third part of the request the Council stated that Right of Light compensation would be a private matter for the developer, given that it is a civil matter and not a planning issue. Therefore, again the Council would not expect to hold this information.
16. The Commissioner accepts that the Council does not hold the requested information at parts 2 and 3 of the request. The complainant has not provided the Commissioner with any evidence that the Council does hold this information, or that it is held on the Council's behalf. Rather the complainant has suggested that the Council should obtain the information from third parties.
17. The Commissioner respectfully disagrees with the complainant. There is no provision or requirement within the EIR for a public authority to obtain information from a third party, unless that third party is holding the information on behalf of the authority. The Commissioner has seen no evidence to suggest that the information requested at parts 2 and 3 of the requests are held on behalf of the Council. The Commissioner is therefore satisfied that the Council does not hold this information.
18. However, with regard to the first part of the request, the Commissioner understands that the Council had commissioned GE to undertake a due diligence assessment of information connected with the planning application. The complainant drew the Commissioner's attention to paragraph 7.20 of the report produced by GE, which states that GE had requested evidence of the developers' Right of Light assumption and had been provided with a copy of a Right of Light report.
19. Therefore it appeared to the Commissioner that GE may have obtained relevant information from the developers. If so, and regardless of whether or not Right of Light is a planning issue, this information would be held on behalf of the Council, since GE was working on behalf of the Council.
20. The Commissioner put this to the Council. The Council advised the Commissioner that it had consulted GE, who had provided the following explanation:

"...due the confidentiality surrounding ROL [Right of Light] we were presented a ROL document at a meeting by an expert. We reviewed it at the meeting and accepted it as appropriate evidence. The documents was returned in the meeting to the applicant as it was not regard appropriate to be retained or published [sic] the information".

21. Since the requested information was not commissioned by the Council or GE as set out above, the Commissioner finds that the report is not held by the expert on behalf of the Council. Furthermore the Commissioner considers GE's response to be a clear and unambiguous statement that GE took deliberate steps to avoid being in possession of the report in question.
22. The Commissioner cannot comment on whether GE ought to have retained a copy of information it relied on when conducting the due diligence assessment on behalf of the Council. However she is obliged to find that the Council does not hold the requested information, nor does GE hold it on behalf of the Council.

Right of appeal

23. 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

24. 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.
25. 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

Sarah O’Cathain
Senior Case Officer
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF