

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

Date: 25 November 2014

Public Authority: Monmouthshire County Council

Address: County Hall
Rhadyr
Usk
Monmouthshire
NP15 1GA

Decision (including any steps ordered)

1. The complainant requested information related to a dispute about ownership of a particular piece of land, and conifer trees situated on the land. Monmouthshire County Council ('the Council') provided some information and requested clarification in relation to one part of the request. During the Commissioner's investigation, the Council disclosed further information relating to the request. The Commissioner's decision is that the Council has disclosed all the relevant information it holds and has complied with regulation 5(1) of the EIR. In failing to provide some of the information within 20 working days the Council breached regulation 5(2) of the EIR. The Commissioner does not require any steps to be taken.

Request and response

2. The complainant wrote to the Council on 13 September 2013, and at the same time forwarded earlier emails between himself and the Council dating back to 2011 about the subject matter of trees cited on a particular piece of land. He requested information in the following terms:

"1. It is recorded that contrary to [name redacted] e-mail on behalf [name redacted] reference [sic] [name redacted] "final letter" to [name redacted] 12th March 2003 of options offered. This was responded to by

[name redacted] by letter on the 19th March 2003 and by [name redacted]'s Trial technical representative [name redacted] in his letter dated the 8th May 2003 both went to [name redacted] the Chief Executive officer Monmouth Council. Please confirm you received and have these letters?

2. I still have not received the missing document referred [sic] to in [name redacted]'s e-mail 10 March 2011 could you please forward this document?

3. Please send the documentation that relates to Monmouthshire Council [sic] remit and Authority that relates to Technical Highways [name redacted] to quote " his physical action to remove the Trees?"

3. The Council responded on 13 September 2013 and advised that it would be able to respond to part 1 of the request but it required further clarification in respect of parts 2 and 3 of the request.

4. The complainant wrote to the Council on 4 October 2013 asking it to carry out an internal review. He also forwarded a copy of an email that he had sent to other third parties on 26 September 2013. In the email of 26 September 2013, the complainant provided the following clarification relating to his request:

"I refer you back to Monmouthshire Council [name redacted]'s attached e-mail March the 10 2011 3:35pm on behalf of Mr. Nigel Burgess Monmouthshire Highways Para 3 of "note of his conversation" that states quote " I discussed at length the fact that I [name redacted] might be able to take physical action to remove the Trees.

Could you please, under the F.O.I/ Data protection Act forward the relevant [sic] documentation and or any documentation of authorisation [sic] that [name redacted] had that gave him the right to physically [sic] remove the trees?

If not could you please clarify why the documentation cannot be forwarded?"

5. The Council wrote to the complainant on 4 October 2013 and pointed out that his email providing clarification (dated 26 September 2013) had not actually been sent to the Council but had been sent to other third parties. As such the Council suggested an internal review request was premature. In relation to the request of 13 September 2013 the Council confirmed the following:

Part 1 of request - it had not yet been able to establish whether the letters referred to had been received and it was hoping to respond within the relevant timescales.

Part 2 of request – the complainant had still not provided any clarification as to what missing document he was referring to.

Part 3 of request – no information held relevant to the request.

6. On 19 November 2013, the Council wrote to the complainant about part 1 of the request and confirmed that it had received copies of the letters referred to. In relation to part 2 of the request, the Council confirmed that it was still unable to process this part of the request as it had twice asked for clarification and the complainant had not provided any clarification.
7. The complainant wrote to the Council on 12 June 2014 and asked it to conduct an internal review into its handling of the request.
8. The Council provided the outcome of its internal review on 6 August 2014. The Council stated that the request should have been handled under the EIR as opposed to the FOIA, although it explained that this would not have made any significant difference to its handling of the request. The Council confirmed it had provided all the information held relevant to the request, with the exception of part 2 of the request as the complainant had not provided clarification of this part of the request. The Council also acknowledged that it had provided information relevant to part 1 of the request outside the 20 working day time limit.

Scope of the case

9. The complainant contacted the Commissioner following receipt of the Council's internal review response to complain about the way his request for information had been handled.
10. During the course of the Commissioner's investigation, the Council disclosed the information held relevant to part 2 of the request.
11. The Commissioner considers the scope of this complaint to be whether the Council complied with its obligations in its handling of the request.

Reasons for decision

Background

12. The Commissioner understands that the request in this case relates to a dispute about ownership of the piece of land on which conifer trees are situated, which has been on-going for approximately 20 years and was the subject of a court case in 1994. There has been significant

correspondence over a period of several years between the resident living near the land (and third parties acting on her behalf including the complainant) regarding the matter of land ownership and the conifer trees planted on it.

13. The Commissioner has no role in the dispute regarding ownership of the land in question or the removal of any trees situated on it. His remit in this case is to establish whether the Council has complied with the FOIA and/or the EIR in its handling of this request.

Correct Access regime

14. The Council originally considered the request under the FOIA and provided some information, stated other information was not held and that it required further clarification in relation to one part of the request. At the time of its internal review, the Council stated that it considered the request to be for environmental information and, as such, the correct access regime was the EIR. However, the Council maintained its position that it had provided the information held relevant to two parts of the request and required further clarification in relation to one part of the request.
15. The Commissioner agrees that the correct access regime is the EIR as the information requested, if held, would fall under the definition of regulation 2(1)(a) as it is information on the state of the elements of the environment (land, landscape). It could also be argued that any information, if held, relating to plans or measures to remove the conifer trees (part 5 of the request), would fall under the definition of regulation 2(1)(c) as it would be information on a measure, which is likely to effect the elements of the environment, namely land and landscape.

Part 1 of the request

16. Part 1 of the request simply asked for confirmation that the Council had received two particular letters. The Commissioner considers it arguable whether this constitutes a valid request for information as the answer to the question would appear to be "yes" or "no", which is unlikely to be information held in recorded form.
17. Whilst the Commissioner is not aware whether the Council holds the information in recorded form, he notes that on 19 November 2013 the Council confirmed that it had received and held a copy of one of the letters. Whilst the Council stated that it could not trace a copy of the second letter, it located its response to the letter which confirmed that the letter in question had been received. The Council therefore confirmed receipt of both letters referred to in the request.

18. Based on the above, the Commissioner is satisfied that the Council complied with regulation 5(1) of the EIR in relation to this part of the request. However, in failing to provide the information within 20 working days after the date of receipt of the request, the Council breached regulation 5(2).

Part 2 of the request

19. This request was for a copy of "the missing document" referred to in an email from a named Council officer dated 10 March 2011. Prior to the Commissioner's investigation, the Council advised the complainant that it would need further clarification of this request in order to answer the request.
20. On review of the relevant correspondence regarding the case, the Commissioner identified that the initial request for information was sent to the Council along with copies of earlier emails between the complainant and the Council dating back to 2011 - including the email referred to in the request. The Commissioner noticed that the email dated 10 March 2011 contained a section relating to three requests for information which the complainant had submitted to the Council in January 2011. Following receipt of the Council's email, the complainant responded the following day (11 March 2011) indicating that the Council had failed to attach the document in relation to his request for information dated 25 January 2011, namely "the most up-to-date version of the adoption status of land in the vicinity". In his email response the complainant had included in the subject line "Missing F.O.I. item (1)".
21. In correspondence with the Council, the Commissioner suggested that as the complainant had forwarded the relevant emails from 2011 with his request of 13 September 2013, "the missing document" referred to in the request referred to item 1 in the email from the Council dated 10 March 2011, ie the most up-to-date version of the adoption status of land.
22. The Council wrote to the complainant on 10 November 2014 and provided a copy of the up-to-date version of the adoption status of land in the vicinity. The Council advised the complainant that, if this was not the missing document referred to in part 2 of the request, he would need to provide further clarification. The complainant subsequently confirmed to the Commissioner that part 2 of the request did relate to the information provided by the Council on 10 November 2014. However, he expressed his dissatisfaction with the delay in providing the information in question.

23. In light of the above, and the additional disclosure of information during his investigation, the Commissioner considers that the Council has now complied with its obligations under regulation 5(1). However, in failing to provide the information within 20 working days of the date of receipt of the request, the Council breached regulation 5(2) of the EIR.

Part 3 of the request

24. This request again referred to the Council's email of 10 March 2011 and asked for "documentation that relates to Monmouthshire Council remit and Authority that relates to Technical Highways [name redacted] to quote 'his physical [sic] action to remove the Trees?'".
25. On 4 October 2013, the complainant clarified this part of the request. He referred to the "note of our conversation" contained within the Council's email of 10 March 2011. This note referred to a conversation between a Council Officer and the complainant. The Council Officer recorded that he had "discussed at length the fact that I might be able to take physical action to remove the trees". The complainant confirmed that his request was for any documentation or authorisation that gave the Officer concerned the right to remove the trees in question.
26. As the Council had relied on section 1(1)(a) of FOIA to inform the complainant it did not hold the request, the Commissioner considered whether the equivalent part of EIR applied in this case. Regulation 12(4)(a) of EIR states that a public authority may refuse to disclose information to the extent that it does not hold that information when a request is received.
27. In its response of 19 November 2013 the Council quoted the full paragraph contained within the note of the conversation referred to by the complainant:
- "I discussed at length, the fact that I might be prepared to take physical action to remove the trees, only if [name redacted] and [name redacted] will agree in front of me that their respective boundaries indicate it is legally permissible. [Name redacted] stated that such a meeting was impossible. On that point I fear we have no way forward".
28. The Council stated that there was nothing within this paragraph which suggested that the Officer concerned was claiming, on behalf of the Council, any rights (legal or other) to remove the trees in question. The Council considers that the Officer was very clearly stating that he would only be prepared to take action if the parties involved in the dispute gave him permission. The Council's position is that the Officer was not claiming any "right" or "authorisation" to remove the trees, as

suggested by the complainant. It confirmed therefore that it did not hold any information relevant to this part of the request.

29. In cases such as this where there is some dispute as to whether a public authority holds information falling within the scope of the request the Commissioner has been guided in his approach by a number of Tribunal decisions which have used the civil standard of the balance of probabilities, i.e. whether on the balance of probabilities the Commissioner is satisfied that no further information is held.¹ In deciding where this balance lies the Commissioner will take into account the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.
30. The Council explained that it did not carry out searches for the information requested as it knew that it did not hold any relevant information. This is because neither the Council nor any officer of the Council has ever claimed it has any right or authorisation to remove the trees in question. The Council's view is that the clarification provided by the complainant on 4 October 2013 referred to a note of a conversation made by a particular Council officer which was abridged by the complainant in order to change the meaning. For this reason, in its internal review response, the Council quoted the exact wording of the telephone note in order to demonstrate that the officer concerned had never claimed any "right" or "authorisation" to remove the trees in question.
31. The Commissioner is aware that the Council has been involved in extensive correspondence with the complainant and the third party he represents about a dispute regarding ownership of the piece of land in question and trees planted on it for around 20 years. The case went to court in 1994 and a ruling was made. The Council's view is that the mapping which was referred to in the judgment is insufficiently accurate to identify the ownership of the land in question, which is the issue underpinning the dispute. The Council advised that responsibility for an entitlement to cut/remove the trees is related to the ownership of the land. The Council stated that the up-to-date version of the adoption status of the land which it provided in response to part 2 of the request relates to highways adoption rather than land ownership. It also

¹ See *Bromley v Information Commissioner* [EA/2006/0072].

confirmed that the adoption of a highway does not necessarily imply ownership by the highway authority.

32. The Commissioner has considered the Council's representations in conjunction with the telephone call note referred to by the complainant in his request. In the Commissioner's opinion, in the note of the discussion he made, the Council Officer in question did not assert he had any right or authorisation to remove the trees in question. In fact, the Officer quite clearly stated that he "might" be prepared to take action to remove the trees, but only if the parties involved agreed in front of him that their boundaries indicated it was legally permissible. It was made quite clear to the Officer by the complainant that such a proposal was not feasible and, as such the Officer concerned concluded that there was no way forward in relation to the matter.
33. Based on all the information available to him, and having considered the wording of the request, on the balance of probabilities the Commissioner accepts the representations put forward by the Council that at the time of the request it did not hold the requested information.

Right of appeal

34. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.
36. 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

Anne Jones
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