

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

Date: 3 July 2018

Public Authority: Luton Borough Council
Address: Town Hall
George Street
Luton
Bedfordshire
LU1 2BQ

Decision (including any steps ordered)

1. The complainant has requested information around a planning dispute.
2. The Commissioner's decision is that Luton Borough Council ("the Council") has disclosed all the information it holds and has therefore complied with its duty under Regulation 5(1), however in failing to issue a response within 20 working days, it breached Regulation 5(2) of the Environmental Information Regulations ("the EIR"). It also failed to either transfer the request to, or inform the complainant of the name and address of a public authority which it believed held (or might have held) the information. It therefore also breached Regulation 10(1).
3. The Commissioner does not require the Council to take any further steps.

Background

4. The context of the request is a long-running dispute over planning enforcement involving the Council, the complainant and the owners of a neighbouring property ("the Garage Owners").

5. In 2002, the Council served a Planning Enforcement Notice on the Garage Owners, requiring them to cease carrying out repair work on site. This Notice was never appealed.
6. In 2008, the Garage Owners submitted an application for a Certificate of Lawfulness on the basis that repairs had been carried out on the property since 1989.¹ The Council refused this application on the basis that an Enforcement Notice was in place, but the Garage Owners appealed this decision, partly on the grounds of ignorance of the Enforcement Notice having been served.
7. Whilst preparing to defend its decision at appeal, the Council appears to have realised that its 2002 Enforcement Notice may have been incorrectly issued and therefore its grounds for resisting the appeal might be weakened.² A compromise was reached whereby the Council would withdraw the Enforcement Notice and the Garage Owners would withdraw their appeal and make a fresh application for a Certificate of Lawfulness.
8. In 2010, the complainant himself brought a planning appeal against the Council in which the Garage Owners made witness statements challenging his version of events. The Inspector also considered evidence from some of the same Council officers who had been involved in the service of the Enforcement Notice on the Garage Owners. The complainant believes that the Council allowed the Garage Owners to carry on their activities in exchange for providing false testimony against him at that hearing. The Council strongly disputes this and has argued that little weight was given, by the Inspector, to that evidence.

Request and response

9. On 29 April 2018, the complainant emailed an officer of the Council and requested information of the following description:

"The 2002 Enforcement notice...records and/or notes/documentation relating to service of the notice in December 2002. [redacted] states

¹ Under Section 191 of the Town & Country Planning Act 1990, a Planning Authority can issue a certificate confirming that particular use for a site is lawful if the site has been in use, for that purpose for a defined period of time and no Enforcement action has taken place.

² An Enforcement Notice must be served within 10 years of the illegal development or use commencing.

that he was told by [redacted] that it was served on an unidentified 'lady' also that a photograph had been taken. Please supply photograph.

"The compliance inspection notes by [Council Officer 1].

"Detailed statements from [3 named Council Officers] would be extremely informative.

"All documentation carried out between [the Garage Owners] and Luton Council."

10. On 3 May 2018, in response to an email from the Councils Information Governance team, he added:

"Plus the transcript [Council Officer 1] giving evidence at my tribunal."

11. On 11 July 2017, the Council responded. It provided some information within the scope of the request but refused to provide the remainder. It withheld a document provided to the Planning Inspectorate as it claimed the document was subject to Legal Professional Privilege and hence exempt from disclosure under Section 42 of the Freedom of Information Act. It stated that it did not hold any other information falling within the scope of the request.
12. The complainant first contacted the Commissioner, through his solicitor, on 12 October 2017. Because of some difficulty in identifying the relevant documents to the request, it was not until 13 December 2018 that the Commissioner was able to identify that the complainant had not exhausted his right to an internal review.
13. The complainant requested an internal review on 18 December 2017 and the Council concluded its review on 19 January 2018. It initially upheld its original position – however, in response to further correspondence from the complainant, it disclosed the document to which it had previously claimed that Legal Professional Privilege applied.

Scope of the case

14. The complainant contacted the Commissioner again on 23 January 2018 to complain about the way his request for information had been handled.
15. At the outset of the Commissioner's investigation, the Council confirmed that it had now disclosed the document to which it had previously claimed Legal Professional Privilege applied. The Commissioner has

therefore only gone on to consider whether further information was held.

Reasons for decision

Procedural Matters

Is the requested information environmental?

16. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;*

17. The Council has stated that it does not consider the information to be environmental. However, the Commissioner considers all the information to be relating to matters involved in Planning and Development Control. As Planning matters concern "measures" affecting (or likely to affect) the elements of the environment the Commissioner has therefore assessed this case under the EIR.

Timeliness

18. Regulation 5(1) states that: "*a public authority that holds environmental information shall make it available on request.*"

19. Regulation 5(2) states that such information shall be made available "*as soon as possible and no later than 20 working days after the date of receipt of the request.*"

20. The complainant made his request on 29 April 2017 and this was acknowledged at the time by the Council. The Council responded on 11 July 2017 – around two and a half months later. Thus the Council breached Regulation 5(2).

Transfer of Request

21. Regulation 10(1) of the EIR states that:

Where a public authority that receives a request for environmental information does not hold the information requested but believes that another public authority or a Scottish public authority holds the information, the public authority shall either—

(a) transfer the request to the other public authority or Scottish public authority; or

(b) supply the applicant with the name and address of that authority,

and inform the applicant accordingly with the refusal sent under regulation 14(1).

22. The Council's refusal notice stated that it did not hold a copy of the transcript which the complainant subsequently added to his original request, but that, if it were held, it would be held by the Planning Inspectorate.
23. However, as the Council did not provide the complainant with an address by which the Planning Inspectorate could be contacted, it breached Regulation 10(1) of the EIR.
24. Although the Commissioner has found the Council in breach of Regulation 10(1), she believes that it would be a simple task for the complainant to access the contact details of the Planning Inspectorate. For this reason, she does not believe that it would be proportionate to include a step in this notice for the Council to remedy this breach. The Council should be aware that in future similar scenarios it must provide the requester with contact details for the other public authority.

Is further information held?

The complainant's position

25. The complainant's position is that the Council is denying him access to information which shows it was guilty of maladministration in the way that it handled enforcement proceedings against both him and the Garage Owners.
26. He believes that the information he has been provided with would not form sufficient justification for the Council to have acted as it did in relation to its decision to withdraw its Enforcement Notice against the Garage Owners. He has pointed to several documents, including a report to the Council's Planning Committee discussing the original Notice, which states that "*the owner has given written assurance that vehicle repairs would cease,*" yet he has not been provided with a copy of that document. He also cites a Council report (which is undated but appears to have been written around the time the Council decided to withdraw the Notice) which talks about "new evidence" in relation to the appeal and a letter which the Council wrote to the Garage Owners stating that it is willing to consider a compromise "in light of the evidence supplied."
27. The complainant has repeatedly accused the Council and/or its officers of perjury, corruption and malfeasance. He believes that information is being withheld by the Council to "cover up" wrongdoing. He wishes to take legal action against the Council and wants to be able to present a court with evidence backing up his assertions.
28. The complainant has also stated that this dispute is turning increasingly nasty and he needs the requested information to draw matters to a conclusion.

The Council's position

29. The Council has stated that it has now provided the complainant with all the information that it holds.
30. The Council has provided the Commissioner with a list of all the files it is has searched which were related to either the complainant, the Garage Owners or the geographical area in which they are based.
31. Searches were conducted of the Council's archive, the current case management software and the Council's previous case management database.
32. Finally, the Council's officers checked the publicly available information on the Planning Portal to ensure that the complainant had been provided with all the information the Council had.

33. The Council has told the Commissioner that its IT contractor has stated that the corporate electronic "vault" of emails only extends back 7 years – which would exclude most (though not all) of the information that has been requested.
34. In addition, the Council's retention policy would normally require the destruction of records relating to civil litigation after 7 years from the last action and appeal files after 6 years from the conclusion of the appeal. It has stated that some of the information it does hold (and has provided) has only been retained because of the continuing contact they have had with the complainant and his legal representatives over the matter.
35. In relation to the transcript of evidence given by Council Officer 1, it has stated that it has never sought a transcript as it had no need to do so and that any recorded information would be held by the Planning Inspectorate.
36. At some point in 2017, the Council's Monitoring Officer carried out a review of the complainant's various grievances against the Council. Whilst mostly upholding the Council's position, the Office did state that no copy of the legal advice that the Planning Department received in relation to the withdrawal of the Enforcement Notice had been retained in the files. The Monitoring Officer noted that it was "intensely frustrating" that no surviving record of the legal advice existed on the Council's files.
37. The Council has stated that, in total, it has spent over 18 hours of staff time searching for information held within the scope of the request.

The Commissioner's view

38. The Commissioner's view is that it is unlikely that further information is held by the Council in relation to this request.
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. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, she will consider any reason why it is inherently likely or unlikely that information is not held.
40. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

41. The Commissioner considers that the searches which the Council has carried out were relevant, accurate and thorough. She considers that such searches should have located all information that was held within the scope of the request.
42. Having looked carefully at the complainant's arguments, it would appear that they are, in part, based on either a mis-reading or a misunderstanding of the information which has been provided.
43. For example, the Council's letter to the Garage Owners dated 18 June 2009 states that the compromise is based on the evidence which the Garage Owners supplied as part of their appeal against the decision to refuse a Certificate of Lawfulness – and not in relation to the original Enforcement Notice. Evidence from the Monitoring Office report suggests that the Council was reviewing its existing evidence in relation to the Enforcement Notice
44. The Council's report suggesting the withdrawing of the Enforcement Notice does indeed mention "new evidence." However, when read in its proper context, the Commissioner considers that an objective reading is that the Council, anticipating a further application for a Certificate of Lawfulness, is proposing to deal with that application on its own merits and in the context of the information supplied with the fresh application:

"Therefore it is advisable to (a) withdraw the Enforcement Notice and (b) following the withdrawal of the notice, to invite a new application for a Certificate of Lawfulness and to determine this on the basis of the new evidence supplied."
45. Therefore the Commissioner concludes that the Council holds no further information beyond that already provided.

Other matters

46. The complainant has invited the Commissioner to adjudicate on a number of other matters which are beyond her jurisdiction. The Commissioner takes no position as to whether the Council has handled the Planning matters appropriately or not. Such matters need to be explored through the Council's complaints process and, if necessary the Local Government Ombudsman.
47. The ongoing dispute between neighbours has no bearing on whether or not information is held.

Right of appeal

48. 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

49. 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.
50. 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

**Ben Tomes
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