

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

Decision notice

Date: 30 September 2020

Public Authority: Milton Keynes Council
Address: Civic Offices
1 Saxon Gate East
Central Milton Keynes
MK9 3EJ

Decision (including any steps ordered)

1. The complainant requested information relating to planning enforcement site visits at a particular address. Milton Keynes Council (the Council) disclosed some information within the scope of the request. It redacted some information but did not specify whether it was out of scope, or whether any exceptions applied.
2. During the course of the Commissioner's investigation the Council confirmed that information was redacted under regulation 13 of the EIR (personal data). However, it is the Commissioner's view that the redacted information was, in fact, outside the scope of the request.
3. The complainant was dissatisfied with the amount of information that had been provided and believed that the Council held further relevant information.
4. The Commissioner's decision is that, on the balance of probabilities, the Council did not hold further information that fell within the scope of the request.
5. The Commissioner does not require the Council to take any steps as a result of this decision notice.

Request and response

6. On 12 August 2019, the complainant wrote to the Council and requested information in the following terms:

"I should like to request full details of all site visits in relation to the planning enforcement issues surrounding 42 Portland Drive, in Willen between the periods 1 January 2018 and 12 August 2019. I would expect your response to include the dates of all site visits, a copy of the notes or reports (including measurements) made by enforcement officers as well any photographs or videos that were taken during the visits.

I would prefer to receive these in electronic format at this email address. If this is not possible, please let me know.

It would be helpful if you were to provide any brief notes which might be necessary to understand the context of the information provided, although I recognise that you are not obliged to do this. If for any reason you feel this request is unclear, please do not hesitate to contact me. If you are not the appropriate authority for this request, or for part of it, please let me know as soon as is convenient.

If the information requested contains sections of confidential information, please blank out or remove these sections, and mark clearly that they have been removed."

7. The Council responded on 4 September 2019 and provided some information within the scope of the request. The Council redacted some information but it did not specify whether this information was out of scope, or whether any exceptions applied.
8. The complainant requested an internal review on 6 September 2019.
9. On 4 October 2019 the Council provided the outcome of its internal review in which it maintained its position and confirmed that no further information was held.

Scope of the case

10. The complainant contacted the Commissioner on 25 October 2019 to complain about the way his request for information had been handled. The Commissioner wrote to the complainant on 19 February 2020 to clarify the scope of his complaint. The complainant confirmed that he

was not satisfied that the Council had provided all of the recorded information it held that was within the scope of his request. He also had concerns that there were significant sections of redacted information and was not satisfied that it was only personal information that had been withheld.

11. Upon revisiting the request during the Commissioner's investigation, the Council disclosed further information to the complainant. This information consisted of email correspondence which either mentioned or broadly related to site visits to the address mentioned in the request.
12. After receiving the Council's initial submissions, the Commissioner wrote to the complainant to set out her preliminary view of the case. She explained that, on the balance of probabilities, no further information was likely to be held by the Council. The Commissioner also explained that the only information that had been redacted was email correspondence and her view was that this correspondence did not fall within the scope of the request.
13. The complainant responded and confirmed that he believed the Council had been dishonest in claiming that it did not hold any further information. He requested a decision notice on the matter.
14. The scope of this case and the following analysis is to consider whether, on the balance of probabilities, the Council held any further information within the scope of the request to that which was disclosed.
15. In correspondence to the Commissioner regarding this case on 2 December 2019, the Council stated:

"I note that this has been responded to under FOI in error as it should have been an EIR however as only personal information has been redacted and no information withheld I don't believe this will have affected the disclosure."

16. This notice also covers whether the request should have been handled under the EIR.

Reasons for decision

Regulation 2 – Is the requested information environmental?

17. Environmental information must be considered for disclosure under the terms of the EIR rather than the FOIA.

18. Regulation 2(1)(c) of the EIR defines environmental information as any information on "*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 [2(1)](a) and (b) as well as measures or activities designed to protect those elements.*"
19. The request in this case is for information relating to planning enforcement matters. The Commissioner is satisfied that the requested information is on a measure that would or would be likely to affect the elements listed in regulation 2(1)(a) and is, therefore, environmental under regulation 2(1)(c).

Regulation 5(1) – Duty to make environmental information available on request

20. Regulation 5(1) of the EIR states that "*a public authority that holds environmental information shall make it available on request.*" This is subject to any exceptions that may apply.
21. 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 was not held, and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that the requested information was not held.
22. For clarity, the Commissioner is not expected to prove categorically whether the information was held, she 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.
23. 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 Council's view

24. The Council was confident it had undertaken sufficient searches and that no further information within the scope of the request was held.
25. The Council confirmed that it searched the system on which enforcement cases were recorded. Enforcement officers also checked their paper notes, computer folders and mailboxes. Electronic search terms included "42", "Portland", the enforcement reference number and the names of the property owner and agent. The Council stated that the information was only held in electronic records. Original hard copy notes were uploaded electronically then shredded.
26. The Council explained that, since the request was received, one of the enforcement officers had left the Council. The officer's mailboxes and drives were searched but no further relevant information was found. The Council told the Commissioner that it was aware that the officer had attended the site prior to 4 December 2018 but that they had failed to log any details or dates of these site visits on the enforcement system.
27. The Council was not aware of any relevant information that had been deleted or destroyed. It stated that details of site visits were a key part of an enforcement officer's work and documentation should therefore be retained. The corporate retention policy was to keep such records indefinitely.
28. After the Commissioner provided her preliminary findings to the complainant, he asserted that the Council had been dishonest in stating that no further information was held. He provided the Commissioner with a document produced by the Council for a public inquiry titled "Planning Proof of Evidence" and an associated appendix titled "Appendix NG1 Site Photographs". Specifically, he drew the Commissioner's attention to several photographs which were not disclosed in response to his request, that he believed were taken during planning enforcement site visits.
29. The Council explained that it held further images of the site but these were not taken during planning enforcement site visits and were, therefore, not in the scope of the request. With regard to the particular photos in question, the Council was unable to confirm where these photos had come from but confirmed that they were not taken during planning enforcement site visits.

The Commissioner's view

30. The Commissioner has examined the submissions of both parties. She has considered the searches performed by the Council, the information

disclosed, the Council's explanations as to why information was not held and the complainant's concerns.

31. The Commissioner is satisfied that the Council carried out adequate and appropriately-targeted searches to locate relevant information within the scope of the request. She notes that all of the relevant officers were consulted and a variety of suitable electronic search terms were used. The Commissioner considers that such searches would have located all relevant information.
32. In the circumstances, the Commissioner does not consider that there is any evidence that would justify refusing to accept the Council's position that it does not hold any further relevant information to that which it had already identified and disclosed to the complainant.
33. The redacted information was email correspondence between the Council and third parties regarding the site in question. While the redacted information may constitute third party personal data, the Commissioner's view is that it fell outside the scope of the request.
34. Furthermore, the Commissioner understands that the Council intended to assist the complainant when it provided further information to him during the course of the Commissioner's investigation. The Council explained that although this additional information was not specifically requested, it decided to disclose it as it made reference to site visits. The information was email correspondence between Council staff or between the Council and third parties, which mentioned or broadly related to site visits. However, it is the Commissioner's view that this information did not fall within the scope of the request.
35. The Commissioner is satisfied that, on the balance of probabilities, the Council did not hold any further information falling within the scope of the request to that which it disclosed in its initial response. The Commissioner considers that the Council has complied with the requirements of regulation 5(1) of the EIR.

Right of appeal

36. 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@justice.gov.uk

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

37. 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.
38. 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
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF