

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 6 June 2012

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

Decision

1. The complainant requested a range of information relating to specific properties in St Catherine's Avenue in Bletchley. The request was separated into 7 numbered elements. This decision notice is confined to a consideration of the council's handling of request parts 1-3.
2. Milton Keynes Council (the "council") confirmed that the requested information was not held.
3. The Commissioner's decision is that requested information constitutes environmental information. He finds that the council should have handled the request under the EIR rather than the Freedom of Information Act 2000 (FOIA). In relation to request parts 1 and 2, he finds that the council should have identified the information as the complainant's personal data and dealt with them as a subject access request under the Data Protection Act 1998 (DPA). As regulator of the DPA, the Commissioner has, separately to this decision notice, assessed the council's compliance in this regard. In relation to request part 3 the Commissioner has concluded that the council correctly confirmed that the information is not held; however, it failed to provide this confirmation outside the 20 working days required by the EIR.
4. The Commissioner does not require the council to take any steps.

Background

5. The request relates to the complainant's concerns that the boundary which separates their property from that of their neighbours' has shifted as a result of 'adverse possession'.
6. According to Land Registry guidance, for adverse possession to take place there must be "...factual possession of the land, with the necessary intention to possess and without the owner's consent."¹
7. The property in question was formerly council-owned and the complainant has made numerous requests to the council to establish the relevant facts about the position of the boundary and to ascertain whether the council was aware that adverse possession had taken place.

Request and response

8. On 26 September 2009, the complainant wrote to the council and requested a range of information relating to properties in St Catherine's Avenue in Bletchley. The request was separated into 7 numbered parts (see annex).
9. The council responded on 22 January 2010 and provided some information. In relation to (1), the council confirmed that the title plans drawn up for 10 and St Catherine's Avenue, Bletchley were not the same and that there were different plans for each address. In relation to (2), the council stated "...there is no evidence of any change to the deeds in 1998 nor can we find any evidence of an adverse possession claim on either title." In relation to (3), the council stated that it was awaiting a response from the relevant department.
10. Following an internal review the council wrote to the complainant on 4 August 2010. In relation to (1), the review confirmed that it could not provide the information as disclosure could result in a breach of the Data Protection Act 1998 (DPA). It advised the complainant to contact their neighbour or the Land Registry for the information. In relation to (2) the council upheld its original decision and confirmed that it was not aware of the adverse possession rights gained by the complainant's neighbour and it did not hold any relevant information. In relation to (3), the review confirmed that the information was not held.

¹ <http://www.landregistry.gov.uk/professional/guides/practice-guide-4>

11. In response to subsequent concerns raised by the complainant regarding this and several other requests for information, the council conducted a further internal review on 6 February 2012. This found that, in relation to (1) and (2), the council did not hold the requested information and in relation to (3), the review confirmed that current versions of the requested plan could only be disclosed to the owner of the property and were otherwise exempt from the FOIA.

Scope of the case

12. The complainant contacted the Commissioner to complain about the way their request for information had been handled.
13. The Commissioner has confirmed with the complainant that the scope of his investigation will be confined to a consideration of the council's handling of request parts (1), (2) and (3).

Reasons for decision

Is it Environmental Information?

14. The Commissioner has considered whether requests (1)-(3) identify environmental information.
15. Regulation 2(1) of the EIR defines 'environmental information'. The relevant parts of the definition are found in 2(1)(a) to (c) and 2(1)(f) which state that it is information in any material form 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) and (b) as well as measures or activities designed to protect those elements...

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or are likely to be affected by the state of the elements of the environment referred to in (a), or, through those elements, by any of the matters referred to in (b) and (c)."

16. The Commissioner considers that information relating to plans constitutes information on measures which affect or are likely to affect the elements and factors referred to in regulation 2(1)(a) and 2(1)(b). Planning legislation is designed to protect land and landscape and related information is therefore environmental as defined in regulations 2(1)(c).
17. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question. In view of this, the Commissioner is satisfied that all the information specified in requests (1)-(3) is environmental under the terms of regulation 2(1)(c) of the EIR.
18. The Commissioner has concluded that the council wrongly handled the requests under the FOIA. During the course of his investigation the council agreed with the Commissioner that it should have dealt with the requests under the EIR.

Is it Personal Data?

Request (1) and (2)

19. Regulation 5(3) of the EIR states:

"To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data."

20. Regulation 5(3) exempts an authority from its duty to provide information in response to a request under the EIR when the information in question is the personal data of the applicant. Although the council did not claim it, the Commissioner has decided, as the regulator of the Data Protection Act 1998 (DPA), to use his discretion to consider whether regulation 5(3) applies to the requested information.
21. In England & London Borough of Bexley v Information Commissioner (Appeal No: EA/2006/0060 & 0066) the Tribunal found that information relating to an address of a property was personal data as it would be

easy to find out the identity of those living at that property from that address.

22. It found that the owners could be identified from the Council Tax register and the Tribunal went on to conclude that,

*"The address alone, in our view, also amounts to personal data because the likelihood of identification of the owner.... In our view this information amounts to personal data because it says various things about the owner. It says that they are the owner of the property and therefore have a substantial asset ... The key point is that it says something about somebody's private life and is biographically significant."*²

23. The Commissioner has considered the criteria above in relation to the information requested by the complainant in (2) and (3). As the information relates to title plans for the complainant's property he has concluded that this constitutes the personal data of the complainant.

24. Regulation 5(1) provides that an authority shall make environmental information available on request, subject to the other provisions and exceptions within the EIR. Regulation 5(3) provides that that duty will not apply where the information in question is the personal data of the applicant.

25. The Commissioner finds that regulation 5(3) applies in this instance and his decision is that the information is, therefore, excepted from disclosure under regulation 5(3).

26. In view of this conclusion, and in accordance with his duty under section 42 of the DPA, the Commissioner has, separately from this decision notice, assessed the council's handling of the complainant's request for their personal data.

Has all the relevant information been provided?

Request (3)

27. Regulation 5(1) of the EIR states:

"Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request."

² <http://www.informationtribunal.gov.uk/DBFiles/Decision/i146/ENgland.pdf>

28. Regulation 5(2) of the EIR states:

"Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of the request."

29. The Commissioner has considered whether the council correctly confirmed that the 1980 title plan is not held.

30. The Commissioner considers that the normal standard of proof to apply in determining whether a public authority holds any requested information is the civil standard of the balance of probabilities.

31. In deciding where the balance lies, the Commissioner will consider 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. The Commissioner will also consider any evidence that information *is* held, including whether it is inherently unlikely that information is not held.

What searches were carried out for information falling within the scope of this request and why would these searches have been likely to retrieve any relevant information?

32. The council confirmed that this information is recognised to be held nationally at the Land Registry. The council reviewed the manual property services file for the property in question and this confirmed that the information was not held.

If the information were held would it be held as manual or electronic records?

33. The council confirmed that, if the information were held it would be as a manual record on the property services file. The council reviewed the manual property services file and confirmed that no copy was held.

Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?

34. The council confirmed that recorded information had not been held.

What does the council's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the council describe the way in which it has handled comparable records of a similar age?

35. The council confirmed that it had no relevant policy for records of this type. It stated that it is recognised national practice that title plans are held at the Land Registry

Is there a business purpose for which the requested information should be held? If so what is this purpose?

36. The council confirmed that there is not a business purpose for the information to be retained.

Are there any statutory requirements upon the council to retain the requested information?

37. The council confirmed that there are no statutory requirements for the requested information to be retained.

Conclusions

38. The Commissioner has considered the explanations provided by the council and, being mindful of the difficulties associated with 'proving a negative', he has also noted that the information identified in the request is some 30 years old.
39. The complainant has not provided relevant arguments or evidence which would support a view that the council should hold the requested information.
40. The Commissioner has concluded that, on the balance of probabilities, the council has correctly confirmed that no further relevant information is held. In failing to provide this confirmation within the time limit specified in the EIR and failing to issue an appropriate refusal notice the Commissioner finds that the council breached regulation 5(2) and regulation 14.

Other matters

41. Although they do not form part of this decision notice the Commissioner would like to note the following matters of concern.
42. The code of practice issued under regulation 16 of the EIR (the "EIR code") provides guidance to public authorities as to the practice that would be desirable for them to follow in connection with discharging their functions under the EIR.
43. Part I of the EIR code sets out recommendations in relation to staff training and advises:

*"In planning and delivering training, authorities should be aware of other provisions affecting the disclosure of information such as the FOIA, the Data Protection Act 1998, and anti-discrimination legislation (such as the Disability Discrimination Act)."*³

44. The Commissioner notes that, in this case, the council failed to handle the request under the EIR and failed to handle elements of the request under the DPA. He has been given assurances that the council has taken steps to prevent a recurrence of these errors and he expects that future requests will be handled under the appropriate legislation.

3

http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/detailed_specialist_guides/environmental_information_regulations_code_of_practice.pdf

Right of appeal

45. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

46. 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.
47. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF