

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

Date: 8 August 2017

Public Authority: North Norfolk District Council
Address: Council Offices
Holt Road
Cromer
Norfolk
NR27 9EN

Decision (including any steps ordered)

1. The complainant requested information from North Norfolk District Council ("the council") in connection with a planning application. He asked to know which restrictive covenants were considered to be unenforceable by the council and how the council justified its ownership of a particular area of land. The council said that the information was not held. The Commissioner's decision is that the request should have been considered under the Environmental Information Regulations 2004 ("the EIR"). However, she accepts that the information was not held. There are no steps to take.

Request and response

2. On 29 November 2016 the complainant wrote to the council to ask for information in the following terms:

"Under the Freedom of Information Act would you kindly explain:

1.0 Which of the restrictive covenants, which you acknowledge are attached to North Lodge Park, do you consider are not enforceable?

2.0 How do you justify your claim to ownership of Primrose Lane in the park?"

3. The council responded on 5 January 2017. It said that it did not hold the information requested.
4. The complainant expressed dissatisfaction with the response on 6 January 2017.
5. On 6 February 2017 the council completed an internal review. It said that it wished to maintain its position.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his request for information had been handled on 7 February 2017. He asked the Commissioner to consider whether the council held the information requested.
7. During the Commissioner's investigation, the council identified that it held some Land Registry documents regarding the relevant title NK326914 that it had relied upon to support its claim to ownership. However this information was already publicly available via the Land Registry. Nonetheless, the council agreed to disclose it to the complainant. This information has therefore been scoped out of the Commissioner's investigation.

Reasons for decision

Environmental information

8. Regulation 2(1)(c) of the EIR provides that any information relating to plans that would affect or would be likely to affect the elements and factors of the environment is "environmental information" for the purposes of the EIR. In this case, the information relates to council plans for a car park in North Lodge Park. The Commissioner's view is that the information requested falls under the EIR rather than the FOIA.

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

9. Regulation 5(1) of the EIR provides a general right of access to recorded environmental information held by public authorities. Public authorities should make environmental information available within 20 working days unless a valid exception applies.

10. 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 argument. She will also consider the actions taken by the authority to check that the information was not held and she will consider if the authority is able to explain why the information was not held. 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 balance of probabilities".¹
11. The council explained to the Commissioner that prior to the request for information the council and the complainant were in correspondence about restrictive covenants and land ownership. The complainant was seeking to persuade the council to withdraw its planning application for a car park in North Lodge Park. On 18 November 2016, the council's solicitor wrote to the complainant and said the following on the subject:

"...the council's legal advisors do not agree with your interpretation and enforceability of the restrictive covenants contained in the documents that you have produced.

*I can also confirm that the site of the former Primrose Lane is part of NNDC's title NK326914. The council, is, **without doubt** the legal owner of the land and consequently Certificate A, provided with the application is correct.*

Moving onto the issue relating to covenants on the land (not a material planning consideration), the issue of enforceability of restrictive covenants is a complex legal one and there are a number of covenants that exist in relation to the property. The mere existence of a covenant in a deed does not make it enforceable – it can only be enforced by a successor in title to (in this case the Hoare family), it he/she/they have property nearby that is prejudiced by a breach of the covenant. Having said that the council does not consider that the small car park that is proposed would be a breach of any of the covenants".

12. The council said that when it received the request, it had interpreted it as asking for more detail about why the solicitor made the statements in the letter on 18 November 2016. The council explained that the solicitor's comments were made on the basis of inspection of a land

¹ This approach is supported by the Information Tribunal's findings in Linda Bromley and Others / Environment Agency (31 August 2007) EA/2006/0072

registry title document and verbal internal discussions following the complainant's comments. The council therefore responded to the request to say that no recorded information was held that would answer the request.

13. The Commissioner explained that the legal advice about the enforceability of covenants and ownership of the land had clearly been relied upon by the council in a formal way in a Development Committee report dated 15 December 2016 as follows:

"Ownership and restrictive covenants

Notwithstanding the fact that restrictive covenants are not material planning considerations, this matter has been dealt with by the Head of Legal Services who has advised the case officer and objector accordingly. The legal advice received is that the covenants would be unenforceable and that NNDC is without doubt the owner of all the land within the application site. There are therefore no issues in terms of the certificates required to accompany the application under Article 14 of the Town & Country Development Management Procedure Order (2015)".

14. The Commissioner said that it would usually be the case that advice of that nature would be recorded for accountability purposes. She also expressed her view that the council may have taken an overly narrow interpretation of the request. She said that she believed that it would be appropriate to interpret the request more broadly than the council had done to cover information about the council's position on these issues rather than merely how the solicitor went about responding to the points raised by the complainant's general correspondence. The Commissioner asked the council to consider what recorded information it held that would explain which of the restrictive covenants it considered were unenforceable and also what recorded information was held that would justify its claim to ownership of the land. The Commissioner highlighted that this interpretation was supported by comments made by the complainant in his complaint to the Commissioner as follows:

"When applying for planning permission NNDC confirmed the existence of restrictive covenants but said they were unenforceable. Minutes of Cromer Town Council dated December 8, 2016, state NNDC had confirmed that covenants were live and effective but would not stop the application. Having given advice to the Development Committee that the covenants were unenforceable and that NNDC owned all the land concerned (page 41 Development Committee papers), they must have evidence that this was the case. It is that information we ask them to share with us".

15. Following the Commissioner's comments, the council indicated that it held a legal memo relating to these issues dated 10 February 2016 and agreed to provide this to the Commissioner for inspection. The Commissioner considered the file note but accepted that although it does relate to the restrictive covenants and the land in question, it does not contain information that would fall within the scope of the precise terms of the request made in this case.
16. The council conceded that it did hold some Land Registry documents that it relied upon to justify its claim to ownership however it said that these documents were already publicly available and it believed that they had already been seen by the complainant. As mentioned in the scoping section, this information was provided to the complainant as he explained that he had only seen one of them. When he received this information, the complainant contacted the Commissioner to express his view that much of this information did not seem to concern the specific area that he was interested in. However, the council has clarified that these are the documents it held with respect to the land title in question and related restrictive covenants and upon which it relied to support its ownership.
17. On the subject of whether any further information was held, the council confirmed its position that nothing further was in fact held. It said that it did not hold any recorded information indicating which of the restrictive covenants were considered to be unenforceable specifically and nothing else was held to support land ownership beyond the publicly available Land Registry documentation. It added that there had been verbal discussions but nothing more was held relating to this particular request. The council said that it had carried out a further search of relevant council records, including the council's legal file and also extended the search to include information held relating to the planning application file PF/16/1251. The council said that the request had also been discussed with the council's legal advisor and Head of Legal Services. The council also confirmed that no information within the scope of the request had been deleted, destroyed or mislaid to the best of its knowledge.
18. As indicated above, the Commissioner can readily understand why the complainant believed that this information must be held based on the comments made in the Development Committee report cited above and the usual position regarding legal advice that is relied upon in a formal way. Nonetheless the council has clarified its position to explain that the legal advice referred to in the report about the land ownership was simply the verbal view of the solicitor following her inspection of the relevant Land Registry documents. It was also the case that although the council had recorded legal advice relating to the site touching upon the restrictive covenants and land, this information did not fall within the scope of the specific requests made. The Commissioner accepts

that the council has provided a reasonable explanation of its position regarding what information was held and it has conducted appropriate searches to confirm that this was the case. The Commissioner therefore accepts that the council did not hold any information within the scope of the request.

Right of appeal

19. 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

20. 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.
21. 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

Elizabeth Archer
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF