

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

Date: 27 August 2019

Public Authority: Ministry of Housing, Communities and Local Government

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested from Ministry of Housing, Communities and Local Government (MHCLG) information relating to the 2012 Tree Preservation Regulations. MHCLG disclosed some information and confirmed that it did not hold the remainder.
2. The Commissioner's decision is that, on the balance of probabilities, the MHCLG does not hold any additional information relevant to the request.
3. The Commissioner does not require MHCLG to take any steps as a result of this decision.

Request and response

4. On 28 October 2018, the complainant wrote to MHCLG and requested information in the following terms:

"1. Please provide the Impact Assessment (IA) for the 2012 Tree Preservation Regulations.

2. Please provide the evidence that the 2012 regulations are compliant with

(a) Human Rights legislation

(b) The Equalities Act 2010.”

5. MHCLG responded on 20 November 2018, providing the complainant with a copy of a document titled *"Impact Assessment for the Town and Country Planning (Tree Preservation) (England) Regulations 2012"*¹ (the Impact Assessment).
6. On the same date the complainant contacted MHCLG effectively requesting an internal review to be conducted. The complainant explained that the provided information did not address his initial request in its entirety. He specifically stated that *"it does not show compliance with the EQA 2010 nor does it show the costs incurred onto people with disabilities who have trees close to their properties."*
7. Following an internal review MHCLG wrote to the complainant on 14 January 2019. MHCLG accepted that its response to the complainant's initial response only addressed the first part of the request and omitted to provide evidence in relation to the second part. With the purpose of rectifying this omission, MHCLG explained the stages of the process a piece of legislation such as the Regulations is required to undergo. MHCLG stated *"Therefore, as a matter of procedure there was compliance, even if this was not expressly recorded, aside from the observations made in the Explanatory Memorandum (which was published with the Regulations)."*

Scope of the case

8. The complainant contacted the Commissioner on 15 January 2019 to complain about the way his request for information had been handled. The complainant expressed his dissatisfaction with the amount of the information he had received in response to his request for information. The complainant asked the Commissioner to investigate whether MHCLG has disclosed all the information it held within the scope of his request.
 9. Whilst MHCLG did not specifically confirm or deny, neither in its initial response nor in its internal review procedure, whether it held recorded
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¹ https://www.legislation.gov.uk/ukia/2012/60/pdfs/ukia_20120060_en.pdf

information in relation to the second part of the request, during the course of the Commissioner's investigation it became clear that the MHCLG's position was that it had provided all the information it held within the scope of the request.

10. Therefore, the Commissioner has focused her investigation on examining whether MHCLG was correct when it stated that it had provided all the information it held and that it held no further information falling within the scope of the complainant's request.

Reasons for decision

Is the requested information environmental information?

11. Regulation 2 of the EIR states that:

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—

(a) the state of the environment, such as air and atmosphere, water, soil, land and landscape and natural sites including wetlands...

(b) factors, such as substances, energy, noise, radiation or waste, emissions...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...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...".

12. The Commissioner considers that, given that the request relates to management of trees, any information within its scope would be environmental under regulation 2(1)(c) as it would be on an activity affecting several of the elements and factors referred to in regulations 2(1)(a) and (b).

Regulation 5(1) – duty to provide environmental information

13. Regulation 5(1) of the EIR provides that a public authority that holds environmental information shall make it available on request.
14. In cases where a dispute arises over the extent of the recorded information 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 public 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. The Commissioner will also consider any reason why it is inherently likely or unlikely that information is not held.

15. 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.²

The complainant's position

16. The complainant is of the opinion that MHCLG did not address his information request appropriately. He maintains that the questions included in his request were not answered properly. He stated that the information provided "*did not show the specific details of the EQA 2010 nor Human Rights legislation and how that was assessed. There was no evidence of any such assessment undertaken by the Government department to show how those with disabilities would manage the duties of tree management if such were enforced by the TPO regulations.*"
17. Consequently, the complainant maintains that since MHCLG claims that the Regulations are compliant with the respective legislation, it must be in possession of information beyond what was already provided and considers that he is entitled to have access to this information.

MHCLG's position

18. In its response to the Commissioner's investigation enquiries, MHCLG stated that it conducted extensive searches in relation to this matter. However, no information, other than that already disclosed to the complainant, was identified.
19. Firstly, MHCLG explained that in the process of preparing a piece of legislation of this type it is guided by "*The Public Sector Equality Duty (PSED), as set out in s.149 of the Equality Act 2010 (the Act) came into force across Great Britain on 5 April 2011*" and it follows "*Equality Act 2010: guidance*".³

² This approach is supported by the Information Tribunal's findings in Linda Bromley and Others / Environment Agency (31 August 2007) EA/2006/0072

³ <https://www.gov.uk/guidance/equality-act-2010-guidance>

20. Further, MHCLG explained that upon receiving the initial information request submitted by the complainant, searches were made within the team that hold the portfolio for Tree Preservation Orders. This team confirmed that no information relating to this request was held, save the web link of the Impact Assessment. During the internal review stage, MHCLG conducted additional searches, this time also within its legal team.
21. During the course of the Commissioner's investigation, MHCLG also contacted the team that has oversight for ensuring the Equality Act is scoped correctly for any new policy being developed. *"This team also did not hold the Equality Impact Assessment for the Regulations."*
22. In response to the Commissioner's question whether the personnel involved in the process of drafting the piece of legislation in question has been contacted to check if they held information relevant to the complainant's requests, MHCLG stated that the legislation in question came into force on 6 April 2012 and *"no members of the team dating from 2012 are still in the team now."* However, MHCLG managed to locate some former members of the team who were still working for the department. *"Enquiries with these former team members revealed that neither hold any information relating to The Town and Country Planning (Tree Preservation)(England) Regulations 2012."*
23. For the purpose of adding to the above statement, MHCLG provided an additional explanation stating that each team within the department has control of its own portion of the shared drive for records retention. The MHCLG's records retention policy for electronic records states that the retention period starts when an electronic file is considered to be closed. According to this policy a folder is considered to be "closed" and made "read only", when *"it hasn't been modified in one year; or a period of five years has elapsed since its creation; or it is moved to the archive."* MHCLG added that at the end of the retention period files must either be deleted or sent to the National Archives, if they are of historical interest.
24. MHCLG stated that in compliance with its policy *"the team drive would not retain any requested information as the folder would not have been amended after 6 April 2012 when the Town and Country Planning (Tree Preservation)(England) Regulations 2012 came into force. Therefore being archived after one year (roughly speaking 6 April 2013) and then moved to the archive and deleted."*
25. The MHCLG's Records Management Team ran additional searches of its archive to ensure whether further information within the scope of the complainant's request was held. However, these searches did not produce any relevant result. In the process of searching its archives, MHCLG used the following terms:

- *Tree Preservation Regulations 2012;*
 - *Human Rights; and*
 - *Equality*
26. MHCLG confirmed that above searches “*found 1 mention of Human Rights in respect of TPOs and this was not in relation to the regulations.*”
27. MHCLG maintains that if any relevant information was held, it would likely to be held in electronic format.
28. MHCLG stated that, at it does not hold destruction records for electronic files, it cannot definitely confirm whether any relevant information held in electronic form has been destroyed.

The Commissioner's view

29. The Commissioner has reviewed the copies of the responses that MHCLG has provided to the complainant and the correspondence it had in the course of handling the complainant's requests.
30. The Commissioner has also considered the complainant's position and the arguments presented in support of his position. She understands the complainant's disappointment at not being given the clarification he considers he is entitled to receive. Nevertheless, the Commissioner reiterates that under the EIR, public authorities are not obliged to provide explanations and/or clarifications in response to queries raised by requesters. The provisions of the EIR are only concerned with recorded information which is actually held by a public authority at the time it receives a request and there is no obligation for the public authority to create information in order to respond to a request.
31. The Commissioner has taken into account the reasoning of MHCLG as to how equality obligations are taken into account when new legislation is drafted, as well as the description provided of the searches it carried out for information within the scope of the complainant's request. Having done so, the Commissioner is satisfied that MHCLG, on the balance of probabilities, does not hold further relevant information to what was previously disclosed to the complainant. The Commissioner therefore finds that MHCLG complied with its obligations under regulation 5(1) of the EIR.

Other matters

32. Although not forming part of the formal decision notice the Commissioner uses 'Others Matters' to address issues that have become

apparent as a result of a complaint or her investigation of that complaint.

33. Whilst the Commissioner appreciates the MHCLG's efforts in the outcome of its internal review to provide necessary explanation in relation to the second part of the complainant's request, she wishes to remind the MHCLG that in order to fully comply with its statutory obligations under the EIR, it is required to clearly state whether it holds information in recorded form falling within the scope of the request.

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@justice.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

**Ben Tomes
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