

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

Date: 4 January 2023

Public Authority: Sandwell Metropolitan Borough Council
Address: Sandwell Council House
Oldbury
Sandwell
B69 3DE

Decision (including any steps ordered)

1. The complainant requested information about building control matters in relation to a specific address.
2. Sandwell Metropolitan Borough Council (the Council) denied holding some of the withheld information and refused to provide the remainder, citing regulation 12(4)(a) and regulation 13 (personal information) of the EIR respectively.
3. The Commissioner has considered whether, on the balance of probabilities, the Council holds information within the scope of parts 2-5 of the request.
4. The Commissioner's decision is that the Council does not hold information within those parts of the request and therefore correctly applied regulation 12(4)(a) of the EIR.
5. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

6. On 28 October 2021, the complainant wrote to the Council and requested information about a building control matter relating to a specific address:
 - “1. All dates and times of visits to the above build, both actual and ‘drive by’s’, plus photos if any.
 2. All reports submitted by the Officers involved and sent to [name 1 redacted], Head of Department and vice versa.
 3. All reports between Building Control and the Planning Department and [name 1 redacted] on the above build.
 4. All the reports which the Building Owner and his builders had concerning ‘extensive talks’ with the Council, which they stated they had had with you.
 5. Finally, the report concerning why the original Case Officer, [name 2 redacted] was replaced by [name 3 redacted] and the reasons behind it.”.
7. The Council responded on 24 November 2021. It cited regulation 13 (personal information) of the EIR in respect of parts 1-4 of the request. It denied holding information relating to part 5 of the request.
8. Following an internal review the Council confirmed the number of visits that had been undertaken (part 1 of the request).

Scope of the case

9. During the course of the Commissioner’s investigation, the Council revisited its handling of the request. With respect to the information in scope of part 1 of the request, notwithstanding that it provided information regarding the number of visits to the property by Building Control, it confirmed its application of regulation 13 to the information it holds that falls within the scope of that part of the request.
10. However, it revised its response in relation to parts 2-4 of the request, stating that it does not hold information within the scope of those parts of the request. Accordingly, it cited regulation 12(4)(a) of the EIR in relation to those parts of the request in addition to the information in scope of part 5 of the request.
11. The complainant remained dissatisfied, disputing that the Council does not hold the information he is seeking. On the basis of the complainant’s correspondence to the Commissioner regarding the Council’s revised response, this decision notice covers whether, on the balance of

probabilities, the Council holds the requested information within the scope of parts 2-5 of the request.

12. The Commissioner has commented on the matter of personal information in 'Other matters' below.

Reasons for decision

Regulation 12(4)(a) – information not held at the time of the request

13. Regulation 12(4)(a) of the EIR provides an exception from the duty to make information available if the authority does not hold the requested information at the time of the request.
14. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities.
15. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
16. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. He will also consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, he will consider any other information or explanation offered by the public authority which is relevant to his determination.

The Council's view

17. In its submission to the Commissioner, the Council confirmed that all Building Control records relating to this matter "have been checked and re-checked". It told the Commissioner:

"It has also been confirmed that no other such reports would be expected to be seen in respect of Building Control matters in a case like this: in other words, the absence of any further information is unsurprising".
18. With regard to how it was able to confirm that it did not hold information within the scope of parts 2-5 of the request, the Council told the

Commissioner that it was able to do so "by way of checks on the system as well as direct enquiries with officers involved".

The Commissioner's view

19. The Commissioner's role is not to consider whether a public authority should hold the information that has been requested but whether, on the balance of probabilities, it does or does not hold it.
20. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that the public authority holds no further relevant information. However, as explained earlier in this notice, the Commissioner is required to make a judgement on whether information is held on the civil standard of the balance of probabilities.
21. In reaching his decision in this case, the Commissioner has taken account of the arguments put forward by the complainant and the explanations provided by the Council.
22. The Commissioner accepts that the requested information is clearly of interest to the complainant and that he considers that the Council should hold the information in scope of parts 2-5 of his request.
23. However, the Commissioner has found no evidence which would indicate that any information is held by the Council that is relevant to those parts of the request.
24. As a result, the Commissioner has decided that, on the balance of probabilities, there is no recorded information held by the Council that falls within the scope of parts 2-5 of the request.
25. Although regulation 12(4)(a) is a qualified exception, the Commissioner's position is that it is not necessary to consider the public interest. To do so would be illogical because the public interest cannot favour disclosure of information which is not held.
26. The Commissioner is therefore satisfied that the Council has complied with the requirements of regulation 12(4)(a) of the EIR.

Other matters

27. The Council variously described the withheld information in scope of part 1 of the request as "the building regulation inspection logs" and "Building Consultancy Inspection Comments".

28. The Commissioner acknowledges that the Council advised that, while planning information is made public, as required by law, the withheld information in this case relates to building control rather than planning.
29. In that respect, the Commissioner understands that building control information relates purely to works undertaken to an individual's property and is separate to the planning process.
30. The Commissioner has not formally considered the Council's application of regulation 13 of the EIR to the withheld information. However, he is mindful that it relates to a particular address, namely the address specified in the request. To the extent that the withheld information constitutes personal data, he considers that disclosure would breach the data protection principles and would not be within the expectations of the individual(s) concerned. It would therefore be exempt from disclosure.

Right of appeal

31. 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: 0203 936 8963
Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

32. 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.
33. 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

Laura Tomkinson
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Wycliffe House
Water Lane
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SK9 5AF