

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

Decision notice

Date: 19 July 2023

Public Authority: London Borough of Lewisham
Town Hall Chambers
Rushey Green
Catford
London
SE6 4RU

Decision (including any steps ordered)

1. The complainant requested information relating to the London Borough of Lewisham's (the "Council's") decision not to fit doubleglazed windows to the complainant's building in 1995.
2. The Commissioner's decision is that the Council failed to identify that the information sought by the request falls under the Environmental Information Regulations 2004 ("EIR"). However, the Commissioner's decision is that, on the balance of probabilities, the Council does not hold the requested information and has therefore discharged its duty under regulation 5(1) of the EIR. The Council did not issue a refusal notice that complied with regulation 14(3)(a) as the request should have been refused relying on the exception in regulation 12(4)(a) of EIR (information is not held). In addition, the Council did not properly discharge its duty under regulation 10(1) of the EIR (transferring a request).
3. The Commissioner does not require the Council to take any steps.

Background

4. The Council owns the freehold of the complainant's flat; the complainant is a leaseholder of a flat in Woodfield House on the Dacres Estate. This means that the complainant is liable for ground rent and service charges, including contributions towards repair and maintenance works carried out on the building.
5. Until 2007, the Commissioner understands that the Council directly managed homes, such as the complainant's building.
6. In 2007, the Council established an Arm's Length Management Organisation (ALMO), Lewisham Homes, to provide housing management services for about 20,000 properties, including Woodfield House.¹
7. Lewisham Homes is a separate company to the Council and has a contract to supply these services on behalf of the Council. As the Commissioner understands it, Lewisham Homes is a public authority in its own right.
8. The complainant has advised the Commissioner that Lewisham Homes proposes to charge the Leaseholders of Woodfield House the sum of £45,000 for Major Works. It is unclear if this is each or in total.

Request and response

9. The complainant made the following information request to the Council on 23 January 2023:

"I write requesting a Freedom of Information request for Woodfield House in regards to the non-works cancelled in June 1995.

My account of the event is that in June of 1995, scaffolding was erected on Woodfield House, followed by the remainder of the estate. However, the rest of the estate had new doubleglazed windows and Woodfield House did not. Two years later the

¹ The Commissioner is aware that services currently managed by Lewisham Homes are set to be transferred back to Lewisham Council by the end of 2023. The change will not affect tenancy and leasehold agreements.

scaffolding was taken down, but nothing was done to Woodfield House!

I was told at the time that there was a problem with Woodfield House and the Council would have to revisit the issue after surveyor reports, etc. However, over 20 years later and nothing was done to rectify the problem (whatever the problem was) and, as a Leaseholder, we are now expected to pay this exorbitant Major Works bill for a problem which could have been a lot less had it been dealt with at the time.

I look forward to hearing from you with a full report on why the repairs were not carried out when the rest of Dacres Estate was being repaired/upgraded in 1995."

10. The Council responded on 20 February 2023 and denied holding information within the scope of the request. It advised the complainant to submit an FOI request to Lewisham Homes.
11. That same day, the complainant wrote to the Council to complain about its response to the request saying:

"You are supposed to be finding out what happened before Lewisham Homes took over.... so you need to go back to your records for 1995."
12. The Council provided the complainant with the outcome of its internal review on 22 March 2023, upholding its original position. It stated that it did not hold housing records from 28 years ago.

Scope of the case

13. The complainant complained to the Commission about the handling of the request on 22 March 2023. The complainant did not accept that the Council did not hold any information falling within the scope of their request. They said:

"Is there any way we can get this information - the Council is getting away with being shoddy Landlords and we the Leaseholders must now pay? Can they subpoena previous employees/surveyors who do have the answers?"
14. The Commissioner may only consider whether information within the scope of the request is held by the Council, or by third parties on behalf of the Council.

15. The Commissioner understands that Lewisham Homes is a separate legal person, and a separate public authority for the purposes of FOIA and the EIR. Therefore the Commissioner has also considered the Council's obligations relating to information held by Lewisham Homes.
16. The complainant has raised a number of specific grounds of complaint about the alleged past negligence of the Council in connection with its duties as a Landlord prior to 2007 and the cost of the recent bill to leaseholders for the new major works to be undertaken. These grounds of complaint fall outside the Commissioner's remit to address in this decision notice, since they do not relate to requirements of the EIR.

Reasons for decision

Is the requested information environmental?

17. Regulation 2(1) of the EIR defines environmental information as being information 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) (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)...as well as measures or activities designed to protect those elements;
18. In cases where the existence of information is disputed, the Commissioner has to consider whether the requested information, if it existed, would be environmental.
19. In this case the requested information concerns a planned major works scheme, specifically external works to be carried out to windows. The

Commissioner has found in previous cases² that information relating to major external works would constitute 'measures and activities affecting, or likely to affect, the elements and factors of the environment'.

20. Accordingly the Commissioner is satisfied that the requested information, if held, would fall within the definition of environmental information at regulation 2(1)(c) of the EIR. Whilst this does not affect whether information is held, it affects the way the Council ought to have handled the request in procedural terms.
21. The Commissioner would remind the Council to handle future requests for information under the correct legislative regime.

Regulation 12(4)(a) – information not held

22. Under regulation 5(1) of the EIR and subject to a number of EIR provisions, a public authority that holds environmental information shall make it available on request.
23. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information "to the extent that it does not hold that information when an applicant's request is received."
24. 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. He will also consider the actions taken by the authority to check that the information is not held and he will consider 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.

² For example, <https://ico.org.uk/media/action-weve-taken/decisionnotices/2022/4019783/ic-92789-y2h9.pdf>; <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4021774/ic-115239-n9h0.pdf> and <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2616086/fer0812296.pdf>

25. If a public authority does not hold recorded information that falls within the scope of the request, the Commissioner cannot require the authority to take any further action.
26. The complainant considers that the Council should hold information within the scope of the request arguing that the Council needs to "go back to [its] records for 1995." The complainant has also asked "Can they subpoena previous employees/surveyors who do have the answers?"
27. The Council's position is that it does not hold information within the scope of the request and the Commissioner notes the Council's explanation of how it had concluded that it did not hold the information. In its responses to the complainant and its submissions to the Commissioner, the Council explained that:
 - the information the requester is seeking dates back to 1995 and the Council do not hold housing records from 28 years ago;
 - information about major works undertaken in 1995 would have been held in paper form in one of 16 separate satellite offices that were in existence prior to 1998. These 16 offices were further reduced to 3 main offices, all of which are no longer operational;
 - it has no way of verifying what happened to the paper records held in these offices and pre-2001 all records would have been held in paper form;
 - the current electronic data base 'Capita' which holds information from 2001 onwards relating to housing stock management including maintenance information was searched as a result of this request but did not yield any relevant information;
 - the Council checked to see if it held any records of having engaged third parties, such as surveyors, but no recorded information is held to enable the Council to determine if any third parties would have been engaged and therefore in possession of any information in scope of this request;
 - in 2007 Lewisham Homes took over the management of the majority of the Council's existing housing stock including Woodfield House. Electronic documents relating to tenancy and leasehold files transferred to Lewisham Homes at this time;
 - the Council made contact with Lewisham Homes regarding this complaint and requested that they undertake a search of the leasehold files for Woodfield House in relation to major works. This

search was carried out and no recorded information was held relevant to the request;

- there is no statutory need to hold this information and the Council's records management policy (based on a records retention tool provided to it by the Local Government Association) states that, all records relating to the management of housing modernisation schemes (including new windows) are retained for 6 months from the last action on the scheme;
 - the Council has no record as to whether a report on why repairs were not carried out to Woodfield House when the rest of Dacres Estate was being repaired/upgraded in 1995 ever existed.
28. The Commissioner considers that the Council has conducted adequate searches for information held within the scope of the request – by the Council, Lewisham Homes, or by third parties (e.g surveyors) on behalf of the Council. He and accepts that the Council's conclusion that it does not hold any information falling within the scope of the request is a reasonable one in the circumstances.
29. The Commissioner notes that the requested information from 1995 is just under 30 years old and, if it existed (which is by no means certain), was in a paper form kept in an office which is no longer operational.
30. An electronic search of the records transferred from the Council to Lewisham Homes in 2007, has not found any information in scope of the complainant's request. During the course of the Commissioner's investigation, it is noted that the Council consulted Lewisham Homes itself and asked them whether they held any information within the scope of the request.
31. The Council has advised the Commissioner that searches were carried out on Lewisham Homes' systems at its request on receipt of the ICO complaint. The Council stated in its submissions to the Commissioner:
- "In 2007, the management of the majority of our Housing stock was transferred to Lewisham Homes who are an Arms-Length Management Organisation (ALMO). Electronic documents relating to tenancy and leasehold files transferred to Lewisham Homes as part of the outsourcing. We have made contact with Lewisham Homes regarding this complaint and requested that they undertook a search of the leasehold files for the block (Woodfield House) in relation to major works. This search was carried out and no recorded information was held relevant to the request."

32. The Commissioner therefore notes the Council's confirmation that Lewisham Homes has advised that they also do not hold any information within the scope of the request.
33. In addition, no recorded information is held to enable the Council to determine if any third parties such as surveyors would have been engaged and therefore in possession of any information in scope of this request.
34. The Commissioner also considers, for completeness, that there is no reason for the Council to contact former employees because information they created should, if retained, be held by the Council.
35. The Commissioner finds to be weighty the Council's argument that it had no business need to retain information this old, nor did the Council's records management policy dictate that it should do so.
36. Finally, the Commissioner notes that the Council states that it has not found any record as to whether a report on why repairs were not carried out to Woodfield House when the rest of Dacres Estate was being repaired/upgraded in 1995 ever existed.
37. The Commissioner appreciates that the complainant has raised a number of specific grounds of complaint, both as part of the internal review process and in submissions to support their complaint, which set out why, in their view, the Council should hold relevant information. Whilst the Commissioner recognises that the complainant does not consider that the Council has fulfilled the request, the Council has provided a clear explanation of why it no longer holds the information falling within the scope of the request (if in fact it ever existed at all). No evidence is available to the Commissioner which would indicate that the Council holds recorded information falling within the scope of the requests or that it is held by third parties (e.g surveyors) on behalf of the Council.
38. In addition, the Commissioner is unable to identify any further action that the Council could reasonably be expected to take as part of its statutory obligations under the EIR in order to identify or locate the requested information. If information is not held then it cannot be disclosed in response to a request.
39. In conclusion, the Commissioner finds, on the balance of probabilities, the Council does not hold any recorded information falling within the scope of the request and so the exception provided by regulation 12(4)(a) is engaged.

40. Technically the exception at regulation 12(4)(a) is subject to the public interest test. However, as no information within the scope of the request is held, the Commissioner can only find that the public interest in maintaining the exception at 12(4)(a) of the EIR outweighs any public interest in disclosure, simply because there is no information to disclose.

Regulation 14(3) – refusal notice

41. Regulation 14(1) of the EIR states that if a request for environmental information is refused by a public authority the refusal shall specify the reasons not to disclose the information requested, and regulation 14(3)(a) requires the relevant EIR exception to be cited in the refusal notice. Where a public authority receives a request for environmental information that it does not hold, it should refuse the request and cite Regulation 12(4)(a) of the EIR.
42. While the Council's response of 20 February 2023 did state explicitly that the requested information was not held by the Council, it did not cite the EIR exception it was relying on.
43. For these reasons, the Commissioner finds that the Council did not issue an adequate refusal notice and has hence failed to comply with regulation 14(3)(a) of the EIR.

Regulation 10 – transfer of request

44. Regulation 10(1) of the EIR states that where a public authority that receives a request for environmental information does not hold the information requested but believes that another public authority holds the information, the public authority shall either— (a) transfer the request to the other public authority or (b) supply the applicant with the name and address of that authority, and inform the applicant accordingly with the refusal notice sent under regulation 14(1).
45. The Commissioner understands that Lewisham Homes is a public authority in its own right. The Council, in its original response suggested that the complainant contact Lewisham Homes. However it did not provide any details of how the public authority could be contacted.
46. The Commissioner notes that the Council contacted Lewisham Homes itself, so it could be argued that there is no point in the complainant now contacting them but they are of course free to do so. The Commissioner considers that the complainant in this case is well aware of how to contact Lewisham Homes and he therefore feels it would be disproportionate to order the Council to provide this information to remedy the shortcoming. However, the Council did not properly discharge its duty in this respect and hence failed to comply with regulation 10(1) of the EIR.

47. The Council should be aware that in future similar scenarios it must comply with regulation 10(1) such that the responsibility for responding is transferred to the correct public authority. As an alternative option, contact details of the other public authority could be provided. This avoids the risk of any unnecessary delay being introduced into the progression of an information request.

Right of appeal

48. 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

49. 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.
50. 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

Sarah O’Cathain
Senior Case Officer
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF