

Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

Decision Notice

Date: 20 October 2010

Public Authority: Northampton Borough Council
Address: The Guildhall
St Giles Square
Northampton
NN1 1DE

Summary

The complainants submitted a request for information relating to the Council's monitoring of structural work and surveys carried out on a property. This property is located in the same building as the property occupied by the complainants. The Council disclosed a number of documents but the complainants alleged the Council was still withholding some further information. The Commissioner has investigated and has found that the Council breached regulation 14(3)(a) by failing to cite the specific exception it relied upon in its refusal notice. However, he is satisfied that the Council holds no additional information relevant to the complainants' requests and does not require any remedial action to be taken.

The Commissioner's Role

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

2. On 24 March 2009, the complainants submitted a request to the Council for the following information:
 - 1) "Emails between Underwoods and the Council (Mr Hunter), including email 06-02-06 concerning Mr Hunter and Ms Ward
 - 2) Letters and emails sent or received by Mr Berrisford Mr Smith surveyors from 2005, to and from the Council
 - 3) Letters and emails concerning structural work at 190 and 192 Kettering Road since 2004, and concerning changes plans and drawings 2004 – 2009
 - 4) Letters and emails containing information to Mr. Biddulph JPP surveyors.
 - 5) A copy of the survey (independent) survey claimed to have been made by Mr Smith
 - 6) Reports made by Mr. Pallett with Mr. Mallard (env) on the known dangerous floors."

3. The Council responded on 1 April 2009 and stated that:
 - 1) This information had already been disclosed to the complainants as a result of previous requests for information
 - 2) This information had already been disclosed to the complainants
 - 3) Providing this information was likely to exceed the appropriate limit and clarification was requested
 - 4) Seven emails were disclosed. Some personal information was redacted under section 40(2), and other information was redacted under section 43(2).
 - 5) The survey in question was not owned by the Council, though a copy was held. The owner's permission to disclose a copy had been sought and refused and the Council therefore withheld the information.
 - 6) This information had already been disclosed.

4. On 6 April 2009, the complainants contacted the Council to express their general dissatisfaction with the way the request had been handled. They also clarified their third request to include information concerning the removal of supports and walls from both cellars and shops. The complainants also submitted a supplementary request for a response from the letting agents to the email sent by the Council on 6 February 2006.
5. The Council treated the complainants' letter as a request for an internal review. On 11 May 2009, it responded and upheld its previous position that no further information was held in response to the original requests. In response to the supplementary requests for information, the Council:
 - 1) Disclosed a copy of the reply to the email of 6 February 2006
 - 2) Disclosed 3 files relating to the removal of supports and walls.

The Investigation

Scope of the case

6. On 13 June 2009 the complainants contacted the Commissioner to complain about the way their request for information had been handled.
7. On 8 October 2009, the Commissioner wrote to the complainants in order to clarify what aspects of the Council's response they were dissatisfied with. The complainants replied on 16 October 2009. The complainants explained that in relation to request 4, they did not believe that all the emails held had been disclosed. However, they did not complain about the redactions from the emails that had been provided in response to this request.
8. On 22 October 2009, the Commissioner wrote to the complainants and summarised that their complaint was that they believed that the Council had not disclosed all the information it held relevant to requests 1 – 4.
9. Request 5 was for a copy of a survey commissioned by the complainant's landlord. This had initially been withheld as the survey's owner did not consent to its disclosure. The Commissioner wrote to the complainants on 27 January 2010, 11 February 2010 and 15 February 2010 to enquire if they still wished to view this survey. In their

responses, the complainants did not comment on this but instead replied with concerns about the condition of the property, the Council's conduct, and other issues outside of the Commissioner's remit. The Commissioner therefore concluded that the complainants no longer wished to view this survey and this final request does not form part of the Commissioner's decision.

Chronology

10. On 22 October 2009, the Commissioner wrote to the Council and asked it to provide further arguments to support its assertion that no additional information was held.
11. The Council provided a substantive response and a file of supporting evidence on 25 November 2009.

Analysis

Substantive Procedural Matters

Regulation 2

12. The Commissioner has considered whether the information requested by the complainants is environmental information as defined by the EIR.
13. The Commissioner considers that the information requested falls within regulation 2(1)(c): "measures (including administrative measure), 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 these elements". Information about a plan or a measure or an activity that affects or is likely to affect the elements of the environment is environmental information. The Commissioner therefore considers information relating to surveys and building work, as requested by the complainants, to be environmental information.

Regulation 5(1)

14. The Commissioner has investigated whether the Council has disclosed all the information it held using the civil standard of the balance of probabilities test. His findings are set out below for each request.

Request 1

15. Request 1 was for a copy of an email sent in response to an email of 6 February 2006. The email of 6 February 2006 was from a Council employee to a firm of letting agents. The email enquired if a DSA survey had been carried out on the property occupied by the complainants, and whether any building work had commenced on site. The Council disclosed an email that it stated was the response to this original communication. However, during the course of the investigation, the Council discovered that the disclosed email was not in fact a response to the email of 6 February 2006. It instead concerned a site visit unconnected with the survey. The Council explained this error to the complainants, as did the Commissioner.
16. The Commissioner then investigated whether any email sent in response to the email of 6 February 2006 was held.
17. The Council explained to the Commissioner that it had searched its email archive for emails from the letting agents and could not find any response to this email. There is no evidence that a response was sent at all. The Council suggested that the letting agents may have posted a copy of the DSA survey in response, perhaps with a covering letter. Alternatively, the letting agents may have followed up on the email with a telephone call. However, the Council has not been able to locate a letter or note of a call. The Council point out that even if it was created, information of this type would have been destroyed by the time of the complainants' request, which was made nearly three years after the original email was sent. This is in line with its retention policies.
18. The Commissioner accepts that on the balance of probabilities, the Council does not hold any information relevant to this request.

Request 2

19. The second request was for correspondence between the Council and a firm of surveyors since 2005. The complainants have previously requested a copy of the survey prepared by this firm of surveyors. The Council has not disclosed a copy to the complainants.
20. The complainants state that the surveyors had been contracted to report on the condition of the property. The initial survey has been amended, and the complainants believe that the Council holds correspondence which details these changes.

21. The Council explained that the survey was commissioned and paid for by the property's owner. A copy was later provided to the Council. However, the Council was not involved in the instruction or drafting of the survey in any way, and so had no contact with the surveyors. If any changes were made to the survey, the Council would not have been consulted as it did not instruct the survey.
22. The Commissioner notes that there is nothing to indicate that the Council would have corresponded with the surveyors about this report, especially given that the Council did not commission it. The Council has provided the Commissioner with internal documents that show that the Council did not in fact receive a copy of this report until September 2006, despite the fact that it was drafted in 2005. This was because the Council did not commission the survey and were only provided with a copy at the discretion of the landlord. Consequently, he accepts the Council's explanation that it does not hold any information relevant to this request.

Request 3

23. The complainants' original request of 24 March 2009 was refused by the Council who state that compliance would exceed the appropriate limit under section 12. The complainants clarified their request on 6 April 2009 to information concerning the removal of supports and walls from both cellars and shops. The complaint focused on the Council's response to this clarified request.
24. The Council disclosed three files relating to work done at the property and stated that it held no additional relevant information. The complainants stated that other events had taken place which were not documented in the files. They consequently believed that the Council had not disclosed all of the information that it held in relation to this request.
25. The Council provided the Commissioner with a list of all the disclosures to the complainant relating to building work on the property which do not indicate any other events took place. These correspond to the records of building work at the address. The Commissioner accepts that there is no record of any additional events relating to the removal of supports. Based on the evidence provided by the Council and examination of the disclosures, the Commissioner accepts that the Council does not hold any more information relevant to this the request.

Request 4

26. Request 4 was for correspondence between the Council and another firm of surveyors. These surveyors were commissioned by the Council to produce a survey on the property, a copy of which has been disclosed to the complainants as a result of a previous request.
27. The complainants believe that the Chief Executive dealt with correspondence on this matter. As none of the emails disclosed to them are from the Chief Executive, they believe that the Council has not disclosed all the information it holds in relation to their request. The complainants wish to receive correspondence sent by the Chief Executive in relation to the survey.
28. The Council explained that the Chief Executive had signed the covering letter which provided the complainants with a copy of the survey. However, all responsibility for commissioning the survey was delegated to other members of staff. The Council provided the Commissioner with a copy of the entire Chief Executive's file on the subject which contains copies of all relevant emails. These make it clear that other members of staff, rather than the Chief Executive, were responsible for corresponding with the surveyors. Correspondence on the subject was forwarded to other members of staff by the Chief Executive's secretary, and they provided responses, rather than the Chief Executive. All of the emails between Council staff and the firm of surveyors have been disclosed.
29. Based on the explanations provided by the Council and his examination of the disclosures, the Commissioner is satisfied that the Council holds no additional information in relation to the request.

Regulation 12(4)(a)

30. The Council stated that no additional information was held in relation to four of the complainants' requests. However, where information is not held, the EIR require a public authority to apply the exception found in Regulation 12(4)(a), which allows a request to be refused where the information is not held.
31. The Council failed to cite this exception and consequently, the Commissioner finds that it has breached regulation 14(3)(a), which requires a public authority to cite the specific exception that it relies on in its refusal notice.
32. The Commissioner appreciates that the wording of Regulation 12(1)(b) specifies that 12(4)(a) is a qualified exception. It would therefore imply

that a public interest test would need to be conducted when information is not held. The Commissioner believes that a public interest test in the event where the information is not held is not possible. This is because even if the public interest test favoured disclosure the public authority would still not hold the information to enable it to be released. The Commissioner therefore cannot consider a public interest test when he adjudicates the application of Regulation 12(4)(a).

The Decision

33. The Commissioner's decision is that by failing to cite the exception at regulation 12(4)(a), the Council breached regulation 14(3)(a). However, he is satisfied that the Council holds no further information relevant to the complainants' requests.

Steps Required

34. The Commissioner requires no steps to be taken.

Right of Appeal

35. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 20th day of October 2010

Signed

**Alexander Ganotis
Group Manager
Information Commissioner's Office
Wycliffe House
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SK9 5AF**

Legal Annex

Regulation 5 - Duty to make available environmental information on request

Regulation 5(1) 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.

Regulation 5(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant's request is received;

Regulation 14 - Refusal to disclose information

Regulation 14(3) The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).