

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

Date: 4 October 2011

Public Authority: London Borough of Bromley
Address: Civic Centre
Stockwell Close
Bromley
BR1 3UH

Decision

1. The complainant made a request to the London Borough of Bromley ('the council') for information from environmental records held on a property. The complainant specified that he wished to inspect this information. The council agreed that the complainant could inspect some of the information but refused to provide other parts unless a fee was paid.
2. The Commissioner's decision is that the council has failed to comply with regulations 5(1) and 5(2) as it has not made the requested information available within the statutory time for compliance. He also finds that the council is not entitled to withhold the requested information under the exceptions at regulations 12(4)(d), 12(5)(b), nor 12(5)(c). The Commissioner also finds that the council is not entitled to levy a charge for the requested information.
3. The Commissioner requires the public authority to make the requested information available to the complainant for inspection free of charge.
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 16 December 2010 and 5 January 2011, the complainant wrote to the council and requested an appointment to inspect CON29R information for four specific properties.
6. The council responded on 7 January 2011 and stated that the details and status of building regulations applications could be inspected free of charge at its access site.¹ However, it also stated that “your request(s) for, ‘details of any proceedings for any contraventions’;² this requires research and re-examined of property information to see if any entries are still relevant or whether or not they can be updated or even removed and this is a professional judgement made by senior qualified officers before an answer can be given. For this information please follow our previously agreed procedure which we have set up with yourself at the agreed charge”.
7. The complainant emailed the council on 8 April 2011 to draw its attention to the Commissioner’s previous guidance regarding access to information of this nature. He also noted that in decision notice [FER0325917](#), the council had agreed during the course of the investigation to provide access to information of this nature free of charge, and the Commissioner consequently solely found a breach of regulation 5(2). He also drew the council’s attention to the decision of the Upper Tribunal in [Kirkless Council v Informaiton Commissioner and Pali](#) (GI/258/2011), which upheld a decision notice that the Commissioner had issued against Kirkless Council regarding access to property search information.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. The Commissioner notes that the council has agreed that the complainant can inspect information relevant to CON29R queries 1.1(f)-(h) free of charge. He has therefore excluded this part of the requests

¹ The Commissioner understands that this information is relevant to CON29R queries 1.1(f)-(h), which are listed in Annex A.

² The Commissioner understands that this information is relevant to CON29R query 3.8, which is again listed in Annex A.

from the scope of his investigation. The Commissioner has focused solely on whether the council has complied with the EIR when handling the complainant's request for information relevant to CON29R query 3.8.

10. In previous complaints of this nature, the council has, during the course of the investigations, agreed that the information would be made available free of charge. During the course of the investigation the council has however decided to make a submission to the Commissioner in support of its position that the information should not be disclosed. It has applied several exceptions. Despite their late application, the Commissioner has used his discretion to consider these exceptions.

Reasons for decision

Regulation 2

11. The Commissioner has first considered whether the information requested by the complainant is environmental as defined by the EIR.
12. The Commissioner considers that the information requested falls within regulation 2(1)(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) and (b) as well as measures or activities designed to protect these elements". The complainant has requested information about actions authorised for contraventions of building regulations. The Commissioner considers that these actions would be 'measures' that would be likely to affect the elements of the environment. He therefore considers the information requested by the complainant to be environmental information.

Regulation 5

Regulations 5(1) and 5(2)

13. The complainant submitted his requests for information on 16 December 2010 and 5 January 2011. The council has not as yet made the information available to the complainant in accordance with the EIR, and so the Commissioner finds breaches of regulations 5(1) and 5(2).

Regulation 5(6)

14. The council points out that local land charges legislation that predates the EIR is still in force. It states that as this legislation has not been revoked, the "statutory obligation to ensure that the charges reflect the local authority's costs" remain in force.

15. The Commissioner's position on this point is clear and has been set out in several previous decision notices. Regulation 5(6) of the EIR provides that "any rule or enactment that would prevent the disclosure of information in accordance with these Regulations shall not apply". It is the Commissioner's view that regulation 5(6) disapplies any other charging provisions. This position also acknowledges the primacy of EU legislation whereby European law, such as the EIR, takes precedence over domestic law. The Upper Tribunal in *Kirklees v Information Commissioner* also pointed out that the relevant alternative legislation, the Charges for Property Searches Regulations ('the CPSR') make express provision at regulation 4(2) to "ensure that the CPSR do not trespass on other enactments which require information relevant to property searches to be provided free of charge". (para 98)

Regulation 6

16. The council states that the requested information is not available on a public register. However it has made no submission to suggest that it is impractical to provide the requested information for inspection, other than to argue that it should be allowed to levy a charge for this information. In the absence of any arguments under regulation 6(1)(a) or 6(1)(b), the Commissioner considers that the council should make the requested information available for inspection.

Regulation 8

17. Regulations 8(1) and 8(3) provide that a public authority can levy a reasonable charge for environmental information. The Information Tribunal in *Markinson v Information Commissioner* found that reasonable charges could only include the costs of disbursements such as postage or packaging. Regulation 8(2)(b) provides that a public authority must not make a charge for allowing an applicant to inspect environmental information in situ.
18. The council has provided lengthy arguments to support its contention that it is in this case in the public interest for it to recoup its costs in providing the information in order to fund the continued work of the land charges department. However, the Commissioner would emphasise that he considers that this information is environmental in nature, and therefore a charge can only be levied in accordance with the EIR. The EIR makes express provision at regulation 8(2)(b) that a charge cannot be levied where information is inspected. As the Commissioner has found that the council should make the information available for inspection, he consequently also finds that it can make no charge for this.

Exceptions

19. In its submission to the Commissioner, the council has mentioned a number of exceptions that it believes prevent, or could prevent disclosure. All exceptions under the EIR are subject to a public interest test. The Commissioner has first considered whether the exceptions are engaged before going on to consider the public interest where appropriate.

Regulation 12(4)(d)

20. The exception at regulation 12(4)(d) applies where the request is for material which is "still in the course of completion, to unfinished documents or to incomplete data". The council argues that records held regarding potential contraventions "are often historic and the circumstances in which an entry came to be made could require considerable research to verify their accuracy or justification". As an example, it cites a scenario whereby a record of an alleged breach may have been made on the basis of a complaint submitted by a neighbour. The council considers that it would be wrong to provide raw data without establishing whether the record was accurate. This might involve the council's officers "visiting the relevant premises, comparing microfiche or other records, contacting witnesses". It argues that this is a "totally additional proactive action", and so the exception at regulation 12(4)(d) applies.
21. The Commissioner observes that the complainant has requested "details of any proceedings for any contraventions" of building regulations at the property. The council has not explained to the Commissioner why it believes that unsubstantiated allegations that the council has not taken any further action over, rather than details of proceedings for actual contraventions, would be relevant to this request. The Commissioner would emphasise that the council's obligations under the EIR can only apply to information that is held in a recorded format and that is relevant to the request. The Commissioner's view is that information of the nature identified in the scenario above would not be relevant to this request, as it does not constitute details of legal proceedings instituted for breaches of building regulations. The Commissioner further considers that it is the council's responsibility to determine whether information is relevant to the scope of an applicant's request. The Commissioner is confident that the council is aware of the information that is relevant as it provides answers to CON29R queries regularly on a commercial basis. If the work that a public authority would have to do to identify relevant information would be obviously excessive, then a public authority has the option to rely on the exception at regulation 12(4)(b). In this case the council has not chosen to do so.

22. The Commissioner in any case notes that the council has not identified whether there is any information held "in the course of completion" relevant to the specific properties mentioned in the complainant's request.
23. The Commissioner therefore considers that the council has not provided sufficient evidence to show that regulation 12(4)(d) is engaged.

Regulation 12(5)(b)

24. The exception at regulation 12(5)(b) applies where disclosure would adversely affect "the course of justice, the ability of a person to receive a fair trial, or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature".
25. The council has applied this exception because it believes that making available "raw data which may be based on nothing more than malicious complaints, could expose the individual who is the subject of any proposed action or any subsequent owner of the property to adverse interference and potentially interfere with any subsequent inquiry into criminal conduct".
26. The Commissioner would again observe that the council has not explained why it would release details of unsubstantiated allegations in response to a request for information about proceedings authorised for contravention of building regulations. It has also not identified any specific information relevant to any of the four properties detailed in the complainant's request that it believes should be withheld from disclosure under this exception. Consequently the Commissioner finds that the exception is not engaged.

Regulation 12(5)(c)

27. The exception at regulation 12(5)(c) applies where disclosure would adversely affect intellectual property rights. The council argues that "where it has to exercise some value judgment on examining or interpreting the records, it imbues said records with intellectual property rights which would entitle it, in the absence of any payment, to maintain that it should not be disclosed by virtue of regulation 12(5)(c)".
28. The council has not identified any the specific "value judgment" that it believes it has or will make when examining or interpreting these records, but the Commissioner assumes that it refers to a decision about whether information is relevant to the complainant's request. The Commissioner however believes that identifying information relevant to a request is a necessary part of dealing with any request for information, either under the Act or the EIR. He therefore does not accept that the exception is engaged.

Other matters

29. The Commissioner notes that in this case, the council chose to make a more substantive submission about why it believed that the requested information should be withheld during the course of the investigation. He would draw the council's attention to its failure to cite the exceptions it later relied upon in its refusal notice, and its failure to offer any mechanism for internal review.

Right of appeal

30. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

31. 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.
32. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex A - CON29R Enquiries

1.1 Which of the following relating to the property have been granted, issued or refused or (where applicable) are the subject of pending applications:

- f) building regulations approval
- g) a building regulations completion certificate
- h) any building regulations certificate or notice issued in respect of work carried out under a competent person self-certification scheme

3.8 Has a local authority authorised in relation to the property any proceedings for the contravention of any provision contained in Building Regulations?