

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

Date: 12 December 2011

Public Authority: London Borough of Islington
Address: 222 Upper Street
London
N1 1XR

Decision (including any steps ordered)

1. The complainant requested information relating to the front gardens of a number of flats being fenced off to create individual gardens. The London Borough of Islington ("the council") said that it did not hold the information requested. During the Commissioner's investigation, it conceded that it held some information and it provided that to the complainant. The complainant was not satisfied and considered that more information was held.
2. The Commissioner's decision is that the council did not hold any further information falling within the scope of the request. However he found that the authority had breached its obligation to offer reasonable advice and assistance.
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 5 October 2010, following some earlier information requests made on 7, 10 and 27 September 2010 which the complainant considered had not been satisfactorily dealt with, the complainant asked the council to provide the information that he considered was outstanding as follows:

"When did LBI make the FRONT gardens private for the following flats:

1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30.

Again, the dwellings listed above already had private rear gardens. The FRONT area of these dwellings were all communal area, then at some point LBI decided to make private FRONT gardens.

- 1. When did LBI make the FRONT gardens of the listed dwellings private?*
 - 2. How much fencing was erected to make the front gardens private?*
 - 3. What was the total cost (fencing, legal fees, amending leases, licenses, licensing fees, etc)*
 - 4. How much did LBI charge tenants and leaseholders to make FRONT gardens private? Was there no cost at all?*
 - 5. Were tenants and leaseholders required to obtain or purchase a license from LBI. If so, what was the cost to tenants and leaseholders? Were there any conditions or stipulations in the licenses required for tenants and leaseholders?*
 - 6. Did LBI require that ALL dwellings needed to unanimously agree in order make the FRONT gardens private for the above mentioned dwellings? Or was only a majority agreement needed for ALL dwellings listed above to receive private FRONT gardens?"*
5. When the complainant received no response from the council he wrote to request an internal review on 3 November 2010.
 6. On 11 January 2011, the council responded. It said that it had engaged with Homes for Islington and they have no record of gardens sold to leaseholders. The gardens in question are therefore not private. It said that this made the questions asked redundant.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the council held the outstanding information referred to in his correspondence dated 5 October 2010.
8. During the Commissioner's investigation, the council conceded that it held some information relating to the Right to Buy Scheme. It provided that information to the complainant thereby informally resolving any complaint that may have arisen in connection with that information. However, it transpired that this information was not of interest to the complainant as he was particularly interested in a period in the 1980s when fencing had been erected that individualised the gardens at the front of the flats concerned.

Reasons for decision

Environmental Information

9. The Commissioner considered that the request should have been dealt with under the terms of the Environmental Information Regulations 2004 ("the EIR") rather than the Freedom of Information Act 2000 ("the FOIA"). Regulation 2(1)(c) provides that environmental information is an information on:

"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 those elements".

10. One of the elements listed in regulation 2(1)(a) is land. In the Commissioner's view, when the previously communal space was separated by fencing into individual front gardens, this process affected the land because of the erection of fencing and the change in access to the land. Information relating to this activity would therefore in the Commissioner's view represent environmental information.

Was the information held?

11. 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 argument. He will also consider the actions taken by the authority to ascertain that the information was not held and he will consider if the authority is able to explain why the information was not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held. He is only required to make a judgement on whether the information was held "on the balance of probabilities".¹
12. By way of background to this matter, residents of flats where the complainant lives were consulted about creating a communal area at the rear of the flats. Homes for Islington wrote to the residents in July 2010 proposing costs and conditions to individualise the gardens. The complainant wants to be able to compare the costs and conditions proposed with what happened when the flats listed in his request had their gardens individualised. He believes that in respect of these flats,

¹ This approach is supported by the Information Tribunal's findings in Linda Bromley and Others / Environment Agency (31 August 2007) EA/2006/0072

the council individualised the gardens at little or no cost to the residents at the time.

13. The complainant supplied to the Commissioner a copy of an information request that had been made to Homes for Islington (an Arms Length Management Company owned by council) by another person relating to similar issues. He also provided a copy of a response that had been provided to that request by Homes for Islington. For clarity, Homes for Islington is a public authority in its own right although it is owned by the council. The response, dated 3 November 2010, states the following:

"Leaseholders were given an estimated cost of £1973 for improvement works including upgrading of the door entry system and the provision of a private communal garden to the rear block and private individual front gardens to the ground floor maisonettes. The actual cost may have been higher or lower than this. HFI are only obliged to hold information records for 6 years therefore we cannot provide information on actual costs. It is not possible to attribute any rent increase directly to the provision of private gardens. Consultation with leaseholders for the works took place in November 1987, the commissioning of the work would have taken place shortly after this date.

Flats 1-60 had a rental increase applied of either £1.36 or £2.30 per week (depending on size of flat) and this was applied from 31/12/90. This could be due to a number of improvement works which took place in and around this block in the preceding 2 years including door entry systems, roofing works, heating works and provision of private gardens including improvements to estate lighting and signs. HFI are only obliged to hold information records for 6 years therefore we cannot provide specific information on which works resulted in the rental increase".

14. The complainant also provided the Commissioner with records obtained from the Land Registry showing that the flats had individual front gardens. He also provided photographs showing the fenced off areas.
15. When the Commissioner approached the council about the complaint, he said that it appeared that the council had interpreted the request too narrowly. It had understood that the complainant was interested in whether the land had been sold. The Commissioner asked the council to consider the request more broadly than this. The council reconsidered the matter and replied that it held some information relating to the Right to Buy Scheme. It explained that an inspection of the council's freehold title registered at the Land Registry carried out by the council's legal services department shows that some of the properties that were sold by the council under the Right to Buy legislation included garden land as part of the Right to Buy lease. It provided the information that it held relating to this.

16. When the complainant received the information relating to the Right to Buy leases, he explained to the Commissioner that this was not the information that he was interested in. He said that he wanted to know the details of what happened in the 1980s when the communal area was fenced off creating a number of individual gardens.
17. The Commissioner agreed with the complainant that the council had again adopted an approach to the request which was too narrow. The Commissioner asked it to search again for information relating to the individualisation of the front gardens in the 1980s.
18. When the council replied to the Commissioner, it referred to the response provided by Homes for Islington to a separate information request that the Commissioner referred to in paragraph 13 of this notice. The council said that having read the response, it accepted that it could have been read as suggesting that the proposals went ahead. Following consultation with Homes for Islington, the council had established that in fact no records were held either by the council or Homes for Islington that showed that the situation ever progressed beyond a proposal.
19. The council said that if the proposals had gone ahead, it would expect that records would have been created about that and that this information would still be held, either on individual property files or "block files" i.e. a file which would have records relating to an entire block of properties. However, it said that no such records were held either by itself or Homes for Islington. Homes for Islington confirmed that it has no knowledge of the proposals having been formalised at any stage. The council was unable to explain why, if the proposals had not gone ahead, the fencing was erected, seemingly giving rise to no dispute.
20. The council said that it had conducted thorough searches for the information. It said that it had inspected leases, the legal department filing system, Right to Buy files, the "Legal Properties System" and land registry records. It had consulted Homes for Islington and "area files" had been reviewed. It said that it had held meetings with the lead officer for the area from Homes for Islington and the council's senior property lawyer. It had checked that no relevant "block files" existed. It had also contacted the lead officer for the Tenant Management Organisation.
21. The council confirmed that it believed that it had never held the information and did not believe that it had been deleted, destroyed or mislaid. The Commissioner queried whether any records held would have been destroyed either by the council or Homes for Islington in line with a records management policy (as comments made by Homes for Islington suggested that this could be the case). However, the council clarified that if the proposals had gone ahead, it believes that records would have been kept.

22. Based on the above, the Commissioner decided that the council had demonstrated that on the balance of probabilities, it did not hold the information requested by the complainant. The Commissioner understands why the complainant believes that the council was involved in agreeing to the erection of the fencing, however, the Commissioner's only role in this matter is to establish on the balance of probabilities whether recorded information was held about that matter. He is satisfied that there is no evidence that would warrant him concluding that the information was in fact held at the time of the complainant's request.

Procedural issue

23. Regulation 9 of the EIR states the following:

"A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants".

24. In this case, the Commissioner considers that it would have been appropriate for the council to explain in its initial response to the complainant that Homes for Islington is a company that is owned by the council, but which is effectively treated as a public authority in its own right for the purposes of the EIR and the FOIA. It would have been appropriate to suggest to the complainant that he may wish to make the same request to Homes for Islington as some records about the proposal are held by them, albeit that nothing is held to indicate that the proposal ever went ahead.

Right of appeal

25. 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

26. 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.
27. 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
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