

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

Decision notice

Date: 16 May 2012

Public Authority: Bradford Metropolitan District Council
Address: City Hall
Centenary Square
Bradford
BD1 1HY

Decision (including any steps ordered)

1. The complainant requested information concerning both his neighbours' properties with regards to building work carried out to construct garden decking and a conservatory. The Information Commissioner's decision is that Bradford Metropolitan District Council (BMDC) does not hold some of the requested information and was correct to withhold the remainder as personal data. The Commissioner does not require BMDC to take any further remedial steps.

Request and response

2. On 18 May 2011, the complainant wrote to BMDC and requested information in the following terms:

"[named address] Silsden

Questions to [named employee of BMDC]

1. *Will you confirm that what was said as outlined in the matters 1 to 6 referred to earlier is correct.*
2. *Were you involved with the issue of the Enforcement Notice to this address.*

Questions to [named employee of BMDC]

1. *Will you confirm that what was said as outlined in the matters 1 to 6 referred to earlier is correct.*
2. *Were you involved with the issue of the Enforcement Notice to this address.*

Questions about the involvement of [named individual] in his Case Notes

1. *Was he involved with the issue of the Enforcement Notice to this address.*
2. *What did he discover after his examination of the conservatory at this address.*
3. *Did the Enforcement Notice refer to all the defects found by him and the conditions imposed on [named individuals] the occupants to rectify those defects.*
4. *Do the Case Notes confirm what [named individual] told me about the firebreak and other matters during our conversation on the 23 December 2010.*
5. *I ask that all the contents of the Case Notes be disclosed now.*

[named address] Silsden

Questions to [named employee of BMDC]

1. *Will you confirm that what was said in the matters [a] to [e] referred to earlier is correct.*
2. *Were you involved with the issue of the Enforcement Notice to this address.*

Questions to [named employee of BMDC]

1. *Will you confirm that what was said in the matters [a] to [e] referred to earlier is correct.*
2. *Were you involved with the issue of the Enforcement Notice to this address.*

Questions about the involvement of [named individual] in his Case Notes

1. *Was he involved with the issue of the Enforcement Notice to this address.*
2. *What did he discover when he examined the decking at this address.*

- 3. Did the Enforcement Notice refer to all the defects found by him and the conditions imposed on [named individuals] to rectify those defects.*
 - 4. Have all conditions been complied with.*
 - 5. I ask that all the contents of the Case Notes be disclosed now."*
3. BMDC responded on 28 June 2011. BMDC answered the majority of the questions and provided clarification on the matters raised. The Commissioner understands that the only information the complainant did not receive was the requested case notes regarding both properties. The rest of the information and clarification requested appears to have been provided to the complainant. BMDC stated that the Enforcement Notices referred to in the request were not issued to either property and therefore no information was held by BMDC in relation to them.
4. The complainant requested an internal review on 5 July 2011. This also contained several new information requests. The complainant requested the following information.

In relation to one property –

- The full guidance in Approved Document K (referred to in previous BMDC response).
- The date the risk of fire spreading was removed by Building Control.
- A copy of the letter dated 20 April 2010 from BMDC to the owners of the named property.
- A copy of the application dated 7 May 2010 referred to in BMDC's response, from the owners of the named property to BMDC.
- A copy of named officer's case notes in relation to all matters concerning the named property, including all site notes and any photographs.

In relation to the second property –

- The exact finished height above ground level, with regard to the decking, that would comply with Building Regulations.
- A copy of the letter dated 20 April 2010 from BMDC to the owners of the named property.
- A copy of the agreement by the owner to raise the ground level to a level acceptable for Building Regulations if in writing or disclosure of the exact details of the conversation if verbal.

- What raised ground level would be acceptable for Building Regulations in this case.
 - Details of all site meetings where named officer visited the property including who was present, dates of visits, the exact measurements taken, what work was carried out, what materials were used, the difference in levels of ground level and decking between visits, other defects that may have been found and whether any new defects had been dealt with.
 - Copies of all case notes, site notes and photographs.
5. BMDC communicated the result of the internal review, which included responses to the new information requests, to the complainant on 3 August 2011. BMDC provided a link to the 'Approved Document K' and stated that some information relating to specific measurements had previously been provided in its letter of 28 June 2011.
6. With regard to the remainder of the information requested (namely the letters between BMDC and the occupants of both properties; the case notes and site notes including any photographs; specific dates fire risks were removed; and details of agreements and meetings between BMDC and the occupants), BMDC refused to comply with the request on the grounds that the information requested was the personal data of a third party and as such was exempt from disclosure under section 40(2) of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant did not accept that the requested information should be withheld as the personal data of a third party and remained dissatisfied with what he considered to be the incorrect content of most of the responses provided by BMDC.
8. The Commissioner considers that the focus of his investigation has been to determine whether BMDC was correct to identify the requested information as third party personal data and refuse to provide it to the complainant as such. The Commissioner has also considered whether the requested information is of an environmental nature and as such whether it should have been handled under the Environmental Information Regulations 2004 (the EIR). He has also investigated whether any information is held concerning the disputed Enforcement

Notices the complainant believes may have been issued in relation to the named properties.

9. The Commissioner, in correspondence and discussion with the complainant, has made it clear that his investigation into the handling of the information requests will not involve any consideration as to whether information provided by BMDC is true or factually accurate. The Commissioner is bound by the remit of the FOIA and EIR which do not include stipulations that information provided by public authorities must be correct. Therefore, the Commissioner is not able to investigate issues of this nature when applicants bring them to his attention, but can only provide a decision as to whether applicants have been or should be provided with actual recorded information held by public authorities.

Reasons for decision

Is the requested information environmental?

10. Regulation 2(1) of the EIR defines environmental information as:

“any information in written, visual, aural, electronic or any other material form 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) 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...”.*

11. The Commissioner considers that the requested information in this case – namely information about external structures, construction and work carried out in the named properties' gardens – would fall under the definition of environmental information found at regulations 2(1)(a) and 2(1)(c).

12. He informed BMDC of his view and asked it to consider the requests under the EIR when corresponding with him as part of his investigation. BMDC responded to the Commissioner and agreed that the information was environmental and should have been handled as such.
13. The Commissioner, therefore, has gone on to consider the handling of the requests for information under the appropriate corresponding regulations of the EIR. Regulation 13(1) provides an exception for refusing to disclose personal information and regulation 12(4)(a) provides an exception to refuse to comply with the request as information is not held.

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

14. Regulation 12(4)(a) of the EIR states that:

“...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...”.

15. In its response of 28 June 2011, BMDC informed the complainant with regard to the disputed Enforcement Notices, that neither property had been issued with an Enforcement Notice and therefore it did not hold any related information. With regards to the first named property, BMDC stated: *“conservatories at ground level are exempt from the Building Regulations under Schedule 2 Class VII, and therefore any non-compliance would not be enforceable by the Council...”.* Again, with regard to the second property, BMDC confirmed that *“a formal ‘Enforcement Notice’ was not issued”.*
16. In order to make a decision in this case, the Commissioner contacted BMDC and made enquiries regarding whether information of this nature was held and what relevant searches may have been undertaken to locate it. The Commissioner also reminded BMDC to consider this matter in relation to regulation 12(4)(a) of the EIR and not section 1 of the FOIA.
17. BMDC responded to the Commissioner and agreed that the correct response would have been to consider this part of the requests under regulation 12(4)(a). BMDC explained, as it had previously done to the complainant, that conservatories at ground level were exempt from the Building Regulations. It therefore confirmed to the Commissioner that an Enforcement Notice had not been issued to either property and as such BMDC did not hold the information requested in relation to this matter.

18. The Commissioner is satisfied that BMDC does not hold any information requested in relation to Enforcement Notices issued to either of the two named properties and therefore upholds its reliance on regulation 12(4)(a).

Regulation 13 – personal data

19. Regulation 13(1) of the EIR states that:

“To the extent that the information requested includes personal data of which the applicant is not the data subject...a public authority shall not disclose the personal data.”

20. The Commissioner is of the view that the requested information in this case as well as being of an environmental nature constitutes personal data of which the complainant is not the data subject. In other words, the information relates to the complainant’s neighbours as the owners of the two named properties which the requests are about. The requested information comprising of case notes, photographs, correspondence and notes of conversations between the owners of the named properties and BMDC falls under the definition of the personal data of those owners.
21. When contacted by the Commissioner as part of his investigation, BMDC confirmed that it considered the information within the relevant case files for each property to be the personal data of that third party. The third parties could be identified from the information as it related to the owners of the properties and it comprised environmental information concerning each of their properties. BMDC again agreed that the requests should have been dealt with under regulation 13(1) of the EIR as opposed to section 40(2) of the FOIA.
22. Having been provided with a sample of the requested information held in the case files by BMDC – namely letters from BMDC to the owners of the named properties and a selection of site notes – the Commissioner has found that the information constitutes personal data and that regulation 13(1) is engaged. The Commissioner has gone on to consider whether it would be correct to disclose the requested personal information. As the information has been found to be personal data, the issue of whether the information should be disclosed has been considered within the remit of the Data Protection Act 1998 (the DPA). Both the FOIA and EIR import the principles of the DPA which govern the processing, storing and recording of personal information into their legislation.
23. The relevant data protection principle in this case is the first principle which states that:

"Personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is met."

24. The Commissioner has therefore considered whether it would be fair to the data subject(s) to disclose their personal data. Information made available under the terms of the EIR is disclosed not just to the requester but to the wider world as well and will always remain in the public domain once disclosed.
25. Linked to the issue of fairness, the Commissioner has considered the reasonable expectations of the data subject(s). The information concerns the data subject(s)'s homes and it would be reasonable to assume that they would not expect that information relating to their private properties would be made available to the public.
26. Disclosing information of this nature would cause the data subject(s) considerable distress and the Commissioner considers this distress would be increased due to the level of expectation the data subject(s) have that their personal information will remain private and not be placed in the public domain.
27. The Commissioner notes that the complainant feels strongly about the issues related to the requested information. However, the Commissioner cannot take this into consideration as there is no public interest test attached to regulation 13(1). He has also found that there are no Schedule 2 conditions from the DPA which justify disclosure.
28. The Commissioner therefore concludes that disclosure of the requested information would contravene the first data protection principle and as such has found that BMDC was correct to withhold the information.

Regulation 14 – Refusal to disclose information

29. As noted earlier in this notice, BMDC was correct to state that no information was held in relation to the disputed Enforcement Notices. The Commissioner has also found that BMDC was correct to withhold the requested information as personal data of a third party. However, due to the fact BMDC failed to handle the requests under the EIR, the Commissioner finds that it therefore failed to handle the refusal in accordance with the obligations of that legislation.

30. Unlike section 1 of the FOIA, if a public authority states that no information is held and subsequently does not provide any information in relation to a request within the remit of the EIR, it should be considered as a refusal to comply with that request. Regulation 14 of the EIR sets out the relevant procedural requirements that a public authority must adhere to when issuing a refusal notice.
31. Regulation 14(2) of the EIR states that:

"The refusal shall be made as soon as possible and no later than 20 working days after the date of the request."

The Commissioner has found a breach of regulation 14(2) as BMDC did not provide a refusal notice to the complainant, citing the exceptions found at regulations 12(4)(a) and 13(1), within the statutory timeframe. The Commissioner notes that BMDC took 30 days to respond to the complainant in answer to his request for information.

Right of appeal

32. 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

33. 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.
34. 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

Jon Manners
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