

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

Date: 9 November 2017

Public Authority: Northumberland County Council
Address: County Hall
Morpeth
Northumberland
NE61 2EF

Decision (including any steps ordered)

1. The complainant has requested information from Northumberland County Council which concerns asbestos and asbestos-containing materials occurring at the complainant's rented property. During the course of its correspondence with the complainant the Council disclosed a number of documents which it considered were relevant to her requests. Following the Commissioner's intervention, the Council found additional information which falls within the terms of the complainant's requests. Having reconsidered the nature of that information, the Council determined that it constitutes the complainant's personal data and therefore her requests under the EIR should be refused in reliance on Regulation 5(3) (the applicant's personal data).
2. The Commissioner's decision is that Northumberland County Council is entitled to refuse the complainant's requests by virtue of Regulation 5(3) of the EIR, on the grounds that the information the Council has recently found is the complainant's personal data.
3. The Commissioner considers that the Council should have treated the complainant's request as a subject access request under Section 7 of the Data Protection Act. She understands that the Council will now proceed on the basis that the complainant has submitted a subject access request and will send her the personal data she is entitled to receive.

Request and response

4. On 31 October 2016, the complainant wrote to Northumberland County Council and requested information in the following terms:

"I would like to request copies of documents relating to or mentioning asbestos testing and treatment within my property. This would include encapsulation and removal of any materials containing asbestos."

5. Additionally, on 2 November 2016, the complainant asked the Council for recorded information concerning her home at [a specified address]. The terms of the complainant's request are:

"I would be grateful if you would kindly forward to me all information regarding any asbestos; materials containing asbestos; and treatment of asbestos within my property.

This includes reports of all testing for asbestos; removal of asbestos materials and the treatment thereafter; encapsulation of materials containing asbestos; or anything else at all to do with asbestos in this property.

I would like as much detail as possible including the location, (past and present of these materials containing asbestos and the dates any works or testing were done in relation to these materials."

6. The Council acknowledged receipt of the complainant's request on 2 November, advising her that it would be dealt with under reference 1639.
7. On 1 November 2016, the Council advised the complainant that a copy of the asbestos management survey had been requested and would be forwarded to her, and on 17 November 2016, the Council responded to the complainant's request by providing her with, "the surveys on our system for [a specified address]". The information disclosed to the complainant was:
- A 39 page AMS Pre Refurbishment/Demolition Report dated 4 October 2011 for [address redacted]
 - An 18 page AMS Pre Refurbishment Report dated 13 November 2014
 - A 43 page ASKAMS Compliance Services Pre Refurbishment report dated 12 June 2015 for [a specified address]
8. Having received the information listed above, the complainant wrote to the Council on 18 November to make further enquiries about her home. The complainant asked:
- "Will you please tell me if the Chrysotile and Bitumen in the living room, passage and bedroom was removed or was it encapsulated?"

Are any Chrysotile or Bitumen encapsulated under the modern flooring in the kitchen?

Will you please give me details of any works relating to asbestos and removal of asbestos, which have been done by Northumberland County Council or Homes for Northumberland?

I believe it was either Northumberland County Council or Homes for Northumberland that did works on the Chrysotile and Bitumen in the living room, bedroom and passage in here. Will you please confirm this?

Will you tell me which company did the covering over the two layers of Chrysotile (and I expect Bitumen underneath the Chrysotile) in the bathroom?"

9. On 29 November, the complainant wrote to the Council to ask to be given, "...copies of the photographs taken by [a named person] in my property on 25 November 2015?"
10. On 2 December 2016, the Council wrote to the complainant to confirm that her request had been passed to Homes For Northumberland and to Northumberland Council's Head of Housing, and that the "team are in the process of retrieving and collating all the relevant information and photographs".
11. On 12 January 2017, the Council disclosed a table to the complainant which illustrates details of Asbestos at her address. The Council's email advised the complainant that the photographs taken by Council officers could not be provided as they had been deleted from the system once the work was completed.
12. The complainant wrote to the Head of Housing on 12 January 2017 to query some of the information the Council had given to her. The complainant asked a number of questions prompted by what she considered were apparent discrepancies in the information disclosed to her. One of the complainant's questions was, "Where is the full documentation for the bedroom tiles?"
13. The complainant wrote to the Council again on 19 January 2017 and referring to information the Council had sent her, she stated, "The attachment to the email states that the Chrysotile and Bitumen in the passage and living room were removed on 2 September 2015. This document shows no record of the Chrysotile being removed from the bedroom, even though I had been told that it would be removed before I moved into the property". The complainant then asked the Council for an internal review.

14. Having completed its internal review, the Council wrote to the complainant on 15 February 2017 to advise her of its final decision. The Council's reviewer stated that, "I consider that the response you received complied with the Council's obligations to furnish you with all of the information it held in relation to the management of asbestos at [a specified address]". The Council's reviewer also provided further explanation to the queries raised by the complainant in her email of 18 November 2016.

Scope of the case

15. The complainant contacted the Commissioner on 29 April 2017 to complain about the way her request for information had been handled.
16. In view of the information provided by the complainant, the Commissioner determined that her investigation should be focussed on whether the Council has satisfied the requirements of the Environmental Information Regulations, and specifically on whether the Council has complied with Regulation 5(1) of the EIR – the duty to make available environmental information.

Reasons for decision

17. Under Regulation 5(1) of the EIR a public authority is required to 'make available on request' information which it holds which is environmental information.
18. In this case the information which the complainant seeks satisfies the definition of environmental information provided by Regulation 2 of the EIR as it relates to substances which affect, or are likely to affect, elements of the environment.
19. The Commissioner has sought to determine whether the Council holds the information which the complainant seeks.
20. In making this determination, the Commissioner applies the civil test of the balance of probabilities which is in line with the approach taken by the First Tier Tribunal (Information Rights) when it has considered whether information is held in cases in the past.
21. The Commissioner has investigated this complaint by asking the Council a number of questions about the searches it has made to locate the requested information which the complainant seeks. The Commissioner's investigation has included questions about the possible deletion and/or

destruction of information which might be relevant to the complainant's request.

22. The Council has informed the Commissioner that it dealt with the complainant's original request under reference EIR 1639 and provided her with a table of the work carried out at her address. The Council informed the complainant that the photographs she had requested were no longer available.
23. A further email was sent to the complainant containing copies of work schedules and asbestos reports undertaken by the Council's appointed asbestos survey company.
24. In addition to the above, the Council has provided the complainant with emails containing additional information relating her property. This information has not been disclosed to the complainant as part of the Council's responses to her requests under the EIR and the FOIA: It has been sent to the complainant as a way of keeping communication with the complainant open.
25. Following the Commissioner's enquiry, the Council has reconsidered the complainant's requests and its responses to them. The Council has concluded that whilst it has provided copies of formal reports and a summary of how asbestos within the complainant's property was managed, the complainant's requests were in fact broader in scope.
26. The Council now accepts that it should have searched its email system, housing management system and personal and network drives to identify whether other documents exist where asbestos testing and treatment at the complainant's property are mentioned. It accepts that insufficient enquiries were made to identify other forms of information over and above the formal reports provided to the complainant.
27. At the time of the request, the information supplied to the complainant was primarily retrieved from the Council's asbestos management system, called Keystone. This system holds all information including reports carried out by 'ASK AMS' who are the Council's designated asbestos surveyors.
28. The Council instructs AMS to carry out asbestos surveys and the reports AMS produces are uploaded onto a portal which the Council downloads to a shared drive.
29. The Council has informed the Commissioner that it holds no manual records or information which would fall within the scope to the complainant's request other than copies or extracts from the original electronic sources.

30. Additionally, the Council has confirmed that it has identified two instances where information relevant to the scope of the complainant's request has been deleted or destroyed:
31. The first concerns photographs taken at the complainant's property on 25 November 2015 by one of its officers. The officer in question has confirmed that the photographs were taken in the complainant's bathroom using his hand-held mobile. They indicated where pipework needed to be boxed in and the photographs were deleted once the required work was completed.
32. The second instance concerns the deletion of email correspondence between the Council's Asset and Asbestos Management Officer and the complainant prior to her taking the tenancy of her property. These emails were deleted in line with the email policy in force at the time and when the Council believed the asbestos issues had been resolved.
33. In her complaint to the Commissioner, the complainant made specific reference to a report made by the Council in August 2015, which she understands concerns the state of the property she had been offered for rental. The complainant informed the Commissioner that she had previously asked the Council for a copy of the August 2015 report and that she was told she could not have it.
34. In view of the complainant's reference to the August 2015 report, the Commissioner asked the Council to confirm whether such a report is held. The Council answered this enquiry by stating, "I can confirm that there are no reports relating to asbestos for this time but there was an inspection report produced as part of the void process in August 2015..." Since the Council's reconsideration of the scope of the complainant's request, the Council has found this inspection report together with a number of email chains which fall within the scope of the complainant's request. It now considers the inspection report, together with the other information recently found can properly be characterised as the complainant's personal data.
35. Notwithstanding the above, the Council assures the Commissioner that no attempt has been made to withhold or conceal information from the complainant.
36. The Council now acknowledges that the complainant's requests of 31 October 2016 and 2 November 2016 relate to documents and information which concerns the property which she occupies as a tenant. In view of this, the Council now considers that information requested by the complainant is in fact the complainant's personal data. This is because it concerns the complainant's rented property and it is information which is used by the Council to make decisions about the individual and the property she occupies as a tenant.

37. As a result of the Council's late realisation that the information requested by the complainant is her personal data, the Council now acknowledges that it should have invited the complainant to submit a subject access request under the provisions of section 7 of the Data Protection Act 1998 ('the DPA') and refused her request in reliance of the exception provided by Regulation 5(3) of the EIR.
38. Under Regulation 5(3), the duty to disclose of environmental information under Regulation 5(1) does not apply where the information includes the personal data of the applicant.
39. To support its position about the recently found information being the complainant's personal data, the Council has provided the Commissioner with copies of that information.
40. The Commissioner has examined the information sent to her by the Council. She finds that all of the information concerns the complainant's property. The information includes chains of emails which includes those sent to or by the complainant or which refer her address; a 'Void Property Inspection Sheet' – referred to as 'an inspection report' at paragraph 35; and an ASKAMS Air Monitoring Report. The Commissioner notes that the Council has not, at this juncture sent this information to the complainant and she also notes that some of the emails fall outside the scope of the complainant's information requests because they post-date those requests.
41. The Commissioner agrees with the Council that the information held by the Council constitutes the complainant's personal data. That being the case the Commissioner's decision is that the Council is entitled to refuse the complainant's request in reliance on Regulation 5(3) of the EIR.
42. The Commissioner notes that the Council has delayed inviting the complainant to submit a subject access request for her personal data until the Commissioner makes her decision in this case. The Commissioner understands the Council's reasons for this. Nevertheless, she must impress on the Council its needs to progress matters at its earliest possible opportunity and sees no barrier to treating the previously received requests as the starting point for providing the due consideration.
43. In considering this case, it is clear to the Commissioner that the Council is guilty of two significant errors: The first is to be found in the Council's failure to recognise that the requested information is in fact the complainant's personal data; the second lies in the Council's failure to recognise the wide-ranging scope of the complainant's request, and as a consequence of this, to conduct appropriate and adequate searches. The Commissioner expects that the Council will learn from these errors.

Right of appeal

44. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. 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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