

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

Decision notice

Date: 12 March 2018

Public Authority: Surrey Heath Borough Council
Address: Surrey Heath House
Knoll Road
Camberley
Surrey GU15 3HD

Decision (including any steps ordered)

1. In two requests, the complainant has requested information broadly associated with access to a particular area of land. Surrey Heath Borough Council ('the Council') denies holding any information relevant to either request.
2. The Commissioner's decision is that the Council is entitled to rely on regulation 12(4)(a) of the EIR to refuse the requests as it did not hold the requested information when the complainant's requests were received.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 22 July 2017, the complainant wrote to the Council and requested information in the following terms:

"Can you please confirm that

- 1. There was no free access across Silverland*
- 2. That the land was fully fenced 1971 – 1985*
- 3. That in 1985 your warden placed a stile on said fence*
- 4. That those claiming free access were mistaken."*

5. On 24 July 2017 the complainant made the following request for information:

"I write to ask confirmation of the following and enclose SHBC letter 1990

- 1. The fence was put in place by Bagshot Rural District Council in 1971 on private land*
- 2. That Surrey Heath Borough Council fully maintained it*
- 3. That there was no free access to the park*
- 4. That there was no free access to private property adjacent*
- 5. The park warden place a stile about 1985 on the boundary fence."*

6. The Council responded to both requests on 27 July 2017. It provided a response to the 22 July 2017 correspondence, which it said it was providing as 'business as usual' ie not under any information legislation. The Council advised that the complainant had put similar statements to a Council solicitor in 2001 and that the Council's position had not changed since the Local Government Ombudsman (LGO) had intervened in 2016. The Council said it was not able to assist the complainant regarding these statements. The Council denied holding any information falling within the scope of the 24 July 2017 request.
7. The complainant appears to have requested an internal review on 31 July 2017. The Council provided an internal review on 4 August 2017 upholding its position regarding its response to the two requests. The Council noted that, although it had provided a response to the 24 July 2017 correspondence under the EIR, it considered this was nonetheless not a request for recorded information but, as with the 22 July 2017 correspondence, was seeking comment or opinion from the Council.

Scope of the case

8. The complainant contacted the Commissioner on 8 August 2017 to complain about the way his requests for information had been handled.
9. The Commissioner's investigation has focussed on whether the Council can rely on the exception at 12(4)(a) of the EIR to refuse to disclose the

requested information. Regulation 12(4)(a) concerns information that is not held when a request is received.

Reasons for decision

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

10. Regulation 12(4)(a) says that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
11. In its submission to the Commissioner, the Council has explained that it has been dealing with communications from the complainant for many years on broadly the same issues as those referred to in his two requests.
12. The Council has referred to its initial response to the complainant of 27 July 2017. In that response the Council had advised that it considered that the content of both of the complainant's letters related to matters that it had previously addressed in correspondence to him in December 2015, and before. The LGO had also dealt with an associated complaint the complainant had submitted to it in 2016. The Council confirmed that its previous response in 2015, and other correspondence it has had with the complainant, had satisfactorily dealt with the complainant's requests and complaints.
13. The Council confirmed that the first request, of 22 July 2017, referred to a specific property and that the complainant had made a number of statements which he had asked the Council to confirm. The Council confirmed that the complainant had put similar statements to a Council solicitor in 2001 and that the complainant had provided the Council with a copy of this 2001 letter when he had written to it in November 2015. The Council confirmed that its position had not changed since 2016 when the LGO had intervened, and that it was unable to help him. As above, it had said it had responded to the 22 July 2017 correspondence as 'business as usual' ie not under any information legislation.
14. The Council says it advised the complainant that although his request of 24 July 2017 did not refer to specific land it had surmised that this request referred to the same matters as had been dealt with in 2015. It invited the complainant to let it know if this was not the case. The complainant does not appear to have done so.
15. The Council says it told the complainant that the statements he had made in his 24 July 2017 request appear to seek an opinion and were not a request for recorded information. The Council confirmed that

neither the EIR nor the FOIA require a public authority to give opinions. It said it had nonetheless considered the complainant's correspondence of 24 July 2017 under the EIR.

16. The Commissioner understands that, as a result of her investigation, the Council has now considered both items of the complainant's correspondence under the EIR and is satisfied it does not hold any information relevant to either of them.
17. The Council has confirmed that the complainant has been notified in writing on numerous occasions that it does not hold any records going back to the 1990s, let alone concerning events in the 1970s and 1980s that are relevant to matters the complainant has referred to in his letters. The Council finally confirmed that no further information has been located since November 2015 when the complainant had made his previous request.
18. In its submission to the Commissioner the Council has advised that, if held, information relevant to the complainant's requests would have been held as paper copies and not electronically. It has confirmed, however, that it has not undertaken any searches for paper records because it is confident it does not hold information going back to the 1970s and 1980s.
19. The Council has acknowledged that the complainant has provided copies of documents that originally came from Surrey Heath Borough Council, and its predecessor bodies, but says that these were held by the complainant; the Council no longer holds this information.
20. In a summary the Council has confirmed that it does not hold the information the complainant is seeking through his two requests; first because of the age of the material concerned and also because, in much of the complainant's second request, he appears to be asking the Council to make a judgement or to provide an opinion in respect of documents he provided to it. The Council said it had nonetheless considered this [and the 22 July 2017] correspondence under the EIR and, as in 2015, was able to confirm that it still did not hold any information within the scope of the requests.
21. The complainant has provided the Commissioner with copies of various documents, maps and correspondence, going back 20 years and more. The Commissioner does not consider this material is evidence that, in July 2017, the Council held information falling within the scope of his requests.
22. The Commissioner has considered whether the requests can be considered to include any more recent information the Council may hold

regarding any responsibilities it may have regarding the park and fence in question. Given the complaint's use of the past tense in the requests and the fact that he did not indicate to the Council – for example in his request for an internal review - that his requests also covered the Council's current responsibilities (if any), the Commissioner is satisfied that the requests refer to the historical situation.

23. Having considered the circumstances of these requests including the age of the material requested, the Council's submission and the material the complainant has provided the Commissioner has decided that the Council is entitled to rely on regulation 12(4)(a) with regard to the request of 22 July 2017 and the request of 24 July 2017, because it did not hold the information requested at the time it received these requests.
24. Regulation 12(4)(a) is subject to the public interest test but the Commissioner's position is that it is not necessary to consider the public interest as to do so would be illogical. The public interest cannot favour disclosure of information that is not held.

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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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

Pamela Clements
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