

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

**Decision notice**

**Date:** 23 March 2021

**Public Authority:** Milton Keynes Council  
**Address:** Civic Centre  
1 Saxon Gate East  
Central Milton Keynes  
MK9 3EJ

**Decision (including any steps ordered)**

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1. The complainant has requested information regarding a planning application.
2. The Commissioner's decision is that Milton Keynes Council does not hold any information in scope of the request. However, the council responded to part of the request outside of statutory timescales and therefore breached regulation 5(2) of the EIR.
3. The Commissioner does not require any steps.

## Request and response

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4. On 8 February 2020 the complainant wrote to Milton Keynes Council ('the council') and requested information in the following terms:

*"The following three documents all relate to the termination of the earlier planning application (18/00643/FUL) and the inception of the later planning application (19/03142/FUL).*

*1. A copy of an email dated 23rd August 2019 addressed to [redacted] from [redacted] in Planning Enforcement under the original planning number 18/00643/FUL.*

*2. A copy of the site visit report which was conducted by Planning Enforcement (to include the date of the site visit and the officer who conducted it).*

*3. A copy of the notification to [redacted] that the original application was now void and that he would have to re-apply under a new application."*

5. The council responded on 26 February 2020. In terms of each of the request items it:

[1] Refused to provide the information on the grounds of regulation 13 (personal information). The council advised that documents previously released in this regard were done so in error, with that issue being handled as a data breach.

[2] Denied holding the requested information.

[3] Denied holding the requested information.

6. The complainant wrote to the council on 28 February 2020 to question the response given and with an additional request for information:

*[4] "... under the same planning application I learned last night from the planning department report submitted to the DCP that a stop notice had been issued some-time after 14th August 2019. I would like to request a copy of that Stop Order to include who issued it and on what date."*

7. The council responded with further explanations on the 5 March 2020, however the position hadn't changed from that previously communicated. In regard to [4] the council denied holding the requested information, stating that a stop notice had not been issued.
8. The complainant requested an internal review on 23 April 2020.

9. The council sent the outcome of an internal review on 21 May 2020, it upheld it's position in regard to all of the request items.
10. However, during the course of the investigation, on 2 February 2021, the council released information within the scope of [3].

### **Scope of the case**

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11. The complainant contacted the Commissioner on 11 June 2020 to complain about the way their request for information had been handled.
12. In regard to request item [1], the complainant expressed dissatisfaction that the '*planning department*' held a different view to the senior officer who had released a copy of the information. The complainant was concerned that the council should have a consistent policy on the release of public documents therefore it shouldn't matter which officer information is requested from.
13. In terms of information access legislation, release under the EIR is effectively release of the information to the world at large. This means that information provided directly to a person is not the same as releasing a document in response to an EIR request. In this case the council have stated that the information was provided in error by a senior officer. In terms of the EIR response, it issued a refusal notice for [1] on the basis of regulation 13. As the complainant has received the document, he chose to withdraw the request and didn't dispute the refusal notice therefore there are no grounds for the Commissioner to investigate in respect of [1].
14. During the course of the investigation, the complainant advised they had received satisfactory confirmation that no information is held in scope of [4]. The complainant therefore withdrew [4] from the scope of the case.
15. The complainant confirmed that they remain dissatisfied with the council's response that it holds no information in scope of [2]. Information in scope of [3], was provided during the course of the investigation, however the complainant is dissatisfied with the explanation provided by the council regarding why the information came to light so late, and the delays which were therefore incurred.
16. The Commissioner considers the scope of the case is to establish whether the council holds the requested information in scope of [2], and whether it made any procedural breaches of the EIR in its handling of request item [3].

## Reasons for decision

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### **Regulation 5(1) – Duty to make environmental information available on request**

17. Regulation 5(1) of the EIR states that: "*a public authority that holds environmental information shall make it available on request.*" This is subject to any exceptions that may apply.
18. 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 arguments. She will also consider the actions taken by the authority to check that the information is not held, and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held.
19. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072) in which it was stated that "*there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records*". It clarified that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test the Commissioner applies in this case.
20. In discussing the application of the balance of probabilities test, the Tribunal stated that, "*We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.*" The Commissioner has therefore taken the above factors into account in determining whether or not further information is held, on the balance of probabilities.

### *The complainants view*

21. In regard to [2] it is the complainant's position that:

- The planning department have confirmed that a site visit took place but can't evidence this position or advise by whom and when.
- Such a lack of records would be a breach of the council's own enforcement plan and therefore the council should be able to explain why the planning and enforcement officers failed to record or supply any documentary evidence. The complainant contends that site visits, with photos and phone calls, must be recorded in order to adhere to national and local rules.
- The planning case involved a serious offence, being an unauthorised demolition. An email from the Senior Planning Enforcement Officer, provided by the council in response to [3], expresses that the matter had been raised with the officer both internally and externally as requiring further attention. The complainant contends that it is difficult to believe that no site visit notes, nor photographs, were taken, considering that [3] confirms that the enforcement officer was aware that the unauthorised demolition was an offence.

#### *The council's response*

22. In regard to [2] the council maintains that it holds no record or report of a site visit. It explained that the enforcement officers had received photographs showing the site and that these were sufficient for the officers to make an assessment of any potential breach.
23. In terms of searching for information in scope of [2] the council advised the Commissioner:
  - All potential in-scope information would be stored in electronic format.
  - Searches were carried out on the '*Information@work*' documentation management system and '*Uniform database*'. It advised that these systems hold all of the council's planning application and enforcement records.
  - Searches were also carried out on the personal email folders of relevant officers.
  - It had used the following search terms: postal addresses; application and enforcement reference numbers; applicant, developer, landowner names; and relevant email addresses.
  - No information in scope of the request had been deleted or destroyed and that all information is retained in line with the

council's retention schedule. It advised that development control and enforcement information is kept for a minimum of six years.

- The council advised that it is required under the Local Government Act and Openness Regulations to hold information relating to planning enforcement investigations and that information is retained should it be relevant to future enforcement cases. However, in this case the specific information requested is not held for the reason already provided.

24. The council considers that it has provided the complainant with appropriate advice and assistance in relation to [2] in terms of an explanation of events and therefore why no information regarding a site visit report is held.

### *Conclusion*

25. In coming to a conclusion, the Commissioner has considered the information requested in respect of the complainants view and the council's response.

26. The complainant has provided the Commissioner with reasons why the information should be held, citing requirements laid out in the council's enforcement plan.

27. However, the Commissioner considers that the council has provided a reasonable explanation regarding why the information requested in [2] does not exist. Furthermore, it is not appropriate for the Commissioner to make a judgement over whether the council followed its due process in terms of holding recorded information in relation to the site visit, therefore the council's arguments are accepted.

28. The complainant asked the Commissioner to determine categorically whether any information in scope of the requests is held in the enforcement file. The council has advised that it searched the systems that hold all of the planning and enforcement records, the Commissioner is therefore satisfied that the searches undertaken were sufficient to locate information in scope of the request. Moreover, it has reported to the Commissioner the statutory reasons why, if the information existed, it would be retained and the council has confirmed that no records were deleted.

29. Having considered the council's responses, and in the absence of any tangible evidence to the contrary, the Commissioner is satisfied that, on the balance of probabilities, the council does not hold any information in scope of [2].

30. The Commissioner therefore considers that the council complied with its obligations under regulation 5(1) of the EIR.
31. No steps are required.

### **Regulation 5(2)**

32. Regulation 5(1) requires a public authority that holds environmental information to make it available on request.
33. Regulation 5(2) requires this information to be provided to the requester within 20 working days following receipt of the request.
34. The complainant made the request on 8 February 2020. The council gave a response on 26 February 2020, which is within the statutory timescales.
35. However, its response it stated that no information was held in terms of [3], a position which was upheld in the internal review of 23 April 2020.
36. Information in-scope of [3] was provided during the Commissioners investigation on 2 February 2021. This is well outside of the statutory timescales, being almost one year after the request was made.
37. The Commissioner finds that the council has breached regulation 5(2) by failing to respond to [3] within 20 working days. However, as the response was issued no steps are required.

### **Other matters**

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38. The complainant has raised concerns that the council located information in-scope of [3] only after the Commissioner was involved in the case.
39. The complainant contends that the document is an email from the enforcement officer to the applicant together with the response from the applicant so these emails should have appeared in both the inbox and outbox of the enforcement officers email application and they would have been very easy to search for as the titles of the emails refer to the site in question.
40. Furthermore, the complainant contends that the information was referenced in a report supplied by a council officer to the development control committee in October 2020.

41. The council advised that it had not initially thought to approach the Senior Planning Enforcement Officer as they had not realised they were involved in the case.
42. It explained that they considered the letter requested in [3] was "*an official letter*". The email latterly identified as in-scope is considered to be "*advice*" rather than an official letter.
43. The council advised that at the time of the initial request, the letter was part of an ongoing enforcement investigation, and "*hence was not to be disclosed*".
44. The Commissioner considers the explanations provided by the council to be unacceptable. Firstly, the issue of whether the information in scope of [3] is an official letter as opposed to an advisory letter is open to interpretation. The disclosed email states "*The primary issue that we have is that the building currently does not have planning permission.... On this basis we would suggest that a planning application is submitted at the earliest opportunity and that works cease in the interim. It would be appreciated if we could receive an undertaking that you will follow this course of action.*"
45. The council's position on the email is further confused by the statement that, at the time of the request, it was part of an ongoing enforcement investigation and therefore not to be disclosed. Clearly if information is being withheld then a refusal notice citing the exception claimed should have been issued.
46. As the council has decided to release the email the Commissioner can take no further course of action however, she regards it as appropriate to make reference to the council's poor handling of the information request and to record her subsequent concerns about its records management and request handling procedures.
47. In summary the Commissioner considers that the council demonstrated a lack of clarity regarding the records held, failed to provide a refusal notice initially, and extended the duration of the request unnecessarily.
48. The EIR regulation 16 Code of Practice provides guidance on how to deal with requests for environmental information. Public authorities should use the Code as a handbook to help with their day-to-day handling of requests. Recommendations for EIR public authorities on record keeping, record management and destruction are set out in the FOIA section 46 Code of Practice.
49. The Commissioner therefore refers the council to the aforementioned Codes of Practice issued under sections 45 and 46 of the Freedom of



Reference: IC-43095-M7M8



Information Act (2000) and the associated guidance that the Commissioner has made available on her website.

## Right of appeal

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50. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

51. 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.
52. 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**  
**Head of FOI Casework and Appeals**  
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