

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

Date: 23 July 2024

Public Authority: North Northamptonshire Council
Address: Municipal Offices
Bowling Green Road
Kettering
Northamptonshire
NN15 7QX

Decision (including any steps ordered)

1. The complainant requested information relating to the status of a piece of land from North Northamptonshire Council ("the council"). The council initially applied Regulation 12(4)(b) of the EIR to refuse to respond further (manifestly unreasonable request). During the course of the Commissioner's investigation, however, the council amended its position. It said that after carrying out further searches, no information is held by it.
2. The Commissioner's decision is that, on the balance of probabilities, the council was correct to state that no information is held by it.
3. The Commissioner does not require further steps.

Request and response

4. On 23 October 2023, the complainant wrote to the council and requested information in the following terms:

"1. What steps were taken in 2016 to determine as a material consideration, (in accordance with the Shropshire case) the legal status of land comprising the parcels of land under different ownerships comprising the development site KET/2016/0044 then maintained by Kettering Borough Council and, in particular, the land known as The Hawthorns, established in 1975 as land for public use for recreational, sport and leisure purposes by the provision of a leisure centre (now demolished) and open space provision for formal and informal recreational purposes that continued to be maintained by the local council grass mowing and hedge maintenance and protected by KBC public notices declaring the land to be public open space and protected CCTV, Police prohibition of alcohol consumption and dog waste bin emptying.

2. Why and by whom was the decision taken to remove the public notices described above and to discontinue maintenance of the Hawthorns land and CCTV around 2017 or thereafter post the public appeal inquiry and why and how did the Council and the landowners jointly agree not to object to the 'temporary' fencing by Bellway to land then not owned by Bellway, particularly the Hawthorns public open space, and to erect private land prohibition noticed on that land in the name of Bellway.

3. What records are held by the Council, archived or otherwise that identify public open space land used for recreational purposes since 1972/5 when land was transferred from the Desborough UDC to KBC.

4. If no records were held - please explain why. But please prove details of what measures have been taken by the Council to rectify this position to ensure the legal status of any of the proposed development land whether registered or not, including any known or unknown easements or prescriptive rights over any of the land and that run with the land, including restrictive covenants, easements and legal rights and obligations in whatever form, including trusts that may or may not exist on the land comprising any of the development site whether registered or not."

5. The council responded on 27 November 2023. It refused the request on the basis that section 12 of FOIA applied.

6. The complainant requested that the council carry out a review of its decision on 18 December 2023.
7. Following the internal review, the council wrote to the complainant on 24 January 2024. It amended its position to state that Regulation 12(4)(b) of the EIR applied.

Scope of the case

8. The complainant contacted the Commissioner on 15 February 2024 to complain about the way their request for information had been handled. They argued that the council was not correct to refuse the request under Regulation 12(4)(b).
9. During the course of the Commissioner's investigation the council wrote to the Commissioner stating that it had now carried out searches for relevant information. It said that it has not located any information, and it therefore now amended its position to state that no information is held by it.
10. The following decision notice therefore considers whether the council holds any information falling within the scope of the complainant's request for information.

Reasons for decision

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

11. Regulation 12(4)(a) of the EIR states 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”.
12. In scenarios where there is some dispute between the amount of information which a public authority says it holds, and the amount of information that a complainant believes is held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
13. In other words, in order to determine such complaints, the Commissioner must decide whether, on the balance of probabilities, a public authority holds any - or additional - information which falls within the scope of the request. For clarity, the Commissioner is not expected to prove categorically whether information is held or not.

14. In order to reach a decision, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to search for relevant information, and will take into account any other reasons offered by the public authority to explain why the information is not held. Finally, he will consider any reason why it is inherently likely or unlikely that information is not held.

The complainant's position

15. The complainant argues that the council should hold the information which he has requested.

The council's position

16. The council argues that it has carried out adequate and appropriate searches in order to locate any relevant information falling within the scope of the complainant's request. It has concluded that no information is held by it.
17. As is usual in such cases, the Commissioner asked the council a series of questions regarding the searches which it carried out in order to determine that no information was held by it.
18. The council clarified that if information were held, it would be held as both manual and electronic data.
19. The council clarified that it is a new council, which was put into place in 2021. It said that it was therefore not responsible for administering and making a decision on the issues which the complainant's request refers to as these were actions relating to the councils in place at the relevant time. Kettering Borough Council is likely to have dealt with the issues in question.
20. The council said that extensive searches had now been carried out of the council's Legal Archive room (located at the Kettering offices) and also the Estate's/Assets' Archive rooms (located at both Kettering and Wellingborough offices). The searches were intended to clarify what, if any, notices were served in relation to the site and to determine what following actions were taken. It said that its searches included property records and legal files. It noted that the rooms contain hundreds of documents which are not indexed. It said that some information was found relating to the site, but this did not answer the complainant's questions or queries.
21. It clarified that, due to the reorganisation in 2021, its current property services team does not include any officers that were employed by the former Kettering Borough Council. It could not, therefore, conduct any

staff consultations over the site to establish the likely place any files might be held.

22. It said that it had conducted an electronic search of the former Kettering Borough Council Senior Management team meeting minutes for 2016 but these did not locate any relevant information. It clarified the search terms it had used for these searches to the Commissioner. It said that these searches were conducted to determine whether any senior management decisions were taken which would fall within the scope of the request.
23. It said that no searches were conducted of any local or personal computers as there are no former key officials or officers of Kettering Borough Council employed by it.
24. It said that *"The answers, if held, could potentially have been held in email content between officers (however, we do not know who these potential officers may have been with the passage of time). The email archive does not support a search covering the timespan relating to this request. A copy of an email could have been saved to the manual files, however these files have already been searched and have produced no results."*
25. It confirmed that there is a business purpose for holding the relevant information; the records relating to a notice served in relation to the public space prior to its potential sale would form part of the overall site/sale file or legal file. legal files and financial transactional information are retained by it in line with the Limitations Act 1980.
26. It concluded that the requested information is specific to potential officer actions taken some 7 or 8 years ago. The relevant officers do not work for the council, however, and it has been unable to locate any information which either confirms or contradicts these actions were undertaken.

The Commissioner's conclusions

27. The Commissioner has considered the arguments of both parties.
28. Whilst the complainant believes that information will be held by the council falling within the scope of his request for information, it has confirmed to the Commissioner that that is not the case.
29. The council has provided a description of the searches which it has carried out, and described why these searches would have been appropriate to locate any relevant information held by it. Following these searches it has determined that no relevant information is held.

30. The council has also explained why that might be the case. The information dates back to 2017 and earlier, and relates to actions which would have been carried out by Kettering Borough Council officers rather than North Northamptonshire Council, which was not set up until 2021.
31. Due to the age of the information, together with the fact that a different authority is now in place, no electronic files have been found, and its searches of the relevant unindexed archives have not located any hard copy information relevant to respond to the request.
32. There is no contradictory evidence available to the Commissioner that indicates the council's position is wrong.
33. On this basis the Commissioner has concluded that, on the balance of probabilities, the requested information is not held.
34. Technically, Regulation 12(4)(a) is subject to the public interest test. However, in the Commissioner's opinion it is not necessary to consider the public interest test here as to do so would be illogical; the public interest cannot favour disclosing information that is not held.

Other matters

35. As covered under the "Scope of the case" heading above, it was only after the intervention of the Commissioner that the council reached a settled position on which exception was applicable to refuse the request, and whether relevant information was, in fact, held by it.
36. In general, the council should ensure that its first step upon receiving an information request is to determine whether it holds the relevant information. Only then should it consider to what extent this information may be covered by exemptions or exceptions.
37. The problems with the council's handling of the complainant's requests were compounded by a lack of timeliness in its engagement with the ICO. Deadlines for responding to written correspondence were missed, necessitating the Commissioner issuing an Information Notice in this case.

Right of appeal

38. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

39. 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.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Ian Walley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF