

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 November 2011

Public Authority: Royal Borough of Kingston upon Thames
Address: Guildhall
Kingston upon Thames
Surrey
KT1 1EU

Decision (including any steps ordered)

1. The complainant requested information held about Royal Borough of Kingston upon Thames' ('the Council's) legal responsibility for a specified boundary. The Council provided her with some information and the complainant contends that this was not the right information.
2. The Commissioner considers that there is no further relevant recorded information held by the Council in this case. He has found some procedural breaches of the FOIA, but requires that no remedial steps are taken.

Requests and response

3. The complainant and the Council have had an ongoing dispute about the scope of its obligations to maintain a boundary that is close to the complainant's property. The Commissioner is satisfied that the relevant boundary has been identified and agreed between the Commissioner, the Council and complainant. However, it cannot be specified in this Notice to ensure the complainant's anonymity.
4. The complainant has made a number of requests in this case. The Commissioner has focussed on those which following agreement with the complainant remain outstanding.

Request one

5. On 18 August 2009 the complainant made her first request. It was worded as follows:

'I refer to your [letter dated] 8 July 2009 in which you say that you "have checked the records" and "your legal obligation is to mark the boundary only". Please will you let me have a copy of this record/law/Act/Regulation/Order and let me know exactly what this 'record' is, where it is to be found and its date'.

6. This request was reiterated and a response chased up on at least the following dates - 26 January 2010, 17 February 2010, 7 March 2010 and 24 May 2010.
7. On 5 August 2010 a response was issued to explain that the Council did not hold the requested information and asked whether she would refine the request to embrace something that it had. On 10 August 2010 the complainant explained that the response had misread the request and explained why.

Request two

8. On 11 August 2010 the complainant made the following request for information:

'In our telephone conversation today you told me that the title deeds 'say fence'. Please may I have a copy of this in writing. The extract should be clear as to its source.'

9. On 27 August 2010 the Council provided one Land Registry Title. On 7 September 2010 the complainant responded to explain that in her view this was not the right Title and to ask for the right one.
10. On 15 January 2011 the complainant reiterated her two requests. On 1 February 2011 the Council replied to explain that in its view it had provided all the information that it held that was relevant to the request.

Scope of the case

11. The complainant contacted the Commissioner to complain about the way a number of requests for information she had made had been handled. She explained that the only thing that she had received was one Land Registry Title and she considered more relevant information was held.
12. On 18 August 2011 the complainant agreed that the Commissioner would consider only her requests for the following information:
 1. The records of purported legal obligation to maintain the boundary that used to have a wall, but now has a fence (this was stated to exist in the letter she received on 8 July 2008); and

2. The deed of transfer for the property that is on the other side of the fence that confirms that Royal Borough of Kingston Upon Thames are required to maintain a fence (as stated to exist in the letter she received on 23 April 2010).
13. She agreed with the Commissioner that he would consider for those requests:
 - [1] Whether there is any recorded information held of and if so, whether she can have it; and
 - [2] To consider the procedural breaches where the Council did not answer the highlighted requests for information in 20 working days.
14. The Commissioner can only consider the operation of his legislation and can make no judgment on the Council's legal position about the maintenance of the boundary or consider whether the previous two walls were inadequately built or whether the Council acted appropriately in installing a fence. All he can consider is whether there is relevant recorded information held that falls within the scope of the case and whether it should be provided to the public. If the complainant disagrees with the Council's view of what the information means, then she would need to seek independent legal advice.

Reasons for decision

15. Section 1(1)(a) states that:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request,"

16. The Commissioner has considered whether the Council has complied with this section of the FOIA in stating that it did not hold any further relevant recorded information (excluding the one Land Registry Title that it has already provided the complainant).
17. In determining whether the Council does hold any more requested information, the Commissioner considers the standard of proof to apply is the civil standard of the balance of probabilities.
18. In deciding where the balance lies in cases such as this one, where the complainant has asked him to consider the public authority's response

with regard to whether or not the requested information is held, the Commissioner may look at:

- explanations offered as to why the information is not held; and
- the scope, quality, thoroughness and results of any searches undertaken by the Council.

19. The Commissioner will consider each category outlined in paragraph 13 above in turn:

1. Records of purported legal obligation to maintain the boundary

20. The complainant's view is that the Council must hold something more than what has been provided. She explained that there was an ongoing dispute about whether the Council had to construct a wall or whether a fence would suffice. She provided the Commissioner with considerable correspondence, including the following comments that he deems relevant:

- 18 October 1996 – the Council appeared to state that 'responsibility for repair of the wall falls to the Council' (although at that time the Council was in the process of building the previous wall that has subsequently become dangerous)
- 8 July 2008 – the Council stated 'we have checked the records and our legal obligation is to mark the boundary only, and not to reinstate the wall...'
- 23 April 2010 – the Council stated 'I have gone through the relevant deeds and it clearly states that the Council is required to maintain a fence...'
- 12 April 2011 – the Council also stated that 'having taken advice from the Council's solicitors. I can see no evidence that we are obliged to do so and the decision in 1997 in no way sets a precedent...' and 'looking at the documentation you have provided in detail, none of this appears to support the claim'.

21. As noted above, on 27 August 2010, the complainant was provided with a Land Registry Title that the Council believed obliged it to maintain the boundary. The complainant pointed out that the Title appeared to concern a property a number of blocks away from the one in question and doubted it was the right one.

22. The Commissioner considered the Land Registry Title and acknowledges that at first glance it appears not to clearly relate to the boundary that is

in question. However, it is important to consider that the Title concerned the situation in 1951 and at that time all the properties that now exist were not present. The Council explained that properties on that road back on to the relevant land and it considered that the obligations transfer across to the boundary in question.

23. It explained that it believed that the Land Registry Title imposed an obligation on it to preserve the boundary, because the little J symbols on the conveyance form showed that its obligation to maintain the boundary stretched up to the complainant's boundary. The Commissioner does accept that as the conveyance preceded computerised records, it was not very clear.
24. The Council also explained to the Commissioner that it could confirm that it was this document that it referred to in its responses to the complainant dated 8 July 2008 and 23 April 2010. It explained that this document had been passed to its Valuer's Department, Housing Department and Legal Departments as the complainant's concerns were being considered.
25. The Council's view is that its obligation stretched to maintaining the boundary and how it exercises its discretion to undertake this obligation is not defined by any covenant or restriction in the titles. It explained that it does not hold any further recorded information about this obligation other than the information the complainant already has.
26. The Commissioner considers that if there was an obligation on the Council then it would need to be mentioned in the title documents of the properties and notes that it is not. This would cover the only circumstances when there would be definitely an enforceable obligation on the Council. The Commissioner should explain that one of the main reasons why a registered land system was introduced was to provide certainty about the obligations and benefits for each piece of land. The obligations that are registered should be viewed as determinative.
27. Otherwise, the only way that the Council would be obliged to act is through a court order made on the specific circumstances of this case. The Commissioner is also satisfied that there is no such court order.
28. The Commissioner has noted that the Council may have provided poor or misleading information to the complainant back in 1996 when it first fixed the wall. The Commissioner considers this was down to the context at the time when the Council decided that it would mark the boundary through reconstructing a wall. It is logical that it would pay for its own choice at that time. The Commissioner does not consider that this means there is further relevant recorded information about the Council's legal obligation than that which has been found.

29. Overall, he considers that the Council have demonstrated that on the balance of probabilities it has no more relevant recorded information that constitutes '*the records of purported legal obligation to maintain the boundary*' and that he therefore must find in the Council's favour.

2. Deed of transfer

30. The Council explained that it did not hold a deed of transfer for the exact piece of land.

31. It did not hold one because it did not acquire the piece of land through a legal agreement with the previous owners of the land. Instead, the Council exercised its compulsory purchase powers to acquire the land.

32. It acquired the land through the Kingston upon Thames Compulsory Purchase Order (No 1) 1946 and there was no need for there to be a conveyance or transfer document referring to the boundary responsibility.

33. The Commissioner has considered the Land Registry title of the complainant's property and the neighbouring property and considers that the Council's record of events is accurate.

34. He has noted that the complainant made the request after being told that something may have existed by the Council on the telephone. The Commissioner considers that the phone call may have been made when the two parties were at cross purposes and the deed in question was actually thought by the Council to be the Land Registry Title itself.

35. The Commissioner is satisfied that because there was no deed of transfer when the Council acquired the land on the other side of the boundary, that this offers sufficient evidence to come to the view that on the balance of probabilities there is no relevant recorded information for the second category either.

Section 10(1)

36. Section 10(1) requires that a public authority (subject to limited circumstances, none of which are relevant here) complies with its obligations under section 1(1) of the FOIA in 20 working days.

37. The Council's delays in dealing with information requests in this case constitute a breach of the FOIA. In particular it took over a year to deal with 'request one'. This constitutes a breach of section 10(1) of the FOIA. The Commissioner considers such a long delay to be totally unacceptable.

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: 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

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.

Signed

Pamela Clements
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