

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

Date: 25 July 2018

Public Authority: Royal Borough of Greenwich
Address: The Town Hall
Wellington Street
London
SE18 6PW

Decision (including any steps ordered)

1. The complainant requested from Royal Borough of Greenwich (the Council) information relating to the closure of the public conveniences at Maryon Wilson Park.
2. The Commissioner's decision is that, on the balance of probabilities, the Council does not hold the requested information and is therefore entitled to rely on regulation 12(4)(a) of the EIR in this case. The Commissioner does not require the Council to take any steps as a result of this decision notice.

Request and response

3. On 28 December 2017, the complainant wrote to the Council and requested information in the following terms:

"Under the FOI Act I would like to have sight of all the documentation concerning the closure of the public conveniences and of all the processes that went into revoking the covenant. I am quite happy to receive these by email attachment."
4. On 26 January 2018 the Council responded. The Council stated that it did not hold the documentation and that it would contact other relevant agencies to try to locate a copy of the covenant's wording. The Council also offered to discuss the matter further with the complainant if they so wished.

5. On 22 February 2018 the complainant wrote to the Council and suggested where the information may be found.
6. On 6 March 2018 the Council provided the complainant with some information relevant to other information requests made by the complainant.
7. On 7 March 2018 the complainant wrote to the Council and expressed her dissatisfaction about the handling of the above information request.
8. On 8 March 2018 the Council treated the complainant's correspondence as an internal review request and it acknowledged receipt of this.
9. On 21 March 2018 the Council provided its internal review response and stated that it had '*not found any documentation*' in regards to the above request.

Scope of the case

10. The complainant contacted the Commissioner on 24 March 2018 to complain about the way her request for information had been handled. Specifically, the complainant was dissatisfied with the Council's response because she believed that information regarding the closure of the lavatories should be held by the Council.
11. The Council argued that no recorded information was ever held relevant to the complainant's request and no information was deleted or destroyed.
12. The scope of the case was to determine whether on the balance of probabilities the Council held the requested information at the time of the request and hence whether it is entitled to rely on regulation 12(4)(a) of the EIR.

Reasons for decision

Is the requested information environmental?

13. Environmental information is defined in regulation 2(1)(a) to (f) of the EIR. The requested information in this case is with regards to a covenant to provide public toilets at Maryon Wilson Park.

14. The Commissioner considers the EIR applies to this request rather than the FOIA and that it falls within the definition of environmental information at regulation 2(1)(a), (b) and (f) of the EIR. It is information (if held) on:
- (a) *the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
 - (b) *factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
 - (f) *the state of human health and safety including built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b).*

Regulation 12(4)(a) of the EIR –Information not held

15. Regulation 5(1) of the EIR requires a public authority, who holds environmental information, to make it available on request.
16. Regulation 12(4)(a) of the EIR allows a public authority to refuse to provide the requested information if it does not hold it at the time of the request being received.
17. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request).
18. In this case, the complainant is seeking information from the Council relating to its decision-making which led to the closure of the public conveniences at Maryon Wilson Park.

Is the requested information held?

19. During the course of the Commissioner's investigation, the Council was asked questions to determine whether information was held relevant to the scope of the request – "*all the processes that went into revoking the covenant*".
20. The Council provided its response to the Commissioner and stated the following: The searches undertaken by the Council included paper office copy files relating to Maryon Wilson Park and Park toilets held at the Royal Borough's Parks, Estates and Open Spaces main office at the Oxleas Woods Centre. The Council searched in the main office files and archived files. Also, searches were made of electronic files on the personal drives of networked work computers of the two Parks officers that deal with enquiries relating to the Park and three shared electronic drives/folders used by the Council, Parks, Estates and Open Spaces Department.
21. The searches included email folders, archived emails, Word folders, Excel folders and PDF files in each officer's drive. Searches also involved using variations of the words Maryon, Maryon Wilson, Park Closure and Toilets.
22. The Council explained that the Royal Borough's Parks, Estates and Open Spaces Department is responsible for managing Maryon Wilson Park. It said that if the requested information had existed, it would have been held by that department.
23. The Council confirmed that information was found which related to the Indenture (contract)/Deed of Gift document showing that there was not a covenant to provide public toilets at Maryon Wilson Park. This information was provided to the complainant on 6 March 2018. The Council also confirmed that no other recorded information was ever held relevant to the complainant's request and that no information was deleted or destroyed.

The complainant's position

24. In this case the complainant has offered a number of different arguments to explain why she considers that the Council either must hold or is able to extract information covered by the request. An overview of each of the principal arguments is provided below:
 - (a) There is a discrepancy between the answer from the Council and the information available to the public. Photographic evidence shows that the land was gifted to Greenwich and one of the terms was the installation of toilet facilities.

- (b) Is the information provided by the Council correct or are the details displayed on the information board correct? If the information board is correct, the Council has broken the terms of the land grant by closing the toilets.
 - (c) It is concerning that the Council had difficulty in finding a key legal document.
 - (d) The Council's inability to find the documents about the decision-making that led to the lavatory closure. Should there be a document containing the minutes to a meeting?
 - (e) The lack of information related to record keeping or the systems used for retention and retrieval are not sound.
25. In short, the complainant believes it would be within the capabilities of the Council to provide the requested information.

The Commissioner's view

26. The Commissioner accepts that the Council's searches would have located the requested information if it was held and she is satisfied that the Council conducted relevant and appropriate searches of its records.
27. The Commissioner accepts that the complainant's arguments, considered separately and in combination, lend weight to the impression that the Council might be in a position to provide the information requested. As part of the investigation of the complaint, the Commissioner has put each of these arguments to the Council. It revisited the request in light of these but the Council maintained that its original position was correct.
28. The Commissioner notes that the comments provided by the complainant are largely observations about what they believe the Council should hold or observations about the way in which documents are stored. The EIR are principally concerned with what recorded information is held at the time of a request, and once it is established that the balance of probabilities lies with the likelihood that no further information is held, the arguments presented fall away. The Regulations do not compel the Council to create information or provide reasons for decisions taken if they do not exist in the first place.

29. The Commissioner has considered the request and the explanations supplied by the Council and she is satisfied that, on the balance of probabilities, the Council did not hold the requested information at the time of the request. As a result the Commissioner does not consider any further action is required and that the Council was correct to rely upon the exception at regulation 12(4)(a) of the EIR.

Right of appeal

30. 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: GRC@hmcts.gsi.gov.uk

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

31. 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.
32. 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

Ben Tomes
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF