

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

Decision notice

Date: 31 January 2019

Public Authority: Department for Education
Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Decision (including any steps ordered)

1. The complainant has requested the Department for Education (DfE) to disclose information relating to a piece of land it purchased to build a new secondary school. The complainant believes the Land Registry documents reference various covenants and other restrictions on the land and asked the DfE to provide full details of how it had discharged these covenants to enable it to build on the land. The DfE confirmed that it does not hold any recorded information falling within the scope of the request.
2. The Commissioner is satisfied that on the balance of probabilities the DfE does not hold the requested information. It was therefore entitled to refuse the request under regulation 12(4)(a) of the EIR.
3. The Commissioner does not require any further action to be taken.

Request and response

4. On 14 November 2017, the complainant wrote to the DfE and requested information in the following terms:

"You have purchased land in Balmoral Avenue, Beckenham, Kent BR3 3RD (the former CO-OP South Suburban Sports Club) for the purpose of building a new Senior School (Eden Park High School). Within the Land

Registry Documents there are references to various covenants and other restrictions restricting development by the purchaser, Department of Education. Can you please provide full details of how you have discharged these covenants so to allow you to build on this piece of land.”

5. As the complainant received no response, he emailed the DfE on 20 December 2017 and 3 January 2018.
6. The DfE responded on 11 January 2018. The DfE refused to confirm or deny whether the information is held under section 36(3) of the FOIA. It stated that it is the qualified person’s opinion that to confirm whether or not the information is held would be likely to otherwise prejudice the effective conduct of public affairs.
7. The complainant requested an internal review on 19 January 2018.
8. The DfE carried out an internal review and notified the complainant of its findings on 19 February 2018. It upheld the application of section 36(3) of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 24 April 2018 to complain about the way his request for information had been handled. The complainant is unhappy that the DfE will neither confirm or deny whether they hold the information. He believes the DfE should confirm or deny whether the information is held and provide the necessary information if it is, as it is in the public interest to do so.
10. During the Commissioner’s investigation the DfE revised its position and wrote to the complainant on 21 November 2018 to notify him directly of this change. The DfE no longer wished to rely on section 36(3) of the FOIA and advised the complainant that the requested information is not held.
11. The Commissioner’s investigation has therefore sought to determine whether, on the balance of probabilities, the DfE holds recorded information falling within the scope of the complainant’s request or not.
12. The Commissioner considers the request should have been considered under the EIR. The request relates to information (if it is held) on measures (regulation 2(1)(c)) that will or would be likely to effect the elements of the environment outlined in regulation 2(1)(a) of the EIR such as the land and landscape. The measures being any covenants or restrictions on the land in question restricting its use or development.

These measures will or are likely to affect the elements of the environment, especially the land itself and the surrounding landscape.

13. In the EIR there is an exception for public authorities to apply to requests where the requested information is not held. This is regulation 12(4)(a).

Reasons for decision

14. 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.
15. Following the DfE's revised response of 21 November 2018, the Commissioner wrote to the complainant and asked him to consider the matter further and confirm how he wished to proceed with his complaint.
16. The complainant responded. He stated that he was surprised that the DfE had now 'conveniently' said that it does not hold the requested information. He commented that if this was the case from the outset then it should have provided this response initially. He does not believe the DfE cannot find the relevant covenant or any information relating to it. The complainant confirmed that the DfE would have had to contact the previous owners of the land and the Land Registry. He advised that he would like to see evidence of the DfE searches at the time especially from the Land Registry and to see what the DfE received which stated that the Land Registry does not hold the land registry entry or deed that refers to the 1928 covenant.
17. The Commissioner wrote to the DfE and asked it to consider the complainant's concerns further and to explain in detail exactly what searches it has undertaken to date in order to establish that no recorded information is held.
18. The DfE responded and explained that when any land is purchased a buyer of a site will want to know as much as they can about the property before entering into a contract to purchase the site. The seller of the site is also under a duty to evidence legal title to the property. In evidencing legal title to the property the seller discloses copies of all title documents which it has available to it and which are relevant to the property it is selling. The buyer of the site will also undertake various searches itself (e.g. land registry, local authority, environmental, highways etc.) and will also raise standard and any additional enquires deemed necessary with the seller in order to extract further information concerning the property.

19. It stated that in relation to this acquisition, it can confirm that all of the appropriate searches and enquiries were raised with the seller by externally appointed solicitors who dealt with the acquisition of this site. The DfE said the due diligence undertaken included (amongst other searches) land registry searches, a review of the land registry title, and enquiries were raised with the seller concerning the property. This due diligence undertaken by the solicitors revealed that the site was subject to -

“such restrictive covenants as may have been imposed thereon before 2 April 1928 and are still subsisting and capable of being enforced”.

20. It argued that this is a general entry which is recorded by the Land Registry where they are unsure if there are restrictive covenants imposed upon the property prior to the date specified (in this case 1928). This is usually recorded in this way because the information the Land Registry holds is incomplete.

21. The DfE referred to paragraph 3.1 of the Land Registry Practice Guide 2 (first registration of title if deeds or lost or destroyed) which states:

“If you have been unable to reconstruct the title completely, missing deeds may contain or refer to restrictive covenants, which may not be otherwise apparent from the application. For example, it is particularly difficult to discover the existence of covenants entered into by a vendor, such as brewery covenants. Where the reconstructed title is incomplete we will make a protective entry in the Charges Register. The entry will state that the land is subject to such restrictive covenants as may have been imposed thereon before the date of first registration, so far as such covenants are subsisting and are capable of being enforced.”

22. The DfE advised that the wording used at entry 2 of the Charges Register at the Land Registry for this property which was acquired follows the same wording referred to in the above mentioned practice guide and is a general entry provided because the owner who registered the land for the first time did not hold all the information.

23. The DfE confirmed that all standard and appropriate searches and enquiries were raised when the land was purchased for development as a school but no information was available, which for the reasons provided above is not unusual for general entries such as this. It is therefore not unusual for properties to be purchased with entries such as this on the title.

24. The DfE concluded by saying that it has not discharged any restrictive covenants imposed on the property before 2 April 1928 as it does not

know if any exist and if they did exist it holds no recorded information about them.

25. The Commissioner is satisfied that the DfE has carried out all necessary searches and enquiries to establish that it does not hold any recorded information falling within the scope of the complainant's request. It has explained what enquiries were made when the land was purchased and that the entry to the Land Registry is a general entry used when they are unsure whether there are restrictive covenants imposed upon the property prior to the date specified (in this case 1928). The DfE has confirmed that it has not discharged any restrictive covenants imposed on the land in question before 2 April 1928 because it does not know if any actually exist. As a result it holds no recorded information of this nature.
26. For these reasons the Commissioner is satisfied that on the balance of probabilities the DfE does not hold the requested information. It was therefore entitled to rely on regulation 12(4)(a) of the EIR at the time of the request (although this was not officially cited by the DfE as it failed to recognise the request is an EIR request rather than a FOIA request).
27. The Commissioner considers the scope of the request was very specific. It asked to be provided with "...full details of how you have discharged these covenants so to allow you to build on this piece of land." As the DfE has confirmed that it does not know if any covenants actually existed prior to 1928, no covenants were discharged so as to allow the build to go ahead. The Commissioner considers the complainant's request to see evidence of the DfE's land and property searches as detailed in paragraph 16 above is a new request for information. If the complainant requires this information he would need to make a new request to the DfE for it.
28. Regulation 12(4)(a) is arguably subject to the public interest test. However, the Commissioner does not consider it is necessary to carry out such an assessment for information that it not held.

Procedural matters

29. As the DfE failed to respond to the request within 20 working days of receipt, it breached regulation 5(2) of the EIR in the case.
30. It also breached regulation 14(3)(a) of the EIR by failing to cite regulation 12(4)(a) as its revised basis for refusing the request in its response of 21 November 2018. The Commissioner acknowledges that this was more than likely as a result of the DfE missing that the request was an EIR request.

Right of appeal

31. 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

32. 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.
33. 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

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