



**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Appeal Reference: EA/2020/0311

**Decided without a hearing
On 9 April & 5 July 2021**

Before

**JUDGE HAZEL OLIVER
SUSAN WOLF
JEAN NELSON**

Between

BARRY HINSLEY

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

MILTON KEYNES COUNCIL

Second Respondent

DECISION

The appeal is upheld.

SUBSTITUTE DECISION NOTICE

1. On the balance of probabilities, Milton Keynes Council did hold further information within the scope of the appellant's request for information under the Environmental Regulations 2004 ("EIR").

2. Milton Keynes Council is to search for and disclose to the appellant the following information (subject to any other exemptions it wishes to rely on under EIR). If no further information is held, Milton Keynes Council is to explain this to the appellant along with details of the searches undertaken for this information. The information is any records relating to site visits in relation to the planning enforcement issues surrounding 42 Portland Drive, Willen, between the periods 1 January 2018 and 12 August 2019, covering:
 - a. Records of any site visits by Mr Dunne or other planning enforcement officers in relation to the application for retrospective planning permission.
 - b. Any emails sent or received by Mr Dunne, Mr Stokes, or any other planning enforcement officer in relation to site visits, which have not yet been disclosed to the appellant.
 - c. Any records of site visits which relate to the planning enforcement issues, including emails, by or relating to other officers who attended site visits during the relevant period. This is to include (but is not limited to): officers who attended the site with Mr Dunne; officers who attended the site with any other planning enforcement officer; site visits by building control officers; and the then Planning Director's viewing of the site.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the "Commissioner") dated 30 September 2020 (IC-46590-Y4H2, the "Decision Notice"). The appeal relates to the application of the Environmental Information Regulations 2004 ("EIR"). It concerns information about planning enforcement site visits for a specific property, as held by Milton Keynes Council (the "Council"). The appellant maintains that further information is held by the Council which has not been disclosed.
2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).
3. On 12 August 2019, the appellant wrote to the Council and requested the following information (the "Request"):

"I should like to request full details of all site visits in relation to the planning enforcement issues surrounding 42 Portland Drive, in Willen between the periods 1 January 2018 and 12 August 2019. I would expect your response to include the dates of all site visits, a copy of the notes or reports (including measurements) made by enforcement officers as well any photographs or videos that were taken during the visits.

I would prefer to receive these in electronic format at this email address. If this is not possible, please let me know.

It would be helpful if you were to provide any brief notes which might be necessary to understand the context of the information provided, although I recognise that you are not obliged to do this. If for any reason you feel this request is unclear, please do not hesitate to contact me. If you are not the appropriate authority for this request, or for part of it, please let me know as soon as is convenient.

If the information requested contains sections of confidential information, please blank out or remove these sections, and mark clearly that they have been removed.”

4. The Council responded on 4 September 2019 and provided some information within the scope of the Request.
5. The appellant requested an internal review on 6 September 2019. The Council responded on 4 October 2019 and confirmed that no further information was held.
6. The appellant complained to the Commissioner on 25 October 2019. The Commissioner conducted an investigation into the complaint. Part of this investigation concerned redacted information, which is not an issue for this appeal. During her investigation, the Commissioner asked the Council to provide details of the searches undertaken to locate further information within scope of the Request.
7. The Commissioner decided:
 - a. The requested information is environmental and so should have been dealt with under EIR.
 - b. On the balance of probabilities, no further information in scope of the Request is held by the Council, based on the information provided by the Council about the searches it had undertaken for relevant information and explanations given for why information was not held.

The Appeal and Responses

8. The appellant appealed on 28 October 2020. His grounds of appeal are:
 - a. The Council did not provide honest or accurate responses to the Commissioner during the course of her investigation and consequently, the Council has not adequately searched or disclosed all information held; and/or
 - b. The Commissioner erred in applying the balance of probabilities test as to whether the Council held any further information within the scope of the Request.
9. The Commissioner’s response maintains that the Decision Notice was correct. She maintains that the Council’s searches were adequate, and additional information provided by the appellant was put to the Council and answered satisfactorily. An issue raised by the appellant about additional photographs is academic as these are already in the appellant’s possession. The Commissioner maintains that she was correct to rely on the Council’s representations, and that the balance of probabilities is the correct test.
10. The appellant submitted a reply which provides further detail on why he believes searches were inadequate and further information is held, as discussed below.

11. The Tribunal initially met to consider this case on 9 April 2021. Both the appellant and the Information Commissioner agreed that the Council should be joined as a party if the Tribunal required further information. The Tribunal agreed that it would not be possible to reach a fair decision without further information from the Council. The Council was joined as a party to the appeal by Directions dated 9 April 2021 and was asked to answer a number of questions. The Tribunal met again to finalise its decision on 5 July 2021.

12. The Council's response states that the searches conducted were reasonable in the circumstances, and refutes any allegations it was dishonest. Although five additional photographs were later identified in response to a separate request from the appellant, this was an inadvertent error. The balance of probabilities test used by the Commissioner is correct. Further information and answers to the Tribunal's questions are provided in a witness statement, as set out below. The appellant provided a reply to the Council's response which is addressed in the discussion below.

Applicable law

13. The relevant provisions of the Environmental Information Regulations 2004 ("EIR") are as follows.

2(1) *...“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form 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);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

.....

5(1) *...a public authority that holds environmental information shall make it available on request.*

.....

5(4) *For the purposes of paragraph (1), where the information made available is compiled by or on behalf of a public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.*

.....

12(4) *...a public authority may refuse to disclose information to the extent that –
(a) it does not hold that information when an applicant's request is received.*

15. Requests for environmental information are expressly excluded from the Freedom of Information Act 2000 (“FOIA”) in section 39 and must be dealt with under EIR, and it is well established that “environmental information” is to be given a broad meaning in accordance with the purpose of the underlying Directive 2004/4/EC. We are satisfied that this request falls within EIR.

16. In determining whether or not information is held, the standard of proof consistently used by the First-Tier Tribunal and the Commissioner is the balance of probabilities. It is rarely possible to be certain that information relevant to a request is not held somewhere in a large public authority’s records. The Tribunal should look at all of the circumstances of the case, including evidence about the public authority’s record-keeping systems and the searches that have been conducted for the information, in order to determine whether on the balance of probabilities further information is held by the public authority.

17. A relevant and helpful decision is that of the First-Tier Tribunal in ***Bromley v the Information Commissioner and the Environment Agency*** (EA/2006/0072). Although this case related to FOIA, the same approach applies to whether information is held under EIR. 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.*”

Issues and evidence

18. The issue in the case is whether, on the balance of probabilities, the Council held further information within the scope of the appellant’s Request at the time when the Request was made. It is not the Tribunal’s role to determine what information the Council ought to hold.

19. In evidence we had an agreed bundle of open documents, which included the appeal, Commissioner’s response, and appellant’s reply. We had some final submissions from the appellant, which are addressed below. We also had the response from the Council and a witness statement from Ms Tracey Aldworth (Deputy Chief Executive at the Council), together with the appellant’s reply to these documents.

Discussion and Conclusions

20. Ms Aldworth’s statement provides some background. The Council accepts that record keeping by its enforcement team was insufficient in relation to the relevant property, particularly in relation to site visits, between 1 January 2018 and 12 October 2019. Often officers who attended a site visit at which nothing notable was identified would not make any notes apart from the date of the visit, and on rare occasions even the date was not recorded. “Desktop” reviews were also entered into the system as site visits, making it difficult or impossible to be certain whether a date on the system was the date of the visit or of a desktop review. Ms Aldworth says that the Council has now taken steps to address these shortcomings.

The scope of the Request

21. Ms Aldworth's statement explains the Council's view of the scope of the Request. Firstly, the planning enforcement case relates mainly to the dimensions of the relevant property. She says that this is separate from the wider issue of whether retrospective planning permission should be granted. The planning permission issue involves wider consideration of the merits of the development, is determined under different statutory criteria, and is outside the remit of the enforcement team. The appellant's reply disagrees with this. He says that it was at the request of Mr Dunne (a member of the planning enforcement team) that the owner should submit a retrospective planning application, and Mr Dunne was responsible for managing and validating this application. He says it is normal practice for an enforcement officer to seek to regularise an unlawful development through submission of a retrospective planning application. He has provided some copy emails which show that Mr Dunne was involved in discussions about a retrospective planning application.

22. We find that the Council has interpreted the appellant's Request too narrowly. He had asked for full details of all site visits in relation to "*planning enforcement issues*". It is clear from the emails submitted by the appellant that Mr Dunne was involved in discussions about the retrospective planning permission. He is described in these emails as being "from the planning enforcement team". We accept that any site visits by Council officers outside the enforcement team who were dealing with an actual application for planning permission would be outside the scope of the Request. However, any site visits by Mr Dunne which related to the retrospective application for planning permission would be within scope, as would such visits by any other members of the planning enforcement team. If any records of such visits exist, they should be disclosed to the appellant.

23. Secondly, the Council's position is that only planning enforcement site visits fell within scope, and the scope did not extend to email correspondence. The Council did in fact provide some email correspondence, to which the appellant replied, "*I neither requested nor understand why the council keep providing me with copies of emails. These were not requested by me.*" (email of 23 May 2020, page D260 open bundle). Ms Aldworth also explains that planning officers carry out site visits for a number of reasons, even where it is the subject of a live enforcement case. She states that, "*The Council considers an enforcement visit to be one which is undertaken by planning enforcement officers for the specific purposes of enforcement. Whilst enforcement officers may have regard to the outcome of other visits by planning officers, any enforcement action will be taken on the basis of enforcement visits.*"

24. The appellant's reply disagrees with the Council's interpretation of the scope of the Request. He says that there were site visits by various officers who were not enforcement officers, but this doesn't mean their visits were outside scope as they visited the site as part of enforcement matters. He lists various visits by such officers along with Mr Dunne (an enforcement officer), and says that visits by building control and highways officers also related to enforcement matters. He also says that email correspondence is not out of scope, as the Request does not specify where searches should be carried out, and Ms Aldworth highlights that it is routine practice for details of site visits to be recorded in emails.

25. Again, we find that the Council interpreted the appellant's Request too narrowly. He had asked for full details of all site visits in relation to "*planning enforcement issues*". This was not limited to visits undertaken by planning enforcement officers for the specific purposes of enforcement. Visits by other officers would also fall within the scope of "planning enforcement

issues” if they provided information to the enforcement team that was relevant to enforcement issues, or if the enforcement officers had regard to the outcome of those visits.

26. In relation to emails, we note that the Council did provide some emails, and the appellant replied that emails were not requested. However, we find that emails do fall within the scope of the Request. The Request itself said, *“I would expect your response to include the dates of all site visits, a copy of the notes or reports (including measurements) made by enforcement officers as well any photographs or videos that were taken during the visits”*. These are given as examples of information, not an exhaustive list. We find that emails containing details of site visits in relation to the “planning enforcement issues” should be disclosed to the appellant. As the Council has disclosed a number of emails, this may already have been done. All emails within scope should be disclosed. This is particularly important because it appears that enforcement officers did not make proper records of site visits and relevant information may be contained in emails instead (as discussed below).

The scope of searches

27. The Council provided information to the Commissioner about the scope of its searches for the requested information, and Ms Aldworth has expanded on this in her statement. This can be summarised as follows:

- a. Searches were restricted to records held by its planning enforcement team, on the basis that any information held by other teams in relation to an enforcement site visit would also be held by the planning enforcement team.
- b. There were electronic searches of: the email inbox of all planning enforcement officers involved in the case; all enforcement case records within the “Uniform” system (where officers log cases) and “Info@Work” system (a records management system where documents attached to a case should be stored).
- c. Individual officers’ devices were not searched as officers do not store data on these devices and data cannot be transferred from a remote desktop to a local host.
- d. The electronic search terms used were the number and street name of the property, the case reference for the enforcement case (18/00283/COMP), the names of the property owner and their agent. The date parameters used were those in the Request.
- e. The Council also searched paper notes. No relevant records were identified. Ms Aldworth says that hand-written notes are entered into the system by typing them into the case management file or an email.

28. The appellant’s reply says that the search terms used were inadequate. In particular, the case reference number 18/00283/COMP appears to have been assigned to a complaint received on 18 October 2018, and there should be a reference number for earlier complaints and investigation. The appellant also says it is difficult to understand how Mr Dunne maintains that he has full knowledge of these site visits and investigations but there is no written record.

29. We have considered the extent of the searches conducted by the Council. We consider that these searches were sufficiently rigorous for the scope that had been identified by the Council. We have considered the point raised by the appellant about the case reference number, but find that the other search terms used were appropriate and sufficient to find earlier information about the relevant property.

30. However, we have found that the Council interpreted the scope of the Request too narrowly. This means that the searches carried out were not sufficient to find all relevant information. The searches were restricted to records held by its planning enforcement team. As explained above, officers from other teams may have participated in visits which related in part to “planning enforcement issues”. The Council says that information held by other teams in relation to an enforcement site visit would also be held by the planning enforcement team. We find this position surprising in light of the Council’s admission that proper records were not kept by the enforcement team during the relevant period. We note that other officers attended site visits alongside Mr Dunne on a number of occasions. Other officers may have attended site visits which resulted in information being gathered on enforcement issues. If this was not properly recorded by the enforcement officers themselves, it may well have been recorded by other officers.

Questions about specific missing information

31. The appellant has raised various specific issues which he says shows the Council has failed to disclose all relevant information. The Council maintains that it has now done so. The Tribunal requested the Council to answer the following questions in order to address the issues raised by the appellant. They are answered in Ms Aldworth’s statement.

32. ***Is it correct that the Council’s searches did not include the mailboxes, hard drives, electronic devices and notes of officers other than enforcement officers who undertook site visits in relation to enforcement matters? If so, why not? (paragraphs 2 and 3 appellant’s reply, page A31 open bundle).*** Ms Aldworth confirms that this is correct, because of the Council’s view of the scope of the Request. Other officers will have visited the site for their own purposes which are separate from enforcement matters, and any information relevant to enforcement would have been recorded by enforcement officers. We refer back to our findings in paragraphs 25, 26 and 30 above. The Council interpreted the scope of the Request too narrowly, the enforcement offices did not keep proper records, and visits by other officers may fall within the scope of “planning enforcement issues”.

33. ***Does the Council agree that the site visits by multiple officers took place between 1 January 2018 and 12 August 2019 in relation to enforcement matters as listed in paragraph 5 of the appellant’s reply (page A32 open bundle)? If so, why was no information disclosed about these visits?*** Ms Aldworth says that the Council has disclosed all information it holds about visits to the property by enforcement officers. Notes have been disclosed which were made by one officer (Mr Dunne), and they have been unable to find any notes from the other enforcement officer Mr Stokes, or any other enforcement officers. They have also disclosed email correspondence relating to site visits by Mr Dunne and Mr Stokes. There were no visits by building control which related to planning enforcement actions. Three other individuals named by the appellant are not enforcement officers. The property was not viewed by a legal officer in 2018/19. Ms Aldworth also confirms that the then Planning Director viewed the site from a neighbouring property on 24 January 2019, as shown in an email, but the Council does not consider this to be an enforcement visit.

34. We accept Ms Aldworth’s evidence that the Council has not been able to find any further notes or information from the enforcement officers. We refer back to our findings in paragraphs 25, 26 and 30 above. The Council interpreted the scope of the Request too narrowly. There were some visits by other officers alongside Mr Dunne, which indicates that these were in part enforcement visits. These officers may have notes or records of these visits which cover the

planning enforcement issues, even if Mr Dunne failed to keep proper records. The Council says there were no visits by building control which related to “planning enforcement actions”, but again this interprets the scope of the request too narrowly – these individuals may have records which cover planning enforcement issues. The Council says that the Planning Director’s viewing of the site is not considered to be an enforcement visit, but has not explained the purpose of this visit. Again, this individual may have a record of this visit which relates to the planning enforcement issues.

35. Why is no information held about the site visit on 29 January 2019 which measured roof height (paragraphs 8-10 appellant’s reply, page A33 open bundle)? Ms Aldworth says that measurements were taken on 14 January 2019 and added to “Uniform” on 15 January, and further measurements taken on 29 January were added to this note without the date being updated. We accept this evidence.

36. Why is no information held about five out of six site visits conducted by Mr Dunne (paragraph 11 appellant’s reply, page A34 open bundle)? Ms Aldworth says that measurements from site visits on 14 and 29 January are recorded in the “Uniform” note, and four photographs taken were also disclosed. Any other information not directly relevant to the enforcement action was recorded in emails to colleagues – for the visits on 14 December 2018, and on 13 February, 22 February and 1 August 2019. No other notes or records are held of these visits. We accept this evidence.

37. Can the Council confirm its explanation for why no records are held for early site visits from January 2018, in light of the points made by the appellant in paragraphs 11 and 12 of his response (page A34-35 open bundle)? Ms Aldworth says that site visits did not always result in notes being entered on the Council’s system. The Council has been unable to find any notes or other records held by the enforcement team from site visits prior to 14 December 2018, apart from the emails already disclosed. The officer involved has left the Council, and no further information has been found on a search of their mailboxes and files. There were two other enforcement officers in post at the time, but there are no records or correspondence to suggest they visited the site.

38. The appellant’s reply says it is unacceptable that no explanation has been provided for substantial gaps and missing records, and it appears no explanation has been sought from the enforcement officers. He says there are serious allegations that officers were instructed by the Council’s Service Director of Growth, Economy and Culture to delete certain enforcement records or not to officially record breaches of planning control at the property, and the Council has refused to investigate these allegations. He provides more detail about this issue in his reply to the Commissioner’s response. He invites the Tribunal to consider exercising its powers to either require a witness statement under oath from Mr Dunne or to require the Council to provide the audit logs of its Uniform system for the enforcement records of the property within the timeframe of the request.

39. We have considered the evidence provided by Ms Aldworth carefully. She is in the senior position of Deputy Chief Executive. She has provided a formal, signed witness statement which includes a statement of truth. She has specifically denied the allegations of dishonesty. We accept that her evidence is truthful. We are not in a position in these proceedings to make any findings on the allegations made by the appellant about deletion of records or instructions not to record certain issues. Our role is to decide whether, on the balance of probabilities, the Council holds further information within the scope of the Request.

40. It appears that additional photographs taken at site visits have been disclosed in response to a new request (paragraphs 4 to 6 appellant's final response). Why were these not disclosed in response to the current request, and have all photographs taken at all site visits now been disclosed? Ms Aldworth says that the Council accepts these photographs were taken on enforcement visits and should have been disclosed. They had been printed and not properly filed, and were found during a search for information in response to a second request, when the enforcement team was sufficiently well staffed to undertake a manual search of all records. Separately, photographs exhibited with proof of evidence of the Council's principal planning witness at an enforcement enquiry were not considered to be within scope, as they were not taken by enforcement officers and his evidence did not cover enforcement matters. The appellant's reply says this raises serious issues about how the Council deals with requests for information, as it had multiple opportunities clarify this, and the photographs show the house to have been raised more than the Council's position in the inquiry. We accept Ms Aldworth's evidence on this point – the photographs relating to enforcement were not disclosed due to an error, but have now been provided to the appellant.

41. Does the Council agree that there was a site visit by Mr Stokes prior to 1 November 2018 and, if so, why has information about this visit not been disclosed (paragraph 8 appellant's final response)? Ms Aldworth explains that this is shown by a disclosed email, but the Council has not been able to find a record of this visit. We accept this evidence.

42. Does the Council agree that certain measurements and details presented by Mr Dunne in October 2019 must have come from site visits and, if so, why has this information not been disclosed (paragraph 9 appellant's final response)? Ms Aldworth says that the information presented was from a combination of planning and enforcement officers, the enforcement team only had the measurements obtained in 2019, and other measurements were from site visits connected with planning applications. We accept this evidence.

43. Why have no electronic scans of notes been disclosed, in light of the Council's explanation to the Information Commissioner that this is usual practice and records are retained indefinitely (paragraph 10 appellant's final response)? Ms Aldworth says that this is not usual practice, instead paper notes are typed up and destroyed. The appellant says no explanation has been provided for why the Commissioner was told during her investigation that paper notes were electronically scanned, and this raises questions about their other responses to the Commissioner. It is unfortunate that incorrect information seems to have been provided to the Commissioner on this point. However, we accept this clear evidence from Ms Aldworth.

Conclusions

44. The Council's overall position is that there have been shortcomings in its recording of site visits, and it should have disclosed the photographs referred to above. However, the Council denies it has been dishonest. The Council maintains that it has actually disclosed more than the appellant requested, by providing extensive email correspondence.

45. The appellant's overall position is that this is repeated behaviour by the Council, it has incorrectly interpreted the scope of the Request, and it clearly held further information within the correct scope of the Request. The appellant has alleged that the Council had been dishonest in its responses to prevent further criticism and investigation of its information rights

practices, its handling of enforcement matters at the site and of maladministration in its Planning Department.

46. The Tribunal's role is not to determine what records a public authority ought to hold. Our role is limited to finding whether a public authority did hold additional information within the scope of a request which ought to have been disclosed. It is well established that the test for doing so is the balance of probabilities. It is unclear whether the appellant is now disputing that this is the correct test. We find that it is the correct test, following the approach of various previous First-Tier Tribunal decisions including **Bromley**.

47. Overall, we accept that the enforcement team failed to keep proper records of site visits between January 2018 and August 2019. We have found that the Council has disclosed those records it has been able to locate about site visits made by the planning enforcement team on enforcement matters. Due to the poor record-keeping by the enforcement team, we find it surprising that the Council did not widen its search. In particular, the Council failed to include other officers who had attended the site with members of the enforcement team, or who may have passed on information to that team about enforcement issues following their own site visit.

48. For the reasons explained above, we find on the balance of probabilities that the Council did hold further information within the scope of the appellant's Request. This is because the Council interpreted the scope of the appellant's Request too narrowly. The Council is to search for and disclose to the appellant the following information (subject to any other applicable exemptions). If no further information is held, the Council is to explain this to the appellant along with details of the searches undertaken for this information. The information is any records relating to site visits in relation to the planning enforcement issues surrounding 42 Portland Drive, Willen, between the periods 1 January 2018 and 12 August 2019, covering:

- a. Records of any site visits by Mr Dunne or other planning enforcement officers in relation to the application for retrospective planning permission.
- b. Any emails sent or received by Mr Dunne, Mr Stokes, or any other planning enforcement officer in relation to site visits, which have not yet been disclosed to the appellant.
- c. Any records of site visits which relate to the planning enforcement issues, including emails, by or relating to other officers who attended site visits during the relevant period. This is to include (but is not limited to): officers who attended the site with Mr Dunne; officers who attended the site with any other planning enforcement officer; site visits by building control officers; and the then Planning Director's viewing of the site.

49. We uphold the appeal and issue the Substitute Decision Notice set out at the start of this decision.

Signed: Hazel Oliver
Judge of the First-tier Tribunal

Date: 10 July 2021

Promulgated Date: 14 July 2021