

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

Decision notice

Date: 20 October 2016

Public Authority: London Borough of Lewisham
Address: Lewisham Town Hall
Catford Road
London
SE6 4RU

Decision (including any steps ordered)

1. The complainant has requested details of land owned, including its use, by the London Borough of Lewisham (the Council). The Council identified a Non-Core Housing Asset Register as falling within the scope of the request but considered it was not obliged to provide this record under the 'law enforcement' (section 31(1)(a)) and 'health and safety' (sections 38(1)(a) and (b)) exemptions to disclosure in FOIA. The Commissioner has found that the exemptions cited by the Council are not engaged. She therefore requires the Council to disclose the Asset Register to ensure compliance with the legislation.
2. The public authority must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

3. On 26 January 2016, the complainant wrote to the Council and requested information in the following terms:

Please provide me with details of all land that is owned by Lewisham Council, or any of its subsidiaries (eg Lewisham Homes etc).

Furthermore, please provide details of the current use of all these areas of land.

I would like to receive this data in a map form – either in a commonly used format (PDF/jpg), or as a file which could be opened with ArcGIS software.

4. Upon receipt of the request, the Council initially contacted the complainant to discuss the mechanics of providing the requested details in a suitable format. The Council's formal response of 24 February 2016 advised, however, that the information engaged the 'confidentiality of commercial or industrial information' (regulation 12(5)(e)) exception to disclosure in the EIR. This is subject to the public interest test and the Council found that on balance the public interest favoured withholding the requested information.
5. The complainant wrote to the Council later the same day and asked it to reconsider its refusal to comply with the request. However, although this was acknowledged by the Council, an internal review was only completed following the involvement of the Commissioner.
6. In its review letter of 13 July 2016, the Council informed the complainant that on reflection it had decided FOIA rather than the EIR applied. Having considered the request under this legislation, the Council found that the 'law enforcement' (section 31(1)(a)) and 'health and safety' (sections 38(1)(a) and (b)) exemptions were engaged. Both of the exemptions are qualified by the public interest test and in each case the Council determined that the public interest in disclosure was outweighed by the public interest in maintaining the exemption.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The information identified by the Council as being relevant to the request is a Non-Core Housing Asset Register, dated July 2015. The complainant has suggested that the Council may hold additional information that would be covered by the request. However, for the purposes of her investigation, the complainant has confirmed that he is happy for the Commissioner's determination to focus on the Asset Register.
9. During the investigation the Council has also informed the Commissioner that, contrary to the initial indications given, it had discovered the Asset Register could not be provided in the form specified in the request. The

complainant has advised that his primary concern is the requested information itself and therefore this particular aspect of the complaint did not need to be pursued.

Reasons for decision

The correct legislation – FOIA or the EIR?

10. The Council initially dealt with the information request under the EIR. However, at the internal review stage and in subsequent correspondence, the Council has asserted that FOIA applied and has responded under this piece of legislation.
11. The EIR and FOIA give rights of public access to recorded information held by public authorities. The regimes are, however, distinct from each other and a public authority must decide under which piece of legislation a request should properly be considered. The EIR derived from EU law and exclusively covers environmental information. FOIA, on the other hand, covers most other types of official records held by public authorities.
12. 'Environmental information' is defined at regulation 2(1) of the EIR. In accordance with the European Council Directive 2003/4/EC from which the EIR derives, it is the Commissioner's view that the definition should be interpreted widely. This is based on the construction of regulation 2(1), which states that environmental information is "any information...on" the factors described at paragraphs (a) – (f). Importantly, it is not necessary for the information itself to record or reflect a direct effect on the environment in order for it to be environmental.
13. The Asset Register is a spreadsheet which contains within it the following categories of information: UPRN (reference number), address, postcode, ward, tenure, type of asset, category description. The last three categories are populated with one of the following entries:
 - Tenure: freehold, leasehold, agency, VA school
 - Type of asset: building, land
 - Category description: operational estate, commercial interest, not classified, regeneration partnership, school

14. In *Uttlesford District Council v Information Commissioner* (EA/2011/0269 & 0285, 6 June 2012)¹ the Information Tribunal stated at paragraph 24 that the 'logical structure and priorities embedded within the definition [of environmental information in the EIR] are noteworthy. The primary focus is on the elements covered in (a) the physical and biological elements of the natural environment.' The Tribunal continued in the following paragraph by saying the 'matters covered in (b) are the products and by-products of human ingenuity which are "...discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a)". The consequence of this is that, for example, a noise, energy or radiation source within an appropriately insulated building does not fall within (b) since the insulation means that it is not making a discharge to the environment.'
15. Even on a broad interpretation of the definitions in regulation 2(1) of the EIR, the Commissioner is satisfied that the Asset Register is not information on the state of the elements of the environment and the products of human ingenuity. Instead, the Asset Register provides what might be deemed an administrative description of each of the various sites for auditing purposes. For this reason, the Commissioner has agreed with the Council that the information is not environmental information and therefore FOIA rather than the EIR would apply. It may be noted the complainant has not objected to the determination that FOIA is the appropriate access regime.
16. In light of this finding, the Commissioner has gone on to consider in turn the exemptions cited by the Council – sections 31(1)(a) and 38(1)(a) and (b) - to withhold the Asset Register.

Section 31 – law enforcement

17. Section 31(1)(a) states that:

Information which is not exempt information by virtue of section 30 [information held for the purposes of investigation and proceedings conducted by public authorities] is exempt information if its disclosure under the Act would, or would be likely to, prejudice –

¹<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i775/20120606%20Decision%20EA20110269%20&%200285.pdf>

(a) the prevention or detection of crime

18. Section 31 is a prejudice based exemption. This means that section 31(1)(a) will only be engaged if a public authority is able to establish that disclosure would, or would be likely to, prejudice the prevention or detection of crime. The exemption may cover all aspects of the prevention and detection of crime and could, for example, be used to protect against the disclosure of information that may increase a party's vulnerability to crime. While in some instances information held for the purposes of preventing or detecting crime will be exempt, it does not have to be held for such purposes for its disclosure to be prejudicial. Section 31(1)(a) is also a qualified exemption and therefore a public authority will be required to assess the public interest test in the event that the exemption is found to apply.
19. The Commissioner's guidance on section 31² explains that the prejudice test built into the exemption involves a number of steps:
- One of the law enforcement interests protected by section 31 – in this case the prevention or detection of crime – must be harmed by disclosure.
 - The prejudice claimed must be real, actual or of substance. Therefore, if the harm was only trivial, the exemption would not be engaged.
 - The public authority must be able to demonstrate a causal link between the disclosure and the harm claimed.
 - The public authority must then decide on the likelihood of the harm actually occurring, ie either 'would' occur or 'would be likely' to occur.
20. The Council has argued that disclosure increases the risk of illegal occupation on sites contained in the Asset Register. It has explained that although squatting in a residential property is now a criminal offence, squatting in a commercial property (non-residential property) is still dealt with as a Civil matter. This, the Council has advised, has led to an increase in commercial properties being targeted, requiring eviction action to be taken and involving on-going clean-up costs.

² <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

21. As an example of when the exemption would apply, the Commissioner's guidance refers to the Information Tribunal's decision on *Yiannis Voyias v Information Commissioner and the London Borough of Camden* (EA/2011/0007, 23 January 2013)³. In that case the Tribunal upheld the public authority's decision to withhold the addresses of empty houses. Importantly for the purposes of the present case, squatting in residential properties was not at that time a criminal offence. However, it was accepted that squatting is associated with criminal damage, for example through the process of entering and securing properties.
22. Extending this principle, the Commissioner considers that the arguments advanced by the Council are ones potentially applicable to section 31(1)(a) and that, furthermore, the prejudice being claimed is of substance. The next question is therefore whether the Council has demonstrated a causal link between the disclosure and the harm cited. In the Commissioner's view it has not.
23. The Commissioner considers there is no obvious way in which the information that is actually contained in the Asset Register could, either by itself or in conjunction with other sources of publicly available data, assist squatters. The descriptions themselves do not tell us anything about the specific nature of the sites which could not be found elsewhere, such as whether a site was a school or playing fields. Consequently, there is no evidence that the information could allow someone to identify a potentially viable area for squatting or even assist them to any extent at all with this activity. Nor has the Council been able to demonstrate in any meaningful way how the information could be used or why disclosure would increase the risk of squatting.
24. Although not a determinative factor, the Commissioner would also note that she has drawn to the attention of the Council the Local Government Transparency Code 2015 (the Code)⁴. The Code says in its introduction that it was issued to 'meet the Government's desire to place more power into citizens' hands to increase democratic accountability and make it easier for local people to contribute to the local decision making process and help shape public services.' It goes on to say that the Code ensures local people can now see and access data covering various aspects of public authorities' operations, including the use of its assets.

³ http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i942/EA-2011-0007_2013-01-22.pdf

⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408386/150227_PUBLICATION_Final_LGTC_2015.pdf

25. The Code, it is explained, does not replace or supersede the existing legal framework provided by access legislation including FOIA and the EIR. However, it advises local authorities considering whether an exemption to disclosure may apply should start from the presumption of openness and disclosure of information, and not rely on exemptions to withhold information unless absolutely necessary. Beginning at paragraph 35, under the heading 'Local authority land', the Code says that local authorities should publish details of all land and building assets; information that, in essence, would correspond with the data that the complainant has requested.
26. The Commissioner can only consider the legislation she regulates and so cannot give a view on compliance with the Code, which is a separate instrument. However, the Commissioner considers the Code does illustrate a government initiative which had determined that information relating to the use of assets was a category of information the public could expect to be made available. At the date of writing it would seem that the Council has not actively reviewed the requirements of the Code in this context and therefore not carried out a complete analysis of what asset information could be placed in the public domain. If it had done so, the Commissioner considers that the Council may have been better placed either to agree that the information could be disclosed or provide cogent arguments and evidence to support the application of an exemption.
27. The Commissioner has ultimately found that section 31(1)(a) of FOIA is not engaged by virtue of the failure of the Council to demonstrate that the third stage of the prejudice test is met – namely, the requirement to demonstrate a causal link between the disclosure and the harm claimed.
28. The Commissioner has next considered the Council's reliance on section 38 of FOIA, which was separately applied to the same information.

Section 38 – health and safety

29. Section 38 of FOIA states:

(1) Information is exempt information if its disclosure under this Act would, or would be likely to –

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual.

30. As section 38 is a qualified exemption, a public authority must go on to consider the public interest if either of (a) or (b) is found to apply.

31. With regard to section 38(1)(a), the Commissioner's guidance⁵ explains that endangering physical health usually means an adverse physical impact and often involves medical matters. Endangering mental health, on the other hand, implies as one would expect that the disclosure of information might lead to a psychological disorder or make mental illness worse. In relation to section 38(1)(b), the guidance says that endangering safety is usually connected to the risk of accident and the protection of individuals. Information that could endanger an individual's safety could also endanger their mental or physical health. If so, both parts of the exemption may be relied upon.
32. The Council has not specifically cited which limb of section 38(1) – (a) or (b) – it considers applies in this situation. The Commissioner has therefore worked on the assumption that it is relying on both.
33. The Commissioner's view is that the use of the term 'endanger' equates to 'prejudice' and therefore, like section 31 of FOIA, section 38 is subject to a prejudice test. This means that a public authority must be able to establish a causal link between the endangerment and disclosure of the information. Furthermore, the public authority must also show that disclosure would, or would be likely to, have a detrimental effect on the physical or mental health of any individual, or the safety of any individual. The effect must be more than trivial or insignificant.
34. The Council has informed the Commissioner that disclosure regarding the current use of land 'could mean that empty properties may be exposed to a greater risk of arson or criminal damage, which if carried out may endanger other persons in neighbouring properties.' The Commissioner once again accepts that the argument is one potentially relevant to the exemption being claimed, particularly in this instance section 38(1)(b) of FOIA.
35. Like her analysis of the application of section 31, however, the Commissioner has found that the Council's reliance on section 38 falls down as a result of its failure to make a link between disclosure and an increased risk of squatting. Without this connection, the Council is unable to substantiate the proceeding argument that the release of the information would likely result in a greater exposure to arson and, or other criminal damage.

⁵ <https://ico.org.uk/media/for-organisations/documents/1624339/health-and-safety-section-38-foia.pdf>

36. The Commissioner has therefore determined that neither section 38(1)(a) or section 38(1)(b) is engaged.

Right of appeal

37. 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

38. 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.
39. 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

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