

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

Date: 6 August 2018

Public Authority: Solihull Metropolitan Borough Council
Address: Council House
Manor Square
Solihull
West Midlands
B91 3QB

Decision (including any steps ordered)

1. The complainant requested information relating to surveys and repairs of a specified highway area over a specified timeframe. Solihull Metropolitan Borough Council (the 'Council') disclosed some of the requested information, but withheld the remainder under Regulation 12(5)(b) – the course of justice etc – of the EIR.
2. The Commissioner's decision is that the Council has correctly applied regulation 12(5)(b) of the EIR to the withheld information and that the public interest in all the circumstances of the case favours maintaining the exception as set out in Regulation 12(5)(b).
3. The Commissioner requires no steps to be taken.

Background

4. In the current case, it is clear from the complainant's correspondence that he has incurred damage to his car tyre; the accompanying photographs he provided to the Commissioner indicate that this was as a result of potholes in the road, and a copy invoice details the cost of replacing that tyre.
5. During the course of the Commissioner's investigation, the Council highlighted a previously issued related decision notice FS505943661. In that case, a request was made to the same Council for information relating to safety inspection reports on a certain area of highway over a three year period. The Council disclosed all the requested information but withheld the inspection dates under Regulation 12(5)(b). The Commissioner found that the Council was entitled to withhold the dates on the basis that disclosure would adversely affect the course of justice, and that the balance of the associated public interest test favoured withholding the dates of those inspections.
6. Whilst the Commissioner is not bound by previous decision notices and will consider each case on its merits, she has taken her earlier decision into consideration.
7. In addition, by way of assistance, the Council has explained to the complainant that:

"... the information can be requested directly from the Council's Insurance Services under the 'Civil Procedure Rules', if you are making a legal claim. Information obtained this way, is not published to the 'world at large' and can be provided to you without the redactions, solely for the purpose of allowing you to pursue your claim."

Request and response

8. On 20 March 2018 the complainant wrote to the Council and requested information in the following terms:

"I am writing to request information under the Freedom of Information Act 2000. Specifically, I require details of surveys

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560663/fs_50594366.pdf

conducted of the road surface and subsequent repairs between 1st September 2017 and 20th March 2018 for the A452 Kenilworth Road covering latitude/longitude coordinates 52.369671, -1.628736 to 52.373494, -1.633166 (junction with Meer End Road). The points used are those as defined by Google Maps."

9. The Council responded under the EIR on 16 April 2018. It provided some information within the scope of the request, specifically a table of ad hoc inspections, together with a table of safety inspections. However, some of the information in the tables, (primarily the inspection dates), was redacted constituting the 'withheld information', as the Council stated that this information was exempt from disclosure under Regulation 12(5)(b) of the EIR – the course of justice etc.
10. Following an internal review the Council wrote to the complainant on 20 April 2018 and maintained its original position.

Scope of the case

11. The complainant contacted the Commissioner on 29 April 2018 to complain about the way his request for information had been handled.
12. During the course of the Commissioner's investigation the Council advised that it intended to disclose some of the previously withheld information to the complainant, which it had redacted in error, and withhold only the dates. Following discussion with the Commissioner, the Council wrote to the complainant informing him of its error and provided the additional information.
13. The Commissioner has determined whether the Council was correct to handle the request under the EIR. She has also considered whether it was entitled to rely on Regulation 12(5)(b) of the EIR in relation to the request and whether the balance of the public interest favours maintaining the exception in respect of the withheld information.

Reasons for decision

14. The Commissioner has first considered whether the requested information constitutes environmental information.

Regulation 2 - Is any of the information environmental?

15. Information is environmental if it meets the definition set out in regulation 2 of the EIR. Regulation 2(1)(a) covers the state of the elements of the environment, including water, soil, land and landscape.

Regulation 2(1)(c) provides that information is environmental where it is on:

"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 [2(1)](a) and (b) as well as measures or activities designed to protect those elements".

16. In both the Commissioner's and the Council's view, the information requested by the complainant constitutes environmental information as it concerns survey reports and repairs/maintenance of a specified highway area, and is likely to affect several of the elements of the environment referred to in 2(1)(a).
17. The Commissioner is therefore satisfied that the request asks for environmental information as per Regulation 2(1)(c) and so the EIR is the correct statutory instrument to apply to the request.

Regulation 12 (5)(b) – The course of justice

18. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that is disclosure would adversely affect –
 - the course of justice, ability of a person to receive a fair trial or
 - the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
19. The Commissioner considers that the course of justice element of the exception is wide in coverage, and accepts that it can include information about civil investigations and proceedings².
20. The successful application of the exception is dependent on a public authority being able to demonstrate that the following three conditions are met:
 - the withheld information relates to one or more of the factors described in the exception,

² https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

- disclosure would have an adverse effect on one or more of the factors cited, and
 - the public interest in maintaining the exception outweighs the public interest in disclosure.
21. When considering the balance of the public interest, a public authority must take account of the express presumption in favour of disclosure which exists in the EIR (regulation 12(2)).
 22. The Council's position is that the disclosure of the dates of safety inspections over the specified seven months' time span would allow individuals to identify road defects that the Council had knowledge of, but had not yet repaired. This would therefore highlight periods of time for which fraudulent claims for damage, such as that which had been sustained elsewhere, could be submitted to the Council.
 23. The Council has explained to the Commissioner that, if individuals seek to bring compensation claims for poorly maintained highways, they are obliged to provide details of not just the highway and evidence, but also the date or short period of time in which they believe the damage occurred, which they should already have. Consequently, the dates of safety inspections and complaints are used for the purpose of validating claims, and the public disclosure of safety inspection dates could therefore facilitate claims that are fraudulent.
 24. To provide further context to its decision that the exception was engaged, the Council has referred the Commissioner to the known issue of individuals submitting fraudulent claims against local authorities, such as for damage sustained from road defects, and has provided hyperlinks to several webpages as evidence of the apparent increase in such activity (some of the examples are included in the links below³).

³ <http://www.keoghs.co.uk/news/Keoghs-warns-councils-to-be-aware-of-organised-pothole-claims>

<http://www.mirror.co.uk/news/uk-news/pothole-scammer-tried-sue-council-5644306> (6th May 2015)

<http://www.yorkshireeveningpost.co.uk/news/latest-news/top-stories/alleged-pothole-injury-victim-exposed-as-a-fraud-1-6776497>

25. Having considered these factors, the Commissioner accepts that it was more probable than not that disclosure of the information would adversely affect the course of justice, and is therefore satisfied that regulation 12(5)(b) was engaged.

Public interest arguments in favour of disclosing the withheld information

26. Some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
27. The Council has explained to the Commissioner that in undertaking a public interest test it has considered the presumption in favour of disclosure required by the EIR, and has additionally considered the need to ensure that individuals who have sustained damage from defects on Council-maintained roads have the appropriate information available to them so as to hold the Council to account.
28. The Commissioner understands that those who have sustained damage from a road defect will be seeking to hold the Council to account. However, the Commissioner considers that this represents a private rather than a public interest, and therefore cannot be considered as an argument in favour of disclosure. Notwithstanding this, the Commissioner does consider that the Council has a responsibility to assure the public that appropriate steps are taken to keep roads free of defects, and the disclosure of the withheld dates would therefore inform the public about the frequency that safety inspections are undertaken.

Public interest arguments in favour of maintaining the exception

29. The Council, in its submissions to the Commissioner, has advised that it has a legal responsibility to tackle fraud, and this is the first argument for maintaining the exception. The likelihood of an adverse effect occurring has already been proven in the fact that the exception is engaged which itself indicates that there is a greater than equal chance of fraud being committed should the withheld information be disclosed.
30. Secondly, the Council has stated that it has a legal obligation to protect the public purse from fraudulent claims. The disclosure of the withheld information would therefore be contrary to this, as it would allow individuals to circumvent one of the means in which the Council assesses a claim for legitimacy, which could result in fraudulent claims being successful.
31. The Council has advised the Commissioner that it is required under Part 36 of the Civil Procedure Rules to release supporting evidence in

response to a formally submitted court claim. The Council has advised that this would normally include the last safety inspection prior to any alleged incident, along with reports of all complaints and repairs undertaken between the inspection and the date of the alleged incident, and would represent sufficient information to allow the claimant to take the matter to Court. This clearly indicates to the Commissioner that there is a more appropriate regime than the EIR for accessing information that is relevant to a claim.

Balance of the public interest arguments

32. The Commissioner has considered the public interest arguments put forward by the Council in this case; none were submitted by the complainant.
33. The Commissioner appreciates that in general there is a clear interest in public authorities being accountable in relation to their responsibilities, particularly when these relate to public safety. However, the Commissioner considers that in the circumstances of this case the public interest in withholding the information is particularly strong. The Council's description of how the withheld information is used to 'validate' submitted claims is based on clear logic, and the Commissioner has concluded that the disclosure of the withheld information would allow individuals to identify periods of time when the Council was responsible for a road defect, and therefore attempt to defraud the public purse through making a false claim.
34. Additionally, the Council has advised the Commissioner that there is also an alternative access regime provided through the Civil Procedure Rules, which would result in part of the withheld information being disclosed as part of any legal proceedings should the complainant submit a claim.
35. The Commissioner has therefore observed that the public interest in maintaining the exception is particularly strong. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, such as clear evidence of unlawful activity or negligence on the part of the Council, or the absence of any alternative means of accessing evidence pertinent to a claim. However, no such arguments appear to be present.
36. Therefore, the Commissioner has concluded that, in all the circumstances of the case, the public interest in maintaining the exception outweighs that in disclosure of the withheld information.

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

**Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**