

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

Date: 9 January 2019

Public Authority: Sunderland City Council
Address: Civic Centre
PO Box 100
Burdon Road
Sunderland
Tyne and Wear SR2 7DN

Decision (including any steps ordered)

1. The complainant has requested a copy of a highway report ("the Report") from Sunderland City Council ("the Council"). The Council refused to provide it on the basis that it was exempt from disclosure under section 42(1) (legal professional privilege) of the FOIA. During the Commissioner's investigation it revised its position, saying that it should have additionally relied on the exception contained in regulation 12(5)(b) (the course of justice) of the EIR.
2. The Commissioner's decision is that the Council was entitled to rely on section 12(5)(b) of the EIR to withhold the requested information. No steps are required.

Background

3. The Council has confirmed the following information about the Report. It was completed in response to a request from its insurance section in connection with the management of a live insurance claim. The Report was completed following a site inspection which took place in June 2018.
4. The Council explained that the Report, and other documentation such as inspection records, formed part of the standard procedure for handling a highways claim.

5. On 25 July 2018 the Council was served with a notice of issue of proceedings. The claim was notified to the Council's insurance solicitors who repudiated the claim on 15 August 2018.

6. The Council explained that the Report:

"... is in two parts – the first provides a summary to assist highways officers to address the issues that are subject to the claim. The second part requires the highways officer to provide the information necessary to inform how the council should handle the claim, including whether it should be defended or accepted".

7. In responding to the complaint's request for an internal review, the Council advised:

"I understand that the report you requested was commissioned in response to a claim you issued against the Council on the 20th July 2018, in relation to damage you sustained to your vehicle after driving over a pot hole on Portsmouth Road in Sunderland".

8. The Commissioner therefore understands that the complainant is also the claimant in the case referred to above. It would appear that the complainant has allegedly experienced damage to his vehicle as a result of a pothole on a public highway.
9. The Commissioner further understands that the claim was struck out by the Court on 11 September 2018, ie after the date of this request, albeit on a procedural matter.
10. The Commissioner has since been advised that the claim has been reinstated.

Request and response

11. On 24 August 2018 the complainant wrote to the Council and requested information in the following terms:

"I would like to request under freedom of information act a report made by a secound [sic] highways inspector at the site outside the flats of Portsmouth road in accordance with the letter you sent me dated 23/08/2018 ref 10/c16".

12. On 13 September 2018 the Council responded. It refused to disclose the requested information. It cited the exemption at section 42 (legal professional privilege) of the FOIA as its basis for doing so.

13. Following an internal review the Council wrote to the complainant on 26 September 2018. It maintained its position.
14. During the Commissioner's investigation the Council revised its position. It advised her:

"... where those elements of the information contained in the document consist of information relating to the condition of the environment and related measures, which falls to be handled according to the Environmental Information Regulations, the council relies additionally on the exemption contained in Regulation 12(5)(b)".

Scope of the case

15. The complainant contacted the Commissioner on 17 September 2018 to complain about the way his request for information had been handled. The Commissioner invited him to make any further representations as to why he thought the information should be disclosed but no response was provided.
16. The Council has not advised the complainant regarding the additional citing of regulation 12(5)(b). As the arguments provided are essentially the same as those given in its response for section 42 of the FOIA, the Commissioner has used her discretion and will consider the arguments without referring back to him.

Reasons for decision

Is the information environmental?

17. Information is "environmental" if it meets the definition set out in regulation 2 of the EIR ¹. Environmental information must be considered for disclosure under the terms of the EIR rather than the FOIA. Under regulation 2(1)(c), any information on activities affecting or likely to affect factors of the environment listed in regulation 2(1)(b) will be environmental information. The information requested in this case relates to the condition of highways, which can be understood to affect various factors including noise and emissions. The Commissioner therefore considers that the request should be dealt with under the EIR.

¹ <http://www.legislation.gov.uk/ukxi/2004/3391/regulation/2/made>

Regulation 12(5)(b) - the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature

18. Regulation 12(5)(b) of the EIR states that

*"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
(b) the course of justice, the 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 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;
- disclosure would have an adverse effect on one or more of the factors cited;
- the public interest in maintaining the exception outweighs the public interest in disclosure.

20. The Commissioner's guidance on regulation 12(5)(b) sets out that there is no definitive list which covers circumstances when a public authority may wish to consider applying the exception. In *Rudd v the Information Commissioner & the Verderers of the New Forest (EA/2008/0020, 29 September 2008)*, the Information Tribunal commented that 'the course of justice' does not refer to a specific course of action but is "a more generic concept somewhat akin to 'the smooth running of the wheels of justice'".

21. In engaging this exception the Council has advised the Commissioner that it:

"... adopts the position set out in the findings of the Commissioner in case FER0611819² (Cheshire West and Chester Council).

In particular it is the council's view that disclosure of the format and content of this document (which has been created specifically for

² https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624521/fer_0611819.pdf

the purpose of defence of a legal claim, in the interest of protecting the public purse from expense in connection with unfounded claims for damages) would expose the Council, and hence the public, to fraudulent claims for damage. While the document requested relates to the condition of the highway on the date of inspection, the council has again considered the effect of disclosure of the environmental information elements at the time the request was received. Release at that date would give scope for multiple claims from further individuals, potentially contesting the highway inspector's findings and enabling a weight of (unfounded / fraudulent) 'evidence' to be produced such as to weigh against the evidence of the single defence witness with personal knowledge of the condition of the highway. This would place an additional and unwarranted responsibility on the court in determining where the balance of the evidence lay".

22. In this case, as in the case FER0611819 referred to above, the Council's claims handlers have confirmed that the complainant had submitted a claim to them which concerned an incident at the location specified in the request. The complainant has therefore been advised by the Council that he must make the appropriate application for disclosure of the information in the course of the proceedings relating to his claim and/or take independent legal advice on how to pursue his claim. In other words, there is a set process for him to obtain the information necessary for him to make his claim to the courts which he should follow rather than requesting that information via the EIR.
23. The Council has advised that it is relying in full on the Commissioner's previous decision. Rather than repeating the relevant arguments to engage the exception in full here, the Commissioner has summarised them as follows.
 - The Council is not relying on legal professional privilege or legal advice privilege.
 - The information is properly available to the complainant via an application in civil proceedings.
 - The complainant is using the EIR to circumvent the normal civil procedure rules for discovery on cases going before the court.
 - Disclosure outside of this process is likely to be unfair and is likely to undermine the proceedings and a fair trial.
 - Civil procedure rules provide a process for disclosure and the EIR should not be used to undermine them.
24. The Commissioner has considered the above arguments. When answering requests under the EIR the public authority should be

applicant blind (ie it should not take into account the identity of the requestor), other than in very few cases such where this is necessary to demonstrate that information is available to a requestor by other means. In general the public authority should also not consider the motives of the applicant when considering whether the information should be disclosed. The question for the Commissioner is therefore whether a disclosure of this information to the whole world would adversely affect the course of justice, bearing in mind that one of those individuals would be the complainant in this case.

25. The Council argues that providing the information would undermine the process of law. It has clarified that the information which the complainant would need in order to bring forward a successful case would already be available to him through the court processes.
26. The Commissioner's guidance on regulation 12(5)(b) is available online³. It recognises that the civil procedure rules provide an access regime for court and tribunal records. The guidance highlights that circumventing the jurisdiction of the appropriate court procedure rules by allowing access to court records under the EIR could potentially adversely affect the course of justice because parties involved in judicial proceedings have the expectation that such information will only be disclosed under the established regime of those rules. Disclosing information under the EIR instead might undermine general confidence in the judicial or inquiry system or might prejudice an individual ongoing case.

Arguments regarding potential fraud

27. As in the case FER0611819 referred to above, the Council has also argued that a disclosure of the information would be likely to provide information which would be helpful to potential fraudsters when making fraudulent claims against the Council. This would be possible because individuals are obliged to provide specific details when bringing a compensation claim for poorly maintained highways. Provision of the Report would include relevant details which may facilitate claims that are fraudulent. Disclosure of the requested information could also aid individuals in identifying a road defect that the Council had knowledge of, but had not yet repaired.
28. The Commissioner has in past cases been referred to the known issue of individuals submitting fraudulent claims against local authorities, such

³ https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

as for damage sustained from road defects, and she notes that it is considered to be a growing problem for local authorities.

29. Whilst the Commissioner accepts this argument in general, its effects would be limited in scope in this case due to the fact that the complainant has only requested information on one particular road over a relatively short period of time.
30. Although time has passed so as to reduce the possibility of any fraud being attempted using the Report which has been requested by the complainant in this case, the Commissioner must consider a disclosure of the information as at the time that the request was received. She also understands that claims can be made for damage up to six years after the fact. She therefore considers that at the time the request was received it was still possible for people to make fraudulent claims using the requested information.

Conclusion

31. The Commissioner is satisfied that disclosure of the Report would provide information which would form part of the records lodged with the courts for the purposes of disclosure. She therefore considers that the request engages the exception in Regulation 12(5)(b).

Public interest test

32. The Commissioner would like to highlight that the EIR clearly state under regulation 12(2) that when considering exceptions to the duty to disclose environmental information, a public authority must apply a presumption in favour of disclosure and only where there is an overriding public interest in maintaining the exception should information not be released in response to a request. The Council has confirmed that it has considered its position on that basis.

Public interest arguments in favour of disclosure

33. The Council has acknowledged that there is a strong public interest in transparency of the Council's dealings, including in relation to its management of adopted highways and public safety.
34. It has also acknowledged that there is a general public interest in public authorities being accountable for their actions.
35. The Commissioner also considers that disclosure may allow individuals to better understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions.

36. The Commissioner understands that the complainant's vehicle has allegedly sustained damage as a result of a pot hole in the highway and he is seeking to prove that the Council was liable for this damage. 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.
37. 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. Disclosure of the information would aid in identifying where there may be a defect in the road which could cause problems to other road users, particularly if it has not been repaired in a timely manner (if indeed this was necessary). Therefore, disclosure of the Report would provide some degree of transparency on the Council's actions regarding safety and maintenance on the road system.

Public interest arguments in favour of maintaining the exception

38. The Council reiterated that it adopts in full the findings of the Commissioner in case FER0611819. In particular it argued that:
- The withheld information is prepared for the purpose and used exclusively in assessing the legitimacy of claims and informing the conduct of litigation.
 - The access regime provided through the Civil Procedure Rules would result in disclosure of the information if determined appropriate as part of the legal proceedings.
 - A disclosure under EIR could undermine the decision of the court and judiciary in this respect, contrary to the public interest in fair process.
39. The Council also advised that the complainant has a private interest in accessing the information and that he has an alternative right of access to the document at the discretion of the court. It could see no indication that there is a wider public interest in obtaining access to the Report.
40. It also told the Commissioner:

"... the report was not prepared as a result of a general inspection of the highway, but in response to recent litigation, and related to part of Portsmouth Road only in direct response to an allegation about its condition on which a financial claim has been based. This is a private interest and there is not considered to be any wider value in the requested information being made publicly available at this time.

The litigation against the Council has been reopened and the Council, its insurers, and their appointed legal advisers had at the

time the request was made, and continue to have a need to be able to consider and review any reports made for the purpose of obtaining legal advice about contemplated litigation, on a confidential basis in the public interest of the proper use of public funds”.

41. The Commissioner would add that there is no suggestion that the Council considers the claim brought by the claimant to be fraudulent. The Council must consider the wider aspect of a disclosure under the Regulations. A disclosure under the Regulations is considered to be to any person rather than simply to the applicant for the information. As noted above, the Council raises the issue of potential fraudulent claims if this information is disclosed to the public rather than simply to the complainant himself. Whilst the information only relates to one particular road it would still provide potentially useful information to individuals wishing to make a fraudulent claim if it was disclosed.
42. The Council has a legal responsibility to tackle fraud and to protect the public purse from fraudulent claims. Disclosure of the withheld information would hinder the Council in fulfilling this obligation, as it would provide information which would aid individuals in making a claim similar to that made by the complainant as, presuming there is sufficient evidence within the Report, its disclosure to the public at large could enable this.
43. The Council is required under the Civil Procedure Rules to release supporting evidence in response to a formally submitted claim which would include the Report. 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 and that a genuine claimant will not lose out due to non-disclosure of inspection dates under the EIR. However, this information is only disclosed to that individual or their legal representative and not to the wider world. Thus, by doing so the Council has discharged its duty under Civil Procedure Rules and the claim can then proceed accordingly.

Balance of public interest test

44. In weighing the balance of public interest, whilst the Commissioner acknowledges the explicit presumption in favour of disclosure of the information provided for under regulation 12(2) of the EIR, and the general public interest in transparency and accountability in relation to the decisions made by public authorities, she is also mindful that the matter remains 'live'.
45. The Council has balanced its position, saying:

"It is the council's view that the strong public interest in litigation privilege and role of the courts in deciding on issues of disclosure in the litigation context, together with the public interest in safeguarding the proper and efficient use of public funds without expending the resources of the public authority in defence of unfounded, improper or fraudulent claims means the balance falls firmly in favour of this information remaining confidential to the council and its legal advisers".

46. 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 there is a public interest in withholding the Report. The Council's description of how the withheld information is used to assess the legitimacy of claims is based on clear logic, and the Commissioner has concluded that the disclosure of the withheld information would undermine the course of justice as the Report which the complainant needs to be provided with would be available through the normal rules of disclosure. The access regime provided through the Civil Procedure Rules, would result in the necessary withheld information being disclosed as part of any legal proceedings resulting from a complainant submitting a claim. It is possible that the courts would consider some information should be withheld under the normal disclosure rules, and therefore a disclosure under EIR could undermine the decision of the court in this respect.
47. The Commissioner is therefore of the view that that there is a strong public interest in maintaining the exception. In order to equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, or the absence of any alternative means of accessing evidence pertinent to a claim. However, no such arguments have been put forward in this case.
48. The Commissioner therefore considers that the council was correct to apply the exception in regulation 12(5)(b) in this case.

Right of appeal

49. 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

50. 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.
51. 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
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