

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 1 February 2021

Public Authority: Birmingham City Council
Address: Council House
Victoria Square
Birmingham
B1 1BB

Decision (including any steps ordered)

1. The complainant has requested information regarding safety inspections in relation to a specific road. Birmingham City Council disclosed some information and withheld other information under the exception for the course of justice – regulation 12(5)(b) of the EIR.
2. The Commissioner's decision is that Birmingham City Council has correctly withheld the information in part 1 of the request under regulation 12(5)(b).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 21 December 2019, the complainant wrote to Birmingham City Council (the "council") and requested information in the following terms:

"...provide the following information in relation to Station Road, Erdington, Birmingham. In particular the section between High Street and Gravelly Lane.

1. Dates of all safety inspections undertaken on the carriageway in the two years preceding and including 18.10.19.

2. Details of all carriageway defects identified during safety inspections in the two years preceding and including 18.10.19.

3. Details of how carriageway safety inspections are undertaken, including whether walked or driven, the speed of the inspection vehicle and the number of persons in the vehicle.

4. The intended frequency of carriageway safety inspections.

5. Details of all complaints and/or enquiries relating to the carriageway, received in the two years preceding and including 18.10.19.

6. The hierarchy classification.

7. The road/section number.

8. The defect intervention criteria adopted in relation to the identification of all categories of carriageway potholes

9. The time period(s) adopted between identification and repair (temporary and permanent) of all categories of carriageway defects.

5. The council responded on 21 January 2020. It withheld the dates of inspections in part 1 of the request under the exception for the course of justice – regulation 12(5)(b). In relation to other parts of the request the council disclosed information and confirmed that other information was not held.
6. Following an internal review, the council wrote to the complainant on 20 May 2020. It stated that it was maintaining its position.

Scope of the case

7. On 29 June 2020 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the dates of inspection (part 1 of the request) under regulation 12(5)(b).
9. During the course of her investigation the Commissioner advised the complainant that, in her initial view and, based on the conclusions of previously decision notices, it was unlikely that she would uphold their complaint. The Commissioner, therefore, invited the complainant to withdraw their complaint in the interests of resolving the matter informally. The complainant declined to do this, so the Commissioner has set out her conclusions in this notice.

Reasons for decision

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

10. The council withheld the dates of road safety inspections identified in part 1 of the request.
11. 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.
12. 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 proceedings.
13. 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, and

- the public interest in maintaining the exception outweighs the public interest in disclosure.
14. The council's position is that the disclosure of the dates of safety inspections over the specified 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.
 15. The Commissioner understands 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.
 16. The council has made reference to comments made by the Information Tribunal in *Rudd v the Information Commissioner & the Verderers of the New Forest* (EA/2008/0020, 29 September 2008) 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". In other words, the council has argued, there is a set process for necessary information to be obtained if there is a need to make a claim to the courts for damage to a vehicle. The council considers that this process should be followed rather than requesting that information via the EIR.
 17. The council has explained that disclosure of relevant information in respect of proceedings is dealt with by part 36 of the civil procedure rules and the court must decide whether the information requested is relevant to those proceedings. It considers that by placing this information into the public domain outside of the legal process is likely to be unfair and is likely to undermine the proceedings and a fair trial.
 18. The council has further argued that disclosure of the information under the EIR would undermine the court process and the jurisdiction of the court, which has the power to determine what shall be disclosed, and when, during the course of proceedings. It considers that legislation, by way of the civil procedure rules, has provided a process for disclosure of information and the EIR should not be used to undermine the jurisdiction of the civil procedure rules.
 19. To support its position, the council directed the Commissioner to previous decision notices issued in relation to requests for similar

information¹. The Commissioner notes that the notices in question upheld the use of the exception to withhold the information.

20. Having considered these factors, the Commissioner accepts that it is more probable than not that disclosure of the information would undermine the existing legal remedies in this matter and adversely affect the course of justice. She is, therefore, satisfied that regulation 12(5)(b) was engaged.

Public Interest Test

21. Having concluded that the exception is engaged, the Commissioner must carry out a public interest test into the application of the exception as required by regulation 12(1)(b). The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
22. When considering the balance of the public interest, a public authority must take account of the express presumption in favour of disclosure identified in regulation 12(2) of the EIR.

Public Interest In Disclosure

23. The council has acknowledged that there is a strong public interest in disclosing the details of the highway conditions, as this would be viewable by a member of the public when he or she walked or drove down the highway.
24. The council has further argued that the public have a right to know the condition of the highways they own and contribute to the cost of their maintenance. Disclosure, it considers, would support the council's aim of transparency and accountability of its public funds, to be able to demonstrate that public money is being used effectively and in an open and honest way.

¹ See, for example:

<https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259595/fer0742277.pdf>
https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624521/fer_0611819.pdf

25. The complainant has argued that they should be entitled to access the information as they have had to pay for car repairs that were incurred through no fault of their own.

Public Interest In Maintaining The Exception

26. The Commissioner acknowledges that the council has a legal responsibility to tackle fraud, and this is the principal argument for maintaining the exception. The likelihood of an adverse effect occurring has already been demonstrated by the engagement of the exception, which itself indicates that there is a greater than equal chance of fraud being committed should the type of withheld information be disclosed.
27. 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.
28. 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.
29. The council has confirmed that its concerns in no way reflect upon any individual making the request because it recognises that with a few exceptions, public authorities should consider FOI and EIR requests without reference to the identity or motives of the requester. It explained that its focus here is on whether the information is suitable for disclosure into the public domain, rather than the effects of providing the information to the individual requester.

Balance Of The Public Interest

30. 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.

31. Additionally, the Commissioner notes 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.
32. 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.
33. The Commissioner acknowledges that the complainant has a legitimate personal interest in accessing this information, however, the public interest in this context relates to the broader public interest in relation to the course of justice. She considers that the public interest in averting adverse effects to the course of justice, as described in this specific case, far outweighs the interest of the complainant.
34. Therefore, the Commissioner has concluded that, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure of the withheld information.

Right of appeal

35. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

36. 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.
37. 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

Andrew White
Head of FoI Casework and Appeals
Information Commissioner's Office
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