

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 February 2019

Public Authority: Staffordshire County Council
Address: 1 Staffordshire Place
Stafford
ST16 2DH

Decision (including any steps ordered)

1. The complainant requested information from Staffordshire County Council (the Council) relating to work in specified locations he believed to have been done by the Council.
2. The complainant disputed the Council's handling of points 2(a) and 2(b) of the request, namely its denial that it held relevant information.
3. The Commissioner's decision is that, on the balance of probabilities, the Council does not hold the requested information. She therefore upholds the Council's application of regulation 12(4)(a) (information not held) of the EIR.
4. She did, however, find a procedural breach of regulation 11 (representations and considerations) of the EIR.
5. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

6. On 27 April 2018, the complainant wrote to the Council and requested information in the following terms:

"my freedom of information enquiry concerns [sic] work done by SCC on land above roughcote lane (st11 9eg) and work done at caverswall road near the junctiion [sic] with the green (st11 9eq).

i have attached a marked map to help identify the two areas.

i.) natural pond above roughcote lane

a.) when did SCC fill this pond in ?

definitely after 1964, my best guess late '60's - early '70's.

b.) job number and details of connection to;-

adjacent manhole(manhole code/number?.) under road culvert pipe

2.) caverswall road drain and under road culvert pipe.

a.) when do SCC maintenance record for flooding accross [sic] caverswall road start?

b.) when was caverswall road footpath installed?

c.) when was the under road culvert pipe installed?

d.) when was the original drain and upgraded drain with new metal bars/grill at southview done?

e.) summary sheet of the maintenance records for this drain /culvert...dates etc...."

7. On 30 April 2018, he wrote to the Council:

"further to your e-mail and my telephone call earlier today, i would like to add an additioal [sic] point to my freedom of information request.

3. southview, the green, caverswall st11 9eq, SCC drain inlet to the under road culvert on caverswall road , (point2) is on private property.

a.) what legal right have SCC to site their drain on private property?

b.) when was this originally done?

c.) what legal right / written permission have SCC got to go on to private property to carry out work on their drain?

d.) have SCC ever made wayleave payments to the owners of this property ?"

8. The Council responded on 30 May 2018.

9. It denied holding some of the requested information, namely in regard to points 1a, 1b, 2b, 2c, 2d and 3d. It provided information with respect to points 2a and 3c. It stated that there is no highway drain on private property along The Green (points 3a, 3b). The Council sought

clarification with regard to the time period for the information requested at point 2e.

10. While expressing general dissatisfaction with the Council's response, the complainant nevertheless provided the requested clarification on 30 May 2018.
11. Following the Commissioner's intervention, the Council provided an internal review response on 1 August 2018. It maintained its original position.

Scope of the case

12. Following earlier correspondence, on 5 August 2018 the complainant provided the Commissioner with the relevant documentation to support his complaint about the way his request for information had been handled.
13. He disputed the Council's handling of points 2(a) and 2(b) of the request. He was also dissatisfied with the timeliness of the Council's internal review response.
14. The Commissioner understands that there had been correspondence, outside of the FOIA, between the complainant and the Council regarding the same subject matter.
15. The Commissioner wrote to the complainant at the start of her investigation setting out the scope of her investigation. She explained that the focus of her investigation would be to determine whether the Council handled points 2(a) and 2(b) of his request in accordance with the FOIA.
16. In his response, while referring to various matters relating to the subject matter of his request, the complainant did not dispute the scope of the investigation set out by the Commissioner in her correspondence. The Commissioner therefore progressed her investigation on that basis.
17. During the course of her investigation, the Council confirmed that it considered that regulation 12(4)(a) (Exceptions to the duty to disclose environmental information) applied as the Council did not hold the information requested at parts 2(a) and/or 2(b) of the request.
18. The analysis below considers whether, on the balance of probabilities, the Council holds information relevant to parts 2(a) and 2(b) of the request.
19. The Commissioner has also considered the timeliness with which the Council provided its internal review response.

Reasons for decision

20. While the Council thanked the complainant for his requests for information “*made under the Freedom of Information Act 2000*” it used terminology relevant to the EIR in its correspondence with the Commissioner.

Is the requested information environmental?

21. Information is ‘environmental information’ if it meets the definition set out in regulation 2 of the EIR. If the information satisfies the definition it must be considered for disclosure under the terms of the EIR rather than the FOIA.
22. The Commissioner has published guidance¹ on regulation 2(1). That guidance states that the test that public authorities should apply is whether the information is on, or about, something falling within the definitions in regulations 2(1)(a)-(f), and not whether the information directly mentions the environment or any environmental matter.
23. Regulation 2(1) of the EIR defines environmental information as information 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...emissions...and other releases into the environment, likely to affect the elements 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;...”.
24. Information about the state of the elements of the environment, such as water, is environmental information. The information in this case relates to drainage/flooding and highway maintenance activities.

¹ https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

25. The Commissioner therefore finds that the request is for environmental information and should be considered under the EIR.

Regulation 5 Duty to make available environmental information on request

26. Regulation 5(1) of the EIR says that a public authority that holds environmental information shall make it available on request.

Regulation 12 Exceptions to the duty to disclose environmental information

Regulation 12(4)(a) EIR

27. By virtue of regulation 12(4)(a), a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.

28. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities.

29. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. In addition she will consider reasons why it is inherently likely or unlikely that information is not held.

30. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

31. As is her usual practice in progressing her investigation in a case such as this, the Commissioner asked the Council questions relating to how it established whether or not it held the requested information.

32. The Commissioner notes that, in line with the clarification provided by the complainant, the Council was required to confirm whether or not it held relevant information relating to a timeframe "*from 1964 to present date*".

33. In correspondence with the complainant, the Council told him:

"The County Council's highway maintenance records date back to approximately 2014 with the systems currently in use. Earlier systems contain older records".

34. In that respect, when the complainant questioned why the Council had not included the information from its earlier records in its response, it told him:

"With regard to your reference to earlier records, we indicated that they had been searched in our complaint response and I apologise for omitting this within the FOI response".

35. In its substantive response to the Commissioner, the Council provided a comprehensive description of the current and previous systems it uses, or has used, for storing information, together with the relevant dates for each of those systems.
36. It told the Commissioner that the Council currently uses electronic systems to record maintenance activities on the public highway in Staffordshire.
37. It explained that two of the systems began being used in 2014, while another system was in use between 2007 and 2014. It confirmed that 2014, when the systems currently in use began to be used, is the date from which it considers information to be held in a searchable format
38. The Council told the Commissioner that, prior to the use of electronic systems, reports from the public about 'defects' and details of maintenance tasks were captured locally at the area highway depots situated around the county:

"Reports from the public about blocked drains for example, may have been written as memos or telephone messages following local residents either visiting the area offices or sending letters to or calling the Council. These paper-based records of reports may then have been archived at the area offices and if so, would usually be kept in a paper-filing system called a Road File".

39. The Council confirmed that it had carried out both manual and electronic searches in relation to this request for information.
40. From the searchable electronic records available, the Council could not locate any record of the installation of the footway on Caverswall Road and therefore concluded that it did not hold an electronic record of this information.
41. The Council told the Commissioner that the only records it might hold in relation to highway maintenance before 2007/08:

"... would be where this may be mentioned or referenced in historic paperwork held in physical Road Files which are now held at one of four area highway depots".

42. It provided details of the paper road files - dating back to 1962 - that had been manually searched in relation to this request.
43. With respect to the information in scope of part 2(b) of the request, the Council told the Commissioner:

"If the footway was installed between 1962 – 2010 there was a likelihood that a reference to this feature's construction may have been found in the associated Road Files for the area. ... No references to the on-site features relevant to [the complainant]'s complaint, including the installation of the footway (and the culvert beneath it) on Caverswall Road were found in files covering a time period from 1962 to 2010."

44. Similarly, the Council confirmed:

"The Council could not unfortunately locate any references to the installation of the road/footway/culvert on Caverswall Road and this is most likely because the age of these assets is older than our available records".

45. In support of its position, the Council further explained:

"We know that the footway on Caverswall Road is not a recently constructed feature, for example it exists on Google Street View images in 2009. We also know that the Public Highway known as Caverswall Road dates back to as early as 1880 as evidenced in Ordnance Survey maps ... The Public Highway known as Caverswall Road may or may not have had both carriageway and footway features at this time, but we do not know when the footway was altered into the feature that it is today".

46. The Council confirmed that, if it had held relevant information, there was no reason why it would have been deleted or destroyed.

47. With respect to its road maintenance records, the Council told the Commissioner:

"The Council can say when its general maintenance records for a particular road start, but this is only after checking the physical road file for any relevant records".

48. It explained that the physical road files have varying start dates and comprise copies of correspondence between the highway authority and the public/other agencies.

49. It also told the Commissioner:

"If there is no mention of highway maintenance [in the paper based road file] then the council would say its general maintenance records start in 2007/08 for that particular road".

50. The Council stated that, as any road file could contain any, or potentially no, reference to highway maintenance, and because of the varying start dates of the manual filing system:

"... it is not possible for the Council to say definitely when its highway maintenance records start. As such, it is not possible for the Council to say for example when its flooding records begin as this is reliant on 'flooding' being referred to in correspondence that may or may not exist in a Road File..."

51. With respect to whether it held information about when flooding across Caverswall Road started - part 2(a) of the request - the Council confirmed that it had obtained the Caverswall Road file from the area office.

52. It described that file as relating from 1977 to 2009.

53. It told the Commissioner that the file was studied to look for historic reports of highway drainage problems such as reports of road flooding/ponding:

"... but no information was found to be held in relation to [the complainant's] request".

54. It told the Commissioner that as well as conducting manual and electronic searches, it had also consulted with colleagues from County Farms and Flood Risk Management teams in relation to this matter.

55. In its final submission to the Commissioner, the Council concluded:

"I can confirm that there are no records of any property/land flooding issues in the Caverswall Road location".

The Commissioner's view

56. When the Commissioner receives a complaint that a public authority has not provided any or all of the requested information, it is seldom possible to prove with absolute certainty that there either isn't any information or anything further to add. The Commissioner will apply the normal civil standard of proof in determining the case, ie she will decide on the balance of probabilities whether the information is held.

57. In applying this test the Commissioner will consider:

- the scope, quality, thoroughness and results of the searches; and, or

- other explanations offered as to why the information is not held.
58. The Commissioner acknowledges that the complainant's argument is that the Council should hold the requested information. With respect to the matter of the installation of the footpath, he considers it '*unbelievable*' that there is no recorded information relating to '*major construction work*'.
59. While appreciating the complainant's frustration that, at the time of the request, the Council did not hold the requested information, the Commissioner is mindful of the comments made by the Information Tribunal in the case of Johnson / MoJ (EA2006/0085)² that the FOIA:
- "... does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold"*.
60. Having considered the searches conducted by the Council, and the explanations provided about how it records information, the Commissioner is satisfied, from the evidence she has seen, that the searches conducted have been reasonable and thorough.
61. In this case the Commissioner finds that, on the balance of probabilities, the Council does not hold recorded information in relation to either part 2(a) or 2(b) of the request that would enable it to answer the question posed by the complainant.
62. Regulation 12(4)(a) is subject to the public interest test but the Commissioner's position is that it is not necessary to consider the public interest as to do so would be illogical. The public interest cannot favour disclosure of information that is not held.
63. In conclusion, she does not consider that there was any evidence of a breach of regulation 5 in relation to such information.

Regulation 11 – Representations and reconsideration

64. Under regulation 11 of the EIR:

"an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it

²

<http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i90/Johnson.pdf>

appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request”.

65. In other words, the EIR include a statutory right for applicants to request an internal review. The public authority then has 40 working days in which to carry out its internal review.
66. In this case, the complainant expressed dissatisfaction with the Council's response on 30 May 2018. However it was not until 1 August 2018, following the Commissioner's intervention, that the Council provided its internal review response.
67. In correspondence with the Commissioner, the Council acknowledged the delay in responding. It told the Commissioner that it originally saw the complainant's response:

"as an expression of frustration rather than a formal request for internal review”.
68. By failing to carry out an internal review within the statutory time limit of 40 working days, the Commissioner finds that the Council breached regulation 11 of the EIR.

Right of appeal

69. 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

70. 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.

71. 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

Jon Manners
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