

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

Date: 18 December 2014

Public Authority: Medway Council
Address: Gun Wharf
Dock Road
Western Avenue
Chatham
Kent
ME4 4TR

Decision (including any steps ordered)

1. The complainant has requested details held by the council about work carried out by one of its contractors on land adjacent to his property which resulted in damage to a boundary fence. The council provided him with information but the complainant considers that more is held. The council also applied section 21 to information which the complainant considers does not apply. It also redacted the name of some individuals under section 40.
2. The Commissioner's decision is that Medway Council was not correct to apply the FOI Act as the information is environmental information. The requests should therefore have been considered under the EIR and refusal notices issued under this legislation. The Commissioner has decided therefore that the council did not comply with the requirements of Regulation 14(3)(a) in its response.
3. The Commissioner has substituted the equivalent exceptions into their place. He has found that Regulation 12(4)(a) applies to this information (information not held), as does Regulation 6(1)(b) (form and format of information). The Commissioner has also applied Regulation 5(3) to information which is the personal data of the complainant.
4. The Commissioner does not require the authority to take any steps.

Request and response

5. On 31 March 2014, the complainant wrote to the council and requested information in the following terms:

1. A copy of 'all' letters or emails sent to [name of complainant redacted]... 'prior' to the tree cutting works that took place... regarding the tree cutting works that were to take place.

The council provided correspondence in response to this. This falls under the Regulation 5(3) and the section 7 of the Data Protection Act 1998 (the DPA) (subject access). It is not therefore considered further within this notice.

2a. A copy of 'all' orders, works orders, letters faxes or emails sent to City Suburban Tree Surgeons (CSTS) by Medway Council 'prior to' the tree cutting works regarding the tree cutting works that were to take place.

The council provided a copy of an order in response to this.

2b. A copy of all correspondence by letter, fax, email or phone transcript 'after' the tree cutting works had taken place.

The council provided enquiries received from the complainant. This falls under Regulation 5(3) and section 7 of the DPA (subject access).

3. A copy of the risk assessment carried out by City Suburban Tree Surgeons and/or Medway Council pertaining to the tree cutting works that took place.

The council provided an on-site risk assessment carried out by the contractors.

4. A copy of the health and safety plan carried out by City Suburban Tree Surgeons and/or Medway Council pertaining to the tree cutting works.

The council provided a copy of the contractors H&S Policy Statement (from the contractor's website). It said that this was all it held in this respect.

5. If 3 & 4 do not exist or were not done, why were they not done?

The council provided information in respect of this by referring to their answers to parts 3 & 4 of the request.

6. The name of the Medway Council representative and the name of the Manager from CDTs responsible for the tree cutting works that took place.

The council provided the names of the individuals concerned.

7. The names of the 2 CSTS operatives who actually carried out the tree cutting works.

The council provided the names as requested.

8. If there is no record at Medway Council of who is responsible for: and who actually carried out the tree cutting works that took place why is this, and why are their names not forthcoming?

The council provided the names as requested.

9. A complete list of all the names of the Medway Council representatives that have visited [the property] between 24th October to date, their reason for visiting and a copy of any reports (in whatever format) they made regarding their visit.

The council provided the names of officers and said that it had provided all reports.

10. A copy of the complete investigation (your ref 10100020572) carried out by Medway Council customer relations team business support directorate into the tree cutting works that took place at [the property] on 20th December 2013 to include all computer records, hand written reports, letters, faxes, emails, transcripts from telephone calls and video.

The council provided the requested information.

11. A copy of the complete investigation (your ref M13PL000187) carried out by Medway Council risk management and insurance into the tree cutting works that took place at [the property] on 20th December 2013,

The council supplied a copy of the information which formed the investigation but withheld some information under s 40 of the Act as it was personal data belonging to third parties.

12. A copy of all letters, faxes, emails, transcripts from phone calls and video of all representations 'to anyone' at Medway Council may be

Cllr Christine Godwin regarding the tree cutting works that took place at [the property] on 20th December 2013.

The council disclosed information in response to this part of the request.

13. A copy of all letters, faxes, emails, transcripts from phone calls and video by anyone from Medway Council 'in reply' to all representations to anyone at Medway Council made by Cllr Christine Godwin regarding the tree cutting works that took place at [the property] on 20th December 2013.

The council disclosed information in response to this part of the request.

14. A copy of all letters, faxes, emails, transcripts from phone calls and video of all representations to anyone at Medway Council 'made by' Tracey Crouch MP regarding the cutting works that took place at [the property] on 20th December 2013.

The council said that it does not hold any relevant information.

15. A copy of all letters, faxes, emails transcripts from phone calls and video from anyone from Medway Council 'in reply' to all representations 'to anyone' at Medway Council 'made by' Tracey Crouch MP regarding the tree cutting works...

The council said that it does not hold any relevant information.

16. A copy of Medway Council's official 3rd party evidence (showing the 'T' denoting responsibility) of who has the legal responsibility of the boundary fence between [the property] and the woodland/copse belonging to Medway Council.

The council applied section 21 on the basis that this information is available from the Land Registry.

17. A copy of Medway Council's recent technical surveyor other 'recent' Surveyors/Engineer's independent 3rd party proof evidence/report that land slip of earth, tree debris and other material has not taken place on Medway Council's land the other side of the boundary line to [the property].

The council said that it does not hold any relevant information.

18. A copy of Medway Council's 'recent' technical surveyor other

'recent' Surveyor's/Engineers independent 3rd party proof/evidence/report that earth, tree debris and other material has 'not gathered at, moved to, blown by wind to or rolled down to the bottom of the bank on Medway Council's land directly the other side of the boundary line to [the property].

The council said that it does not hold any relevant information.

19(a) Have the neighbours of [the property] had any specific baring, influence or made representations with regards to any decisions that Medway Council have taken with regards to the tree cutting works that took place at [the property]. If so, and with regards to the tree cutting at [the property] please list all the specific baring, influence and representations made by the neighbours of [the property] and give the names of the neighbours involved.

The council said that it does not hold any relevant information.

19(b) Have the neighbours of [the property] had any specific baring, influence or made representations with regards to any decisions that Medway Council have taken with regards to the investigation(s) by Medway Council following the tree cutting works that took place at [the property] on 20th December 2013? If so and with regards the recent investigations by Medway Council into the tree cutting at [the property] please list all the specific baring, influences and representations made by the neighbours of [the property] and give the names of the neighbours involved?

The council said that it does not hold any relevant information.

20. In what way (specifically) did CSTS carry out the tree cutting works that took place at [the property] on 20th December 2013 to a high standard? Please list all the 'specific' ways CSTS carried out the tree cutting works at [the property] on behalf of Medway Council to a high standard?

The council said that the standard of work was as set by the site specific policy statement relating to tree maintenance and subsequently, City Suburban's Method Statement. It disclosed a copy of this to the complainant.

6. On 7 June 2014 the complainant requested a review of the council's response. The council responded to this on 13 August 2014 and said that it has disclosed all relevant information which it holds which was not subject to the exemptions stated. This included section 21 for details of the boundary responsibility, and s 40 for personal data held in the

investigations report M13PL000187.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He said that

1a, 1b & 1c – not all of the information was provided

2b – the information provided was not what he requested.

4 – the information provided was not what he requested.

10 & 11 – not all of the information was provided to him.

14, 15, 17, 18, 19a and 19b – further information may be held.

20 – The complainant said that he was not able to identify which information from that provided to him is the site specific method statement.

The complainant also said that he was not satisfied because the council added defensive arguments to its responses when responding to him telling him that no information is held. He considers that the duty of the council is simply to answer 'yes' or 'no' when he has asked it if information is held or not.

8. The Commissioner considers that the above matters raised by the complainant are the scope of the complaint.

Reasons for decision

Background to the case

9. The complainant requested work done behind a boundary fence on his property to clear the area of overgrown vegetation and trees and to clear rubbish. The council used third party contractors to carry out the work. The complainant alleges that when the work was done the contractors damaged the boundary fence. He therefore wrote to the council asking it to rectify the damage and arrange for a new fence to be fitted. The council considers that the fence is the landowner's responsibility, and argued that it was not responsible for the damage to the fence. It also argued that the complainant had agreed to all actions taken by the contractors at the time. The complainant wrote to his local MP who wrote to the council on his behalf. The council refused to take any further action.

Is the information environmental information?

10. The Commissioner has firstly considered whether the information is environmental information. Environmental information is defined in Regulation 2 of the EIR.
11. The Commissioner is satisfied that the information is information on an activity affecting the state of the landscape. The Commissioner therefore considers that the information falls within the scope of Regulation 2 of the EIR. He therefore considers that the council should have considered the information under the Regulations rather than under the Freedom of Information Act.

Personal data of the applicant

12. The Commissioner also considers that some of the information is personal data belonging to the complainant. It relates to a complaint he made to the council and actions taken on his property as a result of that complaint. Personal data is exempt from the Regulations under Regulation 5(3) as individual have rights to request this under section 7 of the Data Protection Act 1998 (subject access requests).
13. In this case this appears to make little actual difference to the council's response as it has provided him with everything which it says it holds, other than information which relates to third parties or which is available to him from elsewhere.

The Commissioner's approach to this case

14. In general the Commissioner's approach where an authority has used the wrong information access legislation is that he would either write to the authority to ask them to reconsider under the correct legislation or he would issue a decision notice requiring the authority to do this. In this case however, the major issue is simply whether further information is held or not. There exemptions which have been claimed are limited to small amounts of information, such as where information is available to the applicant by other means.
15. Given this the Commissioner considers that it is not necessary for him to issue a decision notice requiring the council to respond under the EIR in this case. He can simply use his discretion to apply the equivalent exceptions under the Regulations.
16. The Commissioner wishes to clarify however that his decision is that the council failed to correctly identify that the information was environmental information and therefore did not apply the correct legislation when considering the complainants requests. Its responses did not therefore meet with the requirements of the Regulations in that

it failed to clarify the exceptions which it was relying upon to withhold information or to clarify that no further information is held.

17. The Commissioner has therefore substituted the following exceptions:

- The exception in Regulation 12(4)(a) applies where the council says it does not hold information or does not hold further information.
- Regulation 13(1) applies (by way of Regulation 12(3) to information which is the personal data of third parties.
- Regulation 6(1)(b) has been applied in place of section 21 of FOIA.
- Regulation 5(3) applies to information which is the personal data of the applicant for the information.

18. The Commissioner is however satisfied that the council did not provide its response under the Regulations, and therefore its refusal notice did not comply with the requirements of Regulation 14(3)(a), which requires that an authority responding to a request under the EIR outlines which exceptions it is relying upon to withhold information.

Regulation 12(4)(a)

19. The complainant said that he did not accept the council's response that information was not held for questions 14, 15, 17, 18, 19a and 19b. He also said that he believed that further information was held for questions 1a, 1b, 1c, 2b, 4, 10 & 11. Effectively however the council's response is that it does not hold any further information as regards these parts of the request. As regards question 4 the complainant said that this was not the information which he requested. The council however clarified that this was the only information which it held which fell within the scope of his request.
20. Regulation 12(4)(a) applies where an authority does not hold the requested information.
21. Of particular relevance is the council's answer to question 14 and 15, correspondence to or from the council with the complainant's local MP, Tracey Crouch on his behalf. The complainant knows that a letter was sent to the council and that the council responded to this. He has a copy of the council's response to Ms Crouch passed to him by her office. The council however states that it has not been able to locate a copy of this or any correspondence it received from Ms Crouch. The complainant provided the Commissioner with a copy of the letter as evidence to prove that the council should hold it.

22. The complainant believes this is an example of the council failing to carry out adequate searches for information. He believes that this may be deliberate, and an attempt to fetter his case should he make a complaint to the Local Government Ombudsman over the issue.
23. 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 absolutely that there is no further information held. The Commissioner will apply the normal civil standard of proof in determining the case, i.e. he will decide on the balance of probabilities whether the information is held. 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.
24. Where the question is whether the council holds information or not the Tribunal has in the past outlined that where its searches are adequate the decision must be that the information is not held on a balance of probabilities. Even if further information might be held the Tribunal does not expect that an authority will search every piece of paper or every record it holds in order to determine whether further information is held. It expects that the authority will have carried out appropriate searches of the relevant areas to determine whether relevant information can be found or not.
25. The complainant raised the question of whether the council's searches had been initially limited to just one department, the Greenspaces department. Certainly its initial response had seemed to imply that that was the case. The Commissioner expects an authority to make searches of all departments which may, or are likely to hold information in order to demonstrate that its searches have been adequate and appropriate. He does not however expect an authority to carry out searches of every department, even where the clear likelihood is that that department would not hold relevant information. This might result in prohibitive costs placed upon an authority in responding to many requests. This is why it is important that where a requestor holds information which might help an authority to identify departments or locations where information might be held that the requestor provides this to the authority in order to facilitate searches.
26. The Commissioner wrote to the council and asked it to clarify what searches had been carried out to identify and locate the information.
27. The council said that it had carried out electronic searches for the information. It confirmed that if information was held then this would be

held electronically. It said that the electronic searches included information held on network resources and in emails.

28. It said that searches were carried out in 3 departments:

- Greenspaces department
- Insurance department
- MP and Councillor enquiries for business administration and support service

29. It said that given the matter, and the nature of the request (tree cutting works), the council had limited the searches it carried out to these 3 departments. It confirmed that the Greenspaces department would hold the majority of the information requested because it would have dealt with the tree-cutting works and would hold all information relating to this.

30. The insurance department would hold most of the information requested because the complainant quoted the reference number used by the department.

31. It said that MP and Councillor enquiries for business support service would have held some information requested in relation to MP enquiries. This department confirmed at the time of the request that it did not hold the information requested by the complainant.

32. Having considered the nature of the searches carried out by the council for the remained for the information the Commissioner is satisfied that the council's searches have been adequate and that, on a balance of probabilities, no further information is held in respect of these parts of the request.

33. The Commissioner is therefore satisfied that, other than as outlined in the paragraphs below, on a balance of probabilities the council has provided all of the information which it holds which has not been exempted under other exceptions to the complainant.

MPs Correspondence

34. For the absence of doubt, the Commissioner is satisfied that the letter is a copy of a letter from the council to the MP, and that the council should either still hold a copy or that it should hold a record of the letters destruction. For its part, the council did not disagree that that would be the case. It simply said that it had been unable to locate it and asked the Commissioner if he could forward a copy of the letter in order to assist further searches. A copy of the letter would provide details of

which officer and which department which had dealt with it and any relevant reference numbers through which the council could then trace the letter.

35. The Commissioner therefore asked the complainant whether he could pass a copy of the letter to the council. The complainant refused to allow the Commissioner to provide the council with this however, and told the Commissioner not to provide any further information to the council regarding it.
36. In situations where a complainant refuses to allow the Commissioner to provide further information to an authority the Commissioner's hands are effectively tied. Whilst he holds information which would in all likelihood allow the council to locate its copy of the letter the complainant's refusal to allow him to do that prevents further investigations taking place. The complainant's refusal to allow the Commissioner to provide it with details which might allow it to locate it effectively prevents the council from complying with its obligations under the Regulations.
37. Although the Commissioner recognises that the council is likely to hold a copy of the correspondence it would not be in the public interest for the Commissioner to require the council to carry out extensive further searches for information purely on the basis that this is the only strategy which might alleviate a complainant's suspicions about the extent of its previous searches. Clearly, in any event, the complainant already holds a copy of the council's response to the MP if not her letter to the council.
38. The Commissioner would therefore point out that in this respect the complainant is seeking information which he already holds a copy of. There would therefore be little public interest in requiring the council to carry out extensive further searches for information which the complainant already holds. He therefore considers that the council would have been in a position to refuse the request under Regulation 6(1)(b) as read via Article 3 should it have recognised that this was applicable.
39. The Commissioner has therefore used his discretion in this case and applied Regulation 6(1)(b) (read by way of Art 3 of the Directive) to exempt the information. The Commissioner has outlined below how the exception works in practice.

Regulation 6(1)(b)

40. In addition to the Commissioner's consideration of the correspondence with Tracey Crouch MP, the council responded to part 16 of the request for information (regarding third party evidence regarding legal

responsibility for the boundary) by stating that this information was already available to the complainant via a request to the Land Registry.

41. The complainant argues that he wishes a copy of the council's map in order to ascertain whether it contains a letter T, denoting responsibility for the boundary fence and its upkeep. The council provided a copy of its map to the Commissioner. He is satisfied that the map does not have a letter T denoting the boundary responsibility. The council does not therefore hold the specific information requested by the complainant in his request.
42. The council does however hold a copy of a map (which is sourced from the Land Registry), together with a copy of the deeds for the property it owns. It also holds internal email discussions regarding the ownership of the land which forms the boundary. Again however the complainant's request was specifically for 'third party' evidence rather than the council's internal discussions over ownership and so this falls outside of the scope of the request.
43. Although the council's answer could therefore have been that the specific information which the complainant requested is not held on (as there is no map identifying responsibility for the boundary with a T), it applied section 21 of the FOI Act, which exempts information which is otherwise easily available to the applicant.
44. The council informed the complainant that he could obtain a copy of the information from the Land Registry. Whilst there is no direct equivalent to section 21 of the FOI Act in the Regulations the Commissioner takes into consideration Regulation 6(1)(b) (read by way of Article 3) of the Directive.
45. Article 3(4) of Directive 2003/4/EC provides that:

"Where an applicant requests a public authority to make environmental information available in a specific format (including in the form of copies), the public authority shall make it so available unless:

it is already publicly available in another form or format, in particular under Article 7, which is easily accessible by applicants; or

It is reasonable for the public authority to make it available in another form or format, in which case reasons shall be given for making it available in that form or format."
46. Regulation 6(1)(b) states that:

6. - (1) *Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless –*

(b) the information is already publicly available and easily accessible to the applicant in another form or format.

47. A copy of the map held by the council is publicly available from the Land Registry. The complainant argues however that the Land Registry would only provide deeds of his land to him whilst he wishes to check the map for the council's side of the boundary to see if this demonstrates boundary ownership. The Commissioner is satisfied however that the complainant would be able to obtain a copy of the map from the Land Registry. The ability to view or obtain copies of the relevant deeds is not dependent upon owning the property in question.
48. The Commissioner's decision is that the information requested by the complainant is not held. However he has also decided that the copy of a map which it does hold is available from the Land Registry and is therefore exempt under Regulation 6(1)(b) even if the council were to consider that map in its place.

Regulation 13(1)

49. The council applied section 40 of the FOI Act to names and email contact details. The equivalent exception is Regulation 13.
50. Section 40 was applied to information held in part 11 of the request. The council confirmed that it had withheld the names, contact details and signatures of junior members of staff, but had not withheld the same for the details of members of staff who the complainant was already aware of.
51. The complainant did not specifically raise an issue with the redaction of this information, however he did state in his request for review that he wished a 'complete' copy of the report in question. This has been taken to mean a copy without redactions of names and contact details.
52. The Commissioner has considered whether Regulation 13 is applicable. Regulation 13 provides that the personal information of third parties can be withheld where disclosing that information would breach one of the data protection principles of the Data Protection Act 1998.
53. The relevant principle in this case is the first data protection principle. This requires that personal data shall be processed fairly and lawfully and that one of the conditions in schedule 2 of the Act is applicable.

54. The Commissioner generally considers the fairness aspect of the first data protection principle prior to considering the other factors. For a disclosure to be fair this would either lie within the expectations of the individual or it would be obvious to them that their information might be disclosed. Alternatively the circumstances surrounding the potential disclosure should be such that it would be fair to disclose the information in spite of the expectations of the individual. The First-tier Tribunal has referred to this as a 'pressing social need'.
55. The Commissioner has published guidance on the disclosure of the names and contact details of employees at a public authority at http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx.
56. The guidance suggests at para 60 that:

"In assessing whether employees can have a reasonable expectation that their names will not be disclosed, key factors will include their level of seniority and responsibility and whether they have a public facing role where they represent the authority to the outside world. A junior employee whose name appears on an email simply because they are organising a meeting or distributing a document in an administrative capacity would have a reasonable expectation that their name would not be disclosed."
57. Having considered the information the Commissioner is of the view that the council was correct to apply the exception to the names, contact details and signatures of junior members of staff. They would have no expectation that their details would be disclosed in response to a request under the Regulations unless there was a specific reason to include them. The Commissioner is satisfied that under the circumstances of this case there is not, and therefore the individuals would not have that expectation.
58. The Commissioner has therefore decided that the disclosure of the information would be unfair. He has therefore considered whether there is a pressing social need for that information to be disclosed. He considers the complainant to have a private personal interest in the issues surrounding this case rather than a strong public interest or a pressing social need.
59. His decision is therefore that Regulation 13 applies to the relevant information.

The manner of the council's refusal notice

60. Part of the complaint to the Commissioner questioned the manner of the council's response to his requests. The complainant accused the council's response of being evasive as regards specific requests for information or for questions to be answered in as straight forward a manner as possible. He also considered that he should be able to obtain a straightforward response from the council which does not include defensive statements. In the complainant's view these were being included to persuade the Ombudsman that its arguments were correct should he decide to make a formal complaint.
61. Regulation 14 sets out the requirements for providing a response to a request for environmental information. The Commissioner has no powers to consider the manner of the refusal notice providing that the council meets with its obligations under the Regulations. The Commissioner has outlined above the council's failure to consider the requests under the correct regime, and therefore to provide an appropriate response to the complainant using the correct legislation and exceptions. Other than this however he considers that the equivalent exceptions under the EIR are applicable. He cannot consider the complainant's other concerns further.

Right of appeal

62. 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

63. 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.
64. 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
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