

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 14 May 2014

Public Authority: Darlington Borough Council
Address: Town Hall
Darlington
DL1 5QT

Decision (including any steps ordered)

1. The complainant made a request to Darlington Borough Council ("the Council") for information regarding the cutting back of a hedgerow. The Council disclosed some information to the complainant at the time of the request and some further information was disclosed during the course of the Commissioner's investigation. The complainant has complained that the Council has failed to disclose all of the information it holds.
2. The Commissioner's decision is that the Council has now disclosed all of the information it holds falling within the scope of the request but that it breached regulation 5(1) and 5(2) by failing to disclose some of the information within 20 working days. The Commissioner requires no steps to be taken.

Request and response

3. On 3 September 2013 the complainant made a request for information to the Council which read as follows:

"I make a FOI request for all of the documentation relating to the cutting of the hedgerow along the bridle way 21. I understand it was carried out by Street Scene. This work was done before the bridleway was refurbished by Darlington Golf Club commencing 13th May 2013. Please confirm when the hedgerow was cut."
4. The Council responded to the request on 3 October 2013 when it disclosed an extract from a notebook which appeared to show the work

on Green Lane was carried out on 17 and 18 December 2012. However, the Council separately confirmed that the hedgerow was cut on 15 and 16 November 2012.

5. The complainant subsequently asked the Council to carry out an internal review of its handling of his request and to explain the apparent discrepancy between the two dates given.
6. The Council presented the findings of the internal review on 15 November 2013. First of all it informed the complainant that the request ought to have been dealt with under the Environmental Information Regulations 2004 (EIR) rather than the Freedom of Information Act 2000 (FOIA) as the request was considered to be a request for environmental information. The Council was unable to offer any explanation for the apparent discrepancy between the two dates, however it did provide an email which it said was also found to fall within the scope of the request.
7. On 25 November 2013 the Council contacted the complainant again to confirm that the request was being dealt with under the EIR. It also confirmed that the work undertaken by StreetScene on Green Lane took place on 17 and 18 December 2012 as recorded in the extract from the notebook which it originally provided.

Scope of the case

8. On 13 December 2013 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The Commissioner agreed with the complainant that the scope of his investigation would be to consider whether the Council had disclosed all of the information it held falling within the scope of the request.

Reasons for decision

Regulation 5(1) – duty to make environmental information available on request

9. The complainant believes that the Council holds further information falling within the scope of the request. In particular, the complainant disputes the Council's explanation that the cutting back of the hedgerow was carried out in December 2012. Rather, the complainant believes that this was more likely done after April 2013. The EIR, like FOIA, provides for access to recorded information whether or not it is accurate. It is not for the Commissioner to comment on the accuracy of information held by a public authority, however, the Commissioner has considered whether the Council holds information regarding the possible cutting of the hedgerow after the December 2012 date as suggested by the complainant.
10. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
11. In this case the Commissioner asked the Council to outline what steps it took to search for the requested information, whether any information relevant to the request had been destroyed and if there was a business need or any statutory requirement to retain the information requested by the complainant.
12. In response the Council confirmed that once received, the request was assigned to StreetScene (that part of the Council responsible for environmental services), who were asked to check their records and provide any information falling within the scope of the request. StreetScene confirmed that the following records were checked:
 - The StreetScene Operative's notebook – this would record any works undertaken, whether scheduled or unscheduled;
 - The Council's customer relationship Management database – this would confirm whether any requests for unscheduled works had been requested; and
 - The annual maintenance schedule – this would confirm whether the works were undertaken as part of annual maintenance.

13. The Council also confirmed that to the best of its knowledge no information falling within the scope of the request had been deleted and that whilst there was no statutory requirement to hold the information there was a business purpose to hold the information for the management and maintenance of Council owned hedges.
14. The bridleway where the hedge cutting took place is used by the local golf club which had recently carried out resurfacing work to improve the condition of the road. It had been suggested that the cutting of the hedge was linked to this work. In light of this the Council also checked its records relating to the Green Lane resurfacing work carried out by the Golf Club. At the internal review stage, a number of key officials who had had some involvement with the Golf Club in respect of the resurfacing of Green Lane were also asked to check their e-mails for any information relating to the cutting of the hedgerow.
15. The complainant had suggested that there must have been some instruction to Streetscene for it to complete the hedge cutting which the Council confirmed took place in December 2012 and the Commissioner asked the Council to comment on this. In response the Council explained that the work was part of its annual maintenance schedule and as such there were no specific instructions. The complainant also suggested that despite what the Council had said there must have been further hedge cutting which most likely took place after April 12 2013 and there must be information relating to this. On this point the Council also explained that its maintenance schedule of Council owned hedges runs throughout the winter months due to the restrictions conferred by the Wildlife and Countryside Act 1981, which prevents the Council from cutting back hedges during the bird nesting season (the Commissioner understands that this is generally considered to be 1 March to 31 July) unless urgent maintenance is needed.
16. The Commissioner has considered the Council's handling of the request and he is satisfied that it took all reasonable steps to search for the requested information by carrying out searches of all locations where relevant information would be held and by approaching all of the key officials who might be expected to have knowledge of the hedge cutting referred to by the complainant. The Commissioner notes that the complainant maintains that the hedge cutting likely took place after April 2013 but it seems unlikely this was done with the Council's involvement due to the restrictions in place during the bird nesting season. The Council has also disclosed to the complainant a copy of its operator's handbook and a maintenance schedule demonstrating that the only time the hedgerow was cut in the manner referred to by the complainant was in December 2012. In light of this, and without any evidence to the contrary, the Commissioner must accept that the Council holds no

further information falling within the scope of the request beyond that which has been disclosed to the complainant.

17. Whilst the Commissioner accepts that all relevant information has now been disclosed, he notes that the Council disclosed some information outside of the 20 working day time limit. Regulation 5(1) of the EIR requires public authorities to make environmental information available on request and regulation 5(2) requires that information is made available no later than 20 working days following receipt of the request.
18. Some information was disclosed at the internal review stage and some further information was only disclosed during the course of the Commissioner's investigation, therefore the Commissioner has recorded a breach of regulation 5(1) and 5(2).

Right of appeal

19. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

20. 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.
21. 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

Pamela Clements
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