

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 13 April 2023

Public Authority: Kings Lynn and West Norfolk Borough Council

Address: King's Court
Chapel Street
King's Lynn
PE30 1EX

Decision (including any steps ordered)

1. The complainant requested a copy of legal advice King's Lynn and West Norfolk Borough Council (the "council") intended to obtain in relation to the diversion of a public footpath.
2. The council refused the request, citing section 42 (legal professional privilege) of the Freedom of Information Act 2000 ("FOIA").
3. The Commissioner's decision is that, at the time of the request, the council did not hold the information specified by the complainant; therefore it is entitled to rely on regulation 12(4)(a) of the EIR (information not held) as its basis for refusing the request.
4. However, as the council failed to issue its refusal notice within 20 working days, and also incorrectly considered the request under the FOIA rather than the EIR, the Commissioner has found a breach of regulation 14(2) and 14(3) of the EIR respectively.
5. The Commissioner does not require the council to take any steps as a result of this decision notice.

Request and response

6. On 23 July 2022, the complainant made the following request:

"I have been advised by the planning department that the council intends to seek legal advice regarding the order No. 2022 related to the public footpath No. 18 in Snettisham and raised by the council under Section 257 of the TCPA 1990.

Please take this communication as a formal request under the abovementioned Act Part 1 clause 8, to provide me with a copy of all the of any legal advice provided to the council at the earliest opportunity."

7. The council refused the request on 24 January 2023 on the basis that section 42 of FOIA (legal professional privilege) applied.
8. The council upheld this position on internal review on 21 February 2023.

Reasons for decision

9. The requested information relates to activities affecting or likely to affect the state of elements of the environment. As such, the Commissioner is satisfied that the information is environmental information under regulation 2(1)(a) of the [EIR](#). For procedural reasons, he has therefore assessed this case under the EIR.
10. The Commissioner most often finds that a public authority's arguments in support of the application of section 42 of FOIA are relevant, and transferable, to regulation 12(5)(b) of the EIR (course of justice).
11. However, in this particular instance, the Commissioner regards it to be appropriate to firstly consider whether the council holds information that is relevant to the request. The reason for this decision is explained in the analysis below. If necessary, the Commissioner will then go on to consider whether the council is entitled to rely on regulation 12(5)(b) of the EIR as its basis for refusing the request.

Regulation 12(4)(a) – information not held

12. Regulation 5(1) of the EIR requires a public authority that holds environmental information to make it available on request.
13. Regulation 12(4)(a) of the EIR allows a public authority to refuse to provide the requested information, if it does not hold it at the time that the request is received.

14. Based on the evidence available to him, the Commissioner's decision is that, on the balance of probabilities, the council did not hold information falling within the scope of the request at the time that the request was made, and so the exception provided by regulation 12(4)(a) is engaged.
15. Should the complainant believe that the information they require is now held by the council, then they may wish to consider submitting a new request for that information under the EIR. However, to be clear, when making an information request, they should bear in mind that a public authority is only ever required to consider information that is held (or not held) at the time that the request is received.
16. As no information within the scope of the request was held at the time of the request, the Commissioner can only find that the public interest in maintaining the exception at 12(4)(a) of the EIR outweighs any public interest in disclosure, simply because there was no information to disclose at that time. Furthermore, in light of the decision that the information is not held, the Commissioner does not consider it necessary to go on to consider the exception at regulation 12(5)(b) of the EIR.

Procedural matters

44. The complainant submitted their information request on 23 July 2022. However, it was not until 24 January 2023, that the council responded. The Commissioner notes therefore that the delay in dealing with the request in this case was particularly severe, and well past the required 20 working days. Furthermore, the council incorrectly issued a refusal notice under FOIA.
45. As the council failed to issue a refusal notice within 20 working days, the Commissioner has found a breach of regulation 14(2) of the EIR. In addition, as the council responded under FOIA and not the EIR, the Commissioner has found a breach of regulation 14(3) of the EIR.
46. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. This will align with the goal in his draft [Openness by Design strategy](#) to improve standards of accountability, openness, and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our [Regulatory Action Policy](#).

Right of appeal

17. 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

18. 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.
19. 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

Suzanne McKay
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF