

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

Date: 21 June 2023

Public Authority: Lincolnshire County Council
Address: County Offices
Newland
Lincoln
Lincolnshire
LN1 1YL

Decision (including any steps ordered)

1. The complainant has requested information about the Louth Active Travel Scheme. Lincolnshire County Council ("the Council") disclosed some information and withheld the remainder under regulation 12(4)(d) (Material still in the course of completion, etc.), regulation 12(4)(e) (Internal communications), and regulation 13 (Personal data).
2. The Commissioner's decision is that the Council is entitled to withhold which it withheld under regulation 13, but is not entitled to withhold information under regulation 12(4)(d) and regulation 12(4)(e).
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose that information withheld under regulation 12(4)(d) and regulation 12(4)(e), ensuring that any personal data is redacted where necessary.
4. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner

making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 6 November 2022, the complainant wrote to the Council and requested information in the following terms:

"Louth Active Travel Scheme Interim Impacts and Equality Training

Please disclose:

1. LCCs Interim Impacts thinking, whether a 'rolling' Equality Impact Assessment [Sheakh v L B Lambeth] or otherwise. Anything recorded, eg memos, emails or reports etc should suffice.

This does not have to be formal. Anything which says what LCC thought would be the effects on different people with 'protected characteristics'; how they have evolved and whether they distinguished between a] being in a safe pedestrian zone and b] getting there which are very different.

2. What training, advice or expertise LCC Highways receive or have in Equality and Disability.

This is a follow-up to 4373541 and 4698757. LCC intend to do an Equality Impact Assessment at the end of the scheme which could be interpreted as 'box-ticking'. Since then we have seen some actions ['adjustments'] on the Active Travel scheme but not the thinking behind them and how far they remove or mitigate which disadvantages.

The purpose of an Equality Impact Assessment, however basic, in any form and whatever it is called, is not only to see the effect of any proposed changes on groups with different 'protected characteristics', but also to enable making adjustments to remove or mitigate disadvantage to disabled people. Making 'Reasonable Adjustments' is an anticipatory duty under section 20 of the Equality Act 2010, so cannot wait until the end of a project. What is 'reasonable' depends on various factors."

6. The Council responded on 12 December 2022. In respect of part 1 of the request, it stated that information was held, but exempt under

regulation 13. In respect of part 2 of the request, it disclosed information.

7. The complainant sought an internal review on 13 December 2022. The complainant contested that further information was held in respect of part 1 of the request (beyond that withheld under regulation 13). The complainant also clarified their request (following on from the Council's disclosure to part 2 of the request):

"In part two you have confirmed that staff are EQA trained. LCC have made EQA mitigations and changes to the Louth scheme. I wish to see recorded information about the thinking behind those mitigations and changes."

8. Following an internal review, the Council wrote to the complainant on 23 January 2023. In respect of part 1 of the request, it disclosed further information that it had identified. In respect of part 2 of the request, the Council confirmed that further information was held, but was withheld under regulation 12(4)(e) and regulation 13.
9. The Council provided an updated internal review on 10 March 2023. In this it stated that the information withheld under regulation 12(4)(e) was also withheld under regulation 12(4)(d).

Reasons for decision

Is the requested information environmental?

10. Regulation 2(1) of the EIR defines environmental information as being 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, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment 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)...as well as measures or activities designed to protect those elements;

- (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
11. The requested information relates to ways in which people may be impacted by built structures. The Commissioner believes that the requested information is likely to be information on the state of human health and safety within the meaning of (f). For procedural reasons, he has therefore assessed this case under the EIR.

Regulation 13 – Personal data

12. Regulation 13 provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
13. Section 3(2) of the Data Protection Act 2018 defines personal data as:
- “any information relating to an identified or identifiable living individual.”**
14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. In this case, the Council has withheld the written feedback it has received from the public in respect of an 'Active Traffic Regulation Order', in addition to the identity of an officer who wrote a letter on behalf of the Council. The Council considers this information to fall within scope of part 1 of the request.
16. In respect of the written feedback from the public, it is noted by the Commissioner that this information, representing detailed and specific opinions held by individuals, was submitted voluntarily to the Council following a request for feedback. The Commissioner considers that the identities of each of these individuals may be reasonably identifiable to

other individuals based on the content of their opinions. As such, the Commissioner is satisfied that the information represents personal data.

17. In respect of the officer's identity, the Commissioner is satisfied that this represents personal data.
18. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
19. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
20. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.
21. The Commissioner considers that the complainant is pursuing a legitimate interest – transparency about the Council's invitation for public feedback – and that disclosure of the requested information is necessary to meet that legitimate interest.
22. However, the Commissioner recognises that the information may be related to identifiable individuals.
23. In respect of the written feedback from the public, the Commissioner has recently considered a similar situation in decision notice IC-220114-W0L9¹, in which he considered the feedback received by a public authority as part of a staff survey, and found that disclosure would breach the Data Protection Act 2018. In the circumstances of this case, there is no indication to the Commissioner that the individuals would have held a reasonable expectation that their feedback would be disclosed into the public domain under the terms of the EIR. In such a context, the Commissioner considers that the individuals will have provided their opinions in the expectation of privacy.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4025233/ic-220114-w0l9.pdf>

24. In respect of the identity of the officer who wrote the letter on behalf of the Council, the Council has explained that the officer only wrote to those businesses whose feedback was sought, and that their identity is not otherwise known to the public. The Commissioner's guidance on the personal data of public authority staff² explains that identities will typically be disclosed where the individuals are senior officers, or otherwise representing their authority to the outside world. In the circumstances of this the Commissioner considers that neither circumstance applies, and that the individual would not expect their identity to be disclosed to the public under the EIR.
25. The Commissioner has determined that there is insufficient legitimate interest to outweigh the fundamental rights and freedoms of the individuals. Therefore, he considers that there is no legal basis for the Council to disclose the information and to do so would be in breach of principle (a).
26. The Commissioner's decision is that the Council is entitled to rely on regulation 13 of the EIR to refuse to provide the information. The Commissioner requires no further action to be taken by the Council in relation to this information.

Regulation 12(4)(e) – Internal communications

27. Regulation 12(4)(e) of the EIR states that information is exempt if it represents internal communications.
28. Regulation 12(4)(e) is a class-based exception. This means that there is no requirement to consider the sensitivity of the information in order to engage the exception. The exception is subject to a public interest test under regulation 12(1)(b), and the exception can only be maintained should the public interest test support this.
29. The Council has applied regulation 12(4)(e) to email correspondence, which it considers would fall within scope of part 2 of the request. The Commissioner has reviewed the information and is satisfied that it represents internal communications. As such, the Commissioner is satisfied that regulation 12(4)(e) is engaged.
30. In considering the public interest test, the Commissioner has reviewed the Council's arguments, as stated in both its response and internal

² https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

review outcomes (to the complainant), and confirmed in its submissions to the Commissioner.

31. Having done so, the Commissioner does not consider that the Council has demonstrated that the public interest favours the exception. The Commissioner notes that the Council's arguments are largely generic and absent of any specific details about the content or circumstances of the information.
32. For example, whilst it is understood by the Commissioner that the information relates to an active traffic regulation order (which the Commissioner understands is experimental) there is no clear explanation of why, at the time of the request it was important to maintain a 'safe space' – and what the specific damage would be to the Council in the alternative, or when the need for the safe space would elapse due to other factors.
33. Having considered the above, there is no clear arguments available for the Commissioner that support the exception being maintained.
34. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. In this case, the absence of any clear arguments for the exception being maintained means that the Commissioner must conclude that the public interest favours disclosure.

Regulation 12(4)(d) – Material still in the course of completion, etc.

35. Regulation 12(4)(d) of the EIR states that information is exempt if it represents material still in the course of completion, unfinished documents, or incomplete data.
36. Regulation 12(4)(d) is a class-based exception. This means that there is no requirement to consider the sensitivity of the information in order to engage the exception. The exception is subject to a public interest test under regulation 12(1)(b), and the exception can only be maintained should the public interest test support this.
37. The Council has applied regulation 12(4)(d) to email correspondence, which it considers would fall within scope of part 2 of the request. This is the same information that the Council also applied regulation 12(4)(e) to. The Council has stated that it considers this information to fall within the 'material still in the course of completion' limb of the exception.
38. The Commissioner has reviewed the withheld information. Having done so, the Commissioner does not consider that the Council has evidenced that it represents 'material still in the course of completion'.

39. This is because the basis of the Council's position appears to be that the 'material' is the active traffic regulation order referenced above.
40. The Commissioner's guidance on this regulation³ explains that the 'material' cannot be something that does not physically exist, like a project, an exercise, or a process.
41. For this reason, that Commissioner is not satisfied that regulation 12(4)(d) is engaged.

Other matters

42. The Commissioner reminds the Council of the importance of providing case-specific arguments in any situation where it seeks to withhold information under the FOIA or EIR.
43. The necessity of this, and explanation of the factors and detail required, is impressed by the Commissioner's guidance and prior decision notices, which the Council was referred to in this case. In particular, the Commissioner refers the Council to the example decision notice that it has itself cited (FER0511503⁴). This decision notices demonstrates the detail that the Commissioner would expect to be evidenced in the application of regulation 12(4)(e).

³ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/regulation-124d-eir/#whatdoesthe>

⁴ https://ico.org.uk/media/action-weve-taken/decision-notices/2014/961336/fer_0511503.pdf

Right of appeal

44. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

45. 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.
46. 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

Daniel Perry
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