

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

Date: 13 September 2024

Public Authority: Swansea Council
Address: Civic Centre
Oystermouth Road
Swansea
SA1 3SN

Decision (including any steps ordered)

1. The complainant requested from Swansea Council (the Council) information regarding road inspection reports. The Council withheld the information under section 12(5)(b) (course of justice) of the EIR.
2. The Commissioner's decision is that the Council was entitled to withhold the requested information under regulation 12(5)(b) of the EIR. He does not require the Council to take any steps as a result of this decision.

Request and response

3. On 11 March 2024 the complainant wrote to the Council and requested information in the following terms:

“As an ongoing dispute with the Insurance company, can you please supply me with copies of the last five years reports for this area. Have been informed they occur annually but may include additional reports if the area has been repaired during the twelve months intervals.”

4. On 21 March 2024 the Council responded. It said the request was dealt with under the EIR and confirmed it holds information relating to the request. However, the Council withheld it under section 12(5)(b) (course of justice) of the EIR.
5. On 10 April 2024 the complainant asked for an internal review.
6. On 16 April 2024 the Council provided its review response and maintained its original position.

Reasons for decision

7. This reasoning covers why the Council was entitled to rely on regulation 12(5)(b) of the EIR to refuse to comply with this request.

Regulation 12(5)(b) – course of justice

8. Regulation 12(5)(b) allows a public authority to refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
9. By “adversely affect” this means there must be an identifiable harm to or negative impact on the interests identified in the exception. Also, the threshold for establishing adverse effect is high, because it is necessary to establish that disclosure “would” have an adverse effect.
10. The exception is wider than simply applying to information which is subject to legal professional privilege (‘LPP’). Even if the information is not subject to LPP it may still fall within the scope of the exception if its disclosure would have an adverse effect upon the course of justice or the other issues highlighted.
11. The Council provided the Commissioner with a copy of the withheld information: inspection schedules and claim report from 2018 to 2023 for the area in question. The Council confirmed its application of the exception is to the entirety of this report.
12. The Council explained to the Commissioner about how it deals with requests for road inspection reports. It stated that disclosure of these reports, could potentially make the Council vulnerable to fraudulent claims for alleged damage to vehicles, “through the identification of specific road defects which the Council had become aware of but had not yet repaired”.

13. The Council said it has a duty to protect public funds from the expense involved in dealing with such unfounded claims for damages. The Council stated that in preparing its response, it considered the Commissioner's guidance on the exception along with a previous decision notice FER0611819¹ in which the request, also related to road inspection reports by local authorities.
14. In response to the Commissioner's questions, the Council said it is relying on the course of justice in its broad reach here. It referred to the example within the Commissioner's regulation 12(5)(b) guidance:

"In *Rudd v the Information Commissioner & the Verderers of the New Forest* (EA/2008/0020, 29 September 2008), the Information Tribunal commented that 'the course of justice' does not refer to a specific course of action but is "a more generic concept somewhat akin to 'the smooth running of the wheels of justice'".
15. The Council confirmed it is not relying on legal professional privilege nor on litigation privilege in this case. Also, it is not relying on the argument that disclosure would adversely affect an inquiry.
16. Having viewed the withheld information and considered the Council's reasoning, the Commissioner accepts disclosure could result in fraudulent claims being made to the Council for alleged damage to vehicles due to the potholes. Therefore, the Commissioner considers the requested information engages regulation 12(5)(b) of the EIR.

Public interest test

17. As the Commissioner is satisfied the exception is engaged in this case, he has considered the context of the information, in order to determine whether the public interest in maintaining the exemption outweighs the public interest in favour of disclosure.

Public interest arguments in favour of disclosure

18. The Council recognises transparency with regard to how it spends available funds on road repair. It also recognises public safety, namely driver awareness of a road's condition before choosing to travel.

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624521/fer_0611819.pdf

19. The Commissioner acknowledges the Council has a responsibility to assure the public that appropriate steps are taken relating to road repairs. The disclosure of the information would be helpful in identifying the frequency of safety inspections within the area in question. It would provide some degree of transparency on the Council's actions concerning safety and road maintenance.

Public interest arguments in favour of maintaining the exception

20. The Commissioner understands that the complainant's vehicle had been damaged as a result of driving over a series of potholes within the area in question. It appears that the complainant is seeking to prove the Council's liability for this damage, there is an ongoing dispute with the insurance company and he proposes to take the matter to court. However, the Commissioner views this to be a private interest rather than a public interest and so it cannot be considered as an argument in favour of disclose.
21. The Council argued the legal responsibility which it has in order to prevent fraudulent claims on the public purse. It stated that there is another regime to request the information, and said "should a claim be brought (indicating the date and time of the alleged incident), under part 36 of the Civil Procedure Rules, the most recent/relevant road report would be submitted as evidence to the court." The Council further argued that the information is disclosable to the complainant via another gateway without publishing it more widely through the EIR.
22. The Commissioner is aware that in this situation, the information is disclosed only to the individual or their legal representative, and not to the wider world. Consequently, the Council has fulfilled its duty under part 36 of the Civil Procedure Rules, and the claim could then progress accordingly.

Balance of the public interest

23. The Commissioner accepts there is a clear interest in public authorities being accountable to their responsibilities, particularly in relation to public safety. He is also aware of the public's interest in how the Council spends funds on road repairs.
24. However, in this case, the Commissioner considers there is a public interest in withholding the information requested. The Council's explanation of how the information could be used to assess the legitimacy of claims, is based on clear logic. The Commissioner is of the view that disclosure would undermine the course of justice. This is because the information which the complainant needs to be provided with, would be available through the normal rules of disclosure.

25. The access regime provided through the Civil Procedure Rules, would result in the necessary withheld information being disclosed as part of any legal proceedings resulting from a complainant submitting a claim. It is possible the courts would consider some information should be withheld under the normal disclosure rules, and therefore, a disclosure under the EIR could undermine the decision of the court in this respect.
26. The Commissioner acknowledges that there is a more appropriate regime than the EIR for accessing information relevant to a claim. The information is disclosable to the requester through another gateway without publishing it more widely by means of the EIR. The Council stated "this process would decide the scope of relevant material, which would identify a more specific timeframe."
27. The Commissioner believes that a genuine claimant would not be disadvantaged by non-disclosure of inspection schedules under the EIR. He understands that the issue in this case, relates to the decision made by the complainant's insurance company about his claim: car tyre damage due to potholes. He notes the request relates to an incident being investigated by an insurance company, and the Council considered this request of "five years of reports" to be excessive for the purpose expressed. The Council said that "any member of the public has three years to bring a claim for compensation for hitting a pothole." The Commissioner also acknowledges the Council's argument that using the EIR to circumvent the rules, and placing this information into the public domain outside the legal process, would be unfair.
28. The Commissioner accepts the Council's raised issue of potential fraudulent claims if this information is disclosed to the public. He also accepts that although the information relates only to one particular road, it would still provide potentially useful information to individuals wishing to make a fraudulent claim. The information would assist individuals in identifying road defects which the Council had knowledge of but not yet repaired. This would highlight periods of time for which fraudulent claims for damage to vehicles could be submitted to the Council.
29. The Commissioner is aware that the Council has a legal responsibility to challenge fraud and to protect the public purse from fraudulent claims. The disclosure of the withheld information would therefore hinder the Council in fulfilling this obligation. It would provide information which would assist in allowing individuals to understand the frequency of its road checks, and the length of time it takes to address defects which are found, resulting in potentially fraudulent claims.

Conclusion

30. The Commissioner concludes that there is a public interest in maintaining the exception. He would expect strong opposing factors, or if there were no alternative means of accessing evidence pertinent to a claim, then these would equal or outweigh that public interest. However, there were no such arguments presented in this case.
31. The Commissioner's decision is that the Council was entitled to apply regulation 12(5)(b) of the EIR to the requested information.

Right of appeal

32. 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

33. 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.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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