

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

Date: 31 October 2024

Public Authority: Kent County Council
Address: Sessions House
County Hall
Maidstone
Kent
ME14 1XQ

Decision (including any steps ordered)

1. The complainant requested various information about the maintenance of roadside ditches. Kent County Council (the Council) provided some information, stated other information was not held and applied section 12 (appropriate limit) of the FOIA to other parts of the request. In its internal review, the Council reconsidered the request under the EIR, and stated that compliance with the request would be manifestly unreasonable and, as such, it considered regulation 12(4)(b) to apply.
2. The Commissioner's decision is that the Council has correctly applied regulation 12(4)(b) to the request. The Commissioner also finds that the Council complied with its obligation under regulation 9(1) to offer advice and assistance. The Commissioner does not require any steps to be taken.

Request and response

3. On 1 August 2023 the complainant wrote to the Council and requested information in the following terms:

1. The data I am requesting is over the last 5 years (2018-2023) on the Unclassified road network.
 2. How many roadside ditches have been identified by KCC (as distinct jobs) for maintenance and over what total linear distance?
 3. How many of these originated from public notification of a problem and how many on account of KCC's own inspections?
 4. How many of these were identified as KCC's responsibility and how many as being for the adjoining landowner?
 5. What proportion of such identified KCC jobs were signed off as complete and how long did that take to happen - on average?
 6. Of those that were defined as the responsibility of a landowner, how many resulted in contact being made by KCC staff with that landowner?
 7. Of those landowners contacted how many agreed to do the work?
 8. Of those cases how many were checked and signed off and how long did it take on average?
 9. Of those contacted how many refused to do the work?
 10. Of those, how many received follow up correspondence formally asking them to do the work?
 11. Of those that refused to do the work, how many of them received formal Notice under the relevant legislation?
 12. In how many cases did KCC, on receiving a refusal from a landowner, do the work themselves (whether or not a Notice was served)?
 13. Of those cases, how many landowners were sent a bill for the costs incurred by KCC in doing their maintenance work?
 14. Of those, how many paid the amount due?"
4. The Council responded on 7 September 2023, provided some information, advised that some information was not held, and stated that compliance with the remaining parts of the request would exceed the appropriate limit and as such section 12 of the FOIA applied.
 5. On 12 February 2024 the complainant requested an internal review of the Council's handling of the request. They also indicated that the response contradicted other information they had received from a councillor concerning maintenance of roadside ditches.

6. The Council provided the outcome of its internal review on 18 March 2024. It confirmed that the request should have been considered under the EIR as opposed to the FOIA. The Council stated that its initial response stating that some information was not held was incorrect. It acknowledged that it was capable of answering all parts of the request, however, to do so would impose a significant burden, and as such, it considered the request to be manifestly unreasonable and regulation 12(4)(b) applied.

Scope of the case

7. The complainant contacted the Commissioner on 17 May 2024 to complain about the way their request for information had been handled.
8. The scope of the Commissioner's investigation into this complaint is to determine whether the Council correctly applied regulation 12(4)(b) to the request.

Reasons for decision

Is the requested information environmental?

9. 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);
10. The Commissioner interprets the definition of environmental information widely, and considers information concerning, about or relating to measures, activities and factors likely to affect the environment to be environmental information.
 11. The request in this case is for information relating to the maintenance of roadside ditches. The Commissioner is satisfied that the maintenance of roadside ditches constitutes a "measure", as defined in regulation 2(1)(c) of the EIR which affects or is likely to affect the elements of the environments outlined in regulation 2(1)(a) of the EIR. Therefore, the Commissioner considers that the request was for environmental information as defined by regulation 2(1) of the EIR.

Regulation 12(4)(b) – manifestly unreasonable requests

12. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose environmental information to the extent that the request for information is manifestly unreasonable.
13. There is no definition of 'manifestly unreasonable' under the EIR, but the Commissioner's opinion is that 'manifestly' implies that a request should be obviously or clearly unreasonable for a public authority to respond to in any other way than applying this exception.
14. In the Commissioner's view, the key question for public authorities to consider when determining if a request is manifestly unreasonable is whether the value and purpose of the request justifies the burden that would be placed upon the authority in complying with it.
15. The Freedom of Information and Data Protection (Appropriate Limit and Fees) ("the Fees Regulations") sets out an appropriate limit for responding to requests for information under the Freedom of Information Act 2000 (FOIA). The limit for local authorities, such as the Council, is £450, calculated at £25 per hour. This applies a time limit of 18 hours. Where the authority estimates that responding to a request would exceed this limit, it is not under a duty to respond to the request.

16. Although there is no equivalent limit within the EIR, the Commissioner considers that public authorities may use the Fees Regulations as an indication of what Parliament considers to be an unreasonable burden, when responding to EIR requests. However, the public authority must balance the estimated costs against the public value of the information which would be disclosed, before concluding whether the exception is applicable.
17. Under the Fees Regulations, in estimating the time and burden involved in responding to a request, a public authority may take account of the time it would take to:
 - determine whether it holds the information;
 - locate that information or a document which may contain the information;
 - retrieve the information or a document containing it; and
 - extract the information from a document containing it.
18. Furthermore, unlike FOIA, under the EIR public authorities are entitled to include the time taken to consider the application of exceptions when calculating the cost of compliance with an EIR request.

The Council's position

19. In its internal review response, the Council stated that:

"Due to the way the data is currently structured in the highways WAMS case management system, the Council does not have the functionality to run automated reports for the exact information you have requested. This is because the information would be contained in free text fields or supplementary documents".
20. The Council acknowledges that although the information requested is not held in an easily accessible format, it is likely to hold the 'building blocks' of the requested information.
21. In light of the above, the Council's position is that in order to collate the information requested, it would be necessary to manually review each individual drainage enquiry to ascertain whether it is relevant to the request. It would then be necessary to carry out relevant cross-referencing to obtain information in relation to each part of the request.
22. The Council undertook a search and identified a total of 51,982 drainage enquiries that would need to be reviewed in order to determine if they relate specifically to a drainage ditch along an unclassified road. In its initial response, the Council advised that even if it assumed that it would

take one minute to review each drainage record and identify the answer to each specific question, this would require over 866 hours of officer time.

23. In its internal review response, the Council advised that, due to the amount of manual reviewing required to respond to the request, it would take longer than the illustrative one minute referred to in its initial response in order to interrogate each drainage enquiry.
24. In its response to the Commissioner, the Council advised that drainage records are held within a system known as WAMs, which is a Council customer service/works ordering electronic system. It explained that roadside ditches are not Council assets and the Council does not routinely record information relating to them. They are not a Council highways responsibility and it only becomes involved if a roadside ditch causes a highway problem. WAMS does not have a category code for roadside ditches. As such, in order to locate records relating specifically to roadside ditches it would be necessary to "search title/work type with a key word search". As there is no definitive way to record roadside ditch issues, it would be necessary to use a range of keyword searches to locate the information requested.
25. In order to comply with the request, the Council advised the Commissioner that it would be necessary to undertake the following activities and processes:
 - "Log in to WAMs
 - Enter customer/enquiry service module
 - Bring up search dialogue, which includes filters (dates, road names, work group etc)
 - Search 'Ditch problems', as an example of different terms to search
 - Brings up list of enquiry listed by ref number
 - Check each reference for relevance".
26. The Council estimates it would take between 5 and 10 minutes to review each record and identify whether it is relevant to the request and, if it is, to then extract the information required to respond to each part of the request. In addition, the Council stated that "further info maybe discovered to be with the engineer, this would add extra significant time". The Council confirmed to the Commissioner that in its initial response and internal review response it made an estimate of the time for compliance. However, the estimate of 5-10 minutes that it provided to the Commissioner was calculated based on a sampling exercise undertaken of one record. The Council's total estimate for compliance with the request is therefore $51,982 \times 5 = 259,910$ minutes - $4,331.83$ hours = approximately 180.5 days.

The Commissioner's position

27. The Commissioner notes that the request asks for various specific pieces of information to incidents involving maintenance of roadside ditches. He also notes that the Council does not have a category code or recording method which would allow easy identification of roadside ditch issues from other customer service/works matters.
28. Based on the Council's representations the Commissioner accepts that it would be necessary to manually review each of the 51,982 drainage enquiries, to both determine whether it falls within the scope of the request, and then to go on to extract the specific information requested. The Commissioner notes that the complainant has asked for very detailed information covering a five year period, and he is prepared to accept that it would take an excessive amount of time to comply with the request.
29. In light of the number of records which would need to be reviewed, even if it were to only take one minute to review each one, this would still take the time for compliance with the request significantly over the appropriate limit.
30. Based on the above, the Commissioner is satisfied that complying with the request would place a disproportionate burden on the Council, both in terms of cost and resources. Therefore, the Commissioner is satisfied that the request is manifestly unreasonable and so regulation 12(4)(b) is engaged. The Commissioner will now go on to consider the public interest test.

Public interest test

31. The Council acknowledges that there is a public interest in providing the information requested as it would shed light on how it manages its funds and resources, at a time of exceptional financial pressures.
32. The Council also recognises that the complainant believes that public funds are being spent unnecessarily when private landowners should be required to carry out necessary maintenance on roadside ditches on their land. The Council accepts that there is "a distinct public interest in clarifying this issue".
33. However, the Council pointed out that extracting the data requested in its present format would place a significant burden on its resources. This time would directly affect a small team's capability to do their day job of providing essential and statutory services to the public.
34. The complainant submitted detailed representations in support of their view that there is a significant public interest in disclosure of the information requested. These are summarised below:

- There is “an epidemic of potholes” in the area, which cause damage to vehicles.
 - Residents are already paying substantial amounts as tax payers for the upkeep of roads.
 - Evidence suggests that there is a direct causal link between poorly maintained roadside ditches and the creation of potholes.
 - The Council is facing a backlog of costs for repairs to existing potholes in the county of £464 million, as stated in its Highways Asset Management Plan. Even if a small percentage of potholes are shown to be the result of poorly maintained roadside ditches, significant public money is involved in the subject matter.
35. The Commissioner recognises that the central public interest in the exception being maintained relates to preserving the Council’s resources. It is not in the public interest to require an authority to respond to a disproportionate request which places a significant burden on it, but which would not provide information of significant value to the public.
36. Even where a request would provide information of value to the public, it is not in the public interest to require the authority to fully respond to the request where it would cause such a burden on the authority that this would significantly affect its ability to carry out its other functions.
37. In this case the Commissioner accepts that there is a public interest in the maintenance of roadside ditches and any effect that has on the condition of roads, and in turn the public purse. However, taking into consideration the significant burden that responding to the request would place on the Council, the Commissioner considers that, in this case, the public interest in the maintenance of the exception outweighs the public interest in disclosure.
38. 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. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019):
- “If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...” and “the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations” (paragraph 19).
39. As covered above, in this case the Commissioner’s view is that the balance of the public interest favours the maintenance of the exception,

rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(b) was applied correctly. Therefore, the Council is not required to provide the requested information.

Procedural matters

Regulation 9 – advice and assistance

40. Regulation 9(1) requires a public authority to consider what advice and assistance it can reasonably provide to an applicant in cases where it relies on regulation 12(4)(b) of the EIR on the basis of cost. Even if this is simply to confirm to the complainant in a given case that no reasonable or practicable advice and assistance can be provided.
41. The Council's position is that, as a result of the way that the information relating to maintenance of roadside ditches is held, it is unlikely that the request as worded could be refined in a way that would reduce the burden, without significantly changing the nature and scope of the request. However, in its internal review response the Council advised that it may be able to provide information relating to specific locations.
42. In this case, the Commissioner considers that, given the broad nature of the request and the way that the Council holds information relating to it, it would be difficult to refine it in such a way that the Council would be able to provide significant information. However, the Commissioner notes that the Council has advised that it may be able to provide information relating to specific locations.
43. Considering the above, the Commissioner finds that the Council has complied with its obligations under regulation 9(1) of the EIR in its handling of the request.

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.

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