

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 November 2024

Public Authority: Cornwall Council
Address: New County Hall
Truro
Cornwall
TR1 3AY

Decision (including any steps ordered)

1. The complainant requested copies of reports held by Cornwall Council (the council) relating to visits made to a particular property on, or around, certain specified dates following reports of water in the property.
2. The Commissioner's decision is that, on the balance of probabilities, the council does not hold information falling within scope of the complainant's request, and therefore regulation 12(4)(a) (information not held) of the EIR is engaged.
3. However, as the council incorrectly considered the request under the Freedom of Information Act 2000 (FOIA), and failed to issue an appropriate refusal notice which explicitly confirmed that it did not hold the requested information, the Commissioner has found a breach of regulation 14 (refusal to disclose information) of the EIR.
4. The Commissioner does not require the council to take steps as a result of this decision notice.

Request and response

5. By way of background, on 23 January 2024, the complainant contacted the council to say that they had not received a response to an enquiry they had made for copies of reports held of past visits made to their property. They advised that South West Water had provided specific dates where both its officers, and council officers, had been called out. The complainant asked the council to confirm if its Highways department had been called out on these dates, and if so, why details of these visits would not have come up in checks made at the time of their purchase of the property.
6. On 26 January 2024, the council confirmed to the complainant that it had "received enquiries for this property in August 2020, September 2020, June 2021, August 2021, August 2022 and March 2023."
7. The council advised the complainant that if they were concerned that information about the property should have been declared by the previous owners at the time of its sale, then they should discuss this with their solicitor. The council confirmed to the complainant that recent survey work of the highway drainage line adjacent to the property had revealed no defects, but that as records show that the area is susceptible to ground water flooding, they might wish to consider checking any flood and drainage searches provided with the property purchase.
8. It would appear that, as well as chasing a response to their enquiry, the complainant also made a separate formal information request to the council on 23 January 2024, which is set out below.

"I require copies of the reports, even if they have to be redacted, relating to the visits the Highways Agency (and/or South West Water) made to my property after reports of water in the property on or around the following dates:

28th Aug 2020: 25th September 2020; 5th October 2020 and 16th July 2021."
9. On 20 February 2024, in response to their request, the council provided the complainant with a copy of an "FOI insurance report" which covered the period 1 August 2020 to 1 August 2021.
10. The complainant requested an internal review, stating that the information provided by the council related to nearby roads, and was not relevant to their request. The complainant said that they required copies of the reports relating to the visits made to their property on, or around, the dates that they had specified.

11. The council's internal review response upheld its previous position. It said that all the information held falling within scope of the request, that being the "insurance report", had been provided, and that it was appropriate to apply redactions to the "names" of individuals contained within this information under section 40 of FOIA, as it was considered to be personal information.

Scope of the case

12. The complainant has raised concerns about the council's response to their request, stating that it has not provided the information that they have asked for.
13. During the Commissioner's investigation the council confirmed that it should have considered the request under the EIR, rather than FOIA.
14. However, the council has advised that its position remains the same under the EIR, in that it does not hold any further information that is relevant to the complainant's request.
15. The Commissioner notes the request relates to matters that concern flooding and drainage management, and the effect that this might be having on the complainant's property.
16. The Commissioner considers that the information requested is environmental in nature and that the correct information access regime in this instance is the EIR.
17. The Commissioner will decide whether, on the balance of probabilities, the council holds information relevant to the complainant's request, and has complied with its obligations under the EIR.

Reasons for decision

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

18. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information "to the extent that it does not hold that information when an applicant's request is received."
19. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, must decide whether, on the civil standard of the balance of probabilities, the public authority holds

any information which falls within scope of the request (or was held at the time of the request). For clarity, the Commissioner is not expected to prove categorically whether the information is held.

The complainant's position

20. The complainant believes that the communications that they have exchanged with the council and South West Water indicate that visits were made to the relevant property on, or around, the dates they have set out in their request, and that the council should hold reports relating to these visits.

The council's position

21. The council has said that whilst its email to the complainant of 26 January 2024, confirmed that "enquiries were received" for the relevant property, this is not the information that the complainant requested, nor does it indicate that other information is held that would fall within scope of their request.
22. The council has said to the Commissioner that the description of the information set out within the complainant's request was very specific, in that it asked for copies of reports of visits made to the property "after reports of water in the property" on, or around, specified dates. The council has said that it does not hold further information that meets this description.
23. The council has confirmed that it conducted searches in all relevant areas where information falling within scope of the request would be held, including the council's Highways department and also Cormac, who provides relevant services on behalf of the council.
24. The council has also said that the searches were carried out both at the time of the original request, and at the internal review stage. It says that it is able to identify reports held based on date ranges, location, types of defects, action taken and similar, and that it is satisfied that the searches conducted of its electronic system would have identified any information held that was relevant to the request. The council has also confirmed that Cormac also cross checked its records to establish if it might hold any information relevant to the request.
25. The council has said to the Commissioner that it is possible that South West Water carried out visits and holds records of reports. However, it has said that it is satisfied that it does not hold any further information which meets the very specific description set out within the complainant's request.

The Commissioner's analysis

26. The complainant has set out a very precise description of the information that they required the council to provide in response to their request. At the internal review stage, the complainant reiterated that they specifically wanted "the reports relating to direct calls to my property, [address redacted] when the previous occupants [names redacted] were in situ."
27. Having considered all of the available information, including the searches that have been carried out by the council, it is the Commissioner's view that, on the balance of probabilities, the council does not hold any recorded information that falls within the very specific terms of the complainant's request. The Commissioner is therefore satisfied that regulation 12(4)(a) of the EIR is engaged.
28. Technically, regulation 12(4)(a) is subject to the public interest test. However, the Commissioner considers it would be illogical to find that the public interest favours disclosing information a public authority doesn't hold.

Procedural matters

29. As set out above, in the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA, it is the EIR that actually apply to the requested information. Therefore, where the procedural requirements of the two pieces of legislation differ, it is inevitable that the council will have failed to comply with the provisions of the EIR.
30. In addition, whilst the council may have considered that the information set out in the "insurance report" that it provided in response to the request could be helpful to the complainant (and the Commissioner would not want to discourage the disclosure of information which might be useful to a requester), the council should have issued a refusal notice, stating clearly that it did not hold any information meeting the description set out in the request.
31. For these reasons, the Commissioner finds that the Council did not issue an adequate refusal notice and has hence failed to comply with regulation 14 of the EIR.

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.

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