

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 17 December 2015

**Public Authority:** Solihull Metropolitan Borough Council  
**Address:** Council House  
Manor Square  
Solihull  
B91 3QB

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to safety inspection reports carried out by Solihull Metropolitan Borough Council ("the Council") on a certain area of highway during a 3 year period. The Council disclosed some of the information, however it applied regulation 12(5)(b) of the EIR as a basis for withholding the remaining information.
2. The Commissioner's decision is that the Council has correctly applied regulation 12(5)(b) of the EIR to the withheld information and that the public interest in all the circumstances of the case favours maintaining the exception as set out in regulation 12(5)(b).
3. Therefore the Commissioner requires no steps to be taken.

#### **Request and response**

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4. On 9 June 2015, the complainant wrote to the Council and requested information in the following terms:  
  
"I request all documents, memos, emails and other communications, electronic or written, internal or external, personal or official, relating to the inspection and repair of road surfaces from all directions approaching and within the confines of the road traffic interchange at the junction of A452 Kenilworth Road with the A4177 Meer End Road in Balsall Common opposite Everson's Fuel Depot."

I request all documents, memos, e-mails and other communications, electronic or written, internal or external, personal or official referring to the working parameters as indicated and accepted as appropriate policy by SMBC and, therefore, used during the inspection process to include original official recorded inspection logs, the exact method of inspection, frequency of inspection and logging of faults together with the repairs policy.

I further request copies of the original official office documents, including details of who undertook the inspections, when, how often, and the exact parameters used during the inspections."

5. The Council responded to the complainant on 7 July 2015 disclosing all of the requested information apart from inspection dates, which were redacted from the reports ("the withheld information") as the Council stated that this information was exempt from disclosure under regulation 12(5)(b) of the EIR.
6. The complainant again corresponded with the Council on 28 July 2015 and 30 July 2015 expressing her dissatisfaction with the Council's response and stating that her correspondence was a request for an internal review.
7. Following an internal review the Council maintained its position regarding the application of regulation 12(5)(b) of the EIR to the withheld information. After several exchanges of correspondence, the complainant complained to the Commissioner.

## **Scope of the Case**

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8. The complainant contacted the Commissioner on 21 August 2015 to complain about the way her request for information had been handled.
9. The Commissioner has considered whether the Council has correctly applied regulation 12(5)(b) of the EIR in this case.

## **Reasons for decision**

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10. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that is disclosure would adversely affect –
  - the course of justice, 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.

11. The successful application of the exception is dependent on a public authority being able to demonstrate that the following three conditions are met;
  - the withheld information relates to one or more of the factors described in the exception
  - disclosure would have an adverse effect on one or more of the factors cited, and
  - the public interest in maintaining the exception outweighs the public interest in disclosure.
12. When considering the balance of the public interest, a public authority must take account of the express presumption in favour of disclosure which exists in the EIR (regulation 12(2)).
13. The Council's position is that the disclosure of the dates of safety inspections for a span of 3 years would allow individuals to identify road defects that the Council had knowledge of, but had not yet repaired. This would therefore highlight periods of time for which fraudulent claims for damage, such as that which had been sustained elsewhere, could be submitted to the Council.
14. The Council has explained to the Commissioner that, if individuals seek to bring compensation claims for poorly maintained highways, they are obliged to provide details of not just the highway and evidence, but also the date or short period of time in which they believe the damage occurred, which they should already have. Consequently, the dates of safety inspections and complaints are used for the purpose of validating claims, and the public disclosure of safety inspection dates could therefore facilitate claims that are fraudulent.
15. To provide further context to its decision that the exception was engaged, the Council has referred the Commissioner to the known issue of individuals submitting fraudulent claims against local authorities, such as for damage sustained from road defects, and has provided hyperlinks to several webpages as evidence of the apparent increase in such activity.<sup>12</sup>

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<sup>1</sup> <http://www.keoghs.co.uk/news/Keoghs-warns-councils-to-be-aware-of-organised-pothole-claims>

16. Having considered these factors, the Commissioner accepts that it was more probable than not that disclosure of the information would adversely affect the course of justice, and is therefore satisfied that regulation 12(5)(b) was engaged.

**Public interest arguments in favour of disclosing the withheld information**

17. Some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
18. The Council has explained to the Commissioner that in undertaking a public interest test it has considered the presumption in favour of disclosure required by the EIR, and has additionally considered the need to ensure that individuals who have sustained damage from defects on council-maintained roads have the appropriate information available to them so as to hold the Council to account.
19. The Commissioner understands that those who have sustained damage from a road defect will be seeking to hold the Council to account. However, the Commissioner considers that this represents a private rather than a public interest, and therefore cannot be considered as an argument in favour of disclosure. Notwithstanding this, the Commissioner does consider that the Council has a responsibility to assure the public that appropriate steps are taken to keep roads free of defects, and the disclosure of the withheld dates would therefore inform the public about the frequency that safety inspections are undertaken.

**Public interest arguments in favour of maintaining the exception**

20. The Council, in its submission to the Commissioner, has advised that it has a legal responsibility to tackle fraud, and this is the first argument for maintaining the exception. The likelihood of an adverse effect occurring has already been proven in the fact that the exception is engaged, which itself indicates that the chance of fraud being committed should the withheld information be disclosed is more probable than not.

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<sup>2</sup> [http://trethowans.com/site/library/legalnews/courts\\_show\\_zero\\_tolerance\\_in\\_fraud\\_cases](http://trethowans.com/site/library/legalnews/courts_show_zero_tolerance_in_fraud_cases)

21. Secondly, the Council has stated that it has a legal obligation to protect the public purse from fraudulent claims. The disclosure of the withheld information would therefore hinder the Council in fulfilling this obligation, as it would allow individuals to circumvent one of the means by which the Council assesses such a claim for legitimacy, which could result in fraudulent claims being successful.
22. The Council has advised the Commissioner that it is required under the Civil Procedure Rules to release supporting evidence in response to a formally submitted claim. The Council has advised that this would normally include the last safety inspection prior to any alleged incident, along with reports of all complaints and repairs undertaken between the inspection and the date of the alleged incident, and would represent sufficient information to allow the claimant to take the matter to Court. This clearly indicates to the Commissioner that there is a more appropriate regime than the EIR for accessing information that is relevant to a claim and that a genuine claimant will not lose out due to non-disclosure of inspection dates under the EIR.

### **Balance of the public interest arguments**

23. The Commissioner has considered the public interest arguments put forward by the Council in this case.
24. The Commissioner appreciates that in general there is a clear interest in public authorities being accountable in relation to their responsibilities, particularly when these relate to public safety. However, the Commissioner considers that in the circumstances of this case there is a strong public interest in withholding the information. The Council's description of how the withheld information is used to assess the legitimacy of submitted claims is based on clear logic, and the Commissioner has concluded that the disclosure of the withheld information would allow individuals to identify periods of time when the Council was responsible for a road defect, and therefore facilitate attempts to defraud the public purse through making a false claim.
25. The Commissioner has also been made aware that there is an alternative access regime provided through the Civil Procedure Rules, which would result in part of the withheld information being disclosed as part of any legal proceedings resulting from a complainant submitting a claim.
26. The Commissioner is therefore of the view that there is a strong public interest in maintaining the exception. In order to equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, such as clear evidence of unlawful activity or negligence on the part of the Council, or the absence of any alternative means of accessing evidence pertinent to a claim. However, no such arguments have been put forward in this case.

27. Therefore, the Commissioner has concluded that, in all the circumstances of the case, the public interest is maintaining the exception outweighs that in disclosure of the withheld information.

## Right of appeal

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28. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

29. 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.
30. 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 .....**

**Deirdre Collins**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**