

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

Date: 28 April 2016

Public Authority: Hertfordshire County Council
Address: County Hall
Pegs Lane
Hertford
Hertfordshire
SG13 8DQ

Decision (including any steps ordered)

1. The complainant has requested information relating to how a conclusion was reached that a defect on a pavement did not warrant intervention. The Commissioner's decision is that Hertfordshire County Council does not hold further information relevant to this request. He does not require any steps to be taken to ensure compliance with the legislation.

Request and response

2. Following a previous request (council reference EIR/ENV/01/15/8168) the council received the following request for information on 13 April 2015:

"Q1...

...(c) How does the LNT account for his conclusion that the defect did not warrant intervention on 30th May when it has since been proved and acknowledged by HCC in writing that the defect in fact was 30mm deep – the same depth I had measured twice in the 6 months prior to 30th May 2014?"

3. The council responded on 11 May 2015 as follows:

"Upon request of the HCC Insurance Team the LNT inspection of 30 May 2014 did not indicate the trip hazard was over the HCC identified intervention level of 20mm footway hazard trip. Ringway are unaware of any HCC communication that contradicts this."

4. The complainant wrote to the council on 3 August 2015 as follows:

"I am not yet satisfied with the answers and would like the Question, the answers so far, the comments I made in support of the Question on the second page of my letter of 14th May 2015 and the letters HCC can access dated 20th June 2014 (10 to 18mm), 23rd July 2014 (18mm) and 22nd September 2014 (13mm or only around 20mm) to me from Gallaher Bassett, ALL to be referred for review to the Legal Services Team, Together these letters make clear the crucial nature of the Question and should be taken into account."

5. The council responded on 12 August 2015 stating that it had already provided a full response and had no further information. It also said that it would review the past requests but requires the complainant to state what his reasons are for a review and that the letters "to me from Gallaher Bassett" are outside the review process.
6. On 19 August 2015, the complainant replied that the question has not been fully answered and that the information given is untrue. He then gave his reasons why he believes the answer given is untrue.
7. On 7 October 2015 the council provided its internal review response. Regarding the depth of the defect, it said that the complainant has been given the information that is held by the council. It also said that the rest of the points refer to the complainants opinions against that of the council/Ringway and that requests under EIR only relate to information held and not opinions or responding to them.
8. The Commissioner is aware that there has been considerable correspondence between the council and complainant on this, and related, issues. However, for clarity, only correspondence which is most relevant to this particular complaint regarding the depth of the defect is detailed above.

Scope of the case

9. The complainant contacted the Commissioner on 28 October 2015 to complain about the way his request for information had been handled. The complainant's letter also contained details of two further requests

related to the overall issue. The Commissioner set up two further cases to deal with those requests¹.

10. The Commissioner has considered whether, on the balance of probabilities, the council holds information other than the LNT report, which has been provided to the complainant², within the scope of request Q1c made on 13 April 2015.
11. The Commissioner is aware that further requests were made by the complainant on 13 April 2015. For the avoidance of doubt, only request Q1c is considered in this decision notice.

Background

12. In its response to the Commissioner's enquiries in this case, the council thought it beneficial to provide some understanding of the background to this complaint and provided the following information:

"The complainant is acting on behalf of an individual, where it is alleged that due to a trip on a pavement that is maintained by the County Council, that this individual sustained an injury. A claim for the injury was submitted to the County Council's Insurance Department, who assessed the claim and reached the conclusion that the County Council was not at fault.

As part of their assessment of an injury claim for a trip or fall, our Insurance Department follow this process:

When an injury claim is received, it is set up on our Insurance Department claims handling system. This claim is then sent to Business Support Team (BST) in our Highways Department, who collate the relevant Site History such as past inspections etc and a Local Network Technician (LNT) will be requested to undertake a site visit. The LNT will record their findings on an LNT report form based upon their conclusion, which in this case is the measurement of the depth of a trip hazard. If a defect is over the acceptable tolerance level of 20mm, the LNT will raise a works order to repair the hazard/defect.

¹ ICO case references FER0608880 and FER0608881

² The LNT report was provided to the complainant by the council's insurer and also on 23 March 2016 (including the supporting photos) as part of ICO case reference FER0608880.

Once the LNT report is complete, it is provided to our Insurance Department, who use this alongside site history and inspection information to decide if the County Council is liable and has not adhered to our obligation under the Highways Act 1980. Once a report is submitted it is considered as accurate and our Insurance Department would not have any requirement to question this report, also if any proceedings were taken against the County Council then the LNT, acting in their expert capacity could be called as a witness to authenticate their report. In this case it was deemed that the County Council had observed the obligations that were placed upon us by the Highways Act 1980 as the measurement was below the 20mm level and that would be our defence if court action was taken. Defects are assessed by the Ringway LNT in line with the HCC Defect Management Approach and Assess and Decide Policy, please see attached policy of which pages 105 and 106 would concern this type of inspection."

Reasons for decision

Regulation 5 – Duty to make environmental information available on request

13. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request.
14. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held, he is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
15. The complainant made specific reference to his letter to the council of 19 August 2015. That letter states that it is untrue to say in May 2015 that Ringway were unaware of any communications that contradict that the LNT inspection of 30 May 2014 did not indicate the trip hazard was over the council's identified intervention level of 20mm because the following information was in the hands of the council in May 2015:

- "(i) My written statement that I had photographed and measured the defect twice at **30mm**-included in the letter of claim dated 9th May 2014
(ii) the photograph taken by the LNT himself acting alone on 30th May 2014 (a copy of which I sent you at your request on 4th February 2015)-which clearly is not taken at the centre of the defect and does NOT show a depth of less than 20mm but **23.5mm**
(iii) the Job Report compiled by Ringway/HCC for the temporary repair on the same day-which refers to a depth of **45mm**
(iv) the photograph taken by Ringway/HCC on 19th February clearly showing a depth of 30mm at the centre of the defect
(v) your letter dated 20th February enclosing the photographs and confirming the depth of 30mm shown in the photograph."
16. The complainant also asked the Commissioner to bear in mind all the information and proof he sent to the Commissioner including a letter dated 17 December 2015. The Commissioner has not been able to identify a letter dated 17 December 2015.
17. The Commissioner enquired as to whether the information has ever been held, the scope, quality, thoroughness and results of the searches carried out by the council, whether information had ever been held but deleted and whether copies of information may have been made and held in other locations. He also asked the council to bear in mind that under the FOIA, a question can be a valid request for information if information that answers the question is held in recorded form and therefore if the council has information in its records that answers the question of how the LNT accounts for his conclusion that the defect did not warrant intervention on 30 May, it should provide it in response to the requests.
18. The council explained that the LNT, as the expert in their field, provides a report to its Insurance Department to assist in liability deliberation. This report contains their findings of the apparent defect which they have been requested to investigate, in this case a trip hazard. In this instance, the measurement and photographic evidence were provided and act as evidence as to how this opinion was reached. The council confirmed that no further evidence would be sought from the LNT, as the report is considered as true and accurate and would be used as the basis of the council's defence if court proceeding were instigated. The report is held on the claim file by the council's Insurance Department, as is all other correspondence in relation to the claim. The council confirmed that the insurance claim file does not contain any information from the LNT in relation to how his conclusions of the measurements were reached, other than the actual report and that this was expected as this is the standard practice on all highway injury claims.

19. The council concluded the LNT's reasoning is the report and, in this case photo evidence, provided to its Insurance Department. It said that no further information exists in relation to the findings of the LNT and that it would not expect there to be any either. It further explained that, although a simple process, the provision of the LNT report is the most effective one in terms of its Insurance Department deliberating the many injury claims that it receives. It said that determination of liability is based on the expertise and evidence of the LNT as well as other key information searches carried out by the department and that this process and the acceptable tolerance level have been explained to the complainant and he has been informed by the council's Insurance Department that it does not accept liability, but the complainant refuses to accept the report and considers that the council is liable. The council said that it can do no more under the legislation than provide information that is held, which it has done in this case.
20. The council explained that in order to confirm its conclusion that no further information was held, it checked through the hard copy of the file held by its Insurance Department (as this is where all information would be held in relation to a claim). It also requested that the Customer Service Co-ordinator for Ringway, discuss with the LNT, to ascertain if any further information was held other than the report and he had not ascertained that any further information was held other than the LNT report. It confirmed that the insurance claim file did not contain any information from the LNT in relation to how the measurements were concluded other than the report containing the measurements.
21. In reaching a decision as to whether the requested information is held, the Commissioner also enquired whether there was any legal requirement or business need for the council to hold further information. The council said that there is no business or statutory reason that further information would be expected from the LNT other than the final report and supporting evidence (in this case photo evidence). It reiterated that this information is considered as a true and accurate determination of any suspected defect and which would be used as the basis of defending its position in court. It said that as there is no reason for the LNT to further endorse his conclusion other than to present his report, it only holds the report as evidence of the conclusion.
22. The Commissioner also considered whether the council had any reason or motive to conceal the requested information but has not seen any evidence of this. He understands that the complainant believes there is a valid claim against the council but it is not within the Commissioner's remit to adjudicate on this matter. His remit is restricted to consideration of whether the council has complied with its obligations under information rights legislation.

23. The Commissioner notes that the request in this case is for how the LNT accounts for his conclusion that the defect did not warrant intervention on 30 May. The council has explained that the LNT report, which has been provided, is the LNT's reasoning as to his conclusion that the defect did not warrant intervention and has provided details of the process that is followed when an injury claim is received which supports the position that that no further information is held. The Commissioner has taken into account the complainant's submissions, including those detailed in paragraph 15 but considers that these relate to the complainant's belief that there is a valid claim against the council rather than providing proof that the council holds further information in relation to the LNT's conclusions that the defect did not warrant intervention on 30 May 2014. He understands that the complainant believes the council's assertion in its response to the request that 'Ringway are unaware of any HCC communication that contradicts this' is untrue but an assessment of the accuracy of that narrative information provided by the council is not being considered in this decision. However, it should be noted that the Commissioner has not seen any communications from the council that state the depth of the defect was over 20mm. Whilst the Commissioner is not making any decision as to what the depth of the defect was, or whether there is a valid claim, he has noted, in relation to point iii) of paragraph 15, that the complainant considers that the Job Report refers to a depth of 45mm. The Commissioner was provided with a copy of the job report and notes that the measurement of 45mm refers to 'excavation dimensions' which aren't necessarily the same as defect dimensions, and therefore the complainant may not be basing his beliefs on the same information as the council.
24. The complainant asserts that if the LNT's findings were true, that being that the depth of the defect was less than defect intervention level of 20mm, he would have been in breach of the rules of intervention by requesting a same day repair without authority from the council. The Commissioner does not consider that this adds weight to the belief that further information is held within the scope of the request.
25. In the circumstances, the Commissioner does not consider that there is any evidence that would justify refusing to accept the council's position that it does not hold any further information relevant to this request. The Commissioner is therefore satisfied that on the balance of probabilities, further information is not held by the council. Accordingly, he does not consider that there was any evidence of a breach of regulation 5 in relation to such information.

Right of appeal

26. 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

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

27. 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.
28. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF