

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 12 December 2019

Public Authority: Cheshire East Council
Address: Municipal Buildings
Earle Street
Crewe
CW1 2BJ

Decision (including any steps ordered)

1. The complainant requested information from Cheshire East Council ("the Council") relating to the use of an alleyway.
2. The Commissioner's decision is that the requested information is environmental in nature; however, the Council does not hold any recorded information falling within the scope of the request, other than information which is publicly accessible on its website.
3. The Council breached the requirement, under regulation 14(2) of the EIR, to provide its refusal within 20 working days.
4. The Commissioner does not require the Council to take any steps to ensure compliance with the EIR.

Background to the request

5. The request under consideration in this notice relates to an earlier request to the Council made by a third party on an unspecified date, which read as follows:

"I request information of any restriction placed on the use of the alley (who can use alley and what type of vehicle) as a result of the installation of alley gate number 298. We also request a copy of the gating order, if one exists, and details of any consultation that took place and procedures that were followed prior to the installation of the gate".

6. The Council responded to this request on 5 December 2018 and provided some information. However, it stated that neither a gating order, nor details of any consultation exercise, was held. It referred to certain planning applications which had been approved regarding access by commercial vehicles, and regarding three "new cottages". A description of the site was provided, including a reference to a "small gate held secure by a padlock".

7. On 19 February 2019, the complainant's company wrote to the Council and requested the following information:

"We refer to your letter addressed to [named individual]... please forward a copy of all evidence or list the evidence the Council holds in support of your assertion that the alleyway, the alley gate and the rear entrance into our premises [address provided] is authorised for commercial vehicular use? Furthermore, please provide evidence in support of your assertion that our gate at 2.3 metres wide is 'narrow'?"

8. On 21 March 2019, the Council responded and stated that the information being requested was in the public domain on its disclosure log¹ by searching for the relevant gate number and address. It provided a link to a planning application which it stated was relevant. It also advised that it had stated that the gate was "small" and explained that this was an opinion, based on a site visit. The Council stated that no further information was held.

Request and response

9. On 26 March 2019, the complainant wrote to the Council as she was dissatisfied with its response. She made the following requests:
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¹ Accessible at https://www.cheshireeast.gov.uk/council_and_democracy/council_information/open-data-and-transparency/freedom_of_information/freedom_of_information.aspx

- 1) *"Please supply information you have relating to any other means of access to [redacted address]."*
 - 2) *We require information the Council holds that would otherwise grant the occupants of [redacted address] access to the car park via another entrance.*
 - 3) *Planning Approval [redacted reference]... never granted commercial vehicle use of the alleyway... We require information the Council holds that would otherwise grant unrestricted commercial vehicle use of the alleyway.*
 - 4) *In answering item 3 above, please provide details of commercial premises that have been granted approval to use the alleyway for vehicular access. There is no record of any approval that is publicly available.*
 - 5) *We require information you hold that support(s) the view that the gate is too narrow for domestic vehicular access, or that the gate is narrower than the entrance approved by the Council under [redacted reference]?*
 - 6) *You say that the 6' fence denies the occupants of [redacted address] access to the premises. Therefore, we require evidence that supports this view?*
 - 7) *Please provide information that [redacted address] is a flat or that the occupants have planning rights to use the rear parking area of the premises contrary to planning approval [redacted reference]?*
 - 8) *Please provide information that authorises commercial vehicle use of the alleyway and provide information that allows gate 298 to be accessed for business purposes?*
 - 9) *Please provide information that supports the view that the fence and gate erected under [redacted reference] in 1993 restricts access to [redacted address]?*
 - 10) *Given the alleyway is the primary (and only) means of access to [redacted address], we require evidence that gate 298 was not erected illegally in 2008?"*
10. In a letter sent by email on 23 May 2019, the Council responded as follows.
- Requests 1), 2), 4), 6), 7), 9), 10) – the Council provided an explanation of its position, referring to certain planning applications which it considered to be relevant and which were on

its website, and referring to previous responses, which could also be viewed on its website;

- Request 3) – the Council stated that it did not hold any information in relation to the relevant planning application;
 - Request 5) – the Council stated that the gate being “*small*” was the opinion of an officer who had visited the site;
 - Request 8) – the Council stated that it was likely that a consultation had taken place, but that it did not hold details of it nor a gating order, nor any other information relating to this request.
11. In summary, with regard to any recorded information relevant to the scope of these requests, the Council’s position was that all the information being requested was either in the public domain (in the context of various planning applications, which it specified by number, or on its disclosure log which includes previous FOI responses, as explained further on in this notice), or, in the case of questions 3 and 8, was not held.

Scope of the case

12. The complainant contacted the Commissioner on 30 May 2019 to complain about the way her request of 26 March 2019, which this notice considers, had been handled.
13. During the course of the investigation, the Council agreed with the Commissioner that the request of 26 March 2019 should have been considered under the EIR. The Council had not yet carried out a reconsideration of its handling of this request, since it had considered that it was a request for an internal review into its handling of the request of 19 February 2019.
14. It carried out a reconsideration in providing its responses to the Commissioner. Following the reconsideration, the Council’s position remained the same. It asserted that it did not hold any information relating to the request that it could provide to the complainant, other than information already in the public domain on its website, which it had directed the complainant to.
15. The Council provided further clarification to the Commissioner about the information already in the public domain. It explained that it had provided some information to the third party who made the request in 2018 and that, in line with its normal practice, that information was then

made available to the public on its disclosure log (referenced previously) and could be located by searching for the relevant gate number. It explained that other relevant information which it holds is also publicly available, in connection with the specified planning applications.

16. The Council's position is that no other information is held.
17. Under regulation 6(1)(b) of the EIR, a public authority is excepted from its obligation to disclose environmental information if the information is *"already publicly available and easily accessible to the applicant in another form or format"*, and this decision notice does not cover the information already in the public domain on the Council's website.
18. This notice considers whether the Council correctly stated that it did not hold any recorded information falling within the scope of the request of 26 March 2019, other than the information published on its website, and whether it handled the request in line with the procedural requirements of the EIR.

Reasons for decision

Regulation 2(1) – is the information environmental?

19. Regulation 2(1) of the EIR provides the following definition of environmental information:

"...any information in written, visual, aural, electronic or any other material form 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) and (b) as well as measures or activities designed to protect those elements..."

20. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
21. The Commissioner has produced guidance² to assist public authorities and applicants in identifying environmental information. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
22. The Commissioner notes that the requested information, if held, would relate to the use of an alley and/or car park by commercial vehicles.
23. The Commissioner has considered the definition at regulation 2(1). She is satisfied that the information, if held, would relate to measures and/or activities affecting, or likely to affect, the elements and factors of the environment. She agrees that it would be information "on" these measures and/or activities, and would therefore fall within the definition of environmental information at regulation 2(1)(c) of the EIR. The Commissioner is satisfied that the Council considered the request under the correct access regime.

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

24. Regulation 12(4)(a) states that a public authority may refuse to disclose information to the extent that it does not hold that information when the applicant's request is received.
25. As previously explained, the Council explained that some information falling within the scope of the request is publicly available. However, its position is that it does not hold any further information.
26. The Commissioner is aware that the complainant is highly dissatisfied with the Council's actions and explanations and considers that it has "*allowed a breach of planning law*". However, this is not something

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https://ico.org.uk/media/fororganisations/documents/1146/eir_what_is_environmental_information.pdf

which the Commissioner can address. Her remit in this case is to determine whether any further information is held.

27. In cases where there is a dispute over the amount of information that is held, the Commissioner applies the civil test of the balance of probabilities in making her determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held in cases which it has considered in the past.
28. The Commissioner considers the complainant's evidence and arguments. She also considers the actions taken by the public authority to check whether the information is held, and any other reasons offered by the public authority to explain why the information is not held. She also considers any reason why it is inherently likely or unlikely that information is held.
29. The Commissioner has asked the Council to provide details of the searches it carried out for information. The Council explained that officers in the Community Service, Highways Service and Planning Service all carried out searches for information when the request was received, and that the complainant had been made aware of all relevant information in the public domain. The Council also provided some general explanations in its responses to the complainant. However, no further recorded information was located.
30. The Commissioner notes that the Council used search terms including relevant addresses and various planning application numbers. It carried out its searches at both a local and corporate level.
31. The Commissioner notes that the Council has also investigated a formal complaint regarding this matter, which also required it to consider the overall position regarding the alleyway, including considering the information it held.
32. The Commissioner is satisfied that the searches carried out by the Council were adequate and appropriately-targeted, and that, if information were held, it would likely have been retrieved by the searches or otherwise located in the course of investigating the formal complaint.
33. On the balance of probabilities, the Commissioner is satisfied that the Council does not hold any information falling within the scope of the complainant's request, other than the information that is publicly accessible on its website. She therefore does not require the Council to take any steps to ensure compliance with the EIR in relation to the information which it holds.

Regulation 14(2) – refusal to disclose information

34. Regulation 14(2) of the EIR states that if a request for environmental information is refused by a public authority, the refusal shall be made *"as soon as possible and no later than 20 working days after the date of receipt of the request"*.
35. From the evidence available in this case, it is clear that the Council failed to provide its refusal within 20 working days and has therefore breached regulation 14(2). The Commissioner does not require any remedial steps to be taken in respect of this specific breach, but the Council should ensure that it has appropriate procedures in place to enable to respond to information requests promptly.

Right of appeal

36. 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@justice.gov.uk

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

37. 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.
38. 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

Ben Tomes
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