

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

Decision notice

Date: 19 December 2019

Public Authority: Rotherham Metropolitan Borough Council
Address: Riverside House
Main Street
Rotherham
S60 1AE

Decision (including any steps ordered)

1. The complainant has requested information about the installer of and maintenance records for, a pair of manhole covers. Rotherham Metropolitan Borough Council ("the Council") stated that it held no information within the scope of the request.
2. The Commissioner's decision is that, on the balance of probabilities, the Council holds no further information within the scope of the request and has therefore complied with its Regulation 5(1) duty.
3. The Commissioner does not require any further steps.

Request and response

4. On 18 February 2019, the complainant contacted the Council via the whatdotheyknow.com website and requested information in the following terms:

"On land owned by Rotherham Borough Council in Whiston village, adjacent to High Street (bordered on 3 sides by High Street, Turner Lane and the brook that runs through Whiston), there are 2 dangerously installed metal man-hole covers that allegedly (according to Utilities company sources) do not conform to health and safety guidelines.

"Please let me know;

- 1) *Confirm that the council installed the metal grates, who confirm (with details) who did install them. [sic]*
 - 2) *When were they installed, and details of when they were regularly inspected.*
 - 3) *Since they were installed, have any reports of injury been received by the council."*
5. The Council responded on 7 March 2019. It denied holding information within the scope of the request, but stated that it believed the covers were owned by Yorkshire Water – who might hold information within the scope of the request.
 6. Following an internal review the Council wrote to the complainant on 26 April 2019. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 20 July 2019 to complain about the way his request for information had been handled. He disputed that the Council held no information within the scope of his request.
8. The Commissioner considers that the focus of her investigation is to determine whether the Council holds information within the scope of the request.

Background

9. The complainant explained to the Commissioner that he had been walking his dog on the land in question six months prior to making the request. His dog had managed to get its leg trapped in one of the covers and had, as a result, broken two bones. His claim for compensation had foundered as the Council had not accepted responsibility for maintaining the covers and neither had any other body.

Reasons for decision

Would the requested information be environmental?

10. 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);*
11. As it is information relating to the maintenance of covers on a sewage system, the Commissioner believes that any information that was held would be likely to be information about "measures" affecting the elements of the environment. For procedural reasons, she has therefore assessed this case under the EIR.

Regulation 5(1)/12(4)(a) (Held/Not Held)

12. Regulation 5(1) states that: "*a public authority that holds environmental information shall make it available on request.*"
13. Regulation 12 of the EIR states that:
- (1) *Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—*
 - (a) *an exception to disclosure applies under paragraphs (4) or (5); and*

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

(a) it does not hold that information when an applicant's request is received;

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 arguments. She 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. Finally, she will consider any reason why it is inherently likely or unlikely that information is not held.
15. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

The complainant's position

16. The complainant has argued that, given the Council owns the surrounding land, it was inconceivable that it did not hold information about the installation of the covers.
17. He believed that the covers had been installed in the last ten years and therefore, he argued, the Council would have had to have given permission to any third party, which might have installed the gates, to access the land.
18. The complainant also brought to the Commissioner's attention a response he had received from Yorkshire Water which, he claimed, showed that it was not responsible for the covers.

The Council's position

19. The Council explained that it had checked with its Grounds Maintenance, Highways and Drainage teams but had been unable to locate any information relevant to the request. The Council argued that these

teams would be the ones most likely to hold any information that existed.

20. The Council also noted that it had sent officers to the site in question to see whether they could gather any further useful clues as to what information might be available and where it might be located.
21. The only information which the Council had managed to locate was its Public Sewer and Water Mains Records which indicated that the covers in question were owned by Yorkshire Water.

The Commissioner's view

22. On the balance of probabilities, the Commissioner is satisfied that the Council has undertaken reasonable searches to locate relevant information within the scope of the request.
23. It is rare that the Commissioner is able to prove definitively that information is, or is not, held. Nor is it her role to decide which organisation is most likely to hold particular information. In reaching her decision, the Commissioner has had regard to whether, in her view, the Council has carried out searches which would be likely to identify any relevant information.
24. In this particular case, the Commissioner notes that the Council has consulted the relevant teams, referred to its public sewer records and carried out a manual inspection of the covers themselves. She considers that such searches would have located any relevant information – or at least suggested where any such information might be found.
25. The Commissioner therefore concludes that, on the balance of probabilities, the Council does not hold the requested 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@justice.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

**Phillip Angell
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**