

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

Date: 13 March 2020

Public Authority: Lancashire County Council
Address: PO Box 78
County Hall
Fishergate
Preston
Lancashire
PR1 8XJ

Decision (including any steps ordered)

1. The complainant has requested information relating to the painting of road markings at a specific location. Lancashire County Council disclosed some information and confirmed that no further information was held.
2. The Commissioner's decision is that Lancashire County Council handled the request under the wrong legislation and breached regulation 5(1) of the EIR, but that it disclosed all the relevant information it holds and complied with the duty to carry out an internal review under regulation 11.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 30 January 2019, the complainant wrote to Lancashire County Council (the "council") and requested information in the following terms:

"This FOI request relates to the painting in or about October 2018 of white lines on the road surface at the junction of Naze Lane East and Stoney Lane Freckleton as shown on the attached plan_ Please disclose:

1 All documents (1) requesting and (2) recording your decision to paint those lines

2 All documents (1) requesting and (2) recording the implementation of that decision."

5. The council responded on 26 February 2019 and disclosed some information.
6. On 27 February 2019 the complainant clarified their request, asking for confirmation of whether there had ever been road markings at the junction in question and if there had, what markings had been applied, when and by whom.
7. The council responded on 2 April 2019 and confirmed that there had not previously been road markings at the junction in question.
8. On 18 April 2019 the complainant requested an internal review and the council provided a review response on 13 June 2019 in which it confirmed that no further information was held.

Scope of the case

9. On 3 October 2019 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
10. The Commissioner confirmed with the complainant that her investigation would consider whether the council had disclosed all the relevant information falling within the scope of the request and whether it had complied with its obligations in relation to the carrying out of an internal review.

Reasons for decision

Is it Environmental Information?

11. The council handled the request under the FOIA. During the course of her investigation the Commissioner advised the council that she considered the requested information fell to be considered under the EIR. The Commissioner has set down below her reasoning in this matter.
12. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition is found in 2(1)(a) to (c) which state that it is as any information in any 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...'
13. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
14. In this case the withheld information relates to measures which will have an impact on the use of land, namely the painting of road markings. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of *Kirkaldie v IC and Thanet District Council* (EA/2006/001) ("Kirkaldie").

15. In view of this, the Commissioner has concluded that the council wrongly (initially) handled the request under the FOIA and breached regulation 5(1) of the EIR. As the council subsequently corrected this during the Commissioner's investigation the Commissioner does not require the council to take any steps in this regard.

Regulation 5(1) – duty to make environmental information available on request

16. The council has stated that it considers that it has disclosed all the relevant information falling within the scope of the request. The complainant disputes this and considers that further information should be held.
17. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
18. In other words, in order to determine such complaints, the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
19. To assist with this determination the Commissioner approached the council with standard questions she routinely asks in such scenarios. The relevant questions and summaries of the council's responses (in italics) are set out below.
20. What searches have been carried out to check no information was held within the scope of the request and why would these searches have been likely to retrieve any relevant information?

The council confirmed that it carried out searches on its HAMS system (HAMS is the system/database used by the highways service to log complaints about the highway network). It stated that this retrieved CRN 134679 with details the customer called about which were inputted into the HAMS system by the Customer Call Centre on 24/10/2018.

21. Please describe thoroughly any searches of relevant paper/electronic records and include details of any staff consultations.

The council confirmed that the information would be saved on HAMS so searches of the road in question were made.

22. If the information were held would it be held as manual or electronic records?

The council confirmed that the information would be held as electronic records.

23. Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?

The council stated that it did not consider that any relevant information had been deleted or destroyed.

24. What does the council's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the council describe the way in which it has handled comparable records of a similar age?

The council explained that it is "...very likely that any exchange about painting lines on a highway following customer complaint took place via email or telephone call, if not face-to-face. If the email wasn't saved into a complaints file or file on general maintenance, it will have been automatically deleted 12 months after being sent. The retention of emails is outlined in Policy 9 which states that the 'owner is responsible for capturing and retaining emails identified as records in relation to their own job, service or function, which provide evidence of business transactions, commit the authority or an employee to an action or document an obligation or information about the accountable business of the authority. Such emails are subject to the same records retention rules that apply to other records of the same work type and we must retain them consistent with the Retention Schedule'. In this case the customer enquiry was received by email and transcribed into the HAMS system for action by the highways team."

25. If the information is electronic data which has been deleted, might copies have been made and held in other locations?

The council confirmed that CRN 134679 says 'Email received from the customer' indicating the customer services received the original email and transcribed to the HAMS system.

26. Is there a business purpose for which the requested information should be held? If so what is this purpose?

The council confirmed that once added to the HAMS system the information is used to assess the need for any repairs etc. to the highway.

27. Are there any statutory requirements upon the council to retain the requested information?

The council confirmed that the information is retained to ensure that any complaints about defects to the highway are dealt with to ensure the highway is compliant with highways law.

28. More generally, the council submitted that it is, geographically, a large county with many miles of highway and that it attempts to keep as much information about highways issues as is necessary or otherwise required in order to maintain the highways network for which it is responsible.
29. The Commissioner is mindful that the complainant has genuine concerns about the matter to which the request relates, however, they have not provided the Commissioner with any direct evidence to contradict or otherwise disbelieve the council's position that no further relevant information is held.
30. Having considered the manner in which the council stores relevant information and the searches it conducted in this case, the Commissioner considers that, on the balance of probabilities, it is likely that it has correctly confirmed that no further information is held. She, therefore, finds that the council has disclosed all the relevant information that it holds.

Regulation 11 – representations and reconsideration

31. Regulation 11 of the EIR sets out a public authority's obligations in relation to the consideration of complaints about the handling of requests. This is commonly known as the duty to carry out an "internal review". The complainant has raised concerns that the council failed to carry out an internal review in compliance with the legislation.

32. Regulation 11(1) states:

"Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request."

33. Regulation 11(3) states:

"The public authority shall on receipt of the representations and free of charge—

(a) consider them and any supporting evidence produced by the applicant; and

(b) decide if it has complied with the requirement."

34. Regulation 11(4) states:

"A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations."

35. In this case the complainant asked the council to carry out an internal review on 18 April 2019. On 13 June 2019 the council provided its internal review response in which it confirmed that no further information was held. In this communication the council advised the complainant if they remained dissatisfied following the internal review they had the right to direct a complaint to the Commissioner.

36. The Commissioner is mindful that the complainant continued corresponding with the council following the internal review. However, she considers that with its review response of 13 June 2019, which was issued within 40 working days, the council discharged its duties under regulation 11 of the EIR.

Right of appeal

37. 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

38. 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.
39. 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
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