

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

Date: 14 December 2021

Public Authority: Shropshire Council
Address: Shirehall
Abbey Foregate
Shrewsbury
SY2 6ND

Decision (including any steps ordered)

1. The complainant requested information relating to particular footpaths between specified dates. Shropshire Council (the 'Council') provided some information and ultimately said that no further information was held.
2. The Commissioner's decision is that the Council was correct to handle this request under the EIR for the reasons set out in this notice. He also finds that, on the balance of probabilities, the Council does not hold any further information within the scope of the request.
3. No steps are required as a result of this notice.

Request and response

4. On 12 August 2020, the complainant wrote to the Council and requested information in the following terms:

"Copies of all records, documents and correspondence produced by Shropshire Council or received by Shropshire Council relating to Footpaths 41, 42, 43, 44 and 50 in the Parish of Bishop's Castle between the dates of 1st January 2010 and 12th August 2020.

The information requested includes but is not confined to:

Documents

Maps

Plans

Internal correspondence (such as emails, diary entries and memorandums)

External correspondence (such as emails, telephone records and letters)

Site visit records

Meeting notes/minutes

Records of work carried out."

5. The Council responded, late, on 25 September 2020. It provided the complainant with some information by way of attachments, specifically:
 - *"Email trail of correspondence between your solicitors [name redacted] and the Rights of Way Officer [name redacted] (now retired).*
 - *Letter to [company name redacted] referred to in the email trail attached.*
 - *Extracts from the Outdoor Partnerships database showing issues reported on these footpaths."*
6. The response made no reference to the legislation the request had been handled under, nor to the complainant's right to request an internal review.
7. The complainant requested an internal review on 25 September 2020, querying whether the Council intended to provide the further information he had requested. He cited its response to a previous request on *WhatDoTheyKnow.com* (no URL provided) which he said indicated that further emails were held. The complainant advised the Council that:

"...between 19th February 2019 and 14th May 2019 there were emails within Shropshire Council, between officers of the Rights of Way and/or Outdoor Partnerships Team. This information has not been published in the public domain - it is only listed as documents previously provided by Shropshire Council in response to an anonymous Freedom of Information Request".
8. The Council did not provide its internal review until 8 February 2021. It advised the complainant as follows:

"Having looked into this further I can confirm that all relevant information that the Council holds has been provided, some additional communications may have been held in relation to the previous request you refer to however the member of staff

involved in these communications left the Council last year and therefore any emails they may have held have not been retained and are therefore no longer held."

9. The Council's internal review response made no reference to the legislation nor to the complainant's right to complain to the Commissioner.

Scope of the case

10. The complainant contacted the Commissioner on 20 March 2021 to complain about the way his request for information had been handled. He submitted the following grounds of complaint and suggested resolution which the Commissioner asked the Council to consider:

"The public body has provided some information. However, it has previously provided more information to someone else who used the 'what do they know' website (www.whatdotheyknow.com). The Council now says it does not hold the information and therefore cannot provide it to me. I believe the Council holds more information and should provide this information."

11. In order to resolve his complaint, the complainant argued that the Council should:

"Provide the requested information. They have, apparently, previously provided the information to someone else and therefore should be able to provide it to all members of the public. The Council now says the information does not exist or is inaccessible due to a change in staff. However, I do not consider this to be relevant and they do not name the member of staff or their former role in the Council or say why this is of any relevance to the information request."

12. The Commissioner has considered whether, on the balance of probabilities, the Council holds any further information in scope of the request beyond what has already been provided to the complainant.
13. The Council confirmed it had handled this request under the EIR. The Commissioner has also considered whether the Council handled the request under the correct statutory regime.

Reasons for decision

14. The Commissioner has first considered whether the requested information constitutes environmental information and, therefore, whether the Council was correct to handle the request under the EIR.

Regulation 2 - Is any of the information environmental?

15. Information is environmental if it meets the definition set out in regulation 2 of the EIR, namely "*...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;

(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 elements of the environment referred to in (b) and (c);"

16. The Council told the Commissioner that it had handles the request under the EIR because:

"... it related to footpaths and therefore the maintenance of land".

17. Despite being requested to do so, the Council did not expand on which part(s) of the EIR definitions set out above it had relied on to reach this conclusion.
18. In the Commissioner's view, the requested information would be likely to be information about "measures" (such as plans, works carried out etcetera) affecting the elements of the environment set out in 2(1)(a), specifically land, and therefore would be environmental information under regulation 2(1)(c).
19. The Commissioner is therefore satisfied that the request asks for environmental information as per Regulation 2(1)(c) and that the EIR is the correct statutory instrument to apply to the request.

Regulation 5(1) – general right of access to information held by public authorities

20. Regulation 5(1) of the EIR states requires a public authority that holds environmental information to make it available on request.
21. Under regulation 5(1) public authorities have a general duty to make environmental information available when it is requested. When the information is not held, public authorities should issue a refusal notice, in accordance with regulation 14 that cites the exception under regulation 12(4)(a) of the EIR.
22. The Commissioner is mindful that when he receives a complaint alleging that a public authority has stated incorrectly that it does not hold the requested information, it is seldom possible to prove with absolute certainty whether the requested information is held. In such cases, the Commissioner will apply the normal civil standard of proof in determining the case and will decide on the 'balance of probabilities' whether information is held.
23. The Commissioner will consider the complainant's evidence and arguments. He will also consider 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. 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 is held, he is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.
24. Therefore, the Commissioner has sought to determine whether, on the balance of probabilities, the Council holds any further information relevant to the request that it has not already disclosed to the

complainant. He asked the Council about the searches it had undertaken to in order to respond to the request.

25. The Council explained:

"In response to the FOI the relevant team who dealt with the issue undertook a thorough search of all records/documentation that we would have held on the specific request. This included all types of records including emails and other documents.

The search included paper records, emails, parish file information and our CAMs database which records issues reported to us relating to the public rights of way network.

The search included information held on personal computers (emails) and networked resources (electronic files within the Outdoor Partnerships Team)."

26. In response to the Commissioner's question as to whether any recorded information was ever held relevant to the scope of the complainant's request but had been deleted or destroyed, the Council replied:

"Internal emails with the specific officer who has now retired and left the Council. Information is retained for a period but then access is removed once officer leaves the Council. This is the situation in this respect.

Officers email accounts are normally removed 2 months after they leave. In this case the officer in question officially left the Council on the [personal data redacted] 2020 but she actually left earlier than that due to annual leave owing. As a result any access and the email inbox would have been deleted after two months. Anything that may need retaining will have been extracted where necessary prior to deletion."

27. The Council said that these emails would have been held electronically. It further explained:

"The retention policy for the inboxes of leaving staff is highlighted above, we retain the inbox for 2 months that allows any important information to be extracted and certain issues that may need resolving to be resolved. At this point the inbox is not retained to avoid holding on to information that is no longer required."

28. The Council stated that copies of the deleted emails were not made that were held in another location because they were the:

"...Officers [sic] unique email address and therefore the information was only held within their personal email account and inbox".

29. The Council advised there is no business purpose for which the requested information should be held, and, to its knowledge, no statutory requirements upon it to retain the requested information.
30. With regard to regulation 9 of the EIR which requires a public authority to provide appropriate advice and assistance to the applicant, the Council said it had not done so because:

"...the request was for specific information that was held on a specific officer's account, this is no longer retained for the reasons stated above and therefore can't be provided".

31. Additionally, the Council said:

"To clarify further the position is that the information was available in 2019 and was disclosed in the FOI at that time but as the officer concerned had left the authority these records were no longer available at the time of [the complainant's] FOI request."

32. With regard to the complainant's grounds of complaint and suggested remedy, the Council said:

"In relation to this the issue is very clear and whilst we would like to resolve this we cannot provide him with information we don't hold. Our final position is that as explained in the previous email in answer to the other questions we have completed thorough searches of all records held for information relevant to the request and provided what we held at that time. Whilst at some point additional information may have been held by the Council at the time the request was made this was no longer held due to the staff member leaving and our internal retention requirements. On this basis we do not hold any additional information or the specific information he alludes to as it was held within a specific members of staff's inbox, which is no longer held or accessible."

Conclusion

33. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it must hold, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in the paragraphs above, the Commissioner is required to make a finding on the balance of probabilities.

34. The Commissioner notes that the complainant's complaint centres on his view that further information must be held in scope of his request on the basis that emails were referenced in response to an earlier FOIA request from another requester. The Commissioner has secured explanations about the searches undertaken and how the Council approaches the records management of former officers' email accounts in order to satisfy himself as to what information is held.
35. Based on the explanations provided by the Council, the Commissioner is satisfied, on the balance of probabilities, that no further recorded information is held relevant to the complainant's request than has already been provided. He notes that emails were previously held by the Council but accepts that these have been deleted in accordance with the Council's policy for email accounts of its former employees.

Other matters

Procedural issues

36. Although the complainant did not complain about the delays that occurred in this case which means that the Commissioner is not obligated to record them in the decision notice, he has decided in this case that the delays, coupled with the omission of the complainant's right to an internal review (which is statutory under the EIR) and right to complain to the Commissioner, warrant inclusion.
37. The Commissioner notes the Council's explanation that the delay in issuing its response to the request was due to the impact of the pandemic and the associated diversion of its resources to deal with it, which he considers understandable in the circumstances.
38. Under Regulation 11(4) of the EIR, a public authority has 40 working days in which to provide its internal review. Clearly, this statutory deadline was missed given that the complainant requested an internal review on 25 September 2020 and this was not forthcoming until 8 February 2021.
39. Although the Council reiterated the pandemic impact argument, the Commissioner has recorded the internal review delay for monitoring purposes as he considers the 4.5 months' delay to be excessive.
40. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal

in her draft "Openness by Design strategy"¹ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"².

41. With regard to omitting the complainant's rights to an internal review and to complain to the Commissioner from its response and internal review respectively, the Council said:

"It is our internal policy to include within all review responses a paragraph explaining the requester's right to appeal to the ICO, on this occasion this was an omission on our part and this information should have been included and was left out in error on this occasion. For all reviews we do normally include this as it is required and will make sure this does not happen again for any future review responses."

42. The Commissioner expects these rights to be included in future responses, irrespective of whether or not an exemption is cited, and would ask the Council to remedy its approach from hereon in. He would also remind the Council to ensure it does not omit to include the complainant's right to complain to the Commissioner from future internal review responses.

¹ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

² <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

43. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

44. 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.
45. 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

Carolyn Howes
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