

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 March 2014

Public Authority: Birmingham City Council

Address: Council House
Victoria Square
Birmingham
B1 1BB

Decision (including any steps ordered)

1. The complainant has requested information from Birmingham City Council ("the council") about safety inspections and complaints relating to a specified road in the two years preceding 24 September 2011. The council withheld the dates of these on the basis that it would adversely affect the course of justice, and was therefore exempt under the exception provided by regulation 12(5)(b) of the Environmental Information Regulations ("the EIR").
2. The Commissioner's decision is that regulation 12(5)(b) has been correctly applied, and that the council has fulfilled its obligations under regulation 9(1) through providing reasonable advice and assistance to the complainant.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 2 October 2012, the complainant wrote to the council and requested information in the following terms:

"Under the general requirements of the Freedom of Information Act 2000, I would be grateful if you would provide the following information in relation to A34 Birchfield Road, Perry Barr, Birmingham, and in particular the section of Birchfield Road by slip road with Aldridge Road.

1. *Details of all safety inspections undertaken on the carriageway in the two years preceding 24th September 2011.*
 2. *Details of all carriageway defects identified during safety inspections the two years preceding 24th September 2011.*
 3. *Details of how carriageway safety inspections are undertaken, including whether walked or driven, the speed of the inspection vehicle and the number of persons in the vehicle.*
 4. *The intended frequency of carriageway safety inspections.*
 5. *Details of all complaints and/or enquiries relating to the carriageway, received in the two years preceding 24th September 2011.*
 6. *The hierarchy classification.*
 7. *The road/section number.*
 8. *The defect intervention criteria adopted in relation to the identification of all categories of carriageway potholes.*
 9. *The time period(s) adopted between identification and repair (temporary and permanent) of all categories carriageway defects.*
 10. *Whether or not the authority has formally adopted all or part of the standards contained within the national code of practice for highways maintenance management."*
5. The council responded on 25 October 2012. It disclosed information in response but withheld the dates of the safety inspections and complaints under regulation 12(5)(b) of the EIR.
 6. Following an internal review the council wrote to the complainant on 11 April 2013. It upheld its application of the exception.

Scope of the case

7. The complainant contacted the Commissioner on 23 May 2013. She asked the Commissioner to consider whether the council had correctly withheld the dates of the safety inspections and complaints under regulation 12(5)(b) of the EIR.
8. The complainant has informed the Commissioner that her vehicle sustained damage as a result of a road defect, and that the requested

information is sought so as to allow a claim to be made against the council.

9. On 8 November 2013, and during the course of the Commissioner's investigation, the council offered to resolve the complaint through providing a specific amount of the withheld information to the complainant, which would be sufficient to allow her to submit her claim to the council. The information would have comprised the dated safety inspections undertaken before and after the incident, and the complaints and repair works that were undertaken between those two inspections. However, the complainant declined this compromise and asked the Commissioner to continue in his consideration of the withheld information in its entirety.

Reasons for decision

Is the information environmental?

10. Information is "environmental" if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR rather than the Freedom of Information Act. Under regulation 2(1)(f), any information on the state of human health and safety, including the conditions of built structures, will be environmental information. The Commissioner therefore considers that the request should be dealt with under the EIR.

Regulation 12(5)(b) – The course of justice

11. Under this exception, a public authority can refuse to disclose information on the basis that disclosure would adversely affect "*the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature*". The Commissioner considers that the course of justice element of the exception is wide in coverage, and accepts that it can include information about civil investigations and proceedings¹.
12. In the decision of Archer v Information Commissioner and Salisbury District Council (EA/2006/0037) the Information Tribunal highlighted the

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http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/course_of_justice_and_inquiries_exception_eir_guidance.ashx

requirement needed for this exception to be engaged. It has explained that there must be an “*adverse*” effect resulting from disclosure of the information as indicated by the wording of the exception. In accordance with the Tribunal decision of Hogan and Oxford City Council v Information Commissioner (EA/2005/0026 and EA/2005/030), the interpretation of the word “*would*” is “*more probable than not*”.

13. The council’s position is that the disclosure of the dates of safety inspections, in conjunction with the dates of complaints for a span of 2 years, would allow individuals to identify road defects that the council had knowledge of, but had not yet repaired. This would therefore highlight periods of time for which fraudulent claims for damage, such as that which had been sustained elsewhere, could be submitted to the council.
14. The council has explained to the Commissioner that when considering how to respond to claims relating to road defects, it first considers whether the damage was likely to have been a result of a defect, such as a pothole. The council identifies this through evidence such as photos of the damage or invoices for repair. Secondly, the council considers whether the damage was derived from a road defect that the council held responsibility for. The council identifies this through requesting the date and location of the incident, and consulting its safety inspection and complaints records to identify whether the council had knowledge of the road defect but had yet to repair it. Consequently, the dates of safety inspections and complaints are used for the purpose of validating claims, and the public disclosure of this information could therefore facilitate claims that are fraudulent.
15. To provide further context to its decision that the exception was engaged, the council has referred the Commissioner to the known issue of individuals submitting fraudulent claims against local authorities, such as for damage sustained from road defects, and has provided hyperlinks to several webpages as evidence of the apparent increase in such activity² ³. The council has further advised the Commissioner that it received over 1000 claims alone for damage from potholes in 2013, and believes that the numbers of such claims which are fraudulent are currently increasing due to improved detection systems that are in place

² <https://www.keoghs.co.uk/News/Keoghs-warns-councils-to-be-aware-of-organised-pothole-claims>

³ <http://www.dailymail.co.uk/news/article-1293949/Seven-people-claim-tripped-pavement-pocketing-30-000-compensation-Coincidence-Or-national-scam.html>

to safeguard against other forms of fraudulent claims, such as those relating to injury and staged crashes.

16. Having considered these factors, the Commissioner accepts that it was more probable than not that disclosure of the information would adversely affect the course of justice, and is therefore satisfied that regulation 12(5)(b) was engaged.

Public interest arguments in favour of disclosing the requested information

17. Some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
18. The council has explained to the Commissioner that in undertaking a public interest test it has considered the presumption for disclosure required by the EIR, and has additionally considered the need to ensure that individuals who have sustained damage from defects on council-maintained roads have the appropriate information available to them so as to hold the council to account.
19. The Commissioner understands that the complainant has sustained damage from a road defect, and that this is the basis of her request for information. However, the Commissioner considers that this represents a private rather than public interest, and therefore cannot be considered as an argument in favour of disclosure. Notwithstanding this, the Commissioner does consider that the council has a responsibility to assure the public that appropriate steps are taken to keep roads free of defects, and the disclosure of the withheld dates would therefore inform the public about the frequency that safety inspections are undertaken, and how often members of the public submit complaints about new defects.

Public interest arguments in favour of maintaining the exception

20. The council, in its submission to the Commissioner, has advised that it has a legal responsibility to tackle fraud, and this is the first argument for maintaining the exception. The likelihood of adverse effect has already been proven in the exception being engaged, which itself indicates that there is a greater than equal chance of fraud being committed should the withheld information be disclosed.
21. Secondly, the council has stated that it has a legal obligation to protect the public purse from fraudulent claims. The disclosure of the withheld information would therefore be contrary to this, as it would allow individuals to circumvent one of the means in which the council assesses

a claim for legitimacy, which could result in fraudulent claims being successful.

22. Lastly, the council considers that it has a duty to assist in the effective running of the legal system, and that facilitating fraudulent claims to be submitted would be contrary to this. Additionally, the council has suggested that by disclosing a greater amount of information than is necessary for a claim to be submitted, it would potentially place an burden on resources should the matter come to be dealt with as a civil matter at Court.
23. Additional to these arguments that have been advanced by the council, the Commissioner also perceives that there is a further argument. The council has advised the Commissioner that it is required under the Civil Procedure Rules to release supporting evidence in response to a formally submitted claim. The council has advised that this would normally include the last safety inspection prior to any alleged incident, along with reports of all complaints and repairs undertaken between the inspection and the date of the alleged incident, and would represent sufficient information to allow the claimant to take the matter to Court. This clearly indicates to the Commissioner that there is a more appropriate regime than the EIR for accessing information that is relevant to a claim.

The Commissioner's assessment

24. The Commissioner has considered the public interest arguments put forward by both the complainant and the council, and has formulated his own independent arguments in addition to these.
25. The Commissioner appreciates that in general there is a clear interest in public authorities being accountable in relation to their responsibilities, particularly when these relate to public safety. However, the Commissioner considers that in the circumstances of this case the public interest in withholding the information is particularly strong. The council's description of how the withheld information is used to 'validate' submitted claims is based on clear logic, and the Commissioner has concluded that the disclosure of the withheld information would allow individuals to identify periods of time when the council was responsible for a road defect, and therefore attempt to defraud the public purse through making a false claim. Additionally, the Commissioner has identified that the council have attempted to provide assistance to the complainant that would have disclosed sufficient information for a claim to be submitted, but that this was declined. Related to this, the Commissioner has become aware that there is also an alternative access regime provided through the Civil Procedure Rules, which would result in

part of the withheld information being disclosed should the complainant submit a claim.

26. The Commissioner has therefore observed that the public interest in maintaining the exception is particularly strong. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, such as clear evidence of unlawful activity or negligence on the part of the council, or the absence of any alternative means of accessing evidence pertinent to a claim. However, no such arguments appear to be present.
27. It is on this basis that the Commissioner has concluded that the council correctly maintained the engaged exception.

Regulation 9(1) – Advice and assistance

28. Regulation 9(1) of the EIR states:

"A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants."

29. This regulation places a duty on a public authority to provide advice and assistance to someone making, or considering making, a request. The Commissioner believes that this includes assisting an applicant to amend a request that it would otherwise engage an exception.
30. The Commissioner has identified that the council attempted to resolve this complaint through offering to provide a reduced amount of the withheld information, which would have been sufficient to allow a claim to be submitted to the council. The complainant subsequently declined this offer. However the Commissioner considers that this action represents the only reasonable assistance that the council could have provided in response to the request, and that the council therefore complied with the requirement of regulation 9(1).

Right of appeal

31. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

32. 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.
33. 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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