

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 21 May 2018

Public Authority: Leeds City Council

Address: Civic Hall
Calverley Street
Leeds
LS1 1UR

Decision (including any steps ordered)

1. The complainant has made two information requests in which he seeks various information about the handling of a planning complaint and associated information requests that he has made. Leeds City Council ("the Council") disclosed held information in response, but under the terms of the Data Protection Act 1998 ("the DPA"). The complainant subsequently contested that further information was held that should be provided under the terms of the Environmental Information Regulations 2004 ("the EIR").
2. The Commissioner's decision is that, on the balance of the probabilities, the Council does not hold further information that would fall under the terms of the EIR. However, the Council breached regulation 5(1) by providing a response to the requests outside the time for compliance.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 30 January 2017, the complainant wrote to the Council and submitted request 1. This request is recorded in Annex A.
5. The Council responded on 13 February 2017. It stated that it was refusing to comply with any EIR aspects of the request on the basis that it was 'manifestly unreasonable'. The relevant exception within the EIR is regulation 12(4)(b).
6. On 26 February 2017, the complainant wrote to the Council and submitted request 2. This request is recorded in Annex A.
7. The Council responded on 14 March 2017, and further, on 23 March 2017. It referred to its previous response, and directed the complainant to the Commissioner should he remain dissatisfied.

Scope of the case

8. The complainant contacted the Commissioner on 19 and 23 May 2017 respectively to complain about the way his two requests for information had been handled. These two requests were referred to the Commissioner on the basis that they were principally subject access requests ("SARs") for the complainant's own personal data, and were therefore considered by the Commissioner as part of a DPA case. At that time the complainant clarified that he believed further information was held that did not represent his own personal data, and he requested the Commissioner to provide a decision under the terms of the EIR.
9. During the course of the Commissioner's investigation, the Council withdrew reliance upon regulation 12(4)(b), and on 7 February 2018 issued a new response to both requests under the EIR. In this response the Council appears to confirm that some specific information is not held (e.g. 'revised procedures and processes' documents), and that all relevant information that is held would represent the complainant's own personal data, and would therefore fall under the terms of the DPA.
10. The Commissioner notes that the complainant's SARs have already been considered in an associated DPA case (as part of which the Commissioner also considered a later SAR made by the complainant on 28 February 2017). The Commissioner further understands that the complainant submitted an additional SAR to the Council on 12 May 2017. The purpose of this EIR case is only to determine whether the Council holds recorded information that is not the complainant's own personal data, and which has not otherwise been disclosed to him.

11. The Commissioner therefore considers the scope of this case to be the determination of whether the Council has complied with regulations 5(1) and 5(2).

Reasons for decision

Context

12. The Commissioner understands that the two information requests considered in this decision broadly relate to:
- A planning complaint that the complainant has submitted to the Council (about the Council's decision to not take enforcement action against the owner of a particular wall); and,
 - Previous information requests that the complainant has submitted to the Council under the EIR and DPA (for recorded information about how the Council has dealt with the planning complaint)
13. The Commissioner has previously outlined the apparent context to his matter in decision notice FER0615064¹.

Is the information environmental?

14. 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. Under regulation 2(1)(c), any measures that will affect, or be likely to affect, the elements referred to in 2(1)(a), will be environmental information. The requested information relates to a planning complaint and associated information requests. The Commissioner considers that such information would fall under the terms of the EIR.

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

15. Regulation 5(1) of the EIR provides that any person making a request for information is entitled to have that information communicated to them. This is subject to any exceptions in the EIR that may apply.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2016/1624586/fer0615064.pdf>

16. Where there is a dispute between the information located by a public authority, and the information a complainant believes should be held, the Commissioner follows the lead of a number of First-tier Tribunal (Information Rights) ("the Tribunal") decisions in applying the civil standard of the balance of probabilities.
17. The Commissioner emphasises that the EIR is an access regime for official information that is held in recorded form. Whilst requestors may phrase a request as a 'question', there is no obligation for a public authority to create 'new' information in order to answer it.
18. The Commissioner further emphasises that under the terms of the EIR, a requestor does not have a right of access to their personal data, this being subject to the exception provided by regulation 13. A public authority is expected to respond to any request for a requestor's own personal data under the terms of the DPA.
19. In the circumstances of this case the Commissioner will determine whether, on the balance of probabilities, the Council holds recorded information that is not the complainant's own personal data, and which has not otherwise been disclosed to him.

Request 1

20. The Commissioner understands that this request, which is composed of five questions, relates to the planning complaint. This request was submitted to the Chief Executive as part of ongoing correspondence.
21. In respect of question 1, the Council understands that this seeks a copy of any specific correspondence that was sent to the complainant that addresses 'procedural and processes deficiencies'. No relevant information has been found in relation to this. The Council has informed the Commissioner that the officer with most familiarity of the complainant's concerns (the Information Governance Officer) has manually reviewed the electronic folder that has been created to store all known correspondence with the complainant during 2014-2015. This file was compiled in preparation for a previous Tribunal case involving the complainant, and contains all known correspondence between the Council (including the Chief Executive and Chief Planning Officer) and the complainant during 2014-2015. It is possible that email correspondence sent to the complainant by the previous Chief Planning Officer may have been destroyed in the past, either as part of routine email management, or else when the individual's email account was deleted following their departure. However, the Council considers this scenario unlikely due to nature of the correspondence, as it has sought to retain all relevant records for future reference. The Council also notes

that any such information would represent the complainant's personal data.

22. In respect of question 2, the Council understands that this seeks any information about actions implemented following the complainant's planning complaint (as referred to in a letter sent by the Council on 3 December 2014). No relevant information has been found in relation to this. The Council has informed the Commissioner that it has consulted with the relevant team leader in the Planning Service who implemented the changes referred to in the letter. That officer has confirmed that no revised procedures or processes were recorded in guidance documents, and officers were simply advised to make certain planning documents available on the Council's website in the future. That officer has also confirmed that, due the elapsed time, they do not retain any emails dating back to period when this change was implemented.
23. In respect of question 3, the Council understands that this seeks a copy of any correspondence that was sent to the complainant by the Chief Planning Officer about 'NMA planning process'. The Council has informed the Commissioner that the only relevant correspondence it has identified in the above searches is a letter sent to the complainant by the previous Chief Planning Officer on 19 December 2014, and a complaint response sent to the complainant by the current Chief Planning Officer on 1 November 2015. This information has previously been disclosed to the complainant under the terms of the DPA.
24. In respect of questions 4 and 5, the Council has informed the Commissioner that it does not consider these to be valid requests for recorded information. This is because the questions ask the Council to undertake specific actions in respect of previous correspondence that it has sent to the complainant.

The Commissioner's analysis

25. The Council has provided the Commissioner with a clear explanation of how correspondence with the complainant is held, and has confirmed that this information has been manually reviewed by an officer most familiar with its content. The relevant officer within the Planning Service has also confirmed that no guidance documents were altered following the planning complaint, and general emails from that period of time (which the Commissioner understands to be late 2014 to early 2015) are no longer retained.
26. It is noted that questions 1 and 3 clearly ask for specific correspondence that is addressed to the complainant; it is reasonable for the Commissioner to consider that if any such correspondence is held, it will

have already been provided to the complainant, and in any event, would represent his own personal data.

27. In respect of questions 4 and 5, the Commissioner has reviewed the wording of the questions, and notes that they are requests for 'actions' in respect of previous correspondence. Notwithstanding this, the Commissioner's guidance on the interpretation of requests under the EIR² confirms that public authorities should interpret requests objectively, and, if the requestor refers to other correspondence, or provides additional context when making the request, that the authority should take this into account if it impacts on the interpretation. For these two questions the complainant has clearly referred to specific correspondence. However, it is reasonable for the Commissioner to consider that such correspondence has already been disclosed to the complainant, and in any event, would represent his own personal data.
28. Having considered the searches undertaken in response to this request, there is no indication that further recorded information is likely be held that would fall under the terms of the EIR, and the Commissioner has already considered the complainant's SARs in an associated DPA case. It is also relevant to note that the EIR do not obligate the Council to create 'new' information in response to the request.

Request 2

29. The Commissioner understands that this request, which is composed of thirteen questions, relates to the planning complaint and previous information requests submitted by the complainant. This request was submitted to the City Solicitor as part of ongoing correspondence.
30. In respect of questions 1-4 and 6-8, and 11-12, the Council understands that varied information is sought about how the Council has managed both the planning complaint and previous information requests. The Council has informed the Commissioner that the City Solicitor and Monitoring Officer (who are directly referred to within the request), have used the complainant's name to search their email records, and that the Customer Services team has also used the complainant's name to search staff email accounts and the electronic complaints system. The Council has also reviewed the complaint file in which all correspondence with the complainant is known to be held. No further relevant information has been identified besides that previously disclosed to the

² <https://ico.org.uk/media/for-organisations/documents/1162/interpreting-and-clarifying-a-request-foia-eir-guidance.pdf>

complainant under the terms of the DPA (including the records of the Stage 1 and 2 complaints made by the complainant). Whilst it is possible that other email correspondence may have been previously held by the above officers and team, such information may have been destroyed as part of routine email management. However, the Council considers this scenario unlikely due to nature of the correspondence, as it has sought to retain all relevant records for future reference, and the Customer Services team also save relevant complaint correspondence on a separate system.

31. In respect of questions 5, 9, 10, and 13, the Council has informed the Commissioner that it does not consider these to be valid requests for recorded information. This is because the questions ask the Council to undertake specific actions in respect of previous correspondence that it has sent to the complainant.
32. The Council has informed the Commissioner that it considers all thirteen questions seek information that would represent the complainant's personal data, and has referred the Commissioner to the assessment undertaken by her in the associated DPA case. The Council has clarified that it specifically considered as part of that case whether it holds any of the 'public interest tests' that are referred to within the complainant's questions about his previous information requests.

The Commissioner's analysis

33. The Council has provided the Commissioner with a clear explanation of the steps that it has undertaken to search for recorded information. These steps have included keyword searches (by the complainant's name) of the relevant officers' email accounts, and the complaints system used by the Council. The Council has also reviewed the electronic folder used to store all known correspondence with the complainant. The Commissioner also notes that the information sought by the majority, if not all of the questions, would be highly likely to represent the complainant's own personal data. The Commissioner has already considered the complainant's SARs in an associated DPA case.
34. In respect of questions 5, 9, 10 and 13 the complainant has clearly referred to previous correspondence that he has received from the Council. However, it is reasonable for the Commissioner to consider that such correspondence has already been disclosed to the complainant, and in any event, would represent the complainant's own personal data.
35. Having considered the searches undertaken in response to this request, there is no indication that further recorded information is likely be held that would fall under the terms of the EIR. It is also relevant to note

that the EIR do not obligate the Council to create 'new' information in response to the request.

Regulation 5(2) – Time for compliance

36. Regulation 5(2) states that information should be made available no later than twenty working days after the date of receipt of the request.
37. In this case the Council revised its position during the course of the Commissioner's investigation, and subsequently issued a response in which it sought to comply with the request. On this basis the Commissioner finds a breach of regulation 5(2).

Right of appeal

38. 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@hmcts.gsi.gov.uk

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

39. 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.
40. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex A

Request 1

41. On 30 January 2017 the complainant made the following request:

1. If correspondence was sent to me informing me of the details of what specifically was to be done to address these Council procedural and processes deficiencies, and to rectify procedural errors, please send me a copy.
2. Please send me information on all the actions you have implemented (including copies or all revised procedures, processes, etc.).

It is further noted that in your letter of 3rd December 2014 you also stated;

'In my letter to you of 14 November 2014 I acknowledged those procedural failings, particularly in the recording of decisions by officers, and confirmed to you that the Chief Planning Officer would now review the Head of Planning's original decision to proceed by way of non-material amendment. I also confirmed that you will be provided with a clear explanation of his decision.'

Again I have checked my records and can't locate this information provided by Mr [redacted name], Chief Planning Officer. The only correspondence I can locate at that time is a letter dated 26th February 2015 from [redacted name] responding to my complaint that the Council was failing to comply with the EIR, FoIA & DPA regarding my requests for information. Mr [redacted name] stated that my correspondence/requests were vexatious and that I had made several including a statement that;

'Nevertheless, I do believe that officers have done their best to resolve your concerns and, in doing so, have provided a significant amount of information to you. In addition, the council has conducted an Internal Audit investigation into the handling of this compliance case and has, further, provided a response to your concerns under its complaints procedure. In light of these facts, the authority reserves the right to treat any further information request on this matter as 'manifestly unreasonable' under Reg 12(4)(b) of the EIR. This is on the basis that any such request would fall under the ICO's definition of vexatious behaviour.'

3. Please provide a copy of the response you promised I would receive from Mr [redacted name], Chief Planning Officer (including about use

of NMA planning process) and confirm it is different from the response dated 26th February 2015.

4. Please confirm that the Council's position on matters was correctly expressed by you, CEO, in your letter dated 3rd December 2014.
5. Please also therefore explain the apparent clearly extremely contradictions between the Council's position (including re my complaints) as expressed by the CEO in letter dated 3rd December 2014 and subsequently by Mr [redacted name], Chief Planning Officer in correspondence dated 26th February 2015.

Request 2

42. On 26 February 2017 the complainant made the following request:

1. You are Monitoring Officer and it appears that [redacted name] is your direct reportee. Did Mr [redacted name] at anytime inform you that I was making such requests as covered by these concerns, and discuss with/brief/report or inform you in any way of how he was handling them? If so please detail specifically how.
2. Were you informed, prior to sending your investigation findings on 16th February 2017, that I had objected/opposed/stated that for the Legal section to deal with these concerns/complaint (and Stage 2 Review) was unsatisfactory, that I did not want my complaint investigated by the Legal Section/City Solicitor?
3. If you were informed; when were you informed and by whom? Please provide a copy of all related correspondence.

Under these contentious circumstances of who should investigate this very serious complaint - Did you comply with LCC stage 1 Complaints procedure re

This is the first formal stage, and we will acknowledge receipt of your complaint within 3 working days. Our acknowledgement can be made verbally or in writing and will include:

? An initial apology for the issue that has caused you to complain.

? Contact details for who will be dealing with your complaint.

? A date or timeframe by which you can expect to receive a response.

4. If you claim you did comply; please provide a copy of the documentary evidence you rely on. If you breached the LCC procedure requirements, and it appears evident that you did: please clarify why you as Monitoring Officer breached this procedure.

5. It was evident from my correspondence with the CEO that I had not detailed the specific concerns in my complaint but that I wished to go into these details with the Internal Audit. Why did you not seek clarification of what specifically I was concerned about, in accordance with LCC's Complaints/Concerns Policy?
6. Did you at any time discuss or communicate in any way with LCC CE [redacted name] this concern/complaint I lodged with him re the Monitoring Officer/[redacted name]. If you did; then please provide details.
7. Regarding Stage 2 Complaint re EIR:
Why did you breach LCC Compliments and Complaints Policy Sections relating to EIR, FoIA & DPA and Stage 2 Review. 8 including: -

At this stage, we will ask you to provide details in writing to aid the review, and let us know why you are still dissatisfied.

The complaint will be acknowledged in the same way as at the initial stage.

If you did not comply with these requirements, and it appears evident that you did not: please clarify why you as Monitoring Officer breached these LCC procedures.

In view of the fact that you apparently decided not to follow procedure, and did not ask me to clarify exactly what the '*detailed case with documentary evidence to present*', it is essential that you now clarify exactly what you investigated and found not to be in breach of the law.

8. For the avoidance of any doubt then, as to exactly what you say you investigated and to what extent, please: -
Identify all requests for information from me and LCC responses which you investigated. Please provide copies of all correspondence, information and all the data you inspected. I would note that I am hereby requesting all the data falling within the definition of data under the DPA. This includes all correspondence, including that with only passing reference to me or copies of correspondence which had been overwritten with notes/comments etc.
9. Identify, within each category of requirement/legislation i.e. EIR, FoIA & DPA exactly which items of information/data had been requested by me. For each item of information/data so identified within each category, please state which was item of

information/data was provided and which was not provided according to your investigations.

10. For each and every item of information not provided in each category (e.g. EIR): please state which your investigations found the Council had complied with the law by stating to me that it either held or did not hold the information, and state which were in breach of the law by not stating which it held or not. Please provide the documentary evidence that you investigated this compliance with the law, and provide to me all documentary evidence that you relied on.
11. For each and every item of information withheld, confirm that as part of your investigations you checked that there was a specific public interest test, justifying withholding, carried out at the time of the refusal related to the specific refusal of that specific item at that specific time based on the specific circumstances at the time of refusal. Provide a copy of the public interest test, carried out at the time of refusal, for each and every item of information where disclosure was refused.
12. You claim to have carried out a Stage 2 re information/data disclosure. Please provide a copy of each and every public interest test that was carried out at the time you claimed to have carried out the Stage 2 based on any changed circumstances at the time of the claimed stage 2.
13. You claim that you carried out a Stage 2 on the DPA requests. Please state what investigations you carried out and with whom, thorough enough and sufficient enough, to be able to conclude that there was no data (other than exchanges of correspondences between LCC and me). Please provide all data related to this investigation you claim to have carried out. You will appreciate that there will be, without doubt, documents clearly falling within the DPA definition of data.