

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 21 August 2019

Public Authority: Lincolnshire County Council
Address: County Offices
Newland
Lincoln
LN1 1YL

Decision (including any steps ordered)

1. The complainant has made a multipart request for information about specific highways. Lincolnshire County Council ("the Council") informed the complainant that, in respect of part 1 of the request, it could make the information available subject to a charge of £1050.00, in accordance with regulation 8 of the EIR. The Council also stated, in respect of part 4 of the request, that information was held but was already publicly available, and, in respect of part 5 of the request, that information was withheld under various exceptions.
2. The Commissioner's decision is as follows. In respect of part 1 of the request, the Council has breached regulation 8(3) by seeking to levy an unreasonable charge for the provision of environmental information. In respect of part 4 of the request, the Council has failed to demonstrate that proper searches for recorded information have been carried out, leading the Commissioner to conclude, on the balance of probabilities, that further information may be held, thus breaching regulation 5(1). In respect of part 5 of the request, the Council subsequently disclosed held information, and the Commissioner is satisfied that all held information has been disclosed. In disclosing held information outside the time for the compliance, the Council breached regulation 5(2).

3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - In respect of part 1 of the request, issue a fresh response to the complainant that does not seek to apply a charge under regulation 8.
 - In respect of part 4 of the request, issue a fresh response to the complainant that complies with regulation 5(1).
4. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 19 December 2017, the complainant wrote to Council and requested information in the following terms:
 - 1) *Scaleable plans (preferably 1:1000) of the highway boundaries for Gorse Rise, Hill Avenue, Signal Road, Sandon Road, St Catherine's Road, Beacon Lane, New Beacon Lane, Harrowby Lane (from its junction with Belton Lane to its junction with Kenilworth Road), Belton Lane and Princess Drive, all situated within Grantham, Lincolnshire.*
 - 2) *Plans or other suitable records held of highway assets on the roads specified under item 1, including but not limited to carriageway and footpaths, cycle tracks, traffic signals equipment, zebra crossings, street trees, lit signs, posts, street name plates, benches and rubbish bins.*
 - 3) *Where available, details of land ownership, or records of designation or adoption of the highway in question for the roads specified under item 1. Examples could include extracts from the "Finance Act Maps", "Land Registry Records", "Title Deeds" or other definitive sources.*
 - 4) *Copies of all traffic orders issued by LCC in relation to the roads referenced in item 1, as well as copies of any stopping up orders issued by LCC pursuant to Section 116 of the Highways Act 1980 in relation to any of the roads referenced in item 1. This includes copies of stopping up orders made under previous legislation for the roads referenced in item 1, where relevant.*
 - 5) *Copies of all correspondence, emails, file notes and notes of meetings relating to the status and designation of the highway and the extent of the highway boundary at Gorse Rise.*

- 6) *Internal memos, emails, policy documents or other information sources which clarify the council's definitions of the following: "Public Right of Way", "Highway", "Highway maintainable at the public expense", "Highway not maintainable at the public expense". Where the council does not use any of these definitions, it should provide its definitive definitions of any other similar terms that it may choose to use, such as "public road", "private road", "pavement", "verge".*
 - 7) *Internal memos, emails, policy documents or other information sources which clarify the council's defined process for the following: "Designation of highway", "Stopping up highway", "Dedication and acceptance of land as highway by the public", "Disputes over highway status".*
 - 8) *Any policy document or working document issued by the council to assist council officers in determining the extent of the highway where it is not considered to be the standard common law definition of "hedge to hedge", especially where there are no other indicators to demonstrate the extent of highway boundary to the public.*
 - 9) *Any policy document or working document issued by the council to assist council officers in determining a subsequent reduction in highway extent, where a stopping up order has not been made but where the council wishes to assert a reduction in highway extent as a result of an enquiry from a member of the public.*
 - 10) *A summarised copy of details highway works undertaken by the council or on behalf of the council, including those undertaken by South Kesteven District Council under delegated highway authority powers (such as grass cutting) for the roads referenced in item 1 over the previous 3 years.*
6. The Council responded on 11 January 2018. It refused to comply with the request under regulation 12(4)(b).
7. On 12 January 2018, the complainant asked the Council to undertake an internal review. Following an internal review the Council wrote to the complainant on 16 March 2018. It revised its response and did the following for each part:
- 1) It advised that the information could be provided for the fee of £1050.00.
 - 2) It disclosed information, or directed where it could be publicly accessed.
 - 3) It directed where the information could be publicly accessed.
 - 4) It directed where the information could be publicly accessed.
 - 5) It confirmed information was held, but exempt from disclosure.

- 6) It advised that no information was held.
- 7) It advised that no information was held.
- 8) It advised that no information was held.
- 9) It advised that no information was held.
- 10) It disclosed information.

Scope of the case

8. The complainant contacted the Commissioner on 8 August 2018 to complain about the Council's response to parts 1, 4 and 5 of the request. During the course of investigation, the Council revised its position in respect of part 5, and disclosed held information.
9. The Commissioner considers the scope of the case of this case to be the determination of whether:
 - a) The Council is entitled to apply a charge in respect of part 1 of the request.
 - b) The Council has disclosed all held information in respect of part 4 of the request.
 - c) The Council has disclosed all held information in respect of part 5 of the request.

Reasons for decision

Regulation 8 – Charging

Part 1 of the request

10. Regulation 8(1) allows a public authority to charge for making environmental information available, subject to the following conditions:
 - Regulation 8(2) provides that no charge can be made to allow access to a public register or list of environmental information, or to examine the information at the place which the public authority makes available;
 - Regulation 8(3) requires that any charge must not exceed an amount which the public authority is satisfied is reasonable;
 - Regulation 8(8) requires the public authority to publish and make available to applicants a schedule of its charges and information on the circumstances in which a charge may be made or waived.

11. The Commissioner accepts that a charge can include the staff costs of locating, retrieving and extracting the requested information, as well as any disbursement costs. This follows the findings of the First-tier Tribunal (Information Rights) in *East Sussex County Council v Information Commissioner and Property Search Group (EA/2013/0037)* which found that the drafters of the original EU Directive 2003/4/EC (from which the EIR are derived) made a clear decision not to exclude the cost of staff time in searching for the environmental information when considering a reasonable amount for a charge. However any charge should be reasonable, and a requester should not be disadvantaged by a public authority's poor records management.

What information has been requested?

12. Part 1 of the request seeks scaleable plans for the highway boundaries of specific locations, with a preferred scale of 1:1000.

Regulation 8(2)

13. In respect of regulation 8(2), the Council has confirmed that the requested information is not contained within a public register or list.
14. There is no evidence that suggests the Council's position is incorrect, so the Commissioner accepts that this part of regulation 8 has been met.

Regulation 8(3)

How has the Council calculated the charge?

15. The Council has explained that the request seeks plans indicating the extent of the highway in relation to various roads. The Council estimates that this would require it to produce at least 30 plans. Such plans are created from a Geographic Information System (GIS) database that the Council subscribes to, usually at a scale of 1:1250 (although sometimes this scale cannot be achieved).
16. The Council has explained that it provides these plans for a commercial charge of £35.00 (plus VAT) per plan. As at least 30 plans would be required in respect of this request, the Council has applied the charge of £1050.00 (plus VAT). The charge is made up of officer time to research datasets, interpret the data and plans, and make any alterations to produce the maps requested. The Council publishes a schedule of

charges on its website¹, and is satisfied that the charge is reasonable and in line with similar commercial charges made by other local authorities nationally for this information.

17. In respect of the officer time that would be spent in producing the 30 plans, the Council has estimated that it would be a minimum of 15 hours. This estimate is based on an experienced officer, familiar with the GIS database, working exclusively on this task.
18. The Council has explained that it also offered to provide a refund to the complainant if the number of plans required came to be less than 30, and to notify the complainant if the number of plans was going to exceed 30. The Council highlights that to produce the maps is precise and detailed work, and that 15 hours is a conservative estimate of the required officer time.

How has the Council determined that the charge is reasonable?

19. The Council has informed the Commissioner that it has applied the charge in accordance with regulation 8(1) and 8(3) of the EIR, and associated guidance including the ICO guidance on charges. The Council has also had reference to its published schedule of charges, and has taken into account of the custom of practice by other local authorities nationally.

The Commissioner's analysis

20. The Commissioner has reviewed the Council's submissions, and additionally, the schedule of charges that it has published on its website.
21. In the circumstances of this case, the Commissioner has noted that the schedule of charges provided by the Council appears to relate expressly to commercial charges for property searches. An explanation of property searches, and how they relate to the EIR, can be found in the Commissioner's guidance on this subject². As explained in that guidance, a request for underlying environmental information under the EIR should not be conflated with a request for a 'guaranteed' official property search response (for which a commercial charge can be applied under the terms of the Local Authorities (England) (Charges for Property Searches) Regulations 2008 ("CPSR")).

¹ <https://www.lincolnshire.gov.uk//Download/102617>

² 'Property searches and the EIR' available at: <https://ico.org.uk/media/for-organisations/documents/1612/property-searches-and-eir.pdf>

22. Further evidence that suggests the Council has failed to consider the request as being for underlying environmental information under the EIR is that the Council has sought to apply VAT to the charge, despite there being no basis under the EIR on which the Council can do this (as noted by the Commissioner in decision notice FER0703951³).
23. Having reviewed the circumstances of this matter, the evidence available to the Commissioner suggests that the charge of £35.00 (plus VAT) per map represents a commercial charge for an official property search response, and no clear evidence has been provided by the Council that suggests that the applied charge of £1050.00 (plus VAT) represents a valid charge under the terms of the EIR.
24. It is pertinent for the Commissioner to note that the Council has seemingly applied the total charge based on a previously determined commercial charge, rather than based on the actual costs that the Council would incur by complying with the request. As explained in the Commissioner's guidance on charging under the EIR⁴, a charge under regulation 8 will generally only include the actual costs of staff time, and any disbursement costs required to transfer the information to the requester. In the circumstances of this case the Commissioner does not consider that the Council has provided any clear evidence that correlates the applied charge of £1050.00 (plus VAT) to the estimated time that it would take an officer to comply with the request (15 hours).
25. It is also pertinent for the Commissioner to note that the guidance also explains that 'commercial charges' are permitted in certain exceptions, such as where the public authority already makes the information available on a commercial basis and the charge is necessary to ensure such information continues to be collected and published (an example of which is the Ordnance Survey). However, the Commissioner does not consider that the Council has provided any clear evidence that suggests that this case falls under such a scenario.
26. In the absence of any clear evidence that the applied charge represents the actual costs that would be incurred by the Council in complying with

³ Decision notice FER0703951 available at: <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2258772/fer0703951.pdf>

⁴ 'Charging for environmental information (regulation 8)' available at: <https://ico.org.uk/media/for-organisations/documents/1627/charging-for-environmental-information-reg8.pdf>

the request, the Commissioner is not satisfied that the charge is reasonable.

27. Having concluded that the charge is not reasonable, the Commissioner does not need to proceed to consider regulation 8(8).

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

28. Regulation 5(1) states that any person making a request for information is entitled to have that information communicated to them. This is subject to any exceptions that may apply.
29. 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) decisions in applying the civil standard of the balance of probabilities.

Part 4 of the request

30. The information sought by this part of the request are any Traffic Regulation Orders in relation to a number of specific roads.
31. On handling the request, the Council originally stated that information was held, but already publicly available through an interactive map available on its webpages⁵. Following contact from the ICO, the Council reviewed its position, and identified that further information was held (namely the '2012 Consolidated Order' that incorporated certain orders made by the Council throughout 2012, and which was also publicly available through the webpages of the Traffic Penalty Tribunal).
32. The Council provided a copy of the 2012 Consolidated Order to the Commissioner, who then relayed it to the complainant for awareness. The complainant has subsequently raised a number of concerns, including:
- a) That the 2012 Consolidated Order refers to plans being attached to it, which are not contained within the document.
 - b) That the 2012 Consolidated Order only relates to 'stopping restrictions', whereas the request clearly seeks all Traffic Regulation

⁵ <https://www.lincolnshire.gov.uk/transport-and-roads/traffic-management/traffic-regulation-orders/35415.article>

Orders (including stopping up orders, prescribed route orders, events orders, and banned movements).

33. It is evident to the Commissioner, from the Council's belated confirmation that the 2012 Consolidated Order is held, that the Council originally failed to undertake sufficient searches in response to this part of the request. The Commissioner has also noted that the 2012 Consolidated Order itself appears to be incomplete, and that the Council has potentially neglected to consider the wide extent of the information that may fall within the parameters of this part of the request (as noted by the complainant).
34. Having considered these factors, the Commissioner is not satisfied that the Council has undertaken sufficient searches in respect of this part of the request, and as such, is not satisfied that all held information is likely to have been identified.

Part 5 of the request

35. The information sought by this part of the request are documents about the status and designation of the highway at Gorse Rise.
36. On handling the request, the Council originally stated that information was held, but exempt from disclosure. Following contact from the ICO, the Council reviewed the information, and found that this information did not fall within the parameters of the request due to it relating to a different subject matter.
37. Following the invitation of the ICO to do so, the Council undertook further searches to identify whether any recorded information was held. The Council identified further information spanning approximately 280 pages (including that which represents the complainant's personal data), and disclosed this to the complainant on 9 August 2019.
38. The Council has explained to the Commissioner that these further searches have included:
 - a) The searching of officer email inboxes, local drives, and the Council's information management systems using the keywords "Gorse Rise", "Grantham", a specific property on Hill Avenue, and the complainant's name. Information was retrieved and disclosed. The Council has clarified that, upon further investigation, it was identified that much of the relevant information held by the Council was in reference to the specific property on Hill Avenue.
 - b) Consultation with specialist officers in the 'Development Management' team, who confirmed that no highway adoption records were known to be held in relation to that highway.

- c) The searching of archived email accounts (of officers who have since left the Council) using the above keywords. Information was retrieved and disclosed.
39. Having considered the extent of the searches now undertaken by the Council, the Commissioner is satisfied that all held information is likely to have been identified.

Other matters

40. In investigating this case, the ICO has questioned the Council whether, due to the process by which maps are produced from the GIS database that the Council has access to, the plans are considered to be held by the Council for the purposes of the EIR. The Council has advised that it considers that the plans are held, and the ICO has proceeded on this basis.
41. However, the Commissioner perceives that there appears to be a difference in what the complaint seeks (maps of a scale of 1:1000), and what the Council has indicated it is able to provide (maps of a minimum scale of 1:1250). The Commissioner reminds the Council that in situations where there is a disparity between the information sought by a requester, and the information a public authority is able to provide, it may be necessary for the authority to provide advice and assistance to the requester under regulation 9. Doing so may prevent the authority from dedicating resources to providing information that is not sought by the requester.
42. Lastly, the Commissioner reminds the Council of the importance of clearly identifying the parameters of a request upon receipt, and furthermore, the importance of undertaking appropriate searches for information that would fall within those parameters.

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF