

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 3 March 2020

Public Authority: North Tyneside Council
Address: Quadrant
The Silverlink North
Cobalt Business Park
North Tyneside
NE27 0BY

Decision (including any steps ordered)

1. The complainant requested information from North Tyneside Council ("the Council") relating to a tree. The Council stated that it did not hold any recorded information falling within the scope of the request.
2. The Commissioner's decision is that the Council should have considered the request under the EIR, rather than the FOIA. However, she is satisfied that the Council does not hold the requested information.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. By way of background, the complainant had become concerned about an apparently dead tree in close proximity to the home of a close relative of his, which he feared may fall down. He had previously written to and telephoned the Council regarding his concerns.
5. On 4 August 2019, the complainant wrote to the Council to request information of the following description:

"Copy of the risk assessment and any relevant information on the tree I requested you to have an assessment on approx. 22-5-2019 at the back of [redacted address]. Which you did on 10-7-19. I would be

interested in any information held by your organisation regarding my request... I would like the information in a letter."

6. On 13 August 2019, the Council responded and stated that, since the tree was situated on land that was not maintained by the Council, it did not hold the requested information.
7. The complainant requested an internal review on 18 August 2019. On 13 September 2019, the Council provided the outcome of its internal review. It maintained that no recorded information was held, adding by way of explanation that verbal instructions had been issued and a visual inspection of the tree had taken place, but that since it had been informed that the tree was on private land, its workers had left before completing a risk assessment.

Scope of the case

8. The complainant contacted the Commissioner on 3 October 2019 to complain about the way his request for information had been handled.
9. This notice covers whether the Council should have considered the request under the EIR rather than under the FOIA. It also covers whether or not, on the balance of probabilities, the Council holds the requested information.

Reasons for decision

Regulation 2(1) of the EIR - is the information environmental?

10. Regulation 2(1) of the EIR provides the following definition of environmental information:

"...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...”

11. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
12. The Commissioner has produced guidance¹ to assist public authorities and applicants in identifying environmental information. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
13. The Commissioner notes that the requested information comprises information about assessing the safety of a specific tree, which the Council had been asked to inspect.
14. The Commissioner is satisfied that trees are an element of the environment within the definition at regulation 2(1)(a).
15. She is also satisfied that any risk assessment and/or other relevant information, if held, would potentially be a *measure* or *measures*, or information *on* such measures, that would be likely to affect elements of the environment, within the definition at regulation 2(1)(c).
16. The Commissioner is satisfied that the request fell to be considered under the EIR.
17. In such cases, the Commissioner may require a public authority to issue a fresh response to the requester under the correct regime. However, in this case, she has first considered whether the requested information is held by the Council.

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https://ico.org.uk/media/fororganisations/documents/1146/eir_what_is_environmental_information.pdf

Regulation 12(4)(a) - what information is held?

18. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that it does not hold that information when the applicant's request is received.
19. In cases where there is a dispute over whether information is held, the Commissioner applies the civil test of the balance of probabilities in making her determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held in cases which it has considered in the past.
20. The Commissioner will consider the complainant's evidence and arguments. She 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. She will also consider any reason why it is inherently likely or unlikely that information is held.
21. In bringing his complaint, the complainant explained that he had become concerned about an apparently dead tree in close proximity to the home of a close relative, fearing that it may have become liable to fall. He has provided evidence that he exchanged correspondence with the Council about the tree, which led to "workers" visiting the site of the tree on at least two occasions, prior to him making his request for information.
22. The complainant has explained that, on 10 July 2019, the workers visited his relative and informed her that the tree would be removed. He believes that the Council would hold recorded information about the decision that had apparently been taken to remove the tree, such as instructions to the team, a record of the inspection, or a risk assessment.
23. The complainant has also explained that a week later, he was advised by the Council that it would not be removing the tree since, on arriving to carry out the work, its workers had been told that it was on private land. He believes that the Council may also hold recorded information about this.
24. The Commissioner notes that, from the correspondence, it is not in dispute that the Council visited the site. The Council itself stated that it had visited the site prior to receiving the complainant's request for information.
25. The Council's position is that its tree team was asked, verbally, to inspect the tree on or around 10 July 2019, which it did. On doing, so, the team drew the conclusion that the tree was "*obviously dead*". The

Council has explained that no recorded information exists relating to this initial visit.

26. The Council has explained that if its tree team is tasked with removing a tree, the team normally draws up a report or assessment on the day of removal.
27. However in this case, the tree team had been advised that the tree was on private land. The team had therefore left the site on that occasion without it being necessary to fill in any report.
28. When investigating a complaint of this nature, the Commissioner is limited to considering the public authority's handling of a specific request for information (in this case, the request of 4 August 2019). In considering what information is held by a public authority, she is required to determine what was held while the authority was considering the request: that is, from the date of the request up until the outcome of the internal review.
29. The Commissioner notes that, during the period when the complainant's request for information was being considered by the Council, the tree had not been removed.
30. Therefore, while the Commissioner is aware that the tree was subsequently removed in late September 2019 (she is not aware whether this was done privately or by the Council), her investigation focused on investigating the Council's position that no relevant information was held prior to the outcome of the internal review being provided (13 September 2019).
31. The Commissioner has not been required to investigate whether the Council holds any information which may have been created subsequently.
32. The Council explained that, on receiving the complainant's request, it did not believe any relevant information to be held, since it considered that matters had been dealt with verbally and not formally recorded. However, it carried out searches for relevant information, using search terms relating to the location of the tree. It did not locate any relevant information.
33. The Commissioner considers that it was entirely reasonable for the complainant to expect the Council to hold information about the tree at the date of the request. However, she is satisfied that the Council carried out adequate and appropriately-targeted searches in response to his request, which would have been likely to retrieve information if it were held.

34. She has determined that, in this case, on the balance of probabilities, the Council was correct to state that it did not hold any recorded information relating to the complainant's request.

The Commissioner's decision

35. While the Council failed to consider the request under the appropriate legislation (the EIR), since the Commissioner has determined on the balance of probabilities that the requested information is not held, she does not require the Council to take any steps.

Right of appeal

36. 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

37. 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.
38. 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

Ben Tomes
Team Manager
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