

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

Date: 19 September 2013

Public Authority: North East Lincolnshire Council
Address: Municipal Offices
Town Hall Square
Grimsby
North East Lincolnshire
DN31 1HU

Decision (including any steps ordered)

1. The complainant requested information from North East Lincolnshire Council ("the council") relating to repairs made to a footbridge at the entrance to Humberston Fitties Chalet Park. The council initially said that the information was not held either by it or on its behalf by a third party. During the Commissioner's investigation, the council disclosed some information. It said that it considered that only the cost of the repair was information held on its behalf however it disclosed some additional information on an informal basis to assist the complainant. The complainant was not satisfied because he continues to believe that more information was held.
2. The Commissioner's decision is that the request should be dealt with under the terms of the Environmental Information Regulations 2004 ("the EIR"). The Commissioner found that some information was held on the council's behalf. The Commissioner therefore finds the council in breach of its obligations under section 5(1) and 5(2) of the EIR to make environmental information available within 20 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide a new response to the request under the EIR.

4. The public authority 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. The complainant requested information from the council in the following terms:

"Repairs to the bridge, water and other services at the right of the entrance gate to Humberston Fitties Chalet Park which was damaged on the 1st December 2010 and repairs completed at the end of February 2012.

Please supply all the internal and external information, including copies of the work schedules, quotes, invoices and communications for the above.

The health and Safety Risk Assessment for the above, covering the period 1st December 2010 to 29th February 2012.

Please advise which budget paid for the repairs if it was not included in Humberston Fitties service charge".

6. The council responded on 31 July 2012. In relation to the first two aspects of the request, the council said that as the works were managed and delivered by Balfour Beatty, the information was not held. In relation to the final part of the request, the council said that the cost of the works were paid for by Balfour Beatty, and will not be funded from either council budgets or included in the Humberston Fitties service charge.
7. The complainant requested an internal review on 7 August 2012.
8. The council responded on 30 August 2012. It said that it considered that it had responded properly to the request.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the council had correctly said that it did not hold the information requested in the first two parts of the request as follows:

Please supply all the internal and external information, including copies of the work schedules, quotes, invoices and communications for the above.

The health and Safety Risk Assessment for the above, covering the period 1st December 2010 to 29th February 2012.

10. For ease of reference, the Commissioner will refer to the above as part a) and b) of the request.
11. The complainant subsequently sought to expand the complaint at a later stage to cover the final part of the request relating to the budget for the repairs. The Commissioner's investigation has been limited only to the initial concerns raised as agreed with the complainant at the start of the investigation as outlined above.

Reasons for decision

Is the information environmental?

12. Information that is environmental information must be considered separately under the terms of the EIR. Regulation 2(1)(c) of the EIR defines environmental information broadly as any information on measures, activities, plans etc. affecting or likely to affect the elements and factors of the environment. Land and water are listed as relevant elements in regulation 2(1)(a).
13. The Commissioner understands that the works referred to in the request concerned repairs to a footbridge, water supply and other services at the right of the entrance gate to Humberstone Fitties Chalet Park. Tender information copied to the Commissioner describes that a mains water supply pipe was fractured as a result of construction traffic. The resultant water leak washed away the footings of a footbridge over a waterway. The footbridge subsequently collapsed and further damaged the mains water supply pipe. The works are described as involving the replacement of the pipe and the reinstatement of the footbridge. In view of this, the Commissioner decided that it was appropriate to consider the request under the terms of the EIR because the work would clearly affect the environment.

Regulation 5(1) - General right of access

14. Regulation 5(1) of the EIR provides a general right of access to recorded environmental information held by public authorities. Public authorities must make information available unless a valid reason exists for not doing so.

15. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. He will also consider the actions taken by the authority to check that the information was not held and he will consider if the authority is able to explain why the information was not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held. He is only required to make a judgement on whether the information was held "on the balance of probabilities".¹
16. Under both the EIR and the Freedom of Information Act 2000 ("the FOIA"), whether information is held by public authorities is not always a straightforward matter of considering what information is physically in the possession of the authority and the Commissioner has published some detailed guidance on the subject. For ease of reference, that may be accessed via the following link:

http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/information_held_by_a_public_authority_for_purposes_of_foia.ashx

http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/information_held_for_the_purposes_of_eir.ashx
17. The EIR contain similar provisions to the FOIA at regulation 3(2):

"For the purposes of these Regulations, environmental information is held by a public authority if the information
 - (a) *Is in the authority's possession and has been produced or received by the authority; or*
 - (b) *Is held by another person on behalf of the authority"*
18. As discussed in the Commissioner's published guidance, each case must be considered individually to determine whether information was held however there are various factors that will assist in determining whether a public authority held information for the purposes of the EIR or the FOIA. The weight attached to each one will vary. Factors that would indicate that the information is held solely on behalf of another person include:

¹ This approach is supported by the Information Tribunal's findings in *Linda Bromley and Others / Environment Agency* (31 August 2007) EA/2006/0072

- The authority has no access to, use for, or interest in the information
 - Access to the information is controlled by another person
 - The authority does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information; or
 - The authority is merely providing storage facilities, whether physical or electronic
19. Factors that would indicate that the information is also held by the public authority include:
- The authority provides clerical and administrative support for the other person, whether legally required to or not
 - The authority controls access to the information
 - The authority itself decides what information is retained; altered or deleted
 - The authority deals with enquiries about the information or
 - Costs arising from holding the information are included in the authority's overall budget
20. The council initially sought to maintain that it held no information falling within the scope of the request. It said that any information would be held by Balfour Beatty for its own purposes. It explained in general terms that although the asset concerned is council-owned, day to day operational maintenance works for the Humberston Fitties Chalet Park are managed and delivered by Balfour Beatty in accordance with their responsibilities under a partnership agreement. The council said that the maintenance work undertaken by Balfour Beatty is not for an agreed figure per asset and is part of an overall budget sum to manage a portfolio containing a number of assets. The council said that while it undertakes monitoring of maintenance activities and key performance indicators to ensure compliance with the terms of the partnership, it does not commission nor approve individual operation maintenance activities, nor does it arrange or schedule the undertaking of those activities. The council said that it does not require nor have access to the information requested by the complainant.
21. The Commissioner queried the council's position with reference to the guidance above about the circumstances when third parties may hold information. The Commissioner also noted in particular the part of his published guidance dealing with partnership agreements. The Commissioner's guidance deals with partnership agreements on page 8 and 9. The guidance explains that when working in partnership, there is a need for clarity over what information is held on behalf of each partner or member. The guidance says that in general terms, information that is brought to the partnership by one of the partners is regarded as being held by or on behalf of all partners. As there are a variety of partnership arrangements, it is not possible to provide guidance to cover all of them. Much will depend on the individual arrangements of the partnership as

to whether or not all information is held by all the partners or whether some is held by the partners solely on behalf of one of them.

22. Following the Commissioner's initial intervention, the council wrote to the complainant and said that it had decided to withdraw its refusal of requests (a) and (b). The council subsequently wrote to the complainant to provide some information. In relation to part a) of the request, the council provided a copy of the tender documents including the internal Balfour Beatty Workplace requisition form and quotation for works. In relation to part b) of the request, the council said that no formal written risk assessment existed relating to the footbridge. It clarified that an onsite visual risk assessment would have been completed by an engineer prior to any works being undertaken and subsequently an arrangement was made for the installation of protective rails. The council provided a copy of photographs evidencing the installation of the protective rails and offered to provide some additional photographs if required.
23. Following receipt of the information from the council, the complainant wrote to the Commissioner and said that he remained dissatisfied with the response. He explained that he believed that there would be a document, possibly a job sheet or form sending out the original engineer, and then the engineer's report or assessment. He said that as the engineer arranged for the protective rails to be installed he believes that there would be documents relating to this such as a job sheet or possibly an invoice. The complainant also said that he can tell from an email dated 10 January 2012 provided by the council that the council had not sent a second document for the water supply tender. He said that as the water supply and footbridge repairs were done at the same time, he would expect the same information to be held relating to both. Finally, the complainant said that he would expect there to be an invoice for the completed repairs.
24. The Commissioner subsequently contacted the council again. He said that he understood that the council was no longer seeking to claim that no information was held on its behalf. The council clarified that its position was that only the cost of the repair was information held on its behalf and the remainder of the information it had provided to the complainant had been done on an informal basis in an effort to assist his complete understanding of the context. The council reiterated that the works which the complainant had asked for information about were instructed, undertaken and paid for by Balfour Beatty. It said that the council does not need and are not required to hold detailed evidential records of the third party's internal activities, including the ordering and procurement that they undertake as a business. It added that this work was undertaken outside of the contractual arrangements that the council has with Balfour Beatty as a "goodwill gesture" whilst the company was on site completing other works.

25. For completeness, the council said that it was satisfied that it held no further information which was physically in its own possession. It said that electronic searches had been undertaken by the Performance Management and Contract Compliance Team in the Environment, Economy and Housing Directorate. It clarified that no hardcopy details relating to asset management are held. This team manages and monitors compliance with the relevant contract. Searches had also been undertaken by the Assets Team responsible for the management of the council's land and property assets. It said that no relevant information had been deleted, destroyed or mislaid.
26. The council added that in relation to these particular works, the council was not even informed of the works, aware of the detail, remedy or completion. The council said that Balfour Beatty had taken the decision itself to undertake the necessary repairs because the initial problem had been caused by one of Balfour Beatty's subcontractors. With reference to its earlier statement about undertaking monitoring of works, the council said that no monitoring took place in relation to these particular works because the work was considered to have taken place outside of the council's contractual arrangement. The council said that in this particular scenario, the council's procurement rules do not apply and all the council is interested in is that the bridge is left in a safe condition, no worse than its original condition.
27. The Commissioner decided to accept the council's position that it did not have any information physically in its own possession at the time of the request, albeit that the Commissioner finds this a surprising position. Given that the request relates to a council-owned asset, the Commissioner considers that it was reasonable for the complainant to expect the council to take at least a minimal interest in the repair even if the costs were being covered entirely by the third party. However, the Commissioner accepts that the council has conducted searches and there is no specific evidence to demonstrate that the council had any information in its own possession at the time of the request, or indeed at any other stage. The Commissioner queried the fact that the complainant had been supplied with an email that appeared to have a council email address on it, but the council clarified that under its arrangement with Balfour Beatty, the third party's employees are permitted to use council email addresses and this information had not been sent to the council prior to its informal request during the Commissioner's investigation.
28. Regarding the issue of whether further information was held on behalf of the council by Balfour Beatty, the Commissioner does not accept the council's position that only the repair cost would be held on its behalf. The Commissioner does not consider that it is persuasive for the council to claim that only the cost of the repair was information held on its behalf but none of the other details of the repair or supporting

information. If the cost of the repair was held on its behalf, despite the council's claim that the work took place outside of its contractual arrangements and was funded entirely by Balfour Beatty on their own terms, it is not clear why a straight-forward distinction should be made between the repair cost and any other information relating to the repair. Indeed, claiming that the cost of the repair was held on its behalf seems a contradictory claim for the council to make given the argument it is attempting to sustain.

29. The Commissioner is mindful of the fact that the repairs involved a council asset and that Balfour Beatty is a partner in contract with the authority to undertake maintenance activities. Furthermore, correspondence about the matter was made using a council email address, which suggests that a clear distinction was not being made. A copy of the contract concerned was provided to the Commissioner. The Commissioner understood from the council's responses that there is nothing in the contract that specifically obliges the third party to provide any further information to the council. While there may not be any specific contractual clauses, equally the Commissioner's attention has not been drawn to any clauses that explicitly exclude the provision of information that relates to maintenance of the council's asset. While the council may not have any day to day business need for the information, this does not mean that it would not be entitled to the provision of the information should it ever be required for a more detailed consideration depending on the circumstances.
30. Moreover, the Commissioner considers that the circumstances point to the conclusion that the information requested by the complainant would be held on the council's behalf by Balfour Beatty. The Commissioner does not find the council's claim convincing that Balfour Beatty may undertake maintenance work to its asset without the council taking any responsibility or having any interest in the details of that work. In the absence of any evidence demonstrating that Balfour Beatty is permitted to maintain council assets on its own terms in this manner, without any reference to the usual agreement in place between the parties, the Commissioner cannot accept the council's position that only the cost of the repair would be held on its behalf.
31. Of course, it may well be the case that if Balfour Beatty searched for any further information, no other information would be held. However, the complainant has raised valid concerns in this area and some of the documentation provided informally does suggest it is possible that more information was held. For example, a tender document refers to the requirement of any contractor to provide risk assessments for all work undertaken. The Commissioner cannot explore this area properly if the council will not concede that any information would be held on its behalf by Balfour Beatty beyond the repair cost. Therefore, it is necessary to issue this decision notice to deal with the preliminary issue of whether

any further information could be held on the council's behalf by Balfour Beatty. For the reasons provided, the Commissioner formed the view on the balance of probabilities that further information could be held. However, a response under the appropriate legislation, in this case the EIR, is required before further consideration can be given.

Procedural issues

32. The council provided some information to the complainant during the Commissioner's investigation. It said that some, but not all, of this information was held on its behalf by Balfour Beatty. The Commissioner finds that this information was held on the council's behalf and he therefore finds the council in breach of regulation 5(1) and 5(2) of the EIR. These provisions relate to the duty to make environmental information available within 20 working days.

33. Other matters

34. Although they do not form part of this decision notice the Commissioner would like to note the following areas of concern.

Information held on behalf of a public authority

35. Regulation 3(2)(b) confirms that, for the purposes of the EIR, environmental information is held by a public authority where it is held by another person on behalf of the authority.
36. The Commissioner's guidance explains that such a scenario may arise where a public authority has entered into a contractual arrangement with a third party. In such situations, the terms of the contract will determine what information is held on the public authority's behalf².
37. The Commissioner's guidance clarifies that, in order to comply with the requirements of the EIR, public authorities need to know what information they hold for the purposes of the EIR. This means they need to be aware of information they are solely holding for another person, and information that is being held on their behalf by other persons. With regard to the latter, authorities should know what information is held on their behalf by another person, and also have arrangements in place which allow them to retrieve the information in the event of a request for information being made.

38. The Commissioner considers that good records management is important in this context. Public authorities are advised to follow the good practice which is set out in the Lord Chancellor's Code of Practice under section 46 of FOIA (the "section 46 code"). This includes a section on records that are shared with other bodies or held on their behalf by other bodies.

The section 46 code of practice

39. Paragraph 13.1(e) of the section 46 code states:

"When authorities are working in partnership with other organisations, sharing information and

contributing to a joint records system, they should ensure that all parties agree protocols that specify:

e) Which body holds the information for the purposes of the Act."³

40. Paragraph 13.3 of the section 46 code states:

Some of an authority's records may be held on its behalf by another body, for example a body carrying out work for the authority under contract. The authority on whose behalf the records are held is responsible for ensuring that the provisions of the Code are applied to those records."

41. The Commissioner notes that the request which is the subject of this decision notice identifies information which is held by Balfour Beatty, a contractor of the council. The Commissioner expects that, in revisiting this request, the council will ensure that it follows the recommendations of the Commissioner's guidance and the section 46 code.
42. Where an authority fails to conform to the recommendations of the section 46 code, the Commissioner will consider issuing it with a practice recommendation. In relation to the council's future practice, he expects that this step will not be necessary.

³ <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section-46-code-of-practice.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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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

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