

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

Date: 9 May 2013

Public Authority: Liverpool City Council
Address: Municipal Buildings
Dale Street
Liverpool
L2 2DH

Decision (including any steps ordered)

1. The complainant has requested information relating to agreements and licences under sections 38, 177 and 278 of the Highways Act 1980. Liverpool City Council ('the council') responded by withholding the information under the exemption in the FOIA where the cost of compliance exceeds the appropriate limit.
2. The Commissioner invited the council to reconsider the request under the EIR but the council maintained reliance on section 12 of the FOIA and suggested that some of the information may be exempt under the FOIA exemptions for information provided in confidence (section 41) and commercial interests (section 43).
3. The Commissioner finds that the information requested is environmental and therefore exempt under section 39 of the FOIA. Accordingly the request should have been dealt with under the EIR. The Commissioner therefore requires the council to issue a fresh response under the EIR bearing in mind the duty to provide advice and assistance under regulation 9.
4. The public authority must take this step 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.

Background

5. Under section 38 of the Highways Act 1980, the highway authority may enter into an agreement with a developer of land on either side or both sides of a private street. The highway authority can agree to adopt the street as a highway maintainable at public expense when all the street works have been carried out to their satisfaction, and the developer agrees to carry them out within a stated time.
6. Section 177 of the Highways Act 1980 is concerned with the restriction on construction of buildings over highways.
7. Section 278 of the Highways Act 1980 allows developers to enter into a legal agreement with a highway authority to pay for or to make alterations or improvements to the public highway, for example, the addition of speed bumps.

Request and response

8. On 7 July 2012 the complainant made requests for the following information:
 - s38 Highways Act 1980 Agreements** - Location/Address, Date of Agreement, Applicant/Agent, Developer Address Details, Total Charges by the Local Authority, Total Charges by other parties (consultant if applicable), Cost of Works, Cost of Bond, Current Bond Level Remaining %age or value, Final Certificate Issued Yes/No.
 - s278 Highways Act 1980 Agreements** - Location/Address, Date of Agreement, Applicant/Agent, Developer Address Details, Total Charges by the Local Authority, Total Charges by other parties (consultant if applicable), Cost of Works, Cost of Bond, Current Bond Level Remaining %age or value, Final Certificate Issued Yes/No.
 - s177 Highways Act 1980 Licences** - Location/Address, Date Issued, Applicant/Agent, Licensee Details (address), Period of Licence, Charge by the Local Authority.
9. The council responded on 24 July 2012 and refused to provide the requested information citing section 12(1) of the FOIA.
10. The complainant first expressed dissatisfaction with the response on 28 July 2012. The council responded on 30 July 2012 maintaining the application of section 12(1) and on 1 August 2012, after further

correspondence from the complainant dated 31 July 2012, stated it would initiate an internal review.

11. The council provided its internal review response on 28 August 2012 in which it maintained its original position that to provide the requested information would take in excess of the appropriate time limit. Further correspondence passed between the complainant and the council from 30 August 2012 to 5 September 2012 before a complaint was made to the Commissioner.

Scope of the case

12. The complainant contacted the Commissioner on 10 September 2012 to complain about the way his request for information had been handled. He stated that he had made the same request to all of the Merseyside Authorities and they have either complied or worked with him to clarify the requested information and offer helpful advice, contrary to Liverpool City Council's stance.
13. The Commissioner considers whether the council dealt with the request appropriately.

Reasons for decision

The appropriate legislation – FOIA or EIR?

14. The first matter for the Commissioner to decide is whether the information is covered by the FOIA or the EIR. Section 39 of the FOIA states that information is exempt information if the public authority holding it is obliged, by regulations under section 74 of the FOIA, to make the information available to the public in accordance with those regulations or would be so obliged but for any exemption under those regulations. The regulations under section 74 of the FOIA are the EIR. Information falls to be considered under the EIR if that information is environmental information.
15. Regulation 2(1) of the EIR defines 'environmental information' as having the same meaning as in Article 2(1) of Council Directive 2003/4/EC:

 'namely 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;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c);and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)'.

16. In the Commissioner's view, the use of the word 'on' indicates a wide application and will extend to any information about, concerning, or relating to the various definitions of environmental information.
17. The Commissioner's view is that the requested information is environmental within the meaning of the EIR as it is information on measures, namely agreements and licences, affecting or likely to affect the land which is an element of the environment referred to under regulation 2(1)(a). Information on section 278 agreements was deemed to be environmental in the Commissioner's previous decision notice FER0427861.
18. As the Commissioner deemed the information to be environmental, and therefore exempt from the FOIA under section 39, he requested that the council reconsider the request and, if appropriate, provide arguments in relation to regulation 12(4)(b) (manifestly unreasonable) as this is the nearest equivalent to section 12 of the FOIA.
19. The Commissioner pointed out that the EIR do not provide a definition of what constitutes an unreasonable cost and although the Freedom of Information and Data Protection (Appropriate Limit and Fees)

Regulations 2004 are not directly applicable to the EIR, they can provide a useful point of reference when public authorities argue that complying with a request would incur an unreasonable cost and therefore could be refused on the basis of regulation 12(4)(b). He also pointed out that there are additional factors that should always be considered in assessing whether the cost of complying with a request for environmental information are manifestly unreasonable, in particular:

- Proportion of burden on the public authority's workload, taking into consideration the size of the public authority; and
 - The individual circumstances of the case, including:
 - the nature of the information requested;
 - the importance of the issue at stake; and
 - the aggregated burden on resources where the request is one of many within one item of correspondence, or several items of correspondence submitted over a short period of time.
20. The Commissioner also made the council aware of its duty to provide advice and assistance under Regulation 9 including assisting an applicant to refine a request if it is deemed that providing the requested information would incur an unreasonable cost. In addition, he informed the council that all the exceptions in the EIR are subject to a public interest test.
21. The council's response to the Commissioner maintained reliance on section 12 of the FOIA. In summary, it confirmed that it did hold databases holding some, but not all, of the requested information and therefore interrogation of manual files would be necessary to verify if all of the information was held. It also stated that some of the information may also be exempt under sections 41 and 43 of the FOIA. It did not consider the additional factors detailed in paragraph 19 or the public interest test.
22. In dealing with the request under the FOIA, rather than the EIR, the council did not deal with the request appropriately.
23. As stated in paragraph 3, the Commissioner therefore requires the council to issue a fresh response under the EIR and specifically draws the council's attention to the duty to provide advice and assistance under regulation 9. The council should consult the Commissioner's guidance on the EIR. The following in particular appear relevant in this case:

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

http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Introductory/EIP076_GUIDANCE_FOR_PUB_DOC_VERSION3.ashx

http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Practical_application/eir_confidentiality_of_commercial_or_industrial_information.ashx

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

Right of appeal

24. 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

25. 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.
26. 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