

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 15 July 2015

Public Authority: Hertfordshire County Council

Address: County Hall
Hertford
Hertfordshire
SG13 8DE

Decision (including any steps ordered)

1. The complainant has made three requests to Hertfordshire County Council ("the council") for information relating to kerbing. The council refused the requests under the exception provided by regulation 12(4)(e) of the Environmental Information Regulations ("the EIR").
2. The Commissioner's decision is that the council has correctly applied regulation 12(4)(e).
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 2 September 2014 the complainant wrote to the council and made Request 1:

"Subject: Refusal to remove the dropped kerb outside [redacted addresses], Watford, Hertfordshire. I request copies of ALL documentation consulted and/or involved in reaching this decision. To include:

*Photographs
Any and ALL correspondence
Minutes of meetings
References to legal documentation
ALL Reports
ALL reasons for decision
Risk assessment
Telephone conversations"*

5. The council responded on 30 September 2014, and refused the request under the exception provided by regulation 12(4)(e).
6. The complainant subsequently submitted two further requests on 5 October 2014:

"I request a list of ALL documentation used to reach the decision for the refusal to remove of the dropped kerb outside [redacted addresses], Watford, Herts." [Request 2]

"I request ALL REASONS for the refusal to remove of the dropped kerb outside [redacted addresses], Watford, Herts." [Request 3]
7. The complainant asked for an internal review on 7 October 2014.
8. The council provided the outcome of its internal review on 5 November 2014. It maintained its position.
9. The council responded further on 10 November 2014 to advise that it considered Request 2 and Request 3 to be repeats of Request 1, and to refuse both on the same basis of the first.

Scope of the case

10. The complainant contacted the Commissioner on 9 December 2014 to contest the council's response. Specifically, he disputed the council's refusal under regulation 12(4)(e).
11. The Commissioner therefore considers the scope of this case is the determination of whether the council has correctly engaged regulation 12(4)(e) to refuse all three requests.

Reasons for decision

Background

12. The complainant's requests for information relate to a complaint that he had previously made to the council in respect of the position of a dropped kerb. In response to this complaint, a council officer undertook a site visit to collate information (including digital photographs). This information was then submitted to the appropriate manager for a decision to be made.

13. The resultant decision was that no change should be made to the kerb, and the manager provided the decision (including the factors that had been considered) to the complainant.
14. The complainant subsequently made three requests for information about the manager's decision ("the substantive matter").

Is the information environmental?

15. 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)(f), any information relating to the state of human health and safety, will be environmental information. The requested information relates to the placing of a dropped kerb. The Commissioner therefore considers that the request should be dealt with under the terms of the EIR.

Are all three requests for the same information?

16. The Commissioner has reviewed the three requests for information that the complainant has made, and has noted that each request uses different language and terms of phrase. However, Request 1 clearly requests "*all documentation*" relating to the substantive matter, and whilst Request 2 and Request 3 use the differing terms to describe the information sought, it is logical that Request 1 would encapsulate all held recorded information that is relevant to the substantive matter, including any held "*list of ALL documentation*" as specifically sought in Request 2.

Regulation 12(4)(e) – internal communications

17. Regulation 12(4)(e) states:

"For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that...

(e) the request involves the disclosure of internal communications."

18. Regulation 12(4)(e) is a class based exception, and as such it is not necessary to demonstrate prejudice or harm to any particular interest in order for its engagement.
19. To ascertain whether the regulation is applicable, the Commissioner must first consider whether the information is a 'communication' for the purposes of the EIR. The Commissioner considers that a communication will encompass any information that someone intends to communicate to others, either directly or by making it available for consultation.

15. Having examined the withheld information, and considered the specific circumstances of its creation, the Commissioner is satisfied that it can be properly characterised as a communication for the purposes of this exception.
16. The EIR does not define the meaning of 'internal'. Consequently, in the absence of a definition, a judgment must be made that considers the context of the communications. In this case the information comprises emails and digital photographs that were sent between council officers for the purposes of their duties. The Commissioner is therefore satisfied that the communications were 'internal' to the council, and that regulation 12(4)(e) is engaged.

The public interest test

17. Where regulation 12(4)(e) is engaged, it is subject to the public interest test required by Regulation 12(1). The test is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
18. When carrying out this test the Commissioner must take into account the presumption towards the disclosure of the information as required by Regulation 12(2).

The public interest in disclosing the information

19. The council has confirmed that it has considered the need to ensure accountability and transparency in relation to its decision making, particularly in circumstances such as the substantive matter.
20. Further to this, it is evident to the Commissioner that the substantive matter relates to human health and safety, as well as highway and pavement conditions in a residential area, and that as such a high level of transparency should be expected.

The public interest in maintaining the exception

21. The public interest considerations relating to regulation 12(4)(e) relate heavily to the protection of thinking space, and the ability to have full and frank discussions without fear that such discussions will be disclosed.
22. In this case the council asserts that the protection of thinking space is particularly important, as the area of business within the council that investigates and reaches decisions in such matters (the Network Congestion Management group) receives a large volume of highway related complaints that require a decision to be reached on the basis of advice between officers. The council therefore believes that the

expectation of disclosure would lead to less full and frank advice being communicated between officers. In particular, the council has elaborated that in the context of this specific matter, the council officers were required to reach an independent decision on an area of kerb that was not installed by the council, and for which they were not able to obtain the original reasoning for its placement.

23. The council has also proposed that in the circumstances of this case, the public interest has already been met by the disclosure of the decision itself. As the council has referenced in its own submission, the Commissioner has previously considered the distinction between 'advice' and a 'decision' in decision notice FER0555744. In that decision notice, the Commissioner identified that whilst advice may influence a decision, it was ultimately the resultant decision itself, made by an accountable decision-maker, to which the public interest in disclosure was attached. Having considered the circumstances of this case, it is clear that the accountable decision maker is the manager who reached the decision, and that this decision has already been disclosed.
24. Lastly, the council has confirmed that whilst it has issued its decision, the issue remains live due to on-going monitoring by the council, and the possibility that the complainant may still challenge the council's decision.

Balance of the public interest

25. In reaching a determination on the balance of the public interest, the Commissioner has remained mindful that the withheld information represents direct communications between two council officers for the purpose of a formal decision being reached, which the Commissioner understands could still yet be challenged by the complainant.
26. The Commissioner acknowledges that the disclosure of the communications would provide a more detailed context to the decision, which may assist the complainant in deciding whether to challenge it, and provide wider transparency about the factors the council can consider in such a matter.
27. It is plausible however that such disclosure may result in poorer decision making in future cases, as the expectation that such communications may be routinely published alongside any formal decision may inhibit officers from displaying frankness in their advice.
28. Having considered the negative impact that disclosure may result in, in conjunction with the substantive matter still remaining open to challenge, the Commissioner finds that the public interest lies in maintaining the exception.

Right of appeal

29. 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

30. 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.
31. 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
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