

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 24 October 2016

Public Authority: The London Borough of Croydon
Address: Bernard Weatherill House
8 Mint Walk
Croydon
CR0 1EA

Decision (including any steps ordered)

1. The complainant has requested information from the London Borough of Croydon (the "Council") regarding the measurement and filling in of a hole in a pavement which he considered to be a trip hazard. The Council responded to the request and to further follow-up requests made by the complainant but he remained dissatisfied. Following the intervention of the Commissioner, the Council reviewed this matter and located two further photographs and further detail concerning the measurement of the hole which had not been sent to the complainant. These have now been provided to him. The Council has confirmed to the Commissioner that no further information is held.
2. The Commissioner's decision is that in responding to the initial request in 21 working days and in failing to provide all the information it held, the Council is in breach of regulation 5(1) and 5(2) of the EIR. In failing to provide the complainant with a refusal notice under the EIR with respect to information the Council has confirmed it does not hold, the Commissioner finds the Council to be in breach of regulation 14(1) and (2) of the EIR. The Council also failed to respond to a follow-up request within 20 working days and this is also a breach of regulation 5(2).

Request and response

3. On 19 December 2014 the complainant requested information under the Freedom of Information Act 2000 (the FOIA) from the Council. This was

with respect to a hole in the pavement which the Council had measured and filled in. The complainant requested:

'a.

Detailed photographs to show how the measurement of 0.013mm was obtained and at what location around the hole.

b.

If no photographic evidence is available, then a detailed explanation how the measurement of 0.013mm was obtained and at what location around the hole.

c.

Signed statement from the person and/or persons taking the measurement of 0.013 as to how they took the measurement.

d.

Why did the hole in the pavement get filled in before the full details of the case for both parties had been established as to whether a trip hazard existed, and a joint agreement as to the depth of the trip hazard?'

4. The Council acknowledged the request on 23 December 2014.
5. The Council provided a response under the FOIA on 22 January 2015. The Council addressed each request:
 - The Council explained the measurement was taken with a straight edge and set square and measure.
 - The Council attached a photograph.
 - The Council has explained that as there is currently an ongoing public liability claim against it, it would provide the witness statement at the appropriate time when and if the claim becomes litigated.
 - The Council explained that the senior highways inspector made the decision to repair the hole. It was considered the depression in the pavement may have deteriorated further over time.
6. On 26 July 2015 the complainant again wrote to the Council about the measurements taken and the instruments used.

Further request 3 September 2015

7. The complainant sent a chaser email on 5 August 2015 and a letter outlining why he was not satisfied with the response on 3 September 2015. In this email he made a further request for information:
 1. A request regarding the instruments used to measure the hole.
 2. A quotation for the provision of two core holes to be taken through the filing of the hole.
 3. Details of under what authority the Council could take action to fill in holes in the pavement.
8. On 17 September 2015 the Council confirmed it was gathering the further information required. On 5 October 2015 the Council wrote to arrange a meeting with its insurance team. However on 6 and 13 October 2015 the complainant repeated that he required an answer to his questions before he met the insurance team.
9. On 13 October 2015 the insurance team emailed the complainant to confirm that it had requested that the information he required be sent to him.

Response to request of 3 September 2015

10. On 21 October 2015 the Council responded to the complainant's questions. The Council explained:
 - it did not hold any further information regarding the measurement of the hole other than that sent on 22 January 2015;
 - it held no data on the taking of core holes through the filing of the hole; and
 - the duties of all highway authorities are outlined in the Highways Act 1980.
11. On 3 November 2015 the complainant expressed his dissatisfaction with this response.
12. On 8 December 2015 the Council provided an internal review. It explained that the measurement had been taken by a senior inspector and at the time of the visit was 13mm. It explained the defect was measured using a combination square and spirit level.
13. The Council explained taking a core sample would provide no information in respect of the original defect.

14. The Council then answered further questions asked by the complainant on 13 October 2015.
15. On 4 February 2016 the complainant complained that the Council had no right to undertake an internal review. He complained about the handling of his request. He requested the clauses in the Highways Act 1980 which states the duties of Councils.
16. On 10 February 2016 the Council explained it had conducted the internal review in response to his complaint of 3 November 2015 in order to review all the requests and responses made under the FOIA.
17. On 28 April 2016 the complainant explained he was still not satisfied and required answers to outstanding questions.
18. On 3 May 2016 the Council wrote to the complainant and explained that it had reviewed the information previously provided to him, and did not have anything further to add.
19. On 6 May 2016 the complainant complained about the Council's response. He explained he wished it to respond to a number of questions in which he required it to answer yes or no. The complainant explained he had never received a response to his request of 19 December 2014.
20. On 12 May 2016 the Council explained it considered that it had answered the complainant's questions to the best of its ability. It confirmed it does not hold any further information in addition to the information which he had already been provided with.

Scope of the case

21. The complainant contacted the Commissioner on 24 May 2016 to complain about the way his request for information had been handled. The Commissioner asked the complainant for further documents on 13 July 2016 and wrote to the complainant to define the scope of the case on 19 August 2016. This was agreed on 26 August 2016.
22. The scope of this case is therefore concerned with whether the Council handled the requests of 19 December 2014 and 3 September 2015 in accordance with the EIR.

23. Specifically, the Commissioner will consider whether the Council is correct when it says that it does not hold any further information. The Commissioner will also consider the Council's refusal to provide the requested signed statement from the person and/or persons taking the measurement (requested on 19 December 2014). The Commissioner will also review the Council's initial response under the FOIA and the timing of that response.
24. The Commissioner has clarified with the complainant that the outstanding issues concerned the question as to whether the Council held recorded information held by the Council regarding:
 - the measurement of the hole;
 - the instruments used;
 - photographs of the hole; and
 - a signed statement from the person who took the measurements.

Reasons for decision

Regulation 2

25. The Commissioner has considered whether the information requested by the complainant is environmental information as defined by the EIR.
26. The Commissioner considers that the information requested falls within regulation 2(1)(c): "measures (including administrative measure), 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 these elements".
27. The complainant requested information about the measurement and filling in of a hole in the ground. The Commissioner considers the requested information to be environmental, as it relates to information on an activity which may affect the land or landscape. This is in accordance with the decision of the Information Tribunal in the case of *Kirkaldie v IC and Thanet District Council (EA/2006/001)*.

The Council's position

28. In responding to the Commissioner's questions, the Council located two extra photographs and further detail concerning the measurement of the hole which had not been sent to the complainant. These have now been provided to him.

29. The Council therefore considers that the complainant now has a copy of all the information it holds with respect to the measurement of the hole and the instruments used.
30. The Council has also confirmed that it does not hold a signed statement from the person who took the measurement.

Regulation 12(4)(a) – information not held

31. Regulation 12(4)(a) of the EIR provides that a public authority may refuse to disclose information if it does not hold the information at the time the request is received.
32. In this case, the complainant considers that the Council holds further information which has not been provided to him.
33. In scenarios where there is some dispute between a public authority's explanation of information held and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
34. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
35. The Commissioner therefore asked the Council to explain what searches were carried out for information falling within the scope of this request and why it considered these searches would have been likely to retrieve any relevant information.
36. The Council explained that information relating to Highways matters are recorded in a specialised electronic case file system known as JCAD LACHS. It explained it also uses a Sharepoint system to record and store correspondence across the Council.
37. The Council explained that in line with agreed Council practice, once a freedom of information ("FOI") request is received by the FOI team, the request is sent to the relevant team within the Council who has lead on the information requested. The team is then expected to conduct a detailed search into all electronic systems and where applicable manual files to determine if the information requested is held by the Council.
38. The Council has confirmed that all necessary and relevant searches were made by Council officers in the highways and insurance teams to ensure that the Council retrieved all the relevant held information.

39. The Council confirmed that three photographs were taken by the Highways team regarding the relevant hole but unfortunately only one was sent to the complainant. It has explained that this was a mistake and has apologised for this.
40. The Council has explained that the measurements were obtained by the Council's Highways engineers following a report of an incident to the Council on 3 August 2014. The engineers used the Council agreed method to determine the level of defects. Following the measurements by the engineers, the following information was recorded:

"the depression measures 500mm by 530mm and up to a maximum of 26mm – 27mm in depth. There was no actual vertical trip but the edge of the depression was uneven and a difference in levels of 13mm".
41. The Council has explained that this information was partially provided to the complainant and it has again apologised for this.
42. The Council has explained that it has a duty to inspect and maintain roads under the Highways Act 1980 and in addition that this in line with the Council's procedure document. The Council has confirmed that the Highways Act 1980 is the sole legislative authority for inspecting and maintaining public highways as defined under the legislation.
43. The Council has confirmed that it holds no recorded information about instruments used in carrying out the measurements. However it has previously informed the complainant that the measurements were taken with a straight edge and combination set square and this was provided in the photograph sent to him.
44. The Council has confirmed that it has not deleted or destroyed any information relevant to the complaint and/or the EIR request made by the complainant.
45. With respect to the request for the council officer who took the measurements of the holes to provide a signed statement on how they took the measurement, the Council has explained that this information is not held and therefore that the request does not fall within the remit of the EIR.
46. In view of the above, now the outstanding photographs and further detail concerning the measurement of the hole have been provided to the complainant, the Commissioner is satisfied that on the balance of probabilities, the complainant has a copy of all the requested information which the Council holds.

Procedural matters

47. Regulation 5 of the EIR requires public authorities to provide environmental information within 20 working days of receipt of a request. Where no information is held, Regulation 14(2) requires a refusal notice to be issued within that time.
48. The Commissioner notes that although the Council provided some information in response to the request of 19 December 2014, this was provided in 21 working days. The Council also held further photographs and detail concerning the measurement of the hole which were not provided at the time of the request. This is therefore a breach of regulation 5(1) and 5(2) of the EIR.
49. In failing to provide the complainant with a refusal notice under the EIR with respect to the requested signed statement which the Council has explained it does not hold, the Commissioner finds the Council to be in breach of regulation 14(1) and (2) of EIR. This requires that a public authority refusing a request for information should specify the exceptions upon which it is relying within 20 working days.
50. In failing to provide a response to the complainant's request of 3 September 2015 within 20 working days, the Commissioner finds the Council to be in breach of regulation 5(2) of the EIR.

Right of appeal

51. 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

52. 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.
53. 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

Chris Hogan
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