

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 9 August 2018

**Public Authority:** Frindsbury Extra Parish Council

**Address:** c/o 53 Capelands  
New Ash Green  
Longfield  
Kent  
DA3 8LQ

#### **Decision (including any steps ordered)**

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1. The complainant has requested a copy of a survey report from Frindsbury Extra Parish Council ("the Council").
2. The Commissioner's decision is that the requested information is environmental information within the definition at regulation 2(1)(c) of the EIR. The request should, therefore, have been handled under the EIR rather than the FOIA.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation:
  - Reconsider the request under the provisions of the EIR and issue a fresh response to the complainant.
  - To the extent that the Council withholds any of the requested information, it should issue a refusal notice that complies with regulation 14 of the EIR.
4. The Council 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

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5. On 14 November 2017, the complainant wrote to the Council and requested information in the following terms:

*"It was passed at the Parish meeting on 26th October for me to be issued with a copy of the surveyors report into the encroachments in front of my home... Will one of you be good enough to pass on a copy?"*

6. The Council responded via its solicitors on 13 December 2017. It confirmed that the Council held the information that had been requested, but withheld it under section 41 of the Freedom of Information Act 2000 (FOIA) – information provided in confidence.
7. The complainant was not told of his right to ask for an internal review of the decision.

## Scope of the case

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8. The complainant contacted the Commissioner on 19 December 2017 to complain about the way his request for information had been handled.
9. The Commissioner informed the Council on 8 June 2018 that she noted that the complainant had not been informed that he could ask for an internal review, and that she considered that the information may be environmental in nature in which case his request should have been considered under the EIR.
10. Under the EIR, when requested to, a public authority must carry out an internal review into its handling of a request for information under regulation 11. The Commissioner asked the Council to carry out an internal review covering whether it still wished to withhold the information under section 41 of the FOIA, or whether it now considered that the information was environmental in nature, in which case it should consider the request under the EIR.
11. The Council, via its solicitors, wrote to the Commissioner on 29 June 2018. It stated that it had reviewed its handling of the request but still considered that it had correctly withheld the requested information under section 41 of the FOIA.
12. The Commissioner's decision in this case relates only to the appropriate access regime, that is, whether the requested information falls to be considered under the EIR or the FOIA. The Commissioner has made no

decision as to whether the requested information should be disclosed, since the issue of the appropriate access regime must be resolved first.

## Reasons for decision

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### Regulation 2: environmental information

13. 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;*

*(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 elements of the environment referred to in (b) and (c);"*

14. 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.

15. The Commissioner recognises that it can sometimes be difficult to identify environmental information, and has produced guidance<sup>1</sup> to assist public authorities and applicants. 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.
16. By way of background, the Commissioner notes that the survey report which has been requested ("the report") was drawn up, at the Council's request, by Messrs Rogers Stevens & Chance, Chatham, and is dated 15 September 2017.
17. The Council has stated that it "*does not consider that the report should be disclosed as appropriate environmental information.*" However, it has not offered any supporting arguments.
18. The Commissioner, therefore, has considered the report in light of the definition at regulation 2 of the EIR.
19. The Commissioner's interpretation of the phrase 'any information... on' is that it will usually cover information concerning, about, or relating to the measure, activity, factor etc., in question. It is not necessary for the information itself to have a direct effect on the elements of the environment, or to record or discuss such an effect.
20. The Commissioner has considered the purpose and contents of the report. The report is entitled *Report on Boundary to Rear of* [redacted address]. Its stated purpose is to assess whether there has been encroachment by the owners of the property named in the title of the report onto land at the rear of that property, which is owned by the Council.
21. The Commissioner notes that a small number of adjacent properties in the relevant cul-de-sac back onto a steeply wooded bank which is, as stated, owned by the Council. It is evident from the report that a surveyor visited the property named in the title of the report and

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<sup>1</sup> 1

[https://ico.org.uk/media/fororganisations/documents/1146/eir\\_what\\_is\\_environmental\\_information.pdf](https://ico.org.uk/media/fororganisations/documents/1146/eir_what_is_environmental_information.pdf)

compared the situation 'on the ground' with the delineation of the property and its boundaries on various plans to assess whether encroachment had occurred. In doing so, the surveyor paid particular attention to the construction of the rear garden and patio of the property.

22. In addition to assessing the boundary line, the report refers to the steeply wooded bank and considers whether there has been, or is likely to be, any landslip to the rear.
23. As previously explained at paragraph 19 and in line with her guidance, referenced previously, the Commissioner does not consider that the requested information has, in itself, to have a direct effect on the elements of the environment in order to be environmental.
24. The Commissioner is satisfied that the report contains written information on measures - specifically, activities - affecting or likely to affect the state of the elements of the environment, specifically, soil, land and landscape.
25. The Commissioner's decision is that the report therefore falls within the definition of environmental information at regulation 2(1)(c) of the EIR and she orders the Council to make a fresh response to the complainant's request of 14 November 2017 under the provisions of that legislation.

## Right of appeal

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26. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

27. 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.
28. 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  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**