

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 March 2020

Public Authority: Trafford Metropolitan Borough Council
Address: Trafford Town Hall
Talbot Road
Stretford
M32 0TH

Decision (including any steps ordered)

1. The complainant requested information relating to inspection, maintenance and repairs of a specified highway area over a specified timeframe. Trafford Metropolitan Borough Council (the 'Council') disclosed some of the requested information, but withheld the remainder under the Regulation 12(5)(b) (the course of justice etc) exception of the EIR.
2. The Commissioner's decision is that the Council has correctly applied Regulation 12(5)(b) of the EIR to the withheld information and that the public interest in all the circumstances of the case favours maintaining the exception as set out in Regulation 12(5)(b).
3. The Commissioner requires no steps to be taken.

Background

4. In the current case, the Commissioner has inferred from the complainant's correspondence that he believes damage was caused to his car tyre as a result of a defect in the road for which he lodged a claim for compensation from the Council.

Request and response

5. On 26 March 2019 the complainant wrote to the Council and requested information in the following terms:

'I am writing to request information under the Freedom of Information Act relating to a road your authority is responsible for maintaining. Specifically, my query relates to the carriageway being the inside lane of the southbound carriageway approximately 68m south of the commencement of the straight kerb face from the southern edge of the west bound M60 slip road at it's junction the A56 Chester Road. Approximate coordinates 53.435192, -2.315623.

Please can you send me:

A copy of your current road maintenance policy relating to that road. Please send me the full policy, but this should include details of the intended frequency of road safety inspections, how these inspections should be conducted and the maximum time between identification of a defect and repairs being carried out.

A copy of the road repair history for that road in this approximate location over the past year. Again, please send me the full road repair history, but this should include:

- dates of all safety inspections between 23 March 2018 and 22 March 2019- with details of how safety inspections were undertaken (walked or driven, speed of inspection vehicle etc)

- copies of all images and video recordings of the road surface with description, date and time.

-details of all carriageway defects identified (either by the authority or notified to it), with description, date and time

- details of how the authority handled these defects, what repairs were undertaken and the time between the identification of each defect and a repair being carried out.

Whilst we wait for the documentary evidence of the lack of your maintenance, which is absolutely evident on site, would you please confirm whether you wish to engage in any form of Alternate Dispute Resolution prior to my issuing proceedings'.

6. The Council responded on 20 May 2019. It disclosed a copy of its road maintenance policy but withheld the road repair history for the named section of highway under Regulation 12(5)(b) of the EIR. It said its decision was in line with the Commissioner's Decision Notice FER0611819, dated 26 June 2016, relating to Cheshire West and Chester Council¹.

¹ https://ico.org.uk/media/action-weve-taken/decision-notice/2016/1624521/fer_0611819.pdf

7. On 20 May 2019 the complainant requested an internal review in which he disputed the Council's application of the EIR and the Regulation 12(5)(b) exception to his request.
8. Following an internal review, the Council wrote to the complainant on 21 June 2019 and said it was maintaining its position under Regulation 12(5)(b) of the EIR. In relation to how it handled defects in the road, the Council disclosed a copy of its Code of Practice for Highways Maintenance.

Scope of the case

9. The complainant contacted the Commissioner on 21 June 2019 to complain about the way his request for information had been handled. He complained about the Council's application of the EIR to his request generally and Regulation 12(5)(b) specifically.
10. The Commissioner responded on 12 September 2019 drawing the complainant's attention to a number of previous Decision Notices in relation to requests similar to his own where the public authority's application of Regulation 12(5)(b) of the EIR had been upheld. One such Decision Notice was FER0742277 dated 6 August 2018 concerning Solihull MBC². In this decision, the Solihull MBC had disclosed the maintenance and repair records with the dates redacted. Although the Commissioner is not bound to follow her previous decisions, she invited the complainant to consider whether a copy of the withheld information with the dates redacted would satisfy his request. She also pointed out, as the Council had done earlier, that the complainant might find it easier to access the redacted information via the civil claims process and the Civil Procedure Rules.
11. The complainant responded on 13 September by stating he did not believe the EIR were applicable to his request and felt the withheld information should be disclosed in its entirety. He also said the Metropolitan Borough of Wirral had a policy of defending highway claims by providing all the maintenance and repair evidence as proof of compliance with their published policies.
12. The Commissioner subsequently referred the complainant to a more recent Decision Notice (her reference FER0865364 dated 21 January

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259595/fer0742277.pdf>

2020³) with similar facts to his own concerning Bolton Council. In this decision, the Commissioner upheld council's application of the Regulation 12(5)(b) exception of the EIR.

13. On 24 September 2019 the Commissioner contacted the Council and requested any further arguments it wanted to raise in support of its application of Regulation 12(5)(b) of the EIR. She also invited the Council to reconsider its position in relation to the withheld information and consider disclosing it in its entirety or with the highway inspection/ repair/ maintenance dates redacted.
14. The Council responded on 24 November 2019 by stating it had already disclosed the withheld information to the complainant with the inspection/ repair/ maintenance dates redacted.
15. On 13 February 2020 the complainant stated that the redacted information disclosed by the Council had not satisfied his request. He invited the Commissioner to issue a Decision Notice and confirmed his outstanding complaint related solely to the inspection/ repair/ maintenance dates redacted by the Council.
16. The scope of the Commissioner's decision will be to determine firstly, whether the Council was correct to handle the request under the EIR and secondly, whether it was justified in applying Regulation 12(5)(b) to the redacted information with the balance of the public interest favouring maintaining the exception.

Reasons for decision

17. The Commissioner has first considered whether the requested information constitutes environmental information.
18. The Council believes that it does whereas the complainant believes that does not.

Regulation 2 - Is any of the information environmental?

19. Information is environmental if it meets the definition set out in regulation 2 of the EIR. Regulation 2(1)(a) covers the state of the elements of the environment, including water, soil, land and landscape. Regulation 2(1)(c) provides that information is environmental where it is on:

³ <https://ico.org.uk/media/action-weve-taken/decision-notice/2020/2617089/fer0865364.pdf>

"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 [2(1)](a) and (b) as well as measures or activities designed to protect those elements".

20. The complainant does not believe the EIR are applicable to the information he has requested. He does not accept the physical condition of a road surface can be regarded as an element of the environment. He believes the information relates to the surface of a 'structure' rather than an element of the environment, such as land.
21. The Council on the other hand, believes the information requested by the complainant constitutes environmental information as it concerns reports and repairs/maintenance of a specified highway area, and is likely to affect several of the elements of the environment referred to in 2(1)(a), namely land and landscape.
22. This approach by the Commissioner is in line her previous decisions concerning similar cases. For example, FER0742277 dated 6 August 2018 concerning Solihull MBC⁴ and FER0865364 dated 21 January 2020⁵ concerning Bolton Council.
23. The Commissioner believes the highway repair and inspection records relate to 'measures' affecting or likely to affect 'elements of the environment', namely 'land and landscape'. She is therefore satisfied that the request asks for environmental information as per Regulation 2(1)(c) and decided that the EIR is the correct statutory regime to apply to the request.

Regulation 12 (5)(b) – The course of justice

24. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
 - the course of justice, ability of a person to receive a fair trial or
 - the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259595/fer0742277.pdf>

⁵ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617089/fer0865364.pdf>

25. The Commissioner considers that the course of justice element of the exception is wide in coverage, and accepts that it can include information about civil investigations and proceedings⁶.
26. The successful application of the exception is dependent on a public authority being able to demonstrate that the following three conditions are met:
 - the withheld information relates to one or more of the factors described in the exception,
 - disclosure would have an adverse effect on one or more of the factors cited, and
 - the public interest in maintaining the exception outweighs the public interest in disclosure.
27. When considering the balance of the public interest, a public authority must take account of the express presumption in favour of disclosure which applies in the EIR (Regulation 12(2)).
28. The Council's position is that disclosure of the requested information, and in particular the repair and inspection dates, would facilitate fraudulent compensation claims. They have argued this is because it relies on the information within the inspection reports and road repair history to validate details submitted by claimants to support their claims. The Council believes that to disclose this information would allow potential fraudsters to make claims in line with this data.
29. The Council outlined the process it follows in relation to compensation claims being made against it for injuries sustained to individuals and/or damage to their property, due to defects in the highway. Firstly, the claimant provides details of their claim, including the date and location of an alleged incident. The Council's insurers then collect all the records relevant to the claim, including the 'site history report'. The insurers review all the information to assess whether the Council may be liable, based on its duty to maintain the highway and its statutory defence, under Sections 41 and 58 of the Highways Act 1980. Their decision takes into account the date the Council became aware of the fault in the highway and the timeframe within which it was repaired. All of this information is

⁶ https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

contained within the site history report which the complainant has requested.

30. The Council has explained to the Commissioner its belief that disclosure of this information would not only increase the likelihood of fraudulent claims being submitted and also increase the likelihood of any fraudulent claims being successful.
31. The Council also referred the Commissioner to one of her earlier Decision Notices FER0611819, concerning Cheshire West and Chester Council⁷, where the application of Regulation 12(5)(b) of the EIR had been upheld for the same reasons as it had argued in the present case.
32. The Council added there were other similar ICO Decision Notices where the Commissioner had upheld the public authorities application of the Regulation 12(5)(b) exception.
33. Similar to the present case, the Council referred the Commissioner to some of her previous Decision Notices⁸ concerning requests for business rate credit balances where a refusal to disclose the information under Section 31(1) of the Freedom of Information Act 2000 had been upheld to avoid increasing the risk of fraud.
34. Having considered these factors, the Commissioner accepts that it was more probable than not that disclosure of the information would adversely affect the course of justice, and is therefore satisfied that the Regulation 12(5)(b) exception of the EIR was engaged.

Public interest arguments in favour of disclosing the withheld information

35. In determining the public interest balance, the Commissioner always attaches some weight to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
36. The Council recognises there is a clear public interest in public authorities being accountable in relation to their responsibilities, particularly when they relate to public safety. However, it believes that its responsibility to protect the public purse from an increased

⁷ https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624521/fer_0611819.pdf

⁸ FS50611353 and FS50619844

risk of its being subjected to fraudulent claims outweighs the public interest of accountability in this case.

37. The Council also believes there is a strong public interest in maintaining the application of Regulation 12(5)(b) of the EIR due to the presence of an alternative means of applicants accessing the requested information via the civil claims process and the Civil Procedure Rules.
38. The complainant has expressed the view that he does not believe the EIR and Regulation 12(5)(b) are applicable to the information he has requested. However, if they are, he takes the view that the public interest balance favours the information being disclosed.
39. The complainant believes there is a public interest in the information being disclosed as it would demonstrate the adequacy of the Council's inspections, maintenance and repairs of the highway and the frequency with which they were carried out. This would allow the public to assess the extent to which the Council had complied with its statutory duty to maintain the highway under Section 41 of the Highways Act 1980.
40. The complainant believes that the pro-active disclosure of information showing councils had complied with their statutory duties and internal policies would reduce the number of claims. He cited the example of the Metropolitan Borough of Wirral in support of this view⁹. See paragraph 42 below.
41. The complainant acknowledges that the requested information would be available to him in any civil proceedings but has pointed out this would only apply once legal proceedings had been commenced. The public interest in obtaining the necessary information prior to this would allow a claimant to determine whether there was sufficient evidence to take such action and avoid needless expense and difficulty for both the Council and himself.
42. The Commissioner is aware the Metropolitan Borough of Wirral Council believes 'the presence of and adherence to a clear policy for inspection and maintenance, and allocating repair criteria and repair time targets, has served it well, since it is able to provide a robust defence in court against claims for slips, trips, falls and collisions. As a result, it has a high repudiation rate against claims'¹⁰. However,

⁹ <https://democracy.wirral.gov.uk/documents/s50022270/rep3650.pdf>

¹⁰ <https://democracy.wirral.gov.uk/documents/s50022270/rep3650.pdf>

she has not been able to find any evidence from its website that it proactively publishes unredacted details of road maintenance and repair records, which is the type of information the complainant has requested.

43. The Commissioner understands that those who have sustained damage and loss from a road defect will be seeking to hold the Council to account. However, the Commissioner considers that this represents a private rather than a public interest, and therefore cannot be considered as an argument in favour of disclosure. Notwithstanding this, the Commissioner does consider that the Council has a responsibility to assure the public that appropriate steps are taken to keep roads free of defects and the disclosure of the withheld dates would therefore inform the public about the frequency with which safety inspections are undertaken and repairs carried out.

Public interest arguments in favour of maintaining the exception

44. The Council, in its submissions to both the complainant and the Commissioner, has advised that it has a legal responsibility to tackle fraud, and this is the first argument for maintaining the exception. The likelihood of an adverse effect occurring has already been proven in the fact that the exception is engaged. This in itself indicates that there is an increased risk of fraud being committed should the withheld information be disclosed.
 45. Secondly, the Council has stated that it has a legal obligation to protect the public purse from an increased risk of fraudulent claims arising. The disclosure of the withheld information would therefore be contrary to this, as it would allow individuals to circumvent one of the means in which the Council assesses a claim for legitimacy, which could result in any fraudulent claims being successful.
 46. The Council accepts that it would be obliged to release supporting evidence in response to a formally submitted civil court claim. This would normally include the last safety inspection prior to any alleged incident, along with reports of all complaints and repairs undertaken between the inspection and the date of the alleged incident. This could represent sufficient information to allow a claimant to pursue the matter successfully through the Courts. This clearly indicates to the Commissioner that there is a more appropriate regime than the EIR for accessing information that is relevant to a civil claim for damage to private property such as a motor vehicle.
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Balance of the public interest arguments

47. The Commissioner has considered the public interest arguments put forward by both the Council and the complainant in this case
48. The Commissioner appreciates that in general there is a clear interest in public authorities being accountable in relation to their responsibilities, particularly when these relate to public safety. However, the Commissioner considers that in the circumstances of this case, the public interest in withholding the information is particularly strong. The Council's description of how the withheld information is used to 'validate' submitted claims is reasonable, and the Commissioner has concluded that the disclosure of the withheld information would allow individuals to identify periods of time when the Council was responsible for a road defect, and therefore facilitate any attempts to defraud the public purse through making a false claim.
49. Additionally, the Council has pointed out that there is also an alternative access regime provided through the civil claims process and the Civil Procedure Rules, which would result in the relevant parts of the withheld information being disclosed as part of any civil court proceedings should the complainant submit a claim.
50. The Commissioner has therefore observed that the public interest in maintaining the exception is particularly strong. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, such as clear evidence of unlawful activity or negligence on the part of the Council, or the absence of any alternative means of accessing evidence pertinent to a claim. However, no such arguments appear to be present.
51. Therefore, the Commissioner has decided that, in all the circumstances of the case, the public interest in maintaining the exception outweighs that in disclosure of the withheld information.

52. **Right of appeal**

53. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

54. 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.

55. 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

**Laura Tomkinson
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