

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 10 May 2021

Public Authority: Swindon Borough Council
Address: Civic Offices
Euclid Street
Swindon
SN1 2JH

Decision (including any steps ordered)

1. The complainant has requested information about a 'clean up' after travellers vacated a location, from Swindon Borough Council ('the Council'). The Council provided some information and stated that it held no further information falling within the scope of the request.
2. The Commissioner's decision is that the Council should have dealt with the request under the EIR, but that it did not hold any further relevant information beyond that which it had already provided. The Commissioner is therefore satisfied that the Council complied with its duty under Regulation 5(1) of the EIR by virtue of the exception at regulation 12(4)(a) (information not held). However, the Council responded to the request outside of statutory timescales and therefore breached regulation 5(2) of the EIR. It also provided outdated contact details for the Commissioner's office thereby breaching section 14(5) of the EIR.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 13 May 2020, the complainant wrote to the Council and requested information in the following terms:

"FOLLOWING THE OCCUPATION OF AN AREA OF THE LAWNS WOOD BY A GROUP OF 'TRAVELLORS' [sic] IN THE PERIOD 22 TO 27 APRIL 2020 I WISH TO KNOW:

1. WHAT IS THE TOTAL COST (INCLUDING FINANCE SERVICE LEVY, HUMAN RESOURCES LEVY AND ALL OTHER ASSOCIATED SERVICE CHARGES) FOR THE CLEANING OF THE AREA OCCUPIED BY THE TRAVELLERS?

2. GIVEN THAT THEY LEFT RUBBISH BEHIND, WERE THERE ANY CHARGES LEVIED UPON THEM FOR CLEARING WHAT AMOUNTED TO A FLY-TIPPING INCIDENT?"

5. The complainant received an automated acknowledgement. Having received no further correspondence, on 19 June 2020, 23 June 2020 and 8 July 2020 he chased a response. Again, having received no response, on 21 August 2020 he requested an internal review of the handling of his request.
6. On 9 September 2020, the Council replied advising that it was doing so in response to the complainant's request for an internal review albeit its response also served as a response to his original request. It provided some relevant information and gave some advice and assistance. It did not cite any exemptions / exceptions.

Scope of the case

7. On 18 September 2020, the complainant wrote to the Commissioner to complain about the way his request had been handled. Prior to complaining he had not requested an internal review of the information provided, but this was because of the way in which the Council had handled his request. In view of this, and the delay he experienced in receiving a response to his request, the Commissioner exercised her discretion and decided to proceed to an investigation without first requiring that an internal review be completed.
8. The complainant's grounds of complaint referred to timeliness and an inadequate refusal notice which contained incorrect information about how to contact the Commissioner's office. He also stated that the information provided was 'incomplete' and that:

" ... surely they know their manpower costs and the time spent on a specific unusual task. Also they surely keep asset records and can allocate depreciation costs to an activity. Having been a budget holder I have experienced [sic] first hand how to manage rechargeable activities - or has this skill been lost?"

9. The Commissioner will consider the matters raised by the complainant below.

Reasons for decision

Is the requested information environmental?

10. The starting point for the Commissioner when investigating any information rights complaint is establishing whether the appropriate legislation has been applied by the public authority. In this case, the Commissioner began by looking at whether the Council should have used the EIR or the FOIA as the basis for its decision. She asked the Council to reconsider its handling of the request and to review whether the requested information fell to be considered under the FOIA or the EIR.
11. 'Environmental information' is defined at EIR regulation 2(1). In accordance with the European Council Directive 2003/4/EC, from which the EIR derive, the Commissioner's view is that the definition should be interpreted widely. It is not necessary for the information itself to have a direct effect on the environment, or to record or reflect such an effect, in order for it to be environmental.
12. Regulation 2(1) of the EIR defines environmental information as being

"any information ... 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 ...".*
13. The Commissioner considers that the term "*any information...on*" in the definition of environmental information should be interpreted widely. It

will usually include information concerning, about or relating to measures, activities and factors likely to affect the state of the elements of the environment.

14. The Council responded to the Commissioner's initial enquiries regarding consideration of the EIR as follows:

"The Council dealt with this requested under FOI because it our [sic] view it was requesting information about the costs of the clean-up.

We didn't consider it was directly related to the environment although we are always are ware [sic] of our duty to assist anyone who requests information.

We understand that a factor may be considered to be 'something physical that has an impact or influence on the elements of the environment.'

In this case we thought it was about the costs rather than the damage to the environment or land. We appreciate we should have given it greater consideration and will be guided by you in this case".

15. The subject matter of the request arises from the condition of the land after it was vacated by travellers. The Commissioner considers that this is 'information ... on' the state of the land (regulation 2(1)(a)), waste, as a factor affecting the state of the land (regulation 2(1)(b)), and administrative measures or activities (any associated charges levied) designed to protect the land from the unlawful dumping of waste (regulation 2(1)(c)).
16. In view of the above, the Commissioner considers that the requested information falls within the broad definition of environmental information. Specifically, by virtue of the provisions in regulations 2(1)(a), 2(1)(b) and 2(1)(c).
17. Whilst this does not make it any more or less likely that the Council holds relevant information, for procedural reasons, the Commissioner has assessed this case under the EIR.

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

18. Regulation 5(1) of the EIR states that:

"Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3

of these Regulations, a public authority that holds environmental information shall make it available on request".

19. Regulation 12(4)(a) of the EIR provides that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
20. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, she will consider any other information or explanation offered by the public authority which is relevant to her determination.
21. For clarity, the Commissioner is not expected to prove categorically whether further information is held, she is only required to make a judgement on whether further information is held on the civil standard of the balance of probabilities.

The complainant's view

22. In respect of part (1) of his request, the complainant provided the following arguments to evidence his view that more information is held:

"It is stated that because multiple Services were involved and "A record is not made of every recharge internally as it will be treated as part of daily duties". Thus the overall cost of the exercise could not be ascertained. For this statement to have any credence one of two alternatives has to be true, thus either a) the Council's accounting procedures do not provide complete and transparent records, or, b) the information is an exercise in dissimulation.

In the event that a) is true. I find it difficult to believe that such records did not exist and are not capable of analysis, for the following reasons:-

1. budget holders would have little chance to exercise proper control over their budgets and furthermore the preparation of estimates for future expenditure would be impossible in such an information vacuum.

2. It is reasonable to assume that records of expenditure at a detailed level exist as a failure to maintain proper records of the expenditure of public money would have long ago attracted the attention of the National Audit Office.

3. As I have served both in the Government and Local Authority administration, I cannot believe that in this age detailed manpower costing attracts so little attention in a large organisation such as the Borough Council. I know that SBC have previously collected statistics regarding manpower deployment both for costing and recharging purposes (with new project numbers being generated when unplanned events occurred) so why is such information no longer available.

4. To say that "it has not been possible to charge out all overheads" is, again from personal experience, not a true statement as overhead costs (finance, HR, training etc.) were part of departmental budgets and were levied on a pro rata basis.

Having considered the evidence which shows a lack of creditability of the answer to question 1, I am left with the only conclusion which is that of obfuscation".

23. In respect of the Council's response to part (2) of his request, the complainant provided the following arguments to evidence his view that more information is held:

"The reply simply states that "we do not apply charges to Traveller Encampments". I would have thought that if any positive action had been taken the respondent would have taken the opportunity to highlight any such action - instead just a vague reference to some possible future policy. I wonder therefore whether the Council has fulfilled its responsibilities on Fly Tipping as set out in the Government Guidance notes published in June 2016.

From the incomplete answers in the attached reply I am concerned that Swindon Borough Council has not displayed the financial shrewdness that one would expect of a public body and/or is loath provide what might be embarrassing answers".

The Council's position

24. In its refusal notice the Council provided the following information in respect of part (1) of the request:

"As the encampment occupied Lawn Woods the majority of the cost of the clear up was covered by Park Services and Highways Teams. Environmental Health Services were involved in the clear up of the area. Subsequent involvement from Design to better protect the area from further Traveller Encampments park. A record is not made of every recharge internally as it will be treated as part of daily duties. Which contributed to the delay in coming up with an

estimate of the overall costs. We have been able to provide the cost for making Lawns entrance secure with concrete blocks and removal costs which was £884.84. It has not been possible to charge out all overheads as listed above in your original request".

25. In its refusal notice the Council provided the following information in respect of part (2) of the request:

"We do not apply charges to Traveller Encampments as the Environmental Crime [sic] do not pursue the perpetrator, but we are working on a policy that should allow for recharges in the future".

26. In further correspondence with the Commissioner, and in direct response to the complainant's concerns as cited above, the Council explained:

"There is no one budget for each individual clean-up ... It was agreed that the cost of clean-ups would be paid for from a centralised budget. So that is why there is no record of this clean up. The work is carried out by out by [sic] in-house cleansing teams on a case by case basis. We recognise that this practice is not ideal. We have reviewed again the records held and can find no direct link to this particular clean-up. There is a major problem in identifying the rubbish that may or may not have been left by travellers. As often, it is not possible to confirm the rubbish has been left by them. So the budgets for clean -ups is not the same budget. We did check with all parties, including Finance and Gypsy and Traveller liaison, [name redacted] and [name redacted] Service Manager - Waste, Recycling & Environmental Crime"...

Internal re-charges are not always linked to a site clean-up. They are not treated as individual projects where the cost per clean-up is charged because the full costs cannot always be attributable to rubbish left by the travellers alone. The cost of clean-ups include staff time, possible charges for security, costs of removal that are charged at nationally agreed levels. I have attached for your information examples how these calculations would be dependent on the size of the loads removed...

Not every individual action is charged to a budget which includes the details of a particular clean up. The main driver is to carry our cleans ups [sic] of rubbish, fly tipping incidents, removal of graffiti as quickly as possible. One reason for not having to set up an individual budget code suffix for each incident is to prevent delays in making sure that the rubbish is removed as quickly as possible. This is to prevent opportunism as when it is seen the Council will be

clearing up sites, it can lead rapidly to others following suit and fly tipping more rubbish on the same sites...

Not every officer's time is charged out against a particular job sheet. This may be the case if the Council had outsourced this function, in order to re-charge the costs. When the clean-up happened for this case, there were no records kept of the costs as it was done as part of daily duties. If there had of [sic] been a record there would have been no reason not to share this information with you.

We would be happy to be as transparent and open as possible about the cost of these incidents, but we do not hold the information that has been requested. We were not prepared to guess what the possible costs may have been, as this would have been based on anecdotal evidence not made at the time".

27. The Council confirmed that it had contacted its finance and budget holders in order to ascertain whether any information was held and confirmed that it had "... searched all relevant sources to try to find if we have a record of this clean-up".

The Commissioner's view

28. The Commissioner would like to initially mention that she is unable to comment on whether or not the Council has "*fulfilled its responsibilities on Fly Tipping*" as this would fall outside of her remit. She would also like to add that she is unable to comment on "*financial shrewdness*" or how the Council chooses to record such information. Her remit concerns only the disclosure of recorded information, not what a public authority chooses to record for its own business purposes.
29. The Commissioner recognises that the requested information is clearly of interest to the complainant. She acknowledges that he considers that the Council should hold information addressing such matters as the costs of cleaning up an individual area in such circumstances.
30. However, having considered the Council's response, and on the basis of the evidence provided to her, including its knowledge of the way it manages its budgets, the Commissioner is satisfied that the Council conducted adequate searches that were necessary for identifying any information it held within the scope of the request.
31. On the balance of probabilities, the Commissioner is satisfied that the Council did not hold further information within the scope of the request. She therefore considers that the Council complied with its obligation under regulation 5(1) of the EIR, by virtue of the exception at regulation 12(4)(a).

32. Although regulation 12(4)(a) of the EIR is subject to a public interest test, the Commissioner's position is that, where this exception is engaged, it is not necessary to consider the public interest in disclosure, as to do so would be illogical. There cannot be a public interest in information being disclosed by the public authority, if it is accepted that the information in question is not held by the public authority.

Regulation 5(2)

33. Regulation 5(1) requires a public authority that holds environmental information to make it available on request.
34. Regulation 5(2) requires this information to be provided to the requester within 20 working days following receipt of the request.
35. The complainant made the request on 13 May 2020. The Council gave a response on 9 September 2020, which is outside the statutory timescales.
36. The Commissioner finds that the Council has breached regulation 5(2) by failing to respond to the request within 20 working days.

Regulation 14(5)

37. Regulation 14(5) states that:

"The refusal shall inform the applicant—

(a) that he may make representations to the public authority under regulation 11; and

(b) of the enforcement and appeal provisions of the Act applied by regulation 18".

38. Under the EIR all refusal notices should provide information about the right to appeal to both the Council and the Commissioner. In this case, the Council provided the complainant with outdated contact details for the Commissioner's office. She therefore finds that the Council breached regulation 14(5) of the EIR, and she would remind the Council to ensure its responses to requesters contain her current contact details.

Other matters

39. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

40. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft Openness by Design strategy¹ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our Regulatory Action Policy².
41. The Commissioner also wishes to place on record her understanding of the immense pressures placed on public authorities during the coronavirus pandemic. She is sympathetic to the difficult decisions such authorities must make, between prioritising front-line services and continuing to meet their obligations under the FOIA.

¹ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

² <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

42. 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

43. 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.
44. 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

Carolyn Howes
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