

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 24 May 2023

Public Authority: Cheshire East Council
Address: C/O Municipal Buildings
Earle Street
Crewe
CW1 2BJ

Decision (including any steps ordered)

1. The complainant requested information from Cheshire East Council ("the Council") about Council procedures for staff entering private land in order to carry out highway repairs.
2. The Commissioner's decision is that, on the balance of probabilities, the Council does not hold any further information within the scope of the request, beyond that which it has already disclosed. However, the Council has breached regulation 5(2) by failing to respond to the request within 20 working days.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 25 October 2022, the complainant wrote to the Council and requested information in the following terms:

"Please supply a copy of the procedures for staff to adhere that were in place before the LGO instruction and after, to show the changes that were made - and explain why they were not followed."

5. On 22 December 2022 the Council responded, however it provided its response under its complaints process rather than having treated the request as a request for information. In this response it provided some details of the relevant sections of the Highways Act 1980, making a distinction between the requirements to provide notice to landowners and to occupiers.
6. On 3 January 2023 the complainant requested an internal review, on the grounds that they had not been provided with a copy of the procedures for staff entering private land in order to carry out highway repairs.
7. On 2 February 2023 the Council provided the outcome of its internal review. It stated that it had now considered the request under the EIR and its position was as follows:

“The council has provided you with all relevant documentation regarding this matter in its previous communications with you and has no new information to disclose. Therefore Regulation 6(1)(b) EIRs applies to your request – information already accessible by other means.

The procedures followed by the council remain unchanged following the decision of the Local Government Ombudsman. The reasons for this and details of the procedures followed have already been confirmed to you in the council’s complaint response dated 22nd December 2022. For completeness, I have outlined these again below....”

Scope of the case

8. The complainant contacted the Commissioner on 3 February 2023 to complain about the way their request for information had been handled. Specifically they asked the Commissioner to investigate whether the Council holds further information within the scope of the request.
9. The Council confirmed to the Commissioner during the course of his investigation that the information it considers is already publicly available and easily accessible to the applicant is the Highways Act 1980, to which it has referred the complainant on several occasions, including providing direct links to the legislation.
10. The scope of this decision notice is to consider whether the Council holds any further information relating to the procedures for staff entering private land in order to carry out highway repairs beyond that which it has already disclosed.

Reasons for decision

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

11. Regulation 12(4)(a) of the EIR states 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”.
12. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request). For clarity, the Commissioner is not expected to prove categorically whether the information is held.
13. In this case, the complainant has provided the following reason as to why they believe further information may be held:

“The response from the council fails to provide the requested documentation. Their response resolves around their assessment over whether land is or occupied or unoccupied for their purposes. If you apply the Council logic, there will be 4 sets of procedures – for occupied and unoccupied land, both revised following the LGO decision.”
14. The Commissioner is satisfied that the Council has adequately explained why it does not hold revised procedure(s) that were changed due to the Local Government Ombudsman (LGO) decision. It stated in its internal review response that its position regarding that decision is as follows, “the procedures followed by the council remain unchanged following the decision of the Local Government Ombudsman” and “Cheshire East Council will not be challenging the findings of the Local Government Ombudsman from January 2022 but will equally not be bound to follow them either on the basis that their interpretation of the Code differs from ours”.
15. In the course of his investigation the Commissioner asked the Council to provide details of the searches it has carried out to ensure that all information within the scope of the request has been identified and to address whether, as the complainant suggests, it holds further information in the form of separate procedures for occupied and unoccupied land.
16. As to whether the Council holds further information within the scope of the request beyond that which it has already disclosed, the Council

stated, "the council's only process and procedure in respect of this matter is that contained in the Highways Act 1980. The Council did not have a separate procedure prior to the LGSO decision, and it did not create a new one afterwards".

17. Regarding whether the Council holds further information in the form of separate procedures for occupied and unoccupied land, the Council stated, "I can confirm that the Act covers both occupied and unoccupied land. The difference is just the requirement to provide notice of entry to occupied land and not to unoccupied land. There are not and there have never been 4 sets of procedures".
18. Regarding what searches have been carried out to check no further information was held within the scope of the request and why these searches would have been likely to retrieve any relevant information, the Council stated, "this is a long running matter which has been dealt with by the most senior officers and experts within our Highways and Legal services. They have been consulted in respect of this request, and if any such procedures existed, these officers would be fully aware of their existence".
19. Given the explanations provided by the Council as to why no further information is held and how it has ensured that all relevant information has been identified, the Commissioner is satisfied in this case that, on the balance of probabilities, the Council has provided the appropriate information to the complainant and no further information is held in relation to the request in accordance with regulation 12(4)(a) of the EIR.

Regulation 5(2) – timeliness of response

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

"a public authority that holds environmental information shall make it available on request."

21. Regulation 5(2) of the EIR states that:

"Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."

22. From the evidence provided to the Commissioner in this case, it is clear that the Council did not deal with the request for information in accordance with the EIR. The Commissioner's decision is that the Council has breached regulation 5(2) by failing to respond to the request within 20 working days.

Right of appeal

23. 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

24. 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.
25. 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

Victoria James
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF