

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 10 October 2022

Public Authority: Gravesham Borough Council

Address: freedomgravesham@medway.gov.uk

Decision (including any steps ordered)

1. The complainant requested information about a meeting that they believe took place to discuss their stage three complaint about flooding on their land from Gravesham Borough Council ('the Council'). The Council refused the request on the basis that it was vexatious and cited section 14(1) Freedom of Information Act, 200 ('FOIA'). Following the Commissioner's investigation, the Council undertook a search for the information. It concluded that it did not hold relevant information as a meeting on the specified date did not take place. It amended its response to the complainant accordingly. The Commissioner's decision is that the Council should have considered the request under the Environmental Information Regulations 2004 ('the EIR'). The Commissioner has also concluded that, on the balance of probabilities, the Council does not hold the requested information. The Commissioner does not require the Council to take any steps as a result of this decision notice.

Request and response

2. On 19 August 2020, the complainant wrote to the Council and requested the following information:

"We understand that a meeting was held on 12 August 2020, between the Chief Executive, Stuart Bobby and other members of the LA to discuss our Stage Three complaints. [Named individual one], Borough Councillor may also have attended.

We would request details of who actually did attend this meeting and as the meeting was concerned with our complaints, we would like to be given a copy of the minutes of the meeting.”

3. The Council responded on 8 December 2020. It cited section 14 FOIA to refuse the request on the basis that it was vexatious.
4. Following an internal review the Council wrote to the complainant on 18 December 2020. It upheld its original decision to refuse the request on the basis that it was vexatious.

Scope of the case

5. The complainant contacted the Commissioner on 5 October 2021 to complain about the way their request for information had been handled.
6. As previously stated, the Council amended its response to the complainant during the Commissioner’s investigation, confirming that a meeting on 12 August 2020 did not take place. The Commissioner accepts that relevant information would not be held and contacted the complainant to establish whether they were satisfied with the Council’s amended response. It was agreed that a decision notice outlining the rationale for this decision would be the most appropriate way forward.
7. The following analysis is therefore whether the Council is likely, on the balance of probabilities, to hold any information falling within the scope of the complainant’s request.
8. Additionally, having considered the wording of the request, the Commissioner is of the view that if any relevant information was held, as it would have been in response to the complainant’s Stage Three complaint, most, if not all, would be the complainant’s own personal data and therefore exempt from consideration under the EIR by virtue of regulation 5(3).

Reasons for decision

The appropriate legislation

9. The Commissioner notes that the Council has dealt with the request under FOIA. However, he considers that if the information were held it is likely to be environmental as defined by regulation 2 of the EIR.

10. Regulation 2(1) of the EIR defines 'environmental information'. The relevant parts of the definition are found in 2(1)(a) to (c) which state that it is any information in any 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...'

11. The Commissioner considers that action to prevent the flooding of land is a 'measure', as defined by regulation 2(1)(c), which is likely to affect the elements of the environment such as 'land', referred to in regulation 2(1)(a) and factors such as 'discharges' referred to in regulation 2(1)(b). As the meeting would have been to discuss the complainant's Stage Three complaint in respect of flooding to their land, if relevant information were held, the Commissioner is satisfied that the request would fall under the EIR.

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

12. As stated in paragraph 6, following the Commissioner's investigation, the Council reviewed the request, and concluded that it did not hold relevant information.
13. Regulation 5 of the EIR requires that a public authority that holds environmental information shall make it available on request. This is subject to any exclusions or exceptions that may apply.
14. Regulation 12(4)(a) of the EIR says 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.
15. In scenarios where there is some dispute between whether the public authority holds relevant information, the Commissioner, following the

lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.

16. 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).
17. The Council provided internal email correspondence to the Commissioner dated 9 September 2022. This looked to establish whether a meeting on 12 August 2020 between the Chief Executive, Stuart Bobby and other members of the local authority took place to discuss the complainant's Stage Three complaint.
18. It appears from this correspondence that the Council had difficulty establishing whether a meeting on that date took place, and if so, who attended the meeting, or if there were any minutes.
19. Following this, an email from the Chief Executive confirms that to the very best of his knowledge and the evidence sources available, no such meeting took place, therefore the Council would not hold any minutes.
20. The Council confirmed that the evidence sources are based on the Chief Executive's recollections, and a search of his paper and electronic diaries for the relevant date. Neither the electronic or paper diaries indicate that a meeting was scheduled or took place.

The Commissioner's conclusion

21. The Commissioner has considered the internal emails provided by the Council and considers that contacting the relevant individuals to establish if a meeting took place on the specified date is both a reasonable and proportionate approach. Having found no evidence which confirms that a meeting took place on that date, he believes that it is reasonable to conclude that the Council will not hold relevant information.
22. On this basis the Commissioner is satisfied that the Council has complied with its obligations under regulation 12(4)(a) of the EIR.

Regulation 12(1)(b) – the public interest test

23. Regulation 12(1)(b) of the EIR requires a public interest test to be carried out if a request is refused under any of the exceptions set out under regulation 12 of the EIR.

24. However, as no information has been found to be held, the Commissioner can only find that the public interest in maintaining the exemption at 12(4)(a) of the EIR outweighs any public interest in disclosure, simply because there is no further information to disclose.

Procedural matters

Regulation 14 – refusal to disclose information

25. Where a public authority refuses a request, it is obliged under regulation 14 to inform the complainant why the request is being refused within 20 working days of the request being received. In this instance, the complainant submitted their request on 19 August 2020, and the Council provided its response on 8 December 2020. The Commissioner has therefore found a breach of regulation 14 of the EIR.

Right of appeal

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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: 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

Catherine Dickenson
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