

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 ('EIR')
Decision notice

Date: 5 October 2015

Public Authority: Hampshire County Council
Address: The Castle
Winchester
Hampshire
SO23 8JU

Decision (including any steps ordered)

1. The complainant has requested information regarding testing for legionnaires bacterium at a specific care home. During the Commissioner's investigation Hampshire County Council supplied some information. The complainant alleged that more was held. The Commissioner investigated and found that more information falling within the scope of the request was held. He finds that Hampshire County Council breached regulation 5(1) and 5(2) of the Environmental Information Regulations 2004 ("the EIR") for failing to disclose all the information it held. The Commissioner also found that that on the balance of probabilities no further information is now held.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation:
 - Disclose to the complainant the interim reports dated 5 February 2014 and 19 February 2014.
3. The public authority must take this step 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

4. On 7 April 2014, the complainant wrote to Hampshire County Council ('the council') and requested information in the following terms:

"A) Please would you supply the test/testing document/s relating to the Legionnaires bacterium undertaken in the past 2 years up to Jan 27th 2014?

B) Please also specify the dates of any testing done at BH for the Legionnaires bacterium AFTER Jan 27th 2014 to date, and whether or not the results were positive or negative?

(I understand that another test was done more recently at BH and after my earlier request for dates, I believe you are obliged to answer if there has).

C) Please supply the test documents relative to the tests done for the Legionnaires bacterium at BH after Jan 27th 2014 to date."

5. The above request was made within a letter the complainant sent to the council following its response to an earlier request (FOI 7396).
6. The council responded on 6 May 2014 giving the request the reference of FOI 7575. It said that there was one test undertaken on 10 February 2014 by the Hampshire Scientific Service after 27 January 2014. It provided redacted copies of the test results which confirm the dates and locations the samples were taken from, and the dates the results were provided but said that the test results are exempt under section 36(2)(c).

Scope of the case

7. The complainant has made numerous requests for information to the council surrounding this issue. She wrote to the Commissioner on 30 July 2014 to complain about the way some of her requests for information had been handled. The complaint letter also referred to several issues outside the Commissioner's jurisdiction. The Commissioner set up separate cases to deal with each of the separate information requests (case references FS50551713, FS505533674, FS50553682 and FS50553899).
8. The Commissioner informed the complainant on 8 September 2014 that he would not pursue the complaint in relation to the request for test results (our reference FS50553899, council reference FOI 7575) until

she had asked the council to undertake an internal review in relation to that specific request and provided notification of this.

9. Following the issue of a decision notice for case reference FS50553674, the Commissioner received a letter from the complainant on 5 February 2015 in which it was made it clear that she requires a decision in relation to the request for test results (FOI 7575). As the council's letter to the Commissioner dated 4 December 2014 regarding case reference FS50553674 states that the council continues to rely upon section 36(2)(c) in relation to test results and provides its justification for the application of that exemption, including a copy of the qualified person's opinion on this matter, the Commissioner considered that it was not necessary or appropriate to require the council to undertake an internal review specifically in relation to the request made on 7 April 2014.
10. During the investigation of FS50553899 (that being the investigation of the application of section 36(2)(c)) the Commissioner came to the view that the request related to environmental information and should be dealt with under the EIR. He wrote to the council requesting that it review the case and consider disclosing the requested test results. The council then released information that it had previously withheld under section 36 of the FOIA, that being documentation dated 10/12 February 2014 relating to tests carried out on 27 January 2014 and documentation dated 26/28 February 2014 relating to tests carried out on 10 February 2014. The complainant has since informed the Commissioner that she is not satisfied that all information within the scope of the request has been provided. The Commissioner therefore opened this case to deal with this issue.
11. For clarity, this decision notice focuses solely on the request made on 7 April 2014 which the council refers to as FOI 7575.
12. The Commissioner has considered whether further information is held within the scope of the request.
13. The Commissioner has also considered whether the council has breached the statutory time for compliance at regulation 5(2) of the EIR.

Reasons for decision

Regulation 5 – Duty to make environmental information available on request

14. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request. Regulation 5(2) states

that this information shall be made available as soon as possible and no later than 20 working days after the date of receipt of request.

15. 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 argument. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held, he is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
16. The complainant believes that there must have been a further test, or tests, carried out between 27 January 2014 and 5 February 2014 and that the results of these tests must have been communicated to the council between those same dates. She believes this because the information she has been provided with is dated after action was taken at Bulmer House and after the issue was reported in the press. She also believes that retesting would have had to continue until the site was found to be clear or the testing was abandoned for other reasons and that, because staff were still at the site clearing away furnishings until April 2014, there should be records of tests in March/April 2014.
17. The Commissioner informed the council of the above reasons why the complainant believes further information is held. In an attempt to fully convey the complainant's reasons as to why she believes further information within the scope of the request must exist, he also provided the council with some of the complainants concerns as follows:
 - "1. The initial testing for the Legionnaires bacterium is understood to have taken place at Bulmer house on Jan.21st 2014.
 2. From 2 separate sources from HCC and in writing (email) it was confirmed that HCC were first aware of this on FEB 5th 2014 'after the residents had left'.
 - 2a. I was advised over the telephone by the then Manager tony Rocks that they were first made aware of this on the Wednesday FEB 4th 2014. in the same afternoon that the last 2 residents left (one of which was my mother-in law)...
 - ...3. No details were given to any relatives at this time . Details regarding this only came to light the following week in a front page article in the Petersfield newspaper The Petersfield Post. This was

available from Feb 12th/13. As already stated, the newspaper discovered this detail, because the Day Centre (which was due to remain open even though the residential side was going to close once the residents had been found alternative accommodation).

HCC themselves told the press about Legionnaires at both sides of the building.

As I recall, the 'going to press day' at the PP is 12 pm on a Monday. Therefore, the latest that they would have obtained that information would have to be Monday Feb 10th 2014.

It would seem that in order to be able to confirm to the press and from a councillor and her assistant that the bacterium was present on Feb 5th 2014, that for individuals to make such a statement, that HCC would need confirming details. AT OR AROUND THAT TIME. HCC would not I feel be able to be able to alert or caution staff as to necessary precautions relative to this without the test results being known to them.

The test results that I require are the ORIGINAL ONES. IE., those that were provided to HCC in the first instance after the initial testing on Jan 27th, received by them on or around Feb. 5th.

I believe it is not feasible to suggest that HCC acted 'after a telephone conversation' in this instance as the sites for caution would have to be known also by the 5th if that is the date they are nominating as the coincident date for apparent discovery....

... I also refer to correspondence contained in attachment from Janice Austin 26/6/2015 from the testers to HCC which states,

"It is understood that **remedial work, system chlorination**, was **COMPLETED on February 7th** {{2014}} and **re-sampling** has been carried out on Monday 10th Feb 2014.

As I advised earlier, and as I believe the enclosed also confirms. There was some form of communication/correspondence and test results sent to HCC on or before Feb 5th, to enable the chlorination to be authorised, actioned and agreed by HCC, and for further testing to take place afterwards in result (Feb10th). (Also to be able to advise the press, also as I stated earlier). The test results from, on or around Feb 5th are the ones I require as previously stated, and the ones on which the decision to chlorinate were based and further testing afterwards on Feb10th/12th. As above, the detailing shows that it was a **retesting on Feb 10th** so I feel it could not possibly be the first/ original test result information, and as I believe I correctly advised earlier. Even if a

telephone conversation, a note at least must have been taken and some form of record kept. If not, then that would raise other concerns.

The original test results in whatever form they took (not necessarily in report form) are understood to have been forwarded to HCC between 27/1/2014 and 5/2/2014. These have never been supplied to me, redacted or otherwise."

18. The Commissioner also informed the council that the complainant had provided him with an email she received from a councillor on 17 Feb 2014 which states that the bacterium was discovered on 5 February 2014.
20. The Commissioner enquired as to whether the information has ever been held, the scope, quality, thoroughness and results of the searches carried out by the council, whether information had ever been held but deleted and whether copies of information may have been made and held in other locations.
21. In its response, the council provided the following context to make the timescales clearer:

"Hampshire Scientific Service (HSS) which is part of the County Council carried out routine legionella testing at Bulmer House on 27 January. Analysis of the samples were undertaken by a UKAS accredited laboratory on behalf of HSS.

Analysis of legionella is undertaken using a plating and culture method. It is not a quick process, as legionella grows slowly in a laboratory environment. Testing commences the day after sampling and completion of a negative test takes 10 days of incubation. Legionella is unlikely to develop earlier than 3 days from incubation and can take up to a full 10 days. Once suspect colonies are detected, further confirmation has to be carried out and this can take up to a further 3 days. If a positive result is obtained, interim notifications are sent to HSS and HSS notify relevant County Council staff who take further action as required. The purpose for sending interim notifications is to avoid delay in taking remedial action where required. Once the full incubation period has been completed, a final report is sent to HSS."

22. The council told the Commissioner that HSS was first informed of the results from 27 January by way of the interim notification on 5 February and passed this information on to Adult and Property services on the same day. Chlorination of the water supply took place on 7 February and retesting took place on 10 February. Interim notification of the retesting was received on 19 February and a recommendation was made by HSS

that the water system should be drained and the building was vacated by staff on 20 February.

23. The council also supplied the Commissioner with a timeline setting out the relevant dates in the context of the above.
24. The council said that searches carried out consisted of enquiries to staff at HSS who had first-hand knowledge of the testing for this location and the actions subsequently taken. It said that HSS confirmed that the documents previously passed to the council and released to the complainant were the only documents relevant to the request and that no other reports existed.
25. In response to the Commissioner's enquiry as to whether there was any legal requirement or business need for the council to hold the information, the council said that there is a requirement to retain the requested information which is set out in the Health and Safety Executive Guidance on the control of legionella bacteria in water systems. It explained that the guidance gives practical advice on the legal requirements of the Health and Safety at Work Act 1974, the Control of Substances Hazardous to Health Regulations 2002 concerning the risk from exposure to Legionella and guidance on compliance with the relevant parts of the Management of Health and Safety at Work Regulations 1999. The requirement is to keep all monitoring and inspection records for at least five years. The council informed the Commissioner that it retains paper records for six years, and longer for electronic records, and confirmed that no relevant records have been destroyed.
26. From the council's response as detailed above, it is clear to the Commissioner that the council hold information relating to the interim notifications dated 5 February 2014 and 19 February 2014. This information has not been provided to the complainant. The Commissioner considers that such information falls within the scope of the request, as it can be considered to be 'test documents', and the complainant has made it clear that this is the type of information she is seeking.
27. The Commissioner has therefore found that further information was held and that the council breached its obligations under regulation 5(1) and 5(2) of the EIR for failing to make environmental information available within 20 working days.
28. The complainant also believes that retesting would have had to continue until the site was found to be clear or the testing was abandoned for other reasons and that, because staff were still at the site clearing away furnishings until April 2014, there should be records of tests in

March/April 2014. The Commissioner asked the council whether, when legionella bacteria is found at a premise, retesting continues until the premise is clear of the bacteria and, if so, when this happened in relation to Bulmer House. Although the council did not specifically respond to this question, it has stated that no further tests took place after 10 February 2014.

29. In the circumstances, given the explanation provided by the council, the Commissioner does not consider that there is any evidence that would justify refusing to accept the council's position that no further tests took place after 10 February 2014. No strong evidence has been brought to the Commissioner's attention that would demonstrate the existence of further recorded information beyond the interim notifications identified above. The Commissioner is therefore satisfied that on the balance of probabilities, information relating to tests carried out in March/April 2014 is not held by the council. Accordingly, he does not consider that there was any evidence of a breach of regulation 5 in relation to such information.

Right of appeal

30. 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

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

31. 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.
32. 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

Andrew White
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