

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 23 February 2015

Public Authority: Leicestershire County Council

Address: County Hall
Glenfield
Leicestershire
LE3 8RA

Decision (including any steps ordered)

1. The complainant has requested recorded information relating to complaints made about Cotes Road, Barrow upon Soar, Leicestershire. The complainant specifically requires the dates the road was inspected and the dates when work was carried out. Leicestershire County Council provided information which is relevant to the majority of the complainant's request, but refused to provide details of the complaints it had received and relevant dates in reliance of Regulations 12(4)(e) and 12 (5)(b) of the EIR.
2. The Commissioner's decision is that Regulation 12(5)(b) is not engaged. He finds that Regulation 12(4)(e) is engaged but the public interest favours disclosure of the dates which Leicestershire County Council has withheld.
3. The Commissioner found that some of the redacted information constitutes the personal data of third parties. The Commissioner agrees that the Council would be entitled to withhold this in reliance on Regulation 13.
4. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation:
 - The Council is required to provide the complainant with a new copy of EIR 5169 'Street History Report'. This should be unredacted except where the information consists of the names of persons who have complained about, or raised concerns about, the state of Cotes Road and also details of their complaints/concerns where that

information would identify the third parties. The Council should ensure that appropriate third party personal data is withheld.

5. The public authority must take these steps 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

6. On 23 March 2014, the complainant wrote to the Council and asked to be provided with the following information:

“Details of all reports by Council staff or contractors and complaints from members of the public about the condition of Cotes Road in the six months before 26th December 2013.

The dates and times of all safety inspections undertaken on Cotes Road in the six months before 26th December 2013.

Details of all defects identified during those inspections.

Details of how those carriageway inspections were carried out, whether they were walked or driven, if driven, the speed of the inspection vehicle and the number of persons in the vehicle.

Details of your inspection policy for Cotes Road, frequency of intended inspections and whether that frequency was met in the six months prior to 26 December 2013.

The classification of Cotes Road in terms of the hierarchy of road repairs and inspections.

The criteria used to define when and whether a pothole requires attention.

The time periods adopted between identification and repair (temporary or permanent) for all categories of carriageway defects.

Has the Council adopted all or part of the standards contained in the National Code of Practice for Highway Maintenance Management?

Precise details of when the yellow perimeter marking of the pothole, which was the cause of my claim, was carried out and

the reasons why (faded, but clearly visible in the photographs I sent as part of my claim).

What steps the Council took to ward road users of the pothole in Cotes Lane."

7. The Council responded to the complainant's request for information on 23 April by the providing her with three documents under the following headers:

EIR 5169 Response
EIR 5169 Exception Response
EIR 5169 Street History Report

8. The EIR 5169 Response document provided answers to the 11 elements of the complainant's information request. The Council provided explanations to some of the questions asked by the complainant or made reference to the Exception Response or Street History Report.
9. The Street History Report which the Council sent to the complainant was redacted of various types of information.
10. In its Exception Report the Council explained to the complainant that her request had been handled under the EIR. The Council refused to supply the complainant with the dates of the inspections and/or complaints it had received. The Council stated:

"...we consider that such information, if made publicly available, could easily be used to facilitate fraudulent claims against the Council in respect of damage or personal injuries to alleged poorly maintained roads."

11. The Council informed the complainant that it was relying on Regulation 12(5)(b) to withhold information which it considered would adversely affect the course of justice, and Regulation 12(4)(e) where the dates of the inspections were considered to be internal communications.
12. The complainant wrote to the Council on 27 April to complain about its response to her information request. In her complaint, the complainant stated. "I cannot from the information you have provided identify what category of defect this response time relates to. Category 1 appears to require a response within 72 hours and category 2 seems to require a response within 690 days". The complainant therefore asked to be informed of the exact category and details of the defect found on 5 December which warranted a 28 day response.
13. The Council treated the complainant's letter of 27 April as a request for an internal review. Having undertaken the review the Council wrote to

the complainant on 30 May to inform her that it was upholding its applications of Regulations 12(5)(b) and 12(4)(e).

Scope of the case

14. The complainant contacted the Commissioner on 10 July 2014 to complain about the way her request for information had been handled.
15. The complainant provided the Commissioner with a chronology of events associated with her claim against the Council for damaged caused to her vehicle when she drove over a pothole on 26 December 2013. She informed the Commissioner that she needed 'to decide whether to complain through the courts or accept whether the Council's defence is in fact valid'.
16. The focus of the Commissioner's investigation is whether the Council is entitled to rely on Regulation 12(4)(e) to withhold the dates the Council inspected or worked on the highways and Regulation 12(5)(b) to withhold details of the complaints it had received about the highways.

Reasons for decision

Regulation 12(5)(b) – where disclosure could prejudice the course of justice

17. The council has withheld some of the requested information under regulation 12(5)(b) of the EIR. This regulation provides an exception to the general duty to disclose environmental information where disclosure would adversely affect –

"the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature."
18. The Council has made clear to the Commissioner that the withheld information does not attract legal professional or litigation privilege.
19. The Council has withheld the dates it carried out road inspections solely on its assertion that the course of justice is not served by releasing information which could result in fraudulent claims being made against the Council for allegedly poorly maintained highways. The Council further asserts that it has a duty to protect the public purse from those potential fraudulent claims.

20. The Council informed the Commissioner that claimants are not obliged to provide details of the defects which are the subject of their claim, nor are they required to provide the date of the incident.
21. The Council believes that disclosure of the dates when it became aware of defects in the highway could result in a claim against it being made irrespective of whether or not the claimant had actually suffered any harm.
22. The Council has informed the Commissioner that it has not disclosed the withheld information to date and this information is not available outside of the Council.

Is the exception engaged?

23. The Council has a statutory duty to ensure that it maintains the Highways it is responsible for. This duty is provided by section 41 of the Highways Act 1980. The Council has the power to inspect the highways, to report on them and repair any defects it finds.
24. It also has a duty to respond to claims from the public in regards to alleged damage caused by road defects and ensure that it utilises the information gathered from road inspections to defend itself from false or unsubstantiated claims.
25. The Council's reliance on Regulation 12(5)(b) is founded on a perceived consequence that releasing the withheld information to the public would result in an increase in the number of fraudulent claims it might receive in respect of allegedly poorly maintained highways.
26. It is clear to the Commissioner that the release of the unredacted inspection reports would have the effect of notifying the public of the locations where known defects are, the extent of those defects and the dates the Council became aware of them.
27. What is not clear to the Commissioner is whether disclosure of the withheld information would in fact bring about the fraudulent claims which the Council fears. In this regard the Council has not been able to provide any statement or evidence which would assist the Commissioner in adducing the degree of likelihood that disclosure 'would' prejudice the course of justice. At best the Council's position is speculative.
28. With this in mind, the Commissioner has decided that Regulation 12(5)(b) is not engaged and consequently he has not gone on to consider the public interest test relevant to the Council's reliance on this exception.

Regulation 12(4)(e) – where a request involves the disclosure of internal communications

29. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
30. The first question to consider is whether the information is a 'communication' for the purposes of the EIR. The Commissioner considers that a communication will encompass any information someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it.
31. Having examined the document which contains the withheld information the Commissioner is satisfied that the information can be characterised as a communication for the purpose of this exception.
32. There is no definition of what is meant by 'internal' in the EIR. In this case, the information which the council has withheld in reliance of regulation 12(4)(e) constitutes a report generated from an electronic recording system. The Commissioner understands that this system records the dates on highway inspections for the purpose of the Council's monitoring and reporting functions. The system is designed to pass information from one council department to another so that appropriate actions can be taken.
33. Having examined the unredacted report, the Commissioner is satisfied that regulation 12(4)(e) is engaged.

The Public interest test – the withheld dates

34. Where Regulation 12(4)(e) is engaged, it is subject to a consideration of the public interest test required by regulation 12(1). The test is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
35. When carrying out the test the Commissioner must take into account a presumption towards the disclosure of the information which is required by regulation 12(2).
36. The Commissioner asked the council to explain in detail the arguments it considered for and against disclosure, the weight it gave to each argument and how it reached its final determination.
37. The Council acknowledged that there is a strong public interest in disclosing the details of the highway conditions. The state of the highways would be observable by a member of public who walked or

drove down the highway. The Council also acknowledge that the public have a right to know the condition of the highways as they effectively own them and pay towards the costs of their maintenance.

38. Nevertheless the Council determined that the withheld information should not be disclosed solely on the perceived risk of fraudulent claims being made and a corresponding risk to the public purse as a result of those claims.
39. The Council asserts that its position is supported by it having in place a process for assessing claims. The Council believes that its position is not prejudiced by withholding the redacted information, as all aspects of each claim are discussed with the claimant as part of its investigation.

The Commissioners conclusions and decision

40. The central public interest in the information being disclosed relates to the democratic need for public authorities to be open and transparent in respect of the decisions they make and the actions which they take: These will ultimately affect an entire community.
41. When considering the public interest test the Commissioner must take into account the presumption which favours disclosure of environmental information which is required by Regulation 12(2).
42. In this case the Council's arguments are predicated on its speculative assertion that disclosure of certain dates would result in fraudulent claims being made against it. The Commissioner has some sympathy with this speculation but finds that a sufficiently robust case has not been made to support this.
43. The Commissioner cannot ignore the statutory duty imposed on the Council to inspect and maintain its highways. He is aware that the Council publishes documents relevant to its Highways policy, which include details of the different categories of defects, safety inspection frequencies and details of the average times for jobs to be completed once a defect in the highway is reported. However, he cannot easily reconcile the lack of accountability of the Council that these documents offer in terms of meeting its statutory duty regarding any particular road or street.
44. The Commissioner has therefore decided that although Regulation 12(4)(e) is engaged, there is a strong public interest which favours the disclosure of the dates when highway defects were reported and repaired.

45. Consequently the Commissioner finds that the Council cannot rely on Regulation 12(4)(e) and he orders that the dates redacted from the information disclosed to the complainant should now be disclosed.

Section 40(2) – where information concerns the personal data of third parties

46. The Commissioner is mindful that the report contains redacted information which can properly be described as the personal data of third party individuals.
47. The Commissioner notes that the Council has not identified an appropriate exception to withhold third party personal data.
48. Notwithstanding this, the Commissioner is content that this information – insofar as it is restricted to the identities and addresses of living persons, should continue to be withheld in reliance of Regulation 13 of the EIR.
49. In the Commissioner's experience the data subjects, to whom the personal data relates, would have no reasonable expectation that their personal data would be placed into the public domain as a result of this request for information. Nor would disclosure satisfy any of the conditions in Schedule 2 of the Data Protection Act 1998 to warrant the processing of their personal data.

Right of appeal

50. 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

51. 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.
52. 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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