

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 27 October 2015

Public Authority: Medway Council

Address: Level 3
Gun Wharf
Dock Road
Chatham
Kent
ME4 4TR

Decision (including any steps ordered)

1. The complainant has requested information in response to a council letter regarding a parking restriction proposal. Medway Council (the council) provided some information and refused parts of the request that it considered to be third party personal data – initially refused under section 40(2) of the Freedom of Information Act (FOIA), but later amended it to regulation 13 of the EIR. Lastly it advised that it did not hold some of the requested information.
2. The Commissioner's decision is that the council does not hold any more information, other than what has been identified by the council. With regards to the information refused under regulation 13 of the EIR, the Commissioner found, in a separate decision notice under reference FER0582993, where the same information had been requested by the complainant, that some of the withheld information should be provided to the complainant, and the remaining information was correctly withheld.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Comply with the steps ordered by the Commissioner in decision notice FER0582993.
4. 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

5. On 25 February 2015, the complainant wrote to the council in relation to a council letter dated 16 January 2015 about a proposed traffic regulation order and new no waiting restrictions area of Silverspot Close, Rainham and requested:

"1. Please provide copies of all written replies to this informal consultation received by Medway Council.

2. For any comments or representations received by the council in connection with the above informal consultation but not in writing please supply details in writing of all comments or representations including from whom such came.

3. Please supply details in writing of face to face contacts and meetings/ discussions with residents and/ or councillors and/or anyone else.

4. Starting with the date of the above letter of Mr Avis (January 16th 2015), please supply copies of all correspondence, whether by email or by other means, sent to or from Medway Council about this proposal (and not included in 1 above). This includes correspondence going to or from councillors.

5. Starting with the date of the above letter of Mr Avis (January 16th 2015) please supply copies of all internal correspondence or other documentation (computerised or in any other form) at Medway Council including emails, records of discussions or meetings with any person(s). This includes all contact of any sort with councillors.

6. Please supply copies of records of all site visits.

Please supply the requested information in writing and by post."

6. The complainant contacted the Commissioner on the 15 March 2015 and the council on 26 March 2015. The council responded to the complainant on the 27 March 2015 and provided:
- A summary of the consultation responses and analysis. Names and addresses being withheld under section 40(2) of the FOIA.

- A summary of the consultation findings which includes all comments received as a result of the consultation. Names and addresses being withheld under section 40(2) of the FOIA.
7. The complainant requested an internal review on the 30 March 2015 as he wanted copies of all written replies to the informal consultation not a summary which the council provided, he did not consider the council had responded to the second part of his request and for the fourth and fifth part of his request he listed emails he expected to have been provided with.
 8. The council provided its internal review response on the 28 April 2015. It upheld its decision to only provide the summaries of the informal consultation withholding the names and addresses under section 40(2) of the FOIA and provided the emails requested and responded further to the second part of his request.

Scope of the case

9. The complainant has told the Commissioner is not satisfied with the council's response to part 1 and 2 of the request relying on section 40(2) of the FOIA. He has also advised the Commissioner he considers that there must be information held for part 6 of his request.
10. During the Commissioner's initial investigation he asked the council to consider whether it should have responded under the EIR rather than the FOIA. The council confirmed that the request falls under the EIR and so amended its response to rely on regulation 13 of the EIR instead of section 40(2) of the FOIA for the withholding of personal data.
11. As parts 1 and 2 of the request is for the same information requested in another of the complainants requests, a request dated the 14 April 2015, and has been considered under a separate decision notice FER0582993, the Commissioner relies on the decision in decision notice FER0582993 with regards to the information that has been withheld under regulation 13 of the EIR.
12. The Commissioner therefore considers the scope of this case is to determine whether information is held for part 6 of this request.

Reasons for decision

Regulation 5(1) of the EIR – Information held/ not held

13. Regulation 5(1) of the EIR states:

"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."

14. 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, applies the civil standard of the balance of probabilities. The Commissioner must decide whether, on the balance of probabilities, the public authority holds any information which falls within the scope of the requests (or was held at the time of the request).
15. The complainant has advised the Commissioner that he considers the council must hold information for part 6 of his request. In particular he considers there must have been site visits and records made of them.
16. He has provided a letter that was sent to him by the council during the Commissioner's investigations, which amended its response to site visits. Where it had originally advised that in preparation for the consultation, no specific site visit was made, it has amended this stated that several site visits were made, albeit, no documented evidence of this is available.
17. The council has told the Commissioner that on checking with its integrated transport team, it has confirmed that site visits/ discussions during the informal stage of a process are not usually recorded electronically or manually. Subsequent checks on its electronic and manual system, including officers personal notebooks, confirmed this was the case in this particular case.
18. The council has also told the Commissioner that this sort of information is not necessarily recorded in its formal consultation either.
19. The council has confirmed no relevant information has been deleted or destroyed and as above, it is not required to record this type of information.
20. The Commissioner, on considering the information requested, can see why the complainant would think that officers would have made notes or records of site visits. It would seem like a reasonable expectation of officers to do so, but as the council has explained, they are not actually required to do so and so the Commissioner has to accept the council's response to this as he has no evidence showing that this sort of information has been recorded.

21. Even if it turned out that the council is supposed to record site visits but has not, it would be outside the Commissioner's remit to order any steps for the council to create this information. He can only make a determination on information that has been recorded, not what should be recorded.
22. Therefore he finds, on the balance of probabilities, no information is held to part 6 of the complainant's request.

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@hmcts.gsi.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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF