

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 20 June 2016

Public Authority: Cheshire West & Chester Council
Address: County Hall
Chester
Cheshire
CH1 1SF

Decision (including any steps ordered)

1. The complainant has requested information relating to highway safety inspections from the council. The council confirmed that it holds details of safety inspections on the roads requested by the complainant, together with a policy document regarding highway safety inspections. However, noting that the complainant has made an insurance claim for damage to her vehicle from a pot hole, it applied Regulation 12(5)(b) to the request.
2. The Commissioner's decision is that the council was correct to apply Regulation 12(5)(b) to the information on the specific road requested, however it was not correct to apply the exception to its policy document; 'Code of Practice for Safety Inspections on Borough Roads'.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the document 'Code of Practice for Safety Inspections on Borough Roads' to the complainant.
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 21 August 2015, the complainant wrote to the council and requested information in the following terms:

"Please can you send me:

- 1. A copy of your current road maintenance policy relating to that road. Please send me the full policy, but this should include details of the intended frequency of road safety inspections, how these inspections should be conducted and the maximum time between identification of a defect and repairs being carried out.*

- 2. A copy of the road repair history for that road over the past year. Again, please send me the full road repair history, but this should include:*

- dates of all safety inspections between 27th March and 28th May*
- details of how safety inspections were undertaken (walked or driven, speed of inspection vehicle etc)*
- details of all carriageway defects identified, with description, date and time*
- details of how the authority handled these defects, what repairs were undertaken and the time between the identification of each defect and a repair being carried out."*

6. The council responded on 18 September 2015. It stated that that the exception in Regulation 12(5)(b) applied, (course of justice).
7. Following an internal review the council wrote to the complainant on 3 November 2015. It upheld its initial decision to apply Regulation 12(5)(b).

Scope of the case

8. The complainant contacted the Commissioner on 11 January 2016 to complain about the way her request for information had been handled.
9. The Commissioner considers that the complaint is that the council have incorrectly applied the exemption and that the information should have been disclosed in response to her request.

Reasons for decision

10. Regulation 12(5)(b) of the EIR states that

"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;"

11. The successful application of the exception is dependent on a public authority being able to demonstrate that the following three conditions are met;

- the withheld information relates to one or more of the factors described in the exception
- disclosure would have an adverse effect on one or more of the factors cited, and
- the public interest in maintaining the exception outweighs the public interest in disclosure.

12. The Commissioner's guidance on regulation 12(5)(b) sets out that there is no definitive list which covers circumstances when a public authority may wish to consider applying the exception. *In Rudd v the Information Commissioner & the Verderers of the New Forest (EA/2008/0020, 29 September 2008)*, the Information Tribunal commented that 'the course of justice' does not refer to a specific course of action but is "a more generic concept somewhat akin to 'the smooth running of the wheels of justice'"

13. The council argues that it relied on Regulation 12(5)(b) in its response, explaining to the complainant that the Council's claims handlers had confirmed that the complainant had submitted a claim to them which concerned an incident at the location specified in the request. The complainant was therefore advised by the council that she must make the appropriate application for disclosure of the information in the course of the proceedings relating to her claim and/or take independent legal advice on how to pursue her claim. In other words, there is a set process for her to obtain the information necessary for her to make her claim to the courts which she should follow rather than requesting that information via the EIR.

14. The council clarified to the Commissioner that it is not relying on legal professional privilege or legal advice privilege. It said that the basis on which the exception was applied was that the information is available to the complainant through an application in civil proceedings. The council argues that the complainant is using the EIR to circumvent the normal civil procedure rules for discovery on cases going before the court.
15. The council argues that disclosure of relevant information in respect of proceedings is dealt with by part 36 of the civil procedure rules. The court must decide whether the information requested is relevant to those proceedings. It said that placing this information into the public domain outside of the legal process is likely to be unfair and is likely to undermine the proceedings and a fair trial.
16. It further argued that a disclosure of the information under the Regulations would undermine the court process and the jurisdiction of the court, which has the power to determine what shall be disclosed, and when during the course of proceedings. It argues therefore that legislation, by way of the civil procedure rules, has provided a process for disclosure of information and the Regulations should not be used to undermine the jurisdiction of the civil procedure rules.
17. The Commissioner has considered the above arguments. When answering requests under the Regulations the public authority should be applicant blind (i.e. it should not take into account the identity of the requestor), other than in very few cases such where this is necessary to demonstrate that information is available to a requestor by other means. In general the public authority should also not consider the motives of the applicant when considering whether the information should be disclosed. The question for the Commissioner is therefore whether a disclosure of this information to the whole world would adversely affect the course of justice, bearing in mind that one of those individuals would be the complainant in this case.
18. The council's argues that providing the information would undermine the process of law. It has clarified that the information which the complainant would need to bring forward a successful case would already be available to her through the court processes and that it has in fact made a disclosure of some of the information as a result of this, however that disclosure did not match all of the information which she has requested in her EIR request.
19. The Commissioner's guidance on Regulation 12(5)(b) is available at https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_excepti_on_eir_guidance.pdf. It recognises that the civil procedure rules provide an access regime for court and tribunal records. The guidance highlights

that circumventing the jurisdiction of the appropriate court procedure rules by allowing access to court records under the EIR could potentially adversely affect the course of justice because parties involved in judicial proceedings have the expectation that such information will only be disclosed under the established regime of those rules. Disclosing information under the EIR instead might undermine general confidence in the judicial or inquiry system or might prejudice an individual ongoing case.

Arguments regarding potential fraud

20. The council has also argued that a disclosure of the information would be likely to provide information which would be helpful to potential fraudsters when making fraudulent claims against the council.
21. The Council has explained to the Commissioner that, if individuals seek to bring compensation claims for poorly maintained highways, they are obliged to provide details of the highway and evidence of the damage, but also the date or short period of time in which they believe the damage occurred. Consequently, the dates of safety inspections and complaints are used for the purpose of validating claims, and the public disclosure of safety inspection dates could therefore facilitate claims that are fraudulent.
22. The Council's position is that disclosing the requested information would aid individuals in identifying road defects that the Council had knowledge of, but had not yet repaired. This would therefore highlight periods of time for which fraudulent claims for damage could be submitted to the Council.
23. The Commissioner has in past cases been referred to the known issue of individuals submitting fraudulent claims against local authorities, such as for damage sustained from road defects and notes that it is considered to be a growing problem for local authorities.
24. Whilst the Commissioner accepts this argument in general, its effects would be limited in scope in this case due to the fact that the complainant has only requested information on one particular road over a relatively short period of time.
25. Although time has passed so as to reduce the possibility of any fraud being attempted using the information which has been requested by the complainant in this case, the Commissioner must consider a disclosure of the information as at the time that the request was received. He also understands that claims can be made for damage up to six years after the fact. He therefore considers that it was still possible for people to make fraudulent claims using the requested information.

Conclusion

26. The Commissioner is satisfied that part 2 of the request would provide information which would form part of the records lodged with the courts for the purposes of disclosure. He therefore considers that the information falling within the scope of part 2 of the request engages the exception in Regulation 12(5)(b).

The Code of Practice

27. As regards Part 1 of the request the council holds a document entitled 'Code of Practice for Safety Inspections on Borough Roads'. This provides guidelines to council officers on the frequency of checks, defect criteria and response times to defects found on roadways. It does not however provide detailed schedules for the inspection of individual roads.

28. Whilst this weakens the arguments supporting the information being withheld the information might potentially be of benefit for fraudulent claimants. Individuals would know the criteria under which the council works and would be able to use this information to enhance the likelihood that a claim might be won or settled by the council. For instance, a section of the guide provides a detailed analysis of what the council needs to demonstrate in order to defend claims for damage caused to vehicles by defects in the road. Conversely, it would demonstrate to potential fraudsters some of the areas it needs to consider when drawing up a fraudulent claim. This would however also be available to these individuals by considering the legislative framework from which the Code of Practice derives and there are many websites which provide similar information to road users.

29. The Commissioner notes that many other local authorities make their own versions of this document available to the public online; for instance <https://www.trafford.gov.uk/residents/transport-and-streets/roads-highways-and-pavements/docs/supplementary-information-B1F-highway-inspection-policy.pdf> and at [http://www.cheshireeasthighways.org/Uploads/CEC Highway Safety Inspections CoP 2013 - Part 1.pdf](http://www.cheshireeasthighways.org/Uploads/CEC_Highway_Safety_Inspections_CoP_2013_-_Part_1.pdf)

30. The Commissioner recognises therefore that the arguments regarding potential fraudulent claims are weak when considering the Code of Practice as other authorities are content to make this information available.

31. The Commissioner has considered the councils argument that the document could lead to aiding potential fraud. He does not consider that the council has demonstrated that a disclosure of the Code of Practice

'would' adversely affect the course of justice. The fact that many other authorities make their own versions of this document publically available is strong evidence that the council's arguments in this respect are incorrect. The Commissioner therefore considers that the council was not correct to apply Regulation 12(5)(b) to the Code of Practice.

The public interest

32. As regards part 2 of the request the Commissioner has accepted that the exception is engaged. He must therefore carry out a public interest test into the application of the exception as required by Regulation 12 (1)(b). 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.
33. When considering the balance of the public interest, a public authority must take account of the express presumption in favour of disclosure which exists in the EIR (Regulation 12(2)).

Public interest arguments in favour of disclosing the withheld information

34. Some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
35. The Council considered the presumption in favour of disclosure required by the EIR, and has additionally considered the need to ensure that individuals who have sustained damage from defects on council-maintained roads have the appropriate information available to them so as to hold the Council to account.
36. The Commissioner understands that the complainant's vehicle had sustained damage as a result of a pot hole in the roadway. She is seeking to prove that the council was liable for this damage. However, the Commissioner considers that this represents a private rather than a public interest, and therefore cannot be considered as an argument in favour of disclosure.
37. Notwithstanding this, the Commissioner does consider that the council has a responsibility to assure the public that appropriate steps are taken to keep roads free of defects, and the disclosure of the information would aid in identifying the frequency of safety inspections on the road in question. It would provide some degree of transparency on its actions regarding safety and maintenance on the road system.

Public interest arguments in favour of maintaining the exception

38. There is no suggestion that the council considers the claim brought by the claimant to be fraudulent. The issue simply lies around liability for damage caused to the complainant's car.
39. The council must consider the wider aspect of a disclosure under the Regulations. A disclosure under the Regulations is considered to be to any person rather than simply to the applicant for the information. As noted above, the council raises the issue of potential fraudulent claims if this information is disclosed to the public rather than simply to the complainant herself. Whilst the information only relates to one particular road it would still provide potentially useful information to individuals wishing to make a fraudulent claim if it was disclosed.
40. The Council has a legal responsibility to tackle fraud and to protect the public purse from fraudulent claims. The disclosure of the withheld information would hinder the Council in fulfilling this obligation, as it would provide information which would aid in allowing individuals to understand the frequency of its road checks, and how long it takes for it to address defects which are found. This could potentially aid fraudulent claimants.
41. The Council has advised the Commissioner that it is required under the Civil Procedure Rules to release supporting evidence in response to a formally submitted claim. The Council has advised that this would normally include the last safety inspection prior to any alleged incident, along with reports of all complaints and repairs undertaken between the inspection and the date of the alleged incident, and would represent sufficient information to allow the claimant to take the matter to Court. This clearly indicates to the Commissioner that there is a more appropriate regime than the EIR for accessing information that is relevant to a claim and that a genuine claimant will not lose out due to non-disclosure of inspection dates under the EIR.
42. However, this information is only disclosed to that individual or their legal representative and not to the wider world. Thus, by doing so the Council has discharged its duty under CPR and the claim can then proceed accordingly.

Balance of the public interest arguments

43. The Commissioner has considered the public interest arguments put forward by the council in this case.
44. The Commissioner appreciates that in general there is a clear interest in public authorities being accountable in relation to their responsibilities, particularly when these relate to public safety. However, the

Commissioner considers that in the circumstances of this case there is a public interest in withholding the information requested in part 2 of the request. The Council's description of how the withheld information is used to assess the legitimacy of claims is based on clear logic, and the Commissioner has concluded that the disclosure of the withheld information would undermine the course of justice as the documents which the complainant needs to be provided with would be available through the normal rules of disclosure. The access regime provided through the Civil Procedure Rules, would result in the necessary withheld information being disclosed as part of any legal proceedings resulting from a complainant submitting a claim. It is possible that the courts would consider some information should be withheld under the normal disclosure rules, and therefore a disclosure under EIR could undermine the decision of the court in this respect.

45. The Commissioner is therefore of the view that that there is a strong public interest in maintaining the exception. In order to equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, or the absence of any alternative means of accessing evidence pertinent to a claim. However, no such arguments have been put forward in this case.
46. The Commissioner therefore considers that the council was correct to apply the exception in Regulation 12(5)(b) to part 2 of the request in this case.

Right of appeal

47. 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

48. 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.
49. 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

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