

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

Decision notice

Date: 29 May 2024

Public Authority: Ennerdale & Kinniside Parish Council
Address: clerk@eandkpc.co.uk

Decision (including any steps ordered)

1. The complainant requested information relating to complaints about the construction of a bridge. Ennerdale & Kinniside Parish Council (the "Council") confirmed that the information was not held. The complainant disputes this.
2. The Commissioner's decision is that on a balance of probabilities, the Council holds no recorded information relevant to the complainant's request and that regulation 12(4)(a) of the EIR applies but that in failing to issue a refusal notice under the EIR it breached regulation 14(1).
3. The Commissioner does not require further steps.

Request and response

4. On 6 November 2023, the complainant wrote to Ennerdale & Kinniside Parish Council (the "Council") and requested the following information:

"I request a copy of the letter and the information sent regarding the alleged breaches/complaints about the construction of the bridge at Longmoor Head. Please include details of all departments and recipients who received this information. This was sent by the clerk following the discussion at the Parish Council meeting on 22 September 2022."
5. The Council responded on 26 November 2023. It stated that the information was not held.
6. Following an internal review the Council wrote to the complainant on 28 November 2023. It stated that its position remained that the information was not held.

Scope of the case

7. On 18 January 2024 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is confined to establishing whether the Council correctly confirmed that the requested information is not held.

Reasons for decision

Would the requested information be environmental?

9. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
10. As the requested information relates to complaints regarding the construction of a bridge, the Commissioner believes that it is likely to be information relating to a measure as defined in regulation 2(1)(c). For procedural reasons, he has therefore assessed this case under the EIR.
11. In the circumstances of this case the Commissioner has found that although the Council considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore, where the procedural requirements of the two pieces of legislation differ, it is inevitable that the Council will have failed to comply with the provisions of the EIR.
12. In these circumstances the Commissioner believes that it is appropriate to find that the Council breached regulation 14(1) of EIR which requires a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the Council's responses failed to cite any relevant provision of the EIR. Where an authority does not hold environmental information specified in a request it must issue a refusal notice which cites regulation 12(4)(a).

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

13. Regulation 12(4)(a) of the EIR provides that a public authority may refuse to disclose information to the extent that it doesn't hold that information when an applicant's request is received.
14. In scenarios where there is some dispute between the amount of information located 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 (Information Rights) decisions, applies the civil standard of the balance of probabilities.

15. In other words, in order to determine such complaints, the Commissioner must decide whether on the balance of probabilities a public authority holds (or held at the time of the request) any information which falls within the scope of the request.
16. The request relates to complaints about the construction of a bridge received by the Council and specifically requests a letter sent by the Council regarding these matters to external parties.
17. The Council has explained that the requested letter was sent and, therefore, held some 12 months prior to the receipt of the request for information.
18. The Council has confirmed that, as the letter related to the forwarding of complaints submitted by other individuals rather than the raising of its own complaints, it was classified as "ROT" (redundant, obsolete or trivial) and deleted after 3 months in line with its records management approach. The Council has confirmed that it, therefore, holds no record of the letter or the letter's recipients (details of which were deleted along with the letter). According to this timeline the information would have been deleted many months before the request was received.
19. The Commissioner acknowledges that it is for public authorities to decide what information to record and for how long it should be retained in order to comply with any statutory duties or to explain why decisions are made. His investigation is, therefore, confined to considering what information was likely to have been actually held when the request was received rather than assessing what should have been held and/or retained.
20. The complainant has alleged that the Council deliberately destroyed the requested information in order to block their access to it under the EIR. The Commissioner considers that, in effect, the complainant is suggesting that the Council has committed an offence under regulation 19 of the EIR.
21. The relevant part of regulation 19(1) states:

"...any person to whom this paragraph applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to which the applicant would have been entitled.."

22. In order for it to be confirmed that an offence under regulation 19(1) has been committed it is necessary to demonstrate that, at the time a request is received, information to which a requester is entitled was held and subsequently deleted or concealed, with the intent of blocking access.
23. The Commissioner has no evidence that the information was held by the Council at the time the request was received and, on the basis of its explanation, it seems likely that the information was deleted many months prior to the request being made. He has no evidence to contradict the Council's reasonable explanation of the course of events in this case.
24. Having considered the available evidence the Commissioner has concluded that, on the balance of probabilities, it is likely that Council has correctly confirmed that the requested information is not held and that regulation 12(4)(a) applies.

Right of appeal

25. 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

26. 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.
27. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Christopher Williams
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