

Environmental Information Regulations (EIR)

Decision notice

Date: 8 June 2016

Public Authority: Gloucestershire County Council
Address: Shire Hall
Westgate Street
Gloucester
Gloucestershire
GL1 2TR

Decision (including any steps ordered)

1. The complainant has made a request to Gloucestershire County Council ("the council") for information about a pothole that the complainant had photographed. The council refused the request under regulation 12(4)(b) of the Environmental Information Regulations ("the EIR").
2. The Commissioner finds that the council has correctly refused the request under regulation 12(4)(b), and has complied with the requirements of regulation 9(1).
3. He does not require any steps to be taken.

Request and response

4. On 31 May 2015 the complainant made a request:
 1. *A copy of your current road maintenance policy relating to the road in Question. I require 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 the road over the past year. Again, I require the full road repair history, but this should include:*
 - a) *dates of all safety inspections for the sixty days prior to but including 21/01/2015.*

- b) details of how safety inspections were undertaken (walked or driven, speed of inspection vehicle etc.)*
- c) details of all carriageway defects identified, with description, date and time*
- d) 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.*

5. The council subsequently disclosed the specified information in response on 25 June 2015.
6. On 28 June 2015 the complainant made a second request (including, as far as the Commissioner is aware, photographs of the specific pothole to which he sought information about):

Please respond with the work report of the actual pothole that I hit. I have contacted an expert to support my case & shown him the photographs. He informs me that the pothole is clearly not naturally formed, it has been cut out & filled as a temporary repair and that the repair has obviously failed over time, leaving a worse pothole than its original state. I now require the report of this temporary job please, as your contractors should have returned to complete the repair & it is this negligence that has caused the problem.

7. The council subsequently disclosed a specific Job Report (dated 28 January 2015) on 15 July 2015.
8. On 16 July 2015 the complainant made a third request:

Thank you for your email. However; this is not what I requested. I informed you in my email dated 28/06/2015 that I required the report of the job undertaken to temporarily repair the pothole prior to the date that I encountered it (21/01/2015). I repeat that I have consulted an expert who has viewed my photographs of the scene and confirmed that the hole I hit was not naturally occurring; it can clearly be seen that this hole has previously been cut to shape (see attached example photograph) and therefore; it was either left in this state, or temporarily filled, which means you knew about it previously and have allowed it to remain in this state, or allowed it to fail, if indeed it was a temporary repair. I do not know the date that you undertook a temporary repair but obviously; it was prior to me encountering it and it is this report that I require please.

9. The council responded on 29 July 2015 and refused the request under section 12 of the Freedom of Information Act (“the FOIA”), on the basis that further searches for information would exceed the appropriate limit.
10. The complainant requested an internal review on 29 July 2015.
11. The council provided its internal review on 26 August 2015. It maintained its application of section 12.

Scope of the case

12. The complainant contacted the Commissioner on 27 August 2015 to complain about the council’s refusal under section 12 of the FOIA.
13. The council confirmed to the Commissioner on 2 February 2016 that it should have refused the third request under regulation 12(4)(b) of the EIR, due to the information being environmental in nature.
14. The Commissioner therefore considers the scope of this case to be whether the council has correctly refused the third request under regulation 12(4)(b).

Reasons for decision

Context

15. The complainant has experienced damage to his vehicle as a result of a pothole on a public highway. In order to seek costs for this damage, the complainant has photographed the pothole and has subsequently made three requests to the council in order to seek information about its prior identification and repair.

Is the information environmental?

16. Information is “environmental” if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR rather than the FOIA. Under regulation 2(1)(c), any information on activities affecting or likely to affect factors of the environment listed in regulation 2(1)(b) will be environmental information. The information requested relates to the condition of highways, which can be understood to affect various factors including noise and emissions. The Commissioner therefore considers that the request should be dealt with under the EIR.

Regulation 12(4)(b) – requests that are manifestly unreasonable

17. Regulation 12(4)(b) provides that:

For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that-
(b) the request for information is manifestly unreasonable...

18. The Commissioner has issued public guidance on the application of regulation 12(4)(b). This guidance contains the Commissioner's definition of the regulation, which is taken to apply in circumstances where either the request is 1) vexatious, or 2) where the cost of compliance with the request would be too great. In this case the council considers that circumstance 2) is applicable.
19. The EIR does not contain a limit at which the cost of compliance with a request is considered to be too great. However, the Commissioner's guidance suggests that public authorities may use The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") as an indication of what Parliament considers to be a reasonable charge for staff time. The Regulations specify that £450 is the appropriate limit for local government authorities, and that the cost of complying with a request should be calculated at £25 per hour; this applies a time limit of 18 hours.
20. For the purposes of the EIR, a public authority may use this hourly charge in determining the cost of compliance. However, the public authority is then expected to consider the proportionality of the cost against the public value of the request before concluding whether the request is manifestly unreasonable.

Is the exception engaged?

The council's position

21. The council has provided the Commissioner with a chronology of the requests in order to outline the costs already accrued, and the calculated costs of undertaking further searches for information.
22. In response to the initial request, the council provided the Site History Report for the period of 1 April 2014 to 31 March 2015, in addition to 17 Job Reports for repairs undertaken during the 60 day (21 November 2014 to 21 January 2015) period specified in the request. These reports were recovered from the council's infrastructure asset management system 'CONFIRM', and took approximately 5 minutes per report. The total time searching and recovering this information was therefore 1 hour 30 minutes.

23. Following the second request (which the Commissioner understands included photographs of the specific pothole that information was sought about) the council undertook further searches and provided a single Job Report that it considered was relevant to the complainant's request (but which the Commissioner notes derived from after the timescale specified by the complainant in his initial request). The total time searching and recovering this report from CONFIRM was 15 minutes.
24. Following the third request (in which the complainant specified that he only sought information deriving from before 21 January 2015) the council undertook a search for relevant information deriving from between 1 April 2014 and 31 March 2015. The council identified a total of 38 Job Reports for repairs during this period to the relevant part of the highway (the 'A429 Fosseway Long Section'), and has elaborated to the Commissioner that there is no way to search and retrieve information from CONFIRM at a greater level of granularity. The council has explained that it compared the photographs provided by the complainant with photographs held in each Job Report, but did not identify a match for this time period (the 2014-2015 financial year). The total time spent recovering the information and then cross checking contained photographs was 9 hours and 30 minutes (approximately 5 minutes to retrieve the report from CONFIRM and 10 minutes to assess photographs for similarity with those provided by the complainant). This meant that the total time spent in respect of the complainant's requests came to a total of 11 hours 15 minutes.
25. The council has outlined that to continue its searches within the held records for the previous financial year (1 April 2013 – 31 March 2014) would significantly exceed the appropriate limit. The council has identified that 88 potholes were repaired during this period on the relevant part of the highway, and conservatively estimates that to retrieve and assess each Job Report would take 15 minutes per report (5 minutes to retrieve each report and 10 minutes to review its contents), and therefore require 22 hours of officer time. However the council considers that the relevant Job Report may even predate this, and has detailed that between 1 September 2011 (when the council started to include photographs within Job Reports) and 31 March 2013, a total of 107 potholes were recorded on the relevant section of the highway, and that to search, recover and assess each Job Report would take an approximate total of 26 hours 45 minutes of officer time.

The Commissioner's conclusion

26. The Commissioner has carefully considered the context of the third request, and has identified that 11 hours and 15 minutes of officer time has so far been spent in complying with all three requests.

27. Whilst the EIR does not contain a specific provision for the aggregation of similar requests, the Commissioner's guidance advises that aggregation can be appropriate in situations where the context suggests that requests are intrinsically linked. In this case it is clear that the requests are connected by a single purpose.
28. The Commissioner also recognises that the nature of the complainant's third request requires the council to access each Job Report deriving from the relevant section of the highway before applying judgement as to whether it may relate to photographs provided by the complainant. Having considered this factor the Commissioner accepts the council's estimations of time spent to be realistic. Although it is noted that the council's searches in respect of the third request mistakenly overextend the complainant's timescale by 2 months, this does not appear to alter the substance of the council's position, and it is reasonable for the Commissioner to consider that even should the total amount of time spent so far be reduced by several hours, any further searches in respect of the request (as outlined in paragraph 25) would still incur significant costs so as to be manifestly unreasonable.
29. On this basis the Commissioner accepts that the request is manifestly unreasonable within the meaning of regulation 12(4)(b).

Regulation 12(1)(b) – the public interest test

30. Regulation 12(4)(b) is subject to the public interest test set out in regulation 12(1)(b). This specifies that a public authority may only rely on an exception if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Public interest arguments for maintaining the exception

31. The council considers that the request represents a private interest, and that it has a responsibility to ensure that significant public resources are not unnecessarily diverted to address this.
32. The council also considers that searching the previous financial years would be unlikely to serve the complainant's interests, as the council would typically only hold liability for damage derived from a pothole if it was the result of a recently failed repair.

Public interest arguments against the applied exception

33. The complainant argues that the information is needed for him to present it to the courts, and that he has now initiated court proceedings to recover his costs from the council.

Balance of the public interest

34. The Commissioner recognises the inherent importance of accountability and transparency in decision-making within public authorities, and the necessity of a public authority bearing some costs when complying with a request for information. However, in considering the public interest test for this matter, the Commissioner must assess whether the cost of compliance is disproportionate to the value of the request.
35. Whilst the Commissioner appreciates the reason that underlies the complainant's request, it is noted that this represents a private interest (i.e. seeking compensation for vehicle damage), and that undertaking further searches would divert council resources but without providing any wider public benefit. The Commissioner also notes that the matter has been referred to the courts, and that it is not the purpose of the EIR to replace the powers held by the courts to request and access evidence.
36. Having considered the relevant factors in this matter, the Commissioner has concluded that the public interest favours the maintenance of the exception.

Regulation 9 – advice and assistance

37. Regulation 9(1) provides that:

A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

38. This regulation places a duty on a public authority to provide advice and assistance to someone making a request. The Commissioner considers that this includes assisting an applicant to refine a request if it is deemed that answering a request would otherwise incur an unreasonable cost.
39. The council has proposed that it has already provided a significant amount of information to the complainant in relation to his requests, including the council's view that the pothole was likely to have been a failed permanent repair from an earlier period (due to temporary repairs not being typically undertaken on that part of the highway). The council has also proposed that the nature of the information sought means that it is impossible to refine the request, as the relevant Job Report cannot be connected to a specific time period.
40. The Commissioner recognises that the request is not one that can be effectively refined, as it seeks information of an unknown date using no

description other than a provided photograph. Having considered this the Commissioner has not found a breach of regulation 9(1).

Right of appeal

41. 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

42. 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.
43. 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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