

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 25 May 2021

**Public Authority:** Essex County Council  
**Address:** County Hall  
Chelmsford  
Essex  
CM1 1QH

#### **Decision (including any steps ordered)**

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1. The complainant has requested a series of questions relating to the council's monitoring of road and pavement defects. The council answered some of the questions however the complainant considers that further information should be held by it.
2. The Commissioner's decision is that the council has complied with the requirements of Regulation 5(1) in that no further information is held by it which can respond to the complainant's questions.
3. The Commissioner does not require the council to take any steps.

## Request and response

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4. In responding to an earlier complaint from the complainant regarding damage which had occurred to a vehicle due to a defect on a road, the council responded arguing that it was not liable for the damage caused. It confirmed that the defect was a danger when it inspected it on 16 December 2019, after the accident, but denied having knowledge of a serious defect prior to the accident occurring. It said that:

*"we were aware of the defect in November prior to your incident, but it was not considered to pose any danger, a low priority repair was raised and would be completed as and when resources allow.*

*We completed a routine inspection on 2nd December 2019, prior to your incident and the defect was not noted to have changed in its risk assessment at this time."*

5. The council argued that if it did not know about the defect in spite of carrying out routine monthly inspections then, in law, it was not liable for the damage which occurred as it had carried out reasonable steps to ensure the safety of the highway.
6. It responded to the complainant's claim for damages, stating that it was not liable for the damage, on 15 January 2020 stating that *"With regards to the routine safety inspections, we can confirm that last routine inspection of London Road Billericay, prior to your accident occurring, was completed on the 2<sup>nd</sup> December 2019, during that inspection, the inspector did not find any new defects or any defects that required imminent repair, at the accident location"*.
7. On 24 January 2020, the complainant wrote to the council and requested information in the following terms:

*"Please can you send me:*

*a) The date of advice, council reference and any descriptive information recorded by Essex County Council (ECC) of road defects open at 24/01/2019 and those advised by the public and other third parties for the above road area in the 12 months to 24/01/2020. This to cover notifications directly received by ECC through written, telephone and electronic means and through third parties such as [www.fixmystreet.com](http://www.fixmystreet.com) and "[www.fillthathole.org.uk](http://www.fillthathole.org.uk)" (but not limited to them).*

*b) Against each advice of road defect in (a) the date corrective repair was made against the defect.*

*c) Dates of all inspections (including Ad Hoc) undertaken on the carriageway in the year to 24/01/2020. Confirmation that such inspection for PR1 roads should be monthly (subject to unforeseen events).*

*d) Dates and details of all carriageway defects in respect of the above road identified by ECC during monthly inspections in the last year and confirmation that these are recorded in the report defects specified in (a) above.*

*e) Details of how the above specific carriageway inspections were undertaken (walked or driven), the speed of the inspection vehicle and the number of persons in the vehicle specifically for the section of road covered by the above claim.*

*f) The Priority reference i.e. S1 /S2/ S3/ S4 assigned to each defect advised by the public and through inspections in respect of (a claims) above.*

*g) Where temporary or permanent repair work has been undertaken by the Council in respect of road defects covered by claim 2643023 in the year up to 24/01/2020 the date, description and quantification of work completed - specifically the depth, length and breadth of damaged road repaired."*

8. The council responded on 12 February 2020. It provided some information in the form of the site history report, however it also withheld other information on the basis that Regulation 13(1) applied (personal data relating to a third party). The complainant has not questioned the application of this exception to redact the identities of council staff, and it does not therefore form part of this decision notice.
9. On 10 June 2020 the complainant wrote again to the council and asked it to review its decision. He asked a series of questions relating to the council's responses to questions a), d) and e). His points were as follows:

*"In section (a) of the response 12/02/20 it is confirmed that electronic advices of road defects from "fixmystreet" and "fillthathole" are recorded.*

*On 12/11/2019 "Fixmystreet" reported to the Council "Drain cover by bus stop large pothole and drain cover loose" That does not seem to be recorded under Customer Services of the Site History. Is that because ECC picked up the condition in their survey 1/11/2019?*

*My original request d refers.*

*The Condition survey within the FOI Site History Report for inspection on 01/11/2019 refers to defect 3436372 ADj to LC18 and 3436373 as being By ic18. Is the first the drain gully and the second defect the pothole in the road? Is the distinction the former is noted as requiring action and the latter "no action required even though both defects are conjoined.*

*My original request e refers.*

*The inspections of the specified road has been advised as "by driven."*

*What is lacking is whether there were 1 or 2 people in the vehicle and the recommended speed of the inspection vehicle. Inspection batch 3436372/3 and 3436381 –dated 01/11/2019 under Condition Survey shows measurements of defects. Do the inspectors stop the vehicle and undertake that work or does a separate group undertake it later.*

*In previous replies (27/02/2020) ECC advise that if the risk assessment has not changed on defects in any future inspections (to a previously logged issue) that second inspection will not be logged - as no new defects were noted. Could you please advise whether the inspector(s) on 2/12/2012 viewed from their vehicle or physically re-inspected the original defects 3436372/3436381/3436373 and visually confirmed no deterioration?"*

10. Following its internal review, the council wrote to the complainant on 15 July 2020. It said that no log was held regarding any entry from 'fixmystreet<sup>1</sup>' on the 'confirm' database. It also provided information on the statement 'no action required' on the information relating to the defects concerned.

## **Scope of the case**

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11. The complainant contacted the Commissioner on 28 July 2020 to complain about the way his request for information had been handled.
12. The complainant specified the issues which he wished the Commissioner to consider. They relate to the council's response to questions a) and e) above. He specified that his complaint was that:

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<sup>1</sup> <https://www.fixmystreet.com/>

*1) I questioned if reports are logged from external sources such as "Fixmystreet" and "Fillthathole"*

*The Council response " Page 2 2nd para:*

*"With regard to your point about report made to Fixmystreet; no customer inquiry was logged in the Confirm database therefore we are unable to release that information as it does not exist. It may be helpful to note that Essex Highways does not use or advocate any member of the public to use Fixmystreet as we have on our public website our own, better, proprietary system which takes reports by members of the public straight onto our database and therefore onto inspector's electronic devices."*

*In ECC Highways Maintenance Policy July 2019 the following section is published policy:*

#### *1.5.2 Reactive Safety Inspections*

*In addition to planned-inspection regimes, the Council receives reports and enquiries from a number of sources regarding its highway assets. The Council operates systems that allow these to be received either electronically or via traditional methods, for example Letter/telephone call. It also operates a system to receive reports or enquiries of an emergency nature out of hours.*

*The Council response to my inquiry is that published policy no longer applies. Is that correct? Have "FixmyStreet" been specifically advised as they still send advices to the Council.*

*2) My 2nd request relates to the second inspection of defects undertaken 02/12/2019 and previously recorded 01/11/2019. The Council statement is:*

*A driven inspection is by an inspector and a driver from a slow-moving vehicle. When the inspector sees any imperfection that looks to meet minimum investigatory level the vehicle stops, the inspector gets out, measures the imperfection, carries out a risk assessment and then creates a new or updates an existing defect on their device. They also see on their device all existing outstanding defects on that section they are inspecting and reassess the dimensions and risk assessments of all of these existing defects. Where safe to do so, the vehicle speed shall not exceed 20 mph. Where this is unsafe, multiple passes can be made until the inspector is satisfied that all defects meeting investigatory level have been identified and recorded.*

*With regard to your last point about whether the inspectors viewed from their vehicle or physically re-inspected, please see my comments*

*in the paragraph immediately above. Therefore existing defects are reviewed and re-assessed in the same way that new defects are and are logged accordingly. The above last sentence states "existing defects are reviewed and re-assessed in the same way that new defects are and are logged accordingly."*

*On the Council Condition Survey there is NO UPDATED RECORD of the condition of the defect at 02/12/2019. The above Council policy does not appear to be discretionary in the requirement to update the condition of an existing defect particularly when "Action Required "was noted when first recorded.*

*If it is discretionary my existing request for information relating to the review should stand to confirm what review was undertaken and that NO change was seen between 01/11/2019 and 02/12/2019.*

13. In essence, therefore, as regards point e), the complainant was stating that if no information is held and it is mandatory for council officers to update the record then that would appear to show that that defect was not reviewed on 2 December 2019 to see if it had worsened. However, if council officers have discretion whether to record their review, then his question reverted back to question d) as elaborated upon in his request for review. This asked the council to confirm whether action had been deemed necessary on the second defect on the 1 November 2019 review.
14. The complainant's argument to the Commissioner is that his questions have not been responded to. Whilst public authorities are not required by the EIR to respond to 'questions' directly, they should consider any information held which can be used to respond to the question. In this case, therefore, the complainant is arguing that further information is held by the council which would assist in responding to the questions he has asked.
15. The Commissioner must therefore consider whether the council holds any recorded information which is relevant to the questions posed.

## **Reasons for decision**

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### **Regulation 12(4)(a) information not held**

#### Regulation 5(1)

16. Broadly, Regulation 5 requires that a public authority that holds environmental information shall make it available on request, otherwise, an authority should provide a valid exception in order to exempt itself

from providing that information. Where an authority does not hold information at the time that it receives a request for information then authorities should state that that is the case and apply the exception in Regulation 12(4)(a) (information not held).

17. The council has claimed that no information is held in response to a number of the complainant's requests for information. It has, however, provided further clarification in respect of the first part of the complaint.

Regulation 12(4)(a)

18. Regulation 12(4)(a) provides that a public authority may refuse to disclose information to the extent that it does not hold it when an applicant's request is received.
19. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First Tier Tribunal decisions, applies the civil standard of proof; on a balance of probabilities.
20. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
21. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded.
22. She will also consider any other information or explanation offered by the public authority (and/or the complainant) which is relevant to her determination.
23. During the course of her investigation, the Commissioner asked the council to describe the searches it carried out for information falling within the scope of the request, and the search terms used. She also asked other questions, as is her usual practice, relating to how it established whether or not it held further information within the scope of the request.
24. The council clarified its position to the Commissioner as regards of request a). It said that pothole reports are logged from only one external source, "Fixmystreet" which is where the only report of the defect referred to by the complainant came from. It said that

*"Pothole reports are logged from only one external source, namely "Fixmystreet" which is where the only report of this defect came from. The report and subsequent inspection in response was supplied to [the complainant] as part of the electronic data in the Site History Report which formed part of our response....*

*...The question did not lead us to believe that we were required to explain the source of any notification, simply provide the information held, which we did. The business area made the comment encouraging the requester to use our own reporting mechanism, which with hindsight has confused matters. This is a lesson learned for us; however we still maintain that we did answer the question asked as the requester did not ask us to explain the source of the information we held, simply to provide it".*

25. The council therefore confirmed that it does still receive notifications from 'fixmystreet', but that it does not receive information from any other external source. It also confirmed that it does not hold recorded information demonstrating this, but it could confirm that it received the relevant notification from 'fixmystreet' in this instance.
26. As regards the complainant's second concern, the council said it does not hold information which can respond to the complainant's question. It explained that:

*"For the "ad hoc" inspection, that is in response to a report of a defect, a single person, the inspector, attends. They leave the vehicle on foot to inspect the defect, as in this case. The previous regular monthly inspection was carried out (this has subsequently changed due to Covid restrictions) as a driven inspection with the inspector as passenger from a slow-moving vehicle. There is no documentation held regarding how many people were in the vehicle or whether the inspection was carried out on foot or in vehicle. Inspectors have discretion in how they carry out an inspection according to the local circumstances of each inspection as their safety is paramount. This is made clear in our Maintenance & Inspections Strategy: Carriageways, Footways & Cycleways, the hyperlink to which was provided to [the complainant] in our original response. We accept that we could have been clearer in our response that the specific information requested was not held."*

27. It also clarified that:

*"During regular driven inspections with the inspector as a passenger, reviewing existing defects is done from vehicle or on foot, depending on what the inspector can see. For example if it was a damaged railing, and it was a driven inspection, the inspector will see on their tablet that there is a defect recorded there. They will click on that defect and see what it is and the dimensions and photos; **if they see on site that***



***the defect has not changed they don't record new defect information but will link the new inquiry to the defect [ICO highlighting]. If the defect is something like a gap between paving slabs or a rocking slab etc., that they cannot judge as well from the vehicle they will choose to get out and assess. No information is held to confirm whether or not on this occasion the inspection was on foot or from a vehicle as this is not recorded."***

28. The complainant's statement to the Commissioner was that *"If it is discretionary my existing request for information relating to the review should stand to confirm what review was undertaken and that NO change was seen between 01/11/2019 and 02/12/2019."*
29. The council's response is therefore that the manner in which inspections are carried out is dependent upon a number of circumstances, and that the nature of the defect will affect whether the officer leaves the car to inspect it; that the safety of the individual officer is paramount.
30. The council therefore argues that it does not hold recorded information which specifies to the complainant the manner in which the inspections which were carried out. Under the EIR it is not obligated to respond further to the questions asked.
31. It also clarified that the information which is recorded on its database is dependent upon whether any changes are noted on the defect. If no changes are noted, then it simply links any new notification to the defect. It confirmed that no further relevant information is held on the database in this instance which can answer the specific question.
32. Whether or not this response provided any credence to complainant's position as regards the council's liability for the accident is not a matter for the Commissioner.
33. Finally, the council also answered the Commissioner's questions clarifying the searches which it carried out in order to determine whether relevant information is held.
34. It said that all of the relevant information will be held as electronically on its database 'Confirm'. No other records are kept outside of this system.
35. Searches were carried out using road names and dates for relevant data within the Confirm system.
36. It confirmed that no relevant information has been deleted or destroyed, and that its records retention schedule states that such information has a retention period of 7 years from the last action.

37. It confirmed that information is held to enable efficient repairs and monitoring of Highways assets and to provide information about those to any interested party. There is, however, no statutory requirement for it to retain such records.
38. It confirmed therefore that all information held by the council falling within the scope of the request has been provided to the requester, other than names of staff excepted under Regulation 13(1), which the complainant has not challenged.
39. It also recognised that some of its responses to the further queries raised by the complainant could have been clearer. It said that confusion partly arose where it sought to provide an explanation to the complainant in response to his request for review, but did not specify whether relevant information was in fact held or not. It said that it would learn the lessons gained from this experience.

#### The Commissioner's conclusions

40. The Commissioner recognises that the requested information is of interest to the complainant in order to support his wider argument that the fault lies with the council for the damage caused to the vehicle.
41. Although the complainant has asked a series of questions, rather than making information requests, the council is under a duty to provide recorded information which responds to the questions asked. Under the EIR it is not, however, under a duty to go beyond that point, even if the answers to the questions are known by council officers.
42. The council has responded providing the recorded information it holds and has responded to the questions insofar as the recorded information it holds can do so. As regards question a), it has gone beyond this to specifically clarify that it does take into account reports logged on 'fixmystreet'.
43. As regards question e) it has confirmed that where no change in a defect is noted, that if officers *'see on site that the defect has not changed they don't record new defect information but will link the new inquiry to the defect'*.
44. It also confirmed that it holds no information on the manner in which the review of the defect was carried out, nor whether there were one or two people in the car when it was carried out.
45. Given the council's responses regarding the searches which it has carried out, the Commissioner considers that the council has provided a description of having carried out adequate searches in appropriate

places to determine whether any further information is held falling within the scope of the complainant's request.

46. Additionally, in the absence of evidence to the contrary, she considers that the council's explanations as to why it does not hold further information to be credible.
47. The Commissioner is therefore satisfied that, on the balance of probabilities, the council does not hold the requested information.
48. The Commissioner therefore considers that the council complied with the requirements of regulation 5(1) of the EIR and that regulation 12(4)(a) was engaged.

## Right of appeal

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49. 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@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

50. 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.

51. 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**  
**Head of FoI Casework and Appeals**  
**Information Commissioner's Office**  
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**Wilmslow**  
**Cheshire**  
**SK9 5AF**