

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

Date: 11 October 2017

Public Authority: Surrey County Council
Address: County Hall
Penrhyn Road
Kingston upon Thames
KT1 2DN

Decision (including any steps ordered)

1. The complainant requested information relating to the monitoring and inspection of highways from Surrey County Council (the Council). The Council refused the complainant's requests as manifestly unreasonable as per regulation 12(4)(b) of the EIR. The Council also found that the balance of the public interest test favoured maintaining the exception.
2. The Commissioner's decision is that the Council has incorrectly refused the requests as manifestly unreasonable. The Commissioner also found that the Council breached regulation 5(2) of the EIR as it failed to respond to two of the complainant's requests within 20 working days, and that the Council breached regulation 11(4) as it did not issue its internal review to the complainant's requests within 20 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a further internal review response in relation to the complainant's first request (dated 16 September 2016) and his second request (dated 21 September 2016) which does not refuse these requests on the basis of regulation 12(4)(b) of the EIR.
 - Issue a new response to the complainant's third request (dated 24 October 2016) which is not a refusal on the basis of regulation 12(4)(b) of the EIR.

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. There are three requests which are the subject of this decision. The Commissioner has included the wording of these requests in Annex A, which is attached to this notice. The dates of these requests were as follows:
 - 1) 16 September 2016 – the Council responded to this request on 18 October 2016 and provided some information of relevance to the request.
 - 2) 21 September 2016 – the Council responded to this request on 19 October 2016 and provided some information of relevance to the request.
 - 3) 24 October 2016 – the Council responded to this request on 6 March 2017 and refused the request under regulation 12(4)(b) of the EIR.
6. The Council issued its internal review on 6 March 2017, which also constituted its first response to the complainant's third request. This response refused all three requests under regulation 12(4)(b), and confirmed that the balance of the public interest test favoured maintaining the exception.
7. The Commissioner notes that the Council only had the opportunity to issue one response to the complainant's third request. However, in the Commissioner's view the Council had sufficient time to issue a response prior to the internal review so had enough time to form its view on the request.

Scope of the case

8. The complainant contacted the Commissioner on 13 December 2016 to complain about the way his requests for information had been handled. At that time the appeal related to the failure of the Council to issue a response to the third request, and the failure of the Council to issue an internal review to the first two requests.

9. Upon receipt of the Council's internal review of 6 March 2017 the complainant confirmed that he wished to appeal against the Council's refusal of his requests under regulation 12(4)(b).
10. The Commissioner considers the scope of the case to be whether the Council is entitled to refuse the requests under regulation 12(4)(b) of the EIR. The Commissioner shall also consider the Council's handling of the requests in regards to the time it took to issue its responses and internal reviews to the complainant.

Is the information environmental?

11. In order for a request to be handled under the provisions of the EIR rather than FOIA it needs to be a request for environmental information. The definition for environmental information for the purposes of the EIR is provided at regulation 2.

12. Regulation 2(1)(a) and 2(1)(c) of the EIR states:

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form 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;

...

(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) and (b) as well as measures or activities designed to protect those elements;”

13. The complainant's requests are numerous, but broadly cover the state of the Council's highways and the measures taken to maintain and repair the highways. The Commissioner considers that the requests ask for information about the state of the land in the form of highways, as well as measures that would affect the state of the land. The Commissioner sees this as environmental information as per regulations 2(1)(a) and 2(1)(c).

Reasons for decision

14. Regulation 12(1) of the EIR states that:

"12.—(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

*(a) an exception to disclosure applies under paragraphs (4) or (5);
and*

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information."

15. Regulation 12(4)(b) of the EIR states:

"(4) 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;"

16. Regulation 12(4)(b) allows public authorities to refuse requests where dealing with a request would create unreasonable costs or an unreasonable diversion of resources, or an equivalent request would be found 'vexatious' if it was subject to FOIA. The Council confirmed to the Commissioner that the refusal of the complainant's requests was because it considered them to be vexatious.

17. The Commissioner has issued guidance on determining whether a request is vexatious.¹ This guidance explains that the purpose of section 14(1) of FOIA is to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress. It was confirmed in the Upper Tribunal case of *Craven v The Information Commissioner and the Department of Energy and Climate Change [2012] UKUT442 (AAC)* that the same approach can be taken to refusals under regulation 12(4)(b) for requests a public authority consider to be vexatious.

18. In order to determine whether regulation 12(4)(b) is engaged the Commissioner will decide whether the requests are vexatious. If the Commissioner decides the requests are vexatious she will determine

¹ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

whether the balance of the public interest supports maintaining the exception.

19. In reaching her decision the Commissioner has considered the balance of the public interest test from when the Council issued its internal review, which was 6 March 2017. This reflects the position taken by the Upper Tribunal in *APPGER v ICO and Foreign and Commonwealth Office* (UKUT 0377 (ACC), 2 July 2015). This judgment concluded that 'the public interest should be assessed by reference to the circumstances at or around the time when the request was considered by the public authority (including the time of any internal review)'.²

Council's arguments that requests are manifestly unreasonable

20. The Council stated to the Commissioner that the complainant had brought an insurance claim against it following an accident involving a pothole on a road. The Council acknowledged that freedom of information requests can provide useful information which could make an insurance claim successful, but stated that unlike other claimants the complainant followed up his request for information with a series of requests, and that this went beyond the normal behaviour of claimants. In effect its argument was that the complainant had appropriate recourse for the accident but instead chose to make additional requests, which were an unjustified disruption from Council business.
21. The Council argued that the complainant appeared to pursuing "something of a personal vendetta" against staff members. The Council even went so far as to state the complainant was "'stalking' [sic]" council officers, and on one occasion a council officer's family member. It stated that the complainant had accessed a social media account for this family member, obtained information from a post relating to a non-work subject, and then made a complaint to the Council.
22. The Council estimated it had spent 58 hours answering the complainant's requests over a period of 18 months. The Council provided the Commissioner with copies of the requests and there are numerous questions in some requests.
23. Following the complainant's second request the Council sent the complainant a letter stating his behaviour was unreasonable and that it

²

<http://administrativeappeals.decisions.tribunals.gov.uk//judgmentfiles/j4597/%5B2016%5D%20AACR%205ws.doc> see paragraph 44

would no longer be responding to correspondence from him outside of its obligations under FOIA and EIR. The letter stated:

"[W]e do not expect our staff to be subject to behaviour or language that is, for example, abusive, offensive or threatening.

...

You have also been unreasonably persistent and forceful in pursuing these allegations. The references to a member of staff's personal life in your most recent email correspondence have been perceived as harassment by the staff member concerned, as well as an unacceptable invasion of their privacy. Correspondence of this nature will be reported to the police."

Complainant's arguments that requests are not manifestly unreasonable

24. The complainant stated to the Commissioner that following his failed insurance claim he informed the Council that he was intending to instigate legal action. However, before that he intended to submit requests in order to obtain more information about the state of the highways where he had his accident, as well as the Council's inspection methods for identifying and repairing potholes on the highways. Whilst the motive for the requests came from an unresolved grievance against the Council, the complainant was submitting requests in order to assist his legal action.
25. The complainant also argued that there was a wider argument about the state of the Council's highways that went beyond his own claim. During the period in which the complainant was making his requests a cyclist named Ralph Brazier was killed after hitting a draining grate and pothole. The subsequent inquest found that the pothole had been reported to the Council two months before Mr Brazier's fatal accident, and it was claimed in the subsequent coroner's inquest that the repair work had not been up to standard and was responsible for Ralph Brazier's death.³ The complainant stated that the Council had a legal responsibility to maintain the roads and he had concerns that there were failings within the Highways Department which posed a serious risk to road users.
26. The complainant informed the Commissioner that there were concerted efforts by concerned individuals to highlight dangers on the Council's

³ <http://www.getsurrey.co.uk/news/surrey-news/cyclist-ralph-brazier-died-after-12632669>

roads, and that his efforts had been recognised by a Council officer acting in a personal capacity. The complainant provided the Commissioner with messages from a private social media account which he suggested corroborated this argument. The requests were designed to provide information for the complainant's legal action but also to help gather evidence about the potentially substandard repair work carried out by the Council.

27. The complainant also argued that the Council's responses to him had been inadequate on a number of occasions. In addition to the delayed responses that are documented in this decision notice, the complainant provided the Commissioner with evidence from previous requests where the Council had not provided responses on time, or confirmed or denied whether relevant information was held.
28. The complainant disputed the Council's letter which described his behaviour as unreasonable and that his actions had in any way constituted harassment. The complainant states that his insurance claim to the Council resulted in an inspection being carried out by a highways officer. The information about the pothole provided by this officer did not match the information the complainant obtained through his own measurements. The result of this was that the complainant did not win his insurance claim (although he was successful in his legal action against the Council). The complainant then carried out his own open source research into the highways officer, including his social media profile, in order to see if there was anything relating to his insurance claim, and found comments he considered to be homophobic. The complainant referred these comments to the Council. The complainant also explained that as a result of this he became involved in a discussion with another council officer about open source research and privacy settings on social media accounts and it was in this context that the complainant referred to some information on a social media account of this second officer. The complainant states that his actions were only confined to council officers rather than their family members.

Commissioner's decision

29. The Commissioner is mindful that a request does not just have to be unreasonable in order to engage regulation 12(4)(b), it needs to be manifestly so.
30. The Commissioner notes the Council's submissions in relation to the time it has spent in answering the complainant's requests, and the estimate it provided showing how much time was spent on each of them. Additionally, the Commissioner acknowledges the Council's argument that this is beyond what is normally requested for individual's intending to take a claim to court.

31. However, the Commissioner also notes that the 58 hours of work occurred over an 18 month period. The complainant did submit numerous questions as part of his requests but by and large they were relatively straightforward. Further, the complainant had a legitimate reason for making requests: he wanted to obtain information for his own claim – one which was ultimately successful; but also had concerns about wider safety issues with the Council's highways, as demonstrated by the death of Ralph Brazier. In the Commissioner's view the burden represented by the complainant's requests could not be seen as an unjustified disruption.
32. The Commissioner also considers that some of the correspondence and requests from the complainant could have been avoided through the Council providing more prompt and thorough responses. The Commissioner acknowledges that the Council had problems with staffing at times, but the number of delays is sufficient to prompt criticism of the Council's performance, as is the standard of some of the responses to his requests.
33. The Commissioner also notes the content and tone of the complainant's other correspondence. In the Commissioner's view the complainant has not been "abusive, offensive or threatening" as suggested in the Council's letter. The complainant has at times expressed dismay or incredulity at the responses he received, but this is understandable given the Council's sometimes substandard responses, and the fact that his legal action would vindicate his view that the Council was liable for his accident.
34. In relation to the harassment allegation, the Commissioner understands why the complainant – having identified what he considered to be offensive remarks – felt the need to refer this to the Council. However, the Commissioner does consider that the timing of the complainant's actions to be significant. The complainant did not have a right of appeal to the Council over the insurance claim, so the complainant's searches through the social media account of a highway officer would not have assisted his complaint against the Council or subsequent legal action, and it is understandable that some council officers would find such actions distressing.
35. Furthermore, the Commissioner considers that the complainant's actions in searching for this information were at the extreme end of what she would envisage an individual to do in such circumstances. Furthermore, from the evidence seen by the Commissioner the alleged offensive comments were made through on a council officer's personal social media account and there is a distinction that must be drawn between an individual's private life and their professional one. Whilst the Commissioner would not wish to condone offensive remarks it must be recognised that the complainant looking for such information did little to

assist him with the purpose of pursuing his compensation claim, or trying to improve the standard of roads in the local area.

36. The Commissioner wishes to note that she considers this to be a finely balanced decision and that the complainant's research into individuals' private lives has provided a valid argument that his actions have at times been unreasonable. In spite of this, for the reasons mentioned previously, in particular the campaign to improve the roads in the local area and the relatively limited impact of answering the requests over an 18 month period, the Commissioner considers that a holistic view of the correspondence between the two parties shows that the complainant's requests would not have the potential to cause a *disproportionate* or *unjustified* level of disruption, irritation or distress.
37. Therefore, the Commissioner's decision is that the complainant's requests were not vexatious, and so not manifestly unreasonable as per regulation 12(4)(b) of the EIR.

Regulation 5(2) – time to respond to a request

38. Regulation 5(2) of the EIR states:

"5.–(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."

39. The complainant's first request was submitted on 16 September 2016 and responded to on 18 October 2016 – a total of 22 working days. The complainant's third request was submitted on 24 October 2016 and responded to as part of the Council's internal review response on 6 March 2017 – a total of 93 working days.
40. The Council breached regulation 5(2) by failing to provide a response to two of the complainant's requests within 20 working days. As the response has been issued no steps are required.

Regulation 11(4) - time to issue an internal review

41. Regulation 11 of the EIR states:

"11.—(1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request."

...

- (3) The public authority shall on receipt of the representations and free of charge –*
- (a) consider them and any supporting evidence produced by the applicant; and*
- (b) decide if it has complied with the requirement.*
- (4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations."*
42. For the complainant's first and second requests he asked for an internal review on 18 and 19 October 2016 respectively. The Council issued its internal review response on 6 March 2017 after prompting from the Commissioner.
43. The Council breached regulation 11(4) by failing to provide an internal review response to two of the complainant's requests within 40 working days.

Right of appeal

44. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

45. 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.
46. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex A – text of complainant's requests

The three complainant's requests are as follows (with Council reference numbers):

1) Request 15411 – highway information

On 16 September 2016 the complainant wrote to the Council and requested information in the following terms:

"1) Do SCC use the SCANNER system (or similar) to scan road surfaces in the county?

2) If Yes to (1) then how often is the system deployed on both A and B roads in the county?

3) If Yes to (1) Please provide analysed SCANNER data in a readable format for scans of the B2039 for the section between OCKHAM DRIVE and THE HIGHLANDS and covering the junction with EAST LANE, KT24. (I am interested in type and dimension of defects identified by the scan)

4) List and explain all methods are used by SCC to inspect the highways in the county and the corresponding codes used on Highways reports eg codes for walking inspection, driven inspections etc.

5) Provide any guidance documentation provided to Highways Inspectors or Community Highways Officers for using each of the methods.

6) Explain the process of how a reported defect is monitored for further deterioration and how the information is recorded.

7) Explain the methods that Highways Inspectors use to measure and record reported defects.

8) Provide copies of any guidance documentation or policy provided to HI or CHO for using each method.

9) Does anyone at SCC Highways contribute to the Road Liaison Group if so provide name(s) and role at SCC and how they contribute to the RLG.

10) Do SCC Highways adhere to the code of practice for Highway Maintenance Management.

11) If not provide details of the codes of practice SCC Highways work within."

The Council responded on 18 October 2016 as follows:

- 1 – 3: stated that this had been addressed previously.
- 4: stated that the relevant information has been provided previously.
- 5: information not held.
- 6 & 7: stated that the relevant information had been provided previously.
- 8: information not held.
- 9: provided the name of the relevant member of staff.
- 10: Council stated that it does.
- 11: stated the request is not applicable based on its answer to 10.

2) Request 15417 – inspection records

On 21 September 2016 the complainant to the Council and requested information in the following terms:

"On 04/08/2016 I reported pothole trip hazard on a pavement in Burpham.

(<https://www.fixmystreet.com/report/872674> refers)

It was allocated the reference number SQ-934139 by Surrey County Council.

On 08/08/2016 I received an email from SCC stating

"Reference number: SQ-934139

Location: BOXGROVE ROAD, GUILDFORD

Details: Footway Defect - Potholes

We have inspected this location and have now passed this safety problem to our work teams for repair. It will be fixed or made safe within the next 7 days."

On 12/08/2016 I received this email from Surrey County Council stating.

"Reference number: SQ-934139-1

Location: BOXGROVE ROAD, GUILDFORD

Details: Footway Defect - Potholes

I am pleased to advise you that the works have now been completed.

Regards

[Council employee A]

Customer Services and Improvement Manager"

*As of 21/09/2016 the works had **not** been completed and the hole/hazard is still there. Photographic evidence between the report date and later dates shows no change in the location and nothing has physically been done.*

On 21/09/2016 I met on site with [Council employee B] and [Council employee C] from SCC Highways and they have now raised a job for this to be repaired as it has been identified as a trip hazard.

It concerns me that yet again SCC are not being truthful about the recording and repairing of highways defects. I have raised the matter with [Council employee D] (SCC internal auditor) who does not see a problem with this.

Please supply the inspection records and any other records relating to this report. I would also like an explanation as to why this pavement defect was as marked as completed on your system and you gave me incorrect information. I would like this under the Freedom of Information Act."

The Council responded on 19 October 2016 and provided an inspection record, and stated that it was not required under the Freedom of Information Act 2000 to provide an explanation. The Council is correct that it does not have to provide explanations under the Freedom of Information Act 2000. It is only required to provide information held in its records.

3) Request 15448 – SCANNER data for B2039

On 24 October 2016 the complainant wrote to the Council and requested information in the following terms:

"Please provide analysed SCANNER data in a readable format for scans of the B2039 for the section between OCKHAM DRIVE and THE HIGHLANDS and covering the junction with EAST LANE, KT24. (I am interested in type and dimension of defects identified by the scan).

I would like the data provided the period from 01/01/2007 until 24/10/2016 which should include each of the bi-annual SCANNER inspections in each direction.

I would like the data presented as you did in FOI Request 15247 with the RAG maps and charts.

Please clearly label the date of the SCANNER data as no dates were provided for information received in FOI request 15247.

Please clearly label what that both the X & Y axis are on the graphs."

The Council acknowledged the complainant's request on 27 October 2016, but did not respond until it issued its internal review to the two aforementioned requests. The Council also refused this request under regulation 12(4)(b) as it considered it to be manifestly unreasonable.