

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

Date: 25 June 2018

Public Authority: Medway Council

Address: Gun Wharf
Dock Road
Chatham
ME4 4TR

Decision (including any steps ordered)

1. The complainant has requested information relating to pollution measurements, accident and collisions and works carried out on a specified section of the A2. Medway Council refused to comply with some parts of the complainant's request but refused to comply with other parts of the request in reliance on Regulation 12(4)(b) of the EIR, where the Council advised the complainant that his request was manifestly unreasonable.
2. The Commissioner's decision is that Medway Council correctly applied Regulation 12(4)(b) of the EIR to part 4 of the complainant's request. The Commissioner determined that the Council is entitled to aggregate all of the parts of the complainant's request for the purpose of its application of Regulation 12(4)(b). The Commissioner has also decided that the Council breached Regulation 9 of the EIR by failing to provide advice and assistance to the complainant in respect of his request, and also that it breached Regulation 5(2) by failing to respond to the complainant's request within the twenty day compliance period.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - In compliance with the duty to provide advice and assistance provided by Regulation 9 of the EIR, the Council is required to contact the complainant to assist him in refining his request for information. The Council should then determine if it is possible for the complainant to amend part 4 of his request so that it can be brought within a reasonable cost limit.

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 26 April 2017, the complainant wrote to Medway Council and requested information in the following terms:

"I wish to inspect, at your Chatham offices, the following in relation to the built environment and State of human health and safety of that part of the public highway known as the "A2" New Road, between its junction, to the West with the A229 City Way and its junction, to the East with unclassified highway 'Hamond Hill', your records showing for 6 Years previously (from 27 April 2011, or for so long as are otherwise recorded):

1. Any and all pollution measuring device records in and within, 500m of the 'A2' centreline; and,
2. Any and all accident collision data, for all classes of user – including non-domestic animals and pedestrians, with if possible, any age group of pedestrians injured (and class of injury, including fatalities) and disabilities (e.g. blind, deaf, wheelchair bound pedestrians); and,
3. Any complaints of carriageway and/or footway obstructions made to, and investigated by Medway Council, and if not investigated, the reasons why not; and,
4. Any complaints, of any nature, concerning or relating to work of statutory undertakers and/or utilities before, during or after any work (in that role) by them in the carriageway and/or footways of the said part of the 'A2' (including, fully, of the said junctions each end of the part said and intermediate junctions there between) made to, and investigated by Medway Council and, if not investigated, the reason(s) why not; and,
5. All Highway (carriageway, footways, verges and trees) inspection reports whether scientifically recorded (e.g. mechanical rolling straight edge) or visually recorded inspected; (and, include flooding "spots" ditto); and,
6. Pothole and trench/excavation repairs (by Medway Council as highway authority):
 1. in the carriageway; (incl resurfacing of large "patches",
 2. in the footways; (incl relay/resurfacing of large "patches",
 3. in any other parts (e.g. crossings & refuges); and,
7. Any complaints and/or injury and/or damage (whether to persons, vehicles or non-domestic animals) notices of claims for

- negligence/misfeasance/breach of statutory duty to repair and keep repaired and in (at least) statutory condition, the carriageway, the footways, the verges and the trees on the highway, made to Medway Council, and investigated by Medway Council, and their outcomes:
1. Not accepted (state if "pending" in "not accepted" category,
 2. Not accepted and not further challenged, after notice,
 3. Accepted, or not accepted and further challenged; and
 - (a) resolved without legal proceedings,
 - (b) resolved only after legal proceeding issued [word not legible]
 - (c) not resolved before final order of the Court,
 - (d) abandoned or withdrawn by the claimant and no damages or costs paid by Medway Council in such abandonment or withdrawal; and
 8. Any other data that the Council might wish to put forward to show any quantitative comparisons with the state of human health and safety for similar lengths of the A230 Mainstone Road and the A229 City Way; but please exclude the complicated junctions zone at and about the North (New Cut/Old Road) end of the A230 which will have non-comparable, and distinctly different, conditions to it. This is a mere option for Medway Council; not a data demand."
6. The complainant advised the Council that; "Should you wish you may direct me, by express and explicit address and reference, to such parts of your Council's digitally accessible 'on-line' published records swiftly please by way of EIR "assistance" duty, that will provide me with the records (or any particularised records) above requested or, if not so digitally available by paper print or DVD records of your election, but on the same statutory rights and terms that I am entitled to under the EIR "inspection" of records provision. Copies may be requested upon inspection".
7. The Council responded to the complainant's request on 1 June 2017. The Council informed the complainant that several departments had been involved in collating the extensive information he had requested and as a result the time limit allowed under the Freedom of Information Act 2000 had been exceeded.
8. Notwithstanding this position, the Council advised the complainant that it had collated some of the information, namely answers in respect of question 1, part of question 2, and question 3, and that information is available for inspection and/or collection from the Council's offices. Alternatively, the Council advised the complainant that it could send him the information by email or external post if that would be more convenient to him.
9. The Council advised the complainant that his question 8 is "not FOI" and in respect of his questions 4, 5, 6 and 7, the Council informed the complainant that it had deemed his request to be manifestly

unreasonable and subject to the exception to disclosure provided by Regulation 12(4)(b) of the EIR.

10. On 31 July 2017, the complainant wrote to the Council and asked it to review its handling of his information request. The complainant asserted that the Council's part-refusal of his request was unlawful.
11. The Council acknowledged the complainant's request for an internal review on 3 August 2017, and on 14 August the Council informed the complainant that its final decision was to confirm the position outlined in its refusal notice of 1 June.
12. The Council explained that Regulation 12(4)(b) had been applied to the request because the information the complainant seeks covers the past 6 years and would involve five council departments to manually search their records. The Council said that some of its records may be held electronically but would need to be searched manually as its systems do not allow searches using the criteria used in the request.
13. The Council advised the complainant that, under Regulation 12(2), where a presumption of disclosure should be applied, it had made some information available to him at its Chatham offices.
14. The Council estimated that complying with the request would expose it to "disproportionate burden and disruption to services", and it explained the public interest factors which it had considered in making its final decision.
15. Nevertheless, the Council provided the complainant with the following information/responses to his questions;
 1. "Air Pollution data is published online at www.kentair.org.uk
 2. Refused under section 12(4)(b)
 3. Footway Obstructions – 2 x jobs logged for New Road Rochester
 - 1 – 4/2/2015 – Kerbs outside hospital replaced and too high – advice given that they are that high to protect rail lines that cross the road through the tunnel underneath
 - 2 – 9/11/2015 – Trip hazard from traffic count equipment – passed to contractor who installed equipment to resolveCarriageway obstructions – 2 x jobs logged for New Road Rochester
 - 1 – 30/08/2011 – Debris left after RTC – Cleared
 - 2 – Kerbs too high and did not allow passengers to exit parked cars – engineer had asked for parking bays to be widened. Contractor advised to rectify asap
 4. Refused under section 12(4)(b)
 5. See attached [Information provided to the complainant as an attachment]
 6. See attached [Information provided to the complainant as an attachment]

7. See attached [Information provided to the complainant as an attachment]
8. Information not held"
16. The complainant wrote to the Council on 25 September 2017 to ask for assistance in understanding the parts of the Council's internal review response.
17. Referring to the reviewer's confirmation that she had spoken with colleagues about his request, the complainant asked the Council to confirm whether that was the sole means the review decision was made.
18. Referring to the Council's statement that his request, "will require five council departments to manually search the records they hold", the complainant asked the Council to confirm which element(s) of his request the Council was referring to, to name the five departments, and to identify – for each department, what information they hold which relates to his request.
19. The complainant also asked the Council to state precisely, what it meant by, and identified as paragraph 4 of the review letter as "each individual record".

Scope of the case

20. The complainant contacted the Commissioner 12 October 2017 to complain about the way his request for information had been handled.
21. The Commissioner focussed her investigation on whether Medway Council handled the complainant's request in accordance with the EIR and specifically, whether the Council is entitled to rely on the exception to disclosure provided by Regulation 12(4)(b) of the EIR in respect of its refusal to disclose some to the information he had asked for in parts 2 and 4 of the original request. The Commissioner has also considered the way in which the Council dealt with items 1, 5, 6 and 7 of the request.
22. The Commissioner has not considered the Council's response to item 3 of the complainant's request as the information he had requested under that item was provided by the Council in its response of 14 August 2017.

Reasons for decision

Item 4 of the request

23. The Council has confirmed that it is relying on Regulation 12(4)(b) of the EIR to refuse to comply with item 4 of the complainant's request.
24. The Council's position is that item 4 of the request is manifestly unreasonable on the grounds that to comply with it would impose a significant and detrimental burden on the Council's resources in terms of its officer time and cost.
25. Under Regulation 12(4)(b) of the EIR a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
26. The EIR differ from the FOIA in that there is no specific limit set for the amount of work required by an authority to respond to a request, as that provided by section 12 of the FOIA.
27. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the fees regulations) which apply in relation to section 12 of the FOIA are not directly relevant to the EIR - the cost limit and hourly rate set by the fees regulations do not apply in relation to environmental information. However, the Commissioner accepts that the fees regulations provide a useful starting point where the reason for citing regulation 12(4)(b) is the time and cost of a request but they are not a determining factor in assessing whether the exception applies.
28. The Commissioner is satisfied that Regulation 12(4)(b) sets a fairly robust test for an authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is 'manifestly' unreasonable, rather than simply being 'unreasonable' per se. The Commissioner considers that the term 'manifestly' means that there must be an obvious or clear quality to the identified unreasonableness.
29. It should also be noted that public authorities may be required to accept a greater burden in providing environmental information than other information. This was confirmed by the Information Tribunal in the DBERR case¹ where the tribunal considered the relevance of regulation 7(1) and commented as follows (paragraph 39):

"We surmise from this that Parliament intended to treat environmental information differently and to require its disclosure in circumstances where information may not have to be disclosed under FOIA. This is evident also in the fact that the EIR contains an express presumption

¹ Department for Business Enterprise and Regulatory reform v The Information Commissioner and Platform. Appeal no. EA/2008/0097

in favour of disclosure, which FOIA does not. It may be that the public policy imperative underpinning the EIR is regarded as justifying a greater deployment of resources. We note that recital 9 of the Directive calls for disclosure of environmental information to be "to the widest extent possible". Whatever the reasons may be, the effect is that public authorities may be required to accept a greater burden in providing environmental information than other information."

30. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will take the following factors into account:

- Proportionality of the burden on the public authority's workload, taking into consideration the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services.
- The nature of the request and any wider value in the requested information being made publicly available.
- The importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue.
- The context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester.
- The presumption in favour of disclosure under regulation 12(2);
- The requirement to interpret the exceptions restrictively.

31. The Council has provided the Commissioner with its rationale for applying the exception to disclosure provided by Regulation 12(4)(b). The Council has informed the Commissioner that its customer relations team ("The CRT") is responsible for handling complaints and that the CRT is not able to categorise complaints in sufficient detail to enable it to identify which Highways complaints relate to a specific road.

32. The Council also confirmed that to comply with item 4 of the request would require it to manually search its records – held in both electronic and paper-based formats, as its systems for not allow searches using the criteria identified by the complainant.

33. In the year 2016/17, the Council's CRT logged a total of 163 complaints relating to Highways, Maintenance and Parking Services. From this figure, using 2016/17 as a representative sample, the CRT estimate that

there could have been between 950 and 1000 complaints in received by the Council in the six year period identified in the complainant's request.

34. In order to establish whether a complaint relates to the "work of statutory undertakers and/or utilities, during or after any work (in that role) by them in the carriageway and/or footways" on the specific stretch of the A2 identified by the complainant, the Council has identified a number of tasks it would need to perform: The Council would need to cross reference the number recorded on its spreadsheet and locate the file within its Customer Relations Management System. Each file would then need to be read individually.
35. The Council considers that it would take between 10 and 15 minutes to read each complaint and extract information relevant to the complainant's request. The Council therefore estimates that complying with item 4 of the complainant's request would take between 158 hours and 250 hours:

950 complaints at 10 minutes per complaint = 9500 minutes, ***or***

1000 complaints at 15 minutes per complaint = 15,000 minutes
36. The Council has also confirmed to the Commissioner that the above estimate is based on the quickest method of locating and extracting relevant information.

The Commissioner's conclusions

37. The Commissioner has considered the terms used by the complainant in item 4 of his request: She considers that the complainant's request is clear and precise. On its face, the complainant's request is not manifestly unreasonable. It is only when the request is considered against the time needed to comply with the request that its effects can properly be judged.
38. The Commissioner has to recognise how complying with item 4 of the request would affect the Council. She must therefore consider the Council's representations in terms of the resources required to comply with the request and its overall cost.
39. The Council's representations are certainly plausible and the Commissioner has decided to accept the lower estimate of 158 hours needed to locate and retrieve relevant information.

40. 158 hours of work equates to a notional spend of £3,950. That is the amount of money needed to comply with item 4 of the complainant's request based on the £25 per hour identified in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004².
41. The Council's estimates of the cost of complying with item 4 of the request are so in excess of the cost limit provided by the Fees Regulations that the Commissioner is drawn to conclude that the Council is justified in considering the complainant's request to be manifestly unreasonable.
42. The Commissioner considers that the burden imposed by this request is so markedly greater than that normally required to provide environmental information that the Commissioner has decided that Regulation 12(4)(b) is properly engaged.
43. The Commissioner has also decided that the Council is entitled to aggregate all of the parts of the complainant's request for the purpose of determining whether the request as a whole is manifestly unreasonable on the grounds of cost to the Council.
44. It now falls to the Commissioner to consider whether the public interest favours the maintenance of this exception to disclosure.

The public interest test

45. The public interest test in this case concerns whether the Council should be required to carry out activities to locate and retrieve the information described by the complainant's request in its entirety.
46. The Council acknowledges the public interest inherent in environmental information. It recognises that the dissemination of environmental information promotes accountability and transparency and increased greater public awareness and understanding of environmental matters. It also recognises that making available environmental information to the public is likely to promote the exchange of views and the potential for more effective public participation in the decision making process.
47. Weighed against these factors is the burden imposed on the Council by this particular request, particularly in terms of officer time and cost to the Council. The burden imposed on the Council by this request constitutes a significant diversion of resources away from the Council's

² http://www.legislation.gov.uk/uksi/2004/3244/pdfs/uksi_20043244_en.pdf

core business which would have a proportionally detrimental impact on its provision of services to the public.

48. The Commissioner has also considered the nature of the information which the complainant has asked for. That information is not trivial nor is it without interest to the public generally. That said, the information caught by the complainant's request is limited to a relatively short section of the A2 between two specified locations and consequently the resulting public interest is also limited.
49. Notwithstanding the provision of Regulation 12(2), which requires a public authority to apply presumption in favour of disclosure, the Commissioner cannot disregard the overwhelming burden that is imposed by the complainant's request.
50. In the Commissioner's opinion the burden imposed on the Council by this request is so great as to outweigh the public interest favouring disclosure by a significantly large margin. In consequence of this, the Commissioner has decided the public interest must favour the Council's application of Regulation 12(4)(b) of the EIR and to render item 4 of his request as being manifestly unreasonable.

Regulation 9 – advice and assistance

51. The Council has advised the Commissioner that no advice and assistance was provided to the complainant in respect of his request for information. The Council told the Commissioner that it is unable to give an acceptable explanation as to why advice and assistance was not given and "can only apologise for our neglecting the requirements of Regulation 9."
52. In view of the above, the Commissioner's decision must be to find that the Council has breached Regulation 9 of the EIR. As a result, the Commissioner finds it necessary to require the council to revert back to the complainant with a view to offering ways of refining the request that may allow information of interest to still be provided. The Commissioner does though recognise that it may not be possible to reach a position of compromise if the information of interest retains its current breadth, nonetheless, attempts should be made to investigate a reduction in scope.

Item 2 of the request

53. The Council advised the Commissioner that it incorrectly applied Regulation 12(4)(b) to item 2 of the complainant's request and that the Council's proper position was that it had provided the complainant with information relevant to item 2 of his request in November 2017.

54. The Council told the Commissioner that there had been confusion surrounding this matter and, due to staff turnover, it had been difficult to obtain the reasons the Council initially offered part of the information relevant to item 2 and then applying the exception of Regulation 12 (4)(b).
55. Having spoken to the relevant department, the Council advised the Commissioner that it has no record of responding to this freedom of information request and that it could not ascertain the grounds the Council could offer "part of item 2" to the complainant in its response of 1 June 2017.
56. When the Council conducted its internal review it applied Regulation 12(4)(b) to item 2 of the complainant's request. This position has now changed and the Council has clarified why only part of the information is available to the complainant. The Council's position is that, due to the way it collects collision data, it does not record whether the person(s) involved in a collision has a disability.
57. It became clear to the Council that it had not reviewed the information requested in item 2 prior to investigating the response made to the complainant. Since that time however, the Council has reviewed that information which it has also supplied to the Commissioner.
58. The information collected by the Council in respect of accident data is contained in a document entitled 'Accident Data Between 28 April 2005 and 27 April 2011'. The document lists 17 accidents and records such things as; area reference, severity, day, date, time, grid coordinates, link/node, street, speed, type of carriageway, junction, lighting, weather, road surface, pedestrian crossing, sex, age, etc. None of the recorded information relates to whether the person(s) involved in the accident have a disability.
59. The Council assured the Commissioner that the complainant received this accident collision data in November 2017.
60. In response to the complainant's assertion that information previously made available to him and which may no longer be available is subject to the legal principle of estoppel, the Council stated:

"In respect of item 2, I fully understand that the information originally was not available to [the complainant] even though we had said that it was, keeping this in mind [the complainant] has in fact had this information at this current moment in time."
61. Having clarified what information is recorded in respect of "Any and all accident collision data, for all classes of user..., i.e. item 2 of the complainant's request, the Commissioner is content that the Council has provided the complainant with all of the information it holds relevant to

that part of his request. The Commissioner notes that it would have been appropriate for the Council to have informed the complainant that it does not hold information relating to whether the person(s) involved in an accident collision had a disability.

Items 5, 6 and 7 of the request

62. The Council has provided the Commissioner with three documents to illustrate how it responded to items 5, 6 and 7 of the complainant's request. These documents are:

Item 5: Feature History Report – This document, comprising 5 pages, lists inspections of the highway carried out on New Road, Chatham between 27 April 2011 and 27 April 2017. The document also details whether any defects were found during the inspections; the location of those defects; and, the priority given to rectifying the defect.

Item 6: Feature History Report – as above, but comprising 4 pages.

Item 7: Job List – Comprised of 3 pages, this document details the jobs carried out on New Road Avenue, Chatham between 2007 and 2017. The location of each job is identified.

63. It is clear to the Commissioner that, notwithstanding her decision that Regulation 12(4)(b) applies to item 4 of the complainant's request, it appears to the Commissioner that the Council has provided the complainant with the information it holds relevant to his request and in doing so it has taken a customer-focussed approach.

Item 1 of the request

64. In answer to item 1 of the complainant's request, the Council provided him with details of a website where he could obtain air pollution data for Kent.
65. The complainant asserts that the information on that Kentair website is not necessarily the information which Medway Council holds and he points out that his request is for air pollution information actually held by Medway Council.
66. The Commissioner asked the Council to confirm that it does not hold any other air pollution information other than that provided at www.kentair.org.uk.
67. The Council informed the Commissioner that, "all the data we collect is published on the Kentair website". The Council clarified this position by informing the Commissioner that "Medway is a member of the Kent and Medway Air Quality Partnership, which collectively funds the contract for data monitoring across the region and the associated website,

www.kentair.org.uk and its subsidiary Care for Kent and Medway information site, <http://kentair.org.uk/information>.”

68. The Council has assured the Commissioner that it publishes all its data on that website and all reports (including historical ones) are publicly available. Additionally, the page on Medway Council website³, has a links directly to Kentair for all the data available, which is uploaded directly onto that single portal.
69. The Commissioner is satisfied by the assurance given by the Council. She is content that the Council publishes all of the air quality data it holds on the Kentair website and in doing so it has satisfied the requirement for public authorities to proactively publish environmental information of this type.
70. The Commissioner notes that the Council responded to the complainant's request after the twenty working day compliance period required by Regulation 5(2) of the EIR and that it appears to have relied on Regulation 7(3) to extend the compliance period to forty working days without advising the complainant of this.
71. The Commissioner must therefore find that the Council breached Regulation 5(2) of the EIR.

Other matters

72. The Council has explained to the Commissioner its rationale for determining that item 8 of the complainant's request is not a valid request under the Freedom of Information Act or under the Environmental Information Regulations.
73. The Council advised the Commissioner that in his item 8, the complainant did not ask for recorded information rather he gave the Council an option for providing additional information within a given description.
74. The Council assured the Commissioner that it strives for openness and transparency, however, due to the sheer time and resource already afforded to the complainant, it was not considered necessary to supply any optional information.

³ https://www.medway.gov.uk/info/200140/environment/416/air_quality/1

75. Given the Commissioner's decision at paragraph 49 regarding the application of 12(4)(b), the Commissioner supports the Council's position, as it would have been possible to apply the 'manifestly unreasonable' status to the request in its entirety. The fact that the council didn't give credence to their efforts to provide a high level of customer service and their desire to comply with the spirit of openness that the EIR promotes.

Right of appeal

76. 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

77. 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.

78. 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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