

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

Decision notice

Date: 6 October 2016

Public Authority: Rugby Borough Council
Address: Evreux Way
Rugby
CV21 2RR

Decision (including any steps ordered)

1. The complainant requested information about legionella test results at a named leisure centre from Rugby Borough Council (the 'Council'). In response, the Council provided the information it held. However, the complainant alleged that more information was held because she was aware that there had been an incidence of legionella in August 2014 at that centre, and felt that insufficient information about it had been provided to her. During the investigation, the Commissioner found that more information falling within the scope of the requests was held by the Council, which was then provided to the complainant.
2. The Commissioner's decision is that the Council breached regulations 5(1) and 5(2) of the Environmental Information Regulations 2004 (the 'EIR') for failing to disclose all the information it held relevant to the requests by the time of its internal review. Additionally, the Commissioner has determined that on the balance of probabilities no further recorded information is now held by the Council.

Request and response

3. On 28 September 2015 the complainant wrote to the Council and requested information in the following terms:

"I would like to request information regarding legionella test results at Queen's Diamond Jubilee Centre since it opened in September 2013"

please. I would like to know when the tests took place, what the results were and how these compare with accepted safety levels. For tests where there was a positive level of legionella, I would also like to know when retests took place, how long it took to clear affected areas please."

4. On 12 October 2015 the complainant wrote again to the Council and said:

"I have been advised that it will make the task easier if I add a timescale to the information I'm requesting. Could I also ask for all the information between the environmental health department and the centre and also between [name redacted] and the centre from February 2014 until [sic] present day. If this is too wide a scope I could refine this, and if you require any background behind this request then I am happy to provide this also."

5. The Council said it did not receive the requests until 12 October 2015 and it then responded on 16 November 2015. The complainant advised she had been provided with minutes of a Council meeting held on 15 October 2015; however, these minutes are outside the scope of the requests as they post-date both of them.
6. However, the Council explained it should be noted that the original request was for *"information regarding legionella test results"*, and not for any specific document. It explained that the minutes of the Council meeting contained all of the relevant information regarding the legionella test results. In the Council's view, it would have been unhelpful to withhold a document that post-dated the request but pre-dated the deadline to respond when it contained all of the relevant information. (Please see 'Scope' section of this notice).
7. The complainant queried the Council's response by telephone on 16 November 2015 and subsequently received what she described as *"further limited information"* which she describes as *"incomplete"*, on 17 December 2015.
8. On 21 December 2015 the complainant contacted the Council again to query why information had only been provided from March 2015, particularly because she was aware that there was an incidence of legionella in August 2014 with associated correspondence. In the absence of a response she contacted the Council again on 11 January 2016. After further emails, the complainant said the Council sent her one further document on 20 January 2016, which the complainant described as minutes of a meeting in which legionella was mentioned.

9. After further contact with the Council in January and February 2016, the complainant requested an internal review on 3 March 2016. The Council sent her the outcome of its internal review on 10 March 2016. It upheld its original position, but confirmed that the named person in the requests was no longer employed and that her email account had been deleted.

Scope of the case

10. The complainant contacted the Commissioner on 24 March 2016 to complain about the way her requests for information had been handled. She particularly requested the Commissioner consider the time taken by the Council to respond to her requests.
11. She also submitted the following: *"In addition, it appears to me that RBC [the Council] is being deliberately obstructive and has either: (i) not implemented a sufficient data retention policy which is highly concerning and dangerous; (ii) not undertaken a comprehensive search to comply with its obligations under the FOIA; or (iii) alternatively, it has identified additional material but not provided that material to me. If it is (iii), RBC has at no stage sought to rely on any exemptions to the disclosure and as such the material should have been provided."*
12. The Council questioned whether it should have instead relied on section 22 of FOIA, information intended for future publication, with regard to the Council meeting minutes of 15 October 2015 it provided to the complainant. In the Commissioner's view, because the meeting post-dates both requests, the Council did not need to have provided the minutes and could have cited section 22 of FOIA. However, this is now a moot point given that the minutes were provided; nonetheless the Commissioner recognises the Council was trying to assist the complainant by providing information which technically is out of scope.
13. As part of her investigation the Commissioner asked the Council whether and when it had destroyed or deleted any recorded information held relevant to the requests. The Council then discovered that the email account of the person named in the complainant's requests (who had left the Council's employ) had not actually been deleted as previously thought. It therefore retrieved all the emails relevant to the requests and, on 8 July 2016, it provided them to both the complainant and to the Commissioner with some contact details redacted under section 40(2).

14. As the complainant has not complained about the section 40(2) redactions, the Commissioner has not considered them further during her investigation.
15. On 17 July 2016, the complainant wrote to the Commissioner setting out her views following the Council's recent disclosures. She detailed a number of instances where, in her view, the Council had omitted to provide some of the information.
16. After seeking the complainant's consent, the Commissioner passed her comments onto the Council. It provided a partial response on 1 August 2016, and asked the Commissioner for assistance in how to respond to the complainant's remaining points.
17. Having made it clear that she must maintain an impartial stance, the Commissioner provided some assistance to the Council on 2 August 2016, based on the type of questions she would be asking as part of her investigation. However, the Council did not provide its response until 16 August 2016, despite reminders from the Commissioner.
18. Having relayed the complainant's remaining concerns to the Council, making it clear that this would be the final consideration before the Commissioner made her decision in this case, the Council responded on 7 September 2016. It highlighted that some of the information queried had already been provided to the complainant.
19. Having noted the complainant's concerns set out in paragraph 11, the Commissioner has considered whether, on a balance of probabilities, further information is held within the scope of the requests.

Reasons for decision

20. The Commissioner has first examined whether the requested information constitutes environmental information.

Regulation 2 - Is any of the information environmental?

21. Information is environmental if it meets the definition set out in regulation 2(1) of the EIR which 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;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)".

22. Whilst the Council responded to both requests under FOIA it conceded during the Commissioner's investigation, that the first request of 28 September 2015 should have been handled under the EIR because it said the request was clearly for information relating to environmental matters. However, it argued that because the subsequent request of 12 October 2015 was about "*the decision making process*", it considered this to fall under FOIA. However, the Council also said it would be prepared to accept the Commissioner's view if she were to determine differently.
23. The Commissioner understands that legionella bacteria are widespread in natural water systems, eg rivers and ponds. However, the conditions are rarely right for people to catch the disease from these sources. Outbreaks of the illness occur from exposure to legionella growing in purpose-built systems where water is maintained at a temperature high enough to encourage growth, e.g. cooling towers, evaporative

condensers, hot and cold water systems and spa pools used in all sorts of premises (work and domestic).

24. People contract Legionnaires' disease by inhaling small droplets of water (aerosols), suspended in the air, containing the bacteria. Certain conditions increase the risk from legionella if:

- the water temperature in all or some parts of the system may be between 20-45 °C, which is suitable for growth;
- it is possible for breathable water droplets to be created and dispersed e.g. aerosol created by a cooling tower, or water outlets;
- water is stored and/or re-circulated;
- there are deposits that can support bacterial growth providing a source of nutrients for the organism e.g. rust, sludge, scale, organic matter and biofilms.

25. Therefore, in the Commissioner's view, the information requested by the complainant constitutes environmental information under regulation 2(1)(f) as it concerns the state of human health and safety. This is because the information requested is that held about legionella test results which is likely to affect several of the elements of the environment referred to in 2(1)(a). She also finds that 2(1)(b) would apply because legionella is effectively a 'release into the environment'.

26. In the Commissioner's view, both the original request of 28 September 2015 and the subsequent request of 12 October 2015 fall under the EIR. This is because the emails released in response to the 12 October 2016 request deal with occurrences of legionella at the leisure centre and the steps taken to tackle it.

27. The Commissioner has therefore concluded that the requested information is environmental and that the Council should have handled the requests under the EIR.

Regulation 5(1) – Duty to make available environmental information on request

28. Regulation 5(1) provides a general right of access to environmental information held by public authorities. Regulation 12(4) states that:

"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that – (a) it does not hold that information when an applicant's request is received."

29. Irrespective of the legislative regime, the task for the Commissioner here is to determine whether, on the balance of probabilities, the Council holds any information relevant to the request further to that which it has already identified. Applying the civil test of the balance of probabilities is in line with the approach taken by the Tribunal when it has considered the issue of whether information is held in past cases.
30. The Commissioner asked the Council to explain the extent of the searches undertaken in order to respond to these requests. In reply the Council said it had searched its networked systems and emails and relevant manual files.
31. The Council provided the Commissioner with the search terms it had used to search the Council's computers, whilst confirming that the hard drive of the officer named in the request had been overwritten in September 2015 after she had left the Council.
32. In addition, the Council confirmed that there is no business or statutory purpose for it to hold *"routine correspondence"*.
33. Further, it advised there is no requirement for officers to keep copies of correspondence other than as required for carrying out their responsibilities.
34. Ordinarily, email accounts are suspended and destroyed three weeks after an employee leaves the Council. The named officer's email account was suspended immediately she left the Council, however, as referenced earlier in this notice, the Council undertook a further search during the Commissioner's investigation. It then realised that the named officer's email account had not, as previously believed, been *"wiped completely by the Council's usual method"*.
35. It therefore retrieved and provided the additional emails it had located. However, the Council caveated this disclosure as follows:

"[Complainant] mentions correspondence between [named officer] and Greenwich Leisure Limited; however we do not know how much correspondence existed. As the incident was over 12 months prior to receiving the request, if emails had been exchanged, it is likely that most had been deleted.

We have now been able to retrieve some correspondence received by [named officer], but we have no way of knowing if there was any other correspondence."
36. The Council confirmed that there had been an incidence of legionella at the named centre in August 2014, in line with the complainant's assertions. In answer to the Commissioner's question about what the

Council does in the event of an incidence of legionella, including any process for retesting, the Council highlighted the report from Planning and Recreation to the Health and Safety Members Working Party dated 8 October 2015. It confirmed that this is all the information held by the Council in relation to the incidence of legionella in August 2014 at the named centre.

37. In terms of any advice and assistance to the requester/complainant in line with the duty contained at regulation 9 of EIR, the Council said it had repeatedly sought to clarify the nature of the information requested by her. It also said it had provided the complainant with a copy of the report to the Health and Safety Members Working Party (referenced above) explaining Greenwich Leisure Limited's control of legionella in water systems.
38. The Commissioner asked how often checks for legionella are carried out at the specified centre. In reply, the Council said that checks are carried out monthly by a contractor on behalf of GLL, who are the contractors who run the leisure centre on behalf of the Council.
39. From the Council's response, the Commissioner understands that GLL records the information, holds the policy/written information about testing for legionella and is responsible for the process for testing for legionella within such centres. The Council does not receive copies of legionella test results, but issues about legionella are discussed as an agenda item on the monthly client/contractor meeting between GLL and Rugby Borough Council.
40. After careful consideration of the information disclosed, the complainant's concerns about what has been provided, together with the explanations given by the Council, the Commissioner is satisfied, on the balance of probabilities, that all the information held by the Council relevant to these requests has now been provided.

Regulation 5(2) - Time for compliance

41. Regulation 5(2) of the EIR states that information should be made available: *"as soon as possible and no later than 20 working days after the date of receipt of the request"*. In this case, the Council failed to respond within the requisite 20 working days. In addition, as a result of the Council's failure to identify all the information it held in relation to the requests from the outset, it did not disclose all the relevant recorded information held until 8 July 2016.

Other matters

42. The Commissioner would remind the Council to handle future requests for information under the correct legislative regime.
43. As well as finding above that the Council is in breach of the EIR, the Commissioner has also made a record of the delay in this case. This may form evidence in future enforcement action against the Council should evidence from other cases suggest that there are systemic issues within the Council that are causing delays.
44. In this case, the Commissioner is also concerned about the length of time the Council took to respond to her investigation. She wrote to the Council on 24 April 2016; however the Council did not provide its initial investigation response until 4 July 2016.

Right of appeal

45. 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

46. 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.
47. 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

Carolyn Howes
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