

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 July 2014

Public Authority: Durham County Council
Address: County Hall
Durham
County Durham
DH1 5UL

Decision (including any steps ordered)

1. The complainant has requested information relating to specific planning matters. The complainant also asked to be provided with their own personal data under the Data Protection Act 1998. Durham County Council provided the complainant with their own personal data, disclosed other information under the EIR and confirmed that other information was being withheld under the exceptions for third party personal data (regulation 13), confidentiality of proceedings required by law (regulation 12(5)(d)) and the course of justice (regulation 12(5)(b)).
2. The Commissioner's decision is that Durham County Council:
 - Correctly identified all the relevant information held and complied with regulation 5(1);
 - correctly applied regulation 13 and regulation 12(5)(b) to withhold some of the requested information and;
 - failed to demonstrate that regulation 12(5)(d) was engaged
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose the 2 paragraphs of information withheld under regulation 12(5)(d).
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 20 October 2013, the complainant wrote to Durham County Council (the "council") and requested information in the following terms:

"1) All information held by Durham County Council and previous Teesdale County Council that refers to one or both of us, and/ or our address 15 High Green, Gainford, DL2 3DL, in relation to planning applications 6/2008/0121, 6/2008/0297, 6/2008/0429 and 6/2009/0319 as well as the appeals case APP/X1355/A/09/2100598. This includes correspondence to and from the (Deputy) Heads of Teesdale Council, in 2008, with the applicants and the then Head of Planning Elsbeth Hall. We are also interested in all available notes from the pre-application stages.

2) All information relating to one or both of us, and/ or our address 15 High Green, Gainford, DL2 3DL received, noted and sent by TCC and DCC Environmental Health Departments and Planning Enforcement (mostly managed by Susan Porter). John Pearson took a noise recording in December 2008 from our house. Please also send the notes on this recording. Other information relates to drainage, noise and internal sound attenuation from No. 16 to Nr. 15 High Green (2008/9), Christmas Markets at No. 16 (2008, 2009, 2010), and placing of seating outside No. 16 (2010).

3) All non-exempt information relating to planning application 6/2013/0135/DM/VP. This should also include all non-exempt information from the pre-application stage (April 2013, incl. notes from the Mr. Caines' site visit, 25/04/2013), communication from or to any members of the planning office, County Councillors and Planning Committee members in relation to the application, as well as the Environmental Health Officer's full comments to Mr. Caines, and a transcript of the Planning Committee Meeting notes taken on the day (not the minutes)."

6. The council responded on 4 December 2013. It provided the complainant with their own personal data under the Data Protection Act 1998 (DPA), disclosed other information under the EIR and confirmed that other information (relating to pre-application advice) was being withheld under the exceptions for third party personal data (regulation 13), confidentiality of proceedings required by law (regulation 12(5)(d)) and the course of justice (regulation 12(5)(b)).
7. Following an internal review the council wrote to the complainant on 22 January 2014. The internal review response disclosed further

information previously withheld under regulation 12(5)(d) and, where additional information was not held, confirmed this.

Scope of the case

8. On 4 March 2014 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner agreed with the complainant that his investigation would consider whether the council had correctly applied exceptions to withhold some of the requested information and, in relation to part 3 of the request, whether all the relevant information had been disclosed.

Reasons for decision

Regulation 5 – duty to provide environmental information on request

10. Regulation 5(1) provides that a public authority that holds environmental information should make it available on request.
11. In relation to part 3 of the request the council provided the complainant with relevant information, however, the complainant considers that the council has not provided all the relevant held information.
12. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
13. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
14. In order to assist with this determination the Commissioner asked the council a range of questions which are reproduced along with the associated responses from the council below.

What searches were carried out for information falling within the scope of this request and why would these searches have been likely to retrieve any relevant information?

15. The council confirmed that searches of application files, emails, correspondence and computers.

If searches included electronic data, which search terms were used?

16. The council confirmed that search terms included relevant reference numbers, names of individuals and sites/premises within the scope of the request. Terms used included: Laurels, Gainford, 6/2013/0135, High Green and the names of those submitting and commenting on the relevant application.

If the information were held would it be held as manual or electronic records?

17. The council confirmed that information would be held in both media categories.

Was any recorded information ever held relevant to the scope of the request but deleted/destroyed?

18. The council confirmed that it was not aware of any relevant information which had been deleted or destroyed.

If recorded information was held but is no longer held, when did the council cease to retain this information?

19. The council has stated that it considers that most of the pertinent information was retained and has been provided to the complainant. The council confirmed that, if any emails were deleted this would have occurred during or shortly after consideration of the last application as part of email management good housekeeping. The council confirmed that it does not have a record of the destruction of any information.

What does the council's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the council describe the way in which it has handled comparable records of a similar age?

20. The council confirmed that planning application records are retained although hard copy files are eventually disposed of as part of data transfer/storage requirements.

If the information is electronic data which has been deleted, might copies have been made and held in other locations?

21. The council confirmed that copies had not been made or retained elsewhere.

Is there a business purpose for which the requested information should be held? If so what is the purpose?

22. The council stated that there is not a business purpose to retain the information.

Are there any statutory requirements upon the council to retain the requested information?

23. The council stated that there is a statutory requirement to maintain a planning register with key elements of applications, plans, reports, decision notices and public consultation responses.
24. In addition to the above questions the Commissioner also asked the council to address a number of specific detailed questions which had been submitted by the complainant. For brevity, these questions (which are lengthy) and the council's responses are not reproduced here, however, having considered these submissions, the Commissioner is satisfied that, on the balance of probabilities, the council has provided the complainant with all the relevant information that it holds.

Regulation 13 – personal data

25. Regulation 13 provides that personal data of someone other than the person making the request shall not be disclosed where either one of two conditions are satisfied. The first condition, which is relevant here, is that disclosure would contravene one of the data protection principles in the Data Protection Act 1998 (DPA). In this case, the relevant principle is principle 1, which states that:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met".

26. In this case the council has withheld names and contact details of individuals other than the complainant. Having viewed the information in question the Commissioner is satisfied that it constitutes the personal data of identifiable individuals.
27. In considering whether disclosure would be unfair, and thus contravene the first data protection principle, the Commissioner takes into account the expectations of the individuals concerned and the possible effects of disclosure.
28. From the evidence provided, the Commissioner has no reason to believe that disclosure of the information requested is within the third parties' reasonable expectations. The Commissioner considers that people have

an instinctive expectation that a public authority, in its role as a responsible data controller, will not disclose certain information. In this instance, the information is contained within correspondence between third parties and the council and relates to concerns raised regarding the matters identified in the request. The Commissioner is satisfied that the individuals concerned were in communication with the council in a personal capacity and would reasonably expect that their personal data would not be disclosed more widely.

29. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to provide the information if there is an overriding legitimate interest in disclosure to the public. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.
30. In this instance, the Commissioner considers that, beyond the general interest in transparency, there is no specific legitimate public interest in disclosing the information. He is of the view that the public interest in the substantive matters referred to in the request has been served either via the planning process or by the council's disclosure of the other information identified by the request. The Commissioner does not consider that the disclosing the identity of individuals redacted from the disclosed correspondence would not add anything to the content of the information or otherwise serve the public interest.
31. When balanced against protecting the rights and freedoms of data subjects the Commissioner finds that it would not be fair to disclose the withheld information and that to do so would contravene the first data protection principle.

Regulation 12(5)(d) – confidentiality of proceedings

32. Regulation 12(5)(d) allows a public authority to refuse a request if disclosing the information would adversely affect the confidentiality of the proceedings of that public authority, or any other public authority, where that confidentiality is provided by law.
33. The term 'proceedings' is not defined within the EIR but the Commissioner considers that an activity has to have a degree of formality to qualify as such.
34. It is not sufficient that the information relates to formal proceedings for it to be exempt under regulation 12(5)(b). Those proceedings also have to be confidential under UK law. This means that the information has to

be protected by either a statutory duty of confidence or the common law duty of confidence.

35. In this case, the extent of the withheld information is confined to 2 paragraphs which have been redacted from a letter disclosed to the complainant.
36. In support of its application of the exception the council has stated that disclosing the information "...would prejudice the commercial interests of the applicant before a formal planning application has been made." and that it "...could prejudice any future legal proceedings brought by the applicant".
37. In addition to the submissions above the Commissioner has also referred to the council's original request response, its internal review response and other submissions it has made.
38. Having considered the available evidence the Commissioner considers that the council has failed provided sufficient relevant arguments to demonstrate that the withheld information engages the exception. Whilst the council makes reference to the information relating to planning, a matter for which it has statutory responsibility, it has not properly explained how the information is linked to this nor has it demonstrated that the information is confidential under UK law.
39. As the Commissioner has concluded that the exception is not engaged he has not gone on to consider the public interest.

Regulation 12(5)(b) – adverse affect to the course of justice

40. The council has withheld a reference to the content of legal advice sought (from a document otherwise provided to the complainant) and the legal advice itself, consisting of 3 paragraphs.

41. Regulation 12(5)(b) of the EIR states that:

"(...a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-)

the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature."

Is the exception engaged?

42. In reaching a decision as to whether the council has correctly applied the exception, the Commissioner has considered some relevant Tribunal decisions which clarify how the exception works. In the case of Kirkaldie

v ICO & Thanet District Council [EA/2006/0001] the Tribunal stated that:

"The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation".

43. The Commissioner has also noted the views of the Tribunal in Rudd v ICO & The Verderers of the New Forest [EA/2008/0020], which stated that:

"...the Regulations refer to 'the course of justice' and not 'a course of justice'. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to 'the smooth running of the wheels of justice'...Legal professional privilege has long been an important cog in the legal system. The ability of both parties to obtain frank and comprehensive advice (without showing the strengths or weaknesses of their situation to others) to help them decide whether to litigate, or whether to settle; and when to leave well alone has long been recognised as an integral part of our adversarial system".

44. Legal professional privilege ("LPP") protects the confidentiality of communications between a lawyer and a client. It has been described by the Tribunal in Bellamy v ICO & DTI [EA/2005/0023] as, "a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation"¹.
45. There are two types of privilege – legal advice privilege and litigation privilege.
46. In this case, the council considers the withheld information is subject to LPP and that release of the withheld information would adversely affect the course of justice. The council explained that it sought advice about the legal aspects of a planning enforcement matter relevant to the request.

¹ EA/2005/0023, para 9.

47. Having viewed the withheld information, the Commissioner notes that it consists of legal advice provided by an in-house solicitor at the council and (separately) a reference to the content of the legal advice.
48. The Commissioner is satisfied that the information constitutes a communication between a lawyer and a client and that this advice has not lost the quality of confidentiality.
49. The Commissioner is satisfied that there is a real potential that disclosure would result in the council being discouraged from seeking legal advice, particularly in the context of contentious matters such as those relating to planning, which are potentially damaging to its interests and which would inhibit the effectiveness of its public function. The Commissioner has concluded that it is more likely than not that disclosure of the withheld information would result in adverse effect to the course of justice.
50. He has therefore gone on to consider whether disclosure would have an adverse affect on the course of justice, with particular reference to LPP.

Adverse Affect

51. The council has argued that, although the relevant case is closed, the legal advice in question remains 'live' as it reveals how the council will approach enforcement in such cases and serve as the basis for advice in future, comparable cases. Disclosure of the advice would undermine the council's ability to successfully prosecute future cases because its strategy would be compromised.
52. The Commissioner is of the view that disclosure of information which is subject to LPP will have an adverse effect on the course of justice. This is because the principle of LPP would be weakened if information subject to privilege were to be disclosed under the EIR. He considers the likelihood of this happening to be more probable than not. Having regard to the council's arguments, the nature of the withheld information and the subject matter of this request, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged.
53. As regulation 12(5)(b) is subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.

The public interest test

25. Regulation 12(1)(b) requires that, where the exception in regulation 12(5)(b) is engaged, then a public interest test should be carried out to

ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out his assessment of the public interest test, the Commissioner has applied the requirement of regulation 12(2) which requires that a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosing the requested information

54. The Commissioner considers that there is a strong public interest in disclosing information that allows scrutiny of a public authority's decisions. His view is that it helps create a degree of accountability and enhances the transparency of the process through which such decisions are arrived at. He considers that this is especially the case where the public authority's actions have a direct effect on the environment.
55. The council has acknowledged the general public interest in transparency, openness and understanding the reasons for the council's position.
56. The complainant has an interest in accessing the information because the enforcement matters in question have an impact on their domestic environment.

Public interest in maintaining the exception

57. The Commissioner considers that there is a strong public interest in the council not being discouraged from obtaining full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions for fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have an impact upon the extent to which legal advice is sought. This in turn may have a negative impact upon the quality of decisions made by the council which would not be in the public interest. He accepts the weighting of such arguments, as they have been submitted to him by the council.
58. The Commissioner notes that disclosure of the information would be unfair since parties seeking to challenge the council's legal position would not be obliged to disclose any equivalent advice they had received in relation to this issue. Disclosure would, therefore, adversely affect the council's ability to defend its legal position.
59. The council has further argued that the legal advice is still "live" and is transferable to other comparable scenarios where planning enforcement is being considered.

Balance of the public interest

60. In considering where the balance of the public interest lies, the Commissioner has given due weighting to the fact that the general public interest inherent in this exception will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the course of justice.
61. The Information Tribunal in *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006): "there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest".
62. The Commissioner notes that the legal advice is still current. He accepts that this factor carries considerable weight in favour of maintaining the exception as disclosure would reveal the legal basis of the council's strategy in issuing enforcement notices in such scenarios and this could result in adverse effect to the course of justice via revealing the Council's legal strategy to potential opponents and undermining the principle that legal advice remains confidential. . In the Commissioner's view, this weighs heavily in the balance of the public interest test in this case.
63. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the Council and its legal advisers and that this would lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of thorough legal advice.
64. The Commissioner acknowledges that the complainant has a personal interest in accessing the information. However, he considers that the planning appeal process provides mechanisms for issues to be addressed. Similarly, where there are broader concerns about the conduct of a public authority, these can more appropriately be remedied via arenas other than the EIR.
65. Whilst the Commissioner accepts the complainant's interest in this matter, he does not consider that this factor meets the threshold of an equally strong countervailing consideration which would need to be adduced to override the inbuilt public interest in LPP.
66. In addition, the public interest in the context of the EIR refers to the broader public good and, in weighing the complainant's interests against those of the council and its ability to undertake planning and

enforcement matters on behalf of the wider public, the Commissioner does not consider that the interests of the complainant tip the balance in this case.

67. Whilst the Commissioner considers that the arguments in favour of disclosure have some weight, he has determined that, in the circumstances of this particular case they are outweighed by the arguments in favour of maintaining the exception under regulation 12(5)(b).
68. The Commissioner has, therefore, concluded that the council has correctly applied the exception and that, in this case, the public interest favours maintaining the exception.

Right of appeal

69. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

70. 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.
71. 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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