

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 13 October 2014

Public Authority: East Hampshire District Council

Address: Penns Place
Petersfield
Hampshire
GU31 4EX

Decision (including any steps ordered)

1. The complainant has requested recorded information relating to three planning applications submitted to East Hampshire District Council. The applications concern The Forge at East Meon.
2. The Council provided the complainant with some of the information he asked for but withheld a small number of documents in reliance of Regulations 12(4)(e), 12(5)(b) and 13 of the EIR.
3. The Commissioner's decision is that East Hampshire District Council is entitled to rely on Regulations 12(4)(e), 12(5)(b) and 13 of the EIR to withhold some pieces of information or documents relevant to the complainant's request.
4. The Commissioner does not require the Council to take any further action in this matter.

Request and response

5. On 5 November 2013, the complainant wrote to the East Hampshire District Council ("the Council") and requested information concerning three planning applications for the redevelopment of The Forge, East Meon. The information sought relates to planning applications under the following references SSDNP/13/00224/FUL, SDNP/13/03007/FUL and SDNP/13/04878/FUL. The terms of the complainant's request was:

"This letter constitutes a formal request under the Freedom of

Information Act 2000 (FOIA) for the Council to provide us with copies of all correspondence and documents held by it in relation to its consideration of the Planning Applications (whether in the form of letters, faxes emails, memoranda, notes of telephone conversations, file notes or any other written record).

We are not seeking further copies of documents that have already been made public by posting on the Council's website (please do not provide us with duplicate copies of these documents). We do, however, expect to be provided with copies of all internal correspondence between Council officers and councillors and all correspondence between the Council (officers and councillors) and the applicants and their consultants and between the Council (officers and councillors) and the press and third parties relating to the Planning Applications, including all notes of meetings and of telephone conversations."

6. On 25 November 2013 the complainant sent the Council an email chasing a response to his request. In that email the complainant specified in detail the information he seeks and which he believed fell within the scope of his request:

"1a. A full and complete list of all communications and meetings between the applicants and their agents with officers of EHDC in respect of the Applications, noting time, dates and attendees or participants.

1b. All documented communications between any EHDC officers or representatives and the applicants or their agents that relate in any way to the Applications, and any notes or records of meetings or telephone conversations.

1c. Information relating to any meetings or communications between EHDC officers or representatives and any individuals involved in or in any way associated with the making of a television programme about the Applications above, noting times, dates, attendees and all notes made and internal communications associated with or consequent to any such meetings.

2a. All notes, emails or documents that relate to discussions between EHDC officers in respect of any of these Applications.

2b. All notes, emails or documents that relate to the advice given to the applicant or their agents in respect of the third Application (SDNP/13/04878/FUL) and discussions within EHDC with respect the handling of this Application.

2c. All communications between EHDC and SDNPA with respect to any of

the above Applications

3a. A copy of the EHDC policy on the management of conflict of interest, and subsidiary policies or internal procedures that relate to the application of such a policy in respect of planning matters.

3b. Any internal communications or documents that relate to the assessment of and/or management of any actual or perceived conflict of interest in respect of the handling of any of the above Applications from the outset of the process including details of the of the officers involved and any determination reached - or confirmation that no such assessment took place.

4a. The costs to date borne by EHDC associated with the defence of the challenge to the decision to grant planning permission with respect to Application SDNP/13/03007/FUL, the estimation of the costs that will be incurred to conclude this process and the names/offices of the officers who have reviewed and authorised the defence and associated costs.

4b. the estimated costs to EHDC of the process to assess the third, identical, Application (SDNP/13/04878/FUL).

4c. Any information that relates to a review of these decisions given the recent decision not to contest the challenge on the grounds that EHDC had not properly dealt with planning policies and relevant material considerations."

7. On 4 December 2013 the Council responded to the complainants request by providing documents other than those already on the South Downs National Park Authority's website. The Council removed a small amount of text from the documents, which included names, email addresses and personal data of third parties. The Council cited regulation 12(3) of the EIR as its justification for the redaction of this information and concluded that there was no ascertainable public interest in releasing the redacted information which outweighs the data protection rights of the third parties involved.
8. In addition to the third party data, the Council also withheld a small amount of paperwork in reliance of regulation 12(4)(e) - disclosure of internal communications, and regulation 12(5)(b) - prejudice to the course of justice.
9. The Council treated the complainant's email of 25 November as a separate request and responded to that request on 23 December. The Council answered each of the complainant's points by advising him whether recorded information is held or by providing an explanation.

Scope of the case

10. The complainant contacted the Commissioner on 16 December 2013 to complain about the way his request for information had been handled.
11. The Commissioner has investigated whether the Council is entitled to rely on Regulations 12(4)(e), 12(5)(b) and 13 of the EIR to withhold some of the information sought by the complainant. This Decision Notice sets out the Commissioner's decision.

Reasons for decision

Background information relevant to this decision

12. The information sought by the complainant relates to three planning applications concerning The Forge at East Meon. The Forge is described as a "picturesque feature" of East Meon and features on Hampshire County Council's list of "Treasures". In 2009 English Heritage stated that it is of local importance and should be protected.
13. Information about The Forge and objections to the planning applications can be found at:

<http://www.eastmeonforgecricketassociation.org.uk/objections.php>
14. The planning applications of concern to the complainant are:
 - Application SDNP/13/00227/FUL. This was withdrawn by the applicant.
 - Application SDNP/13/03007/FUL. This application was granted planning permission on 11 September 2013. The planning permission was subsequently quashed by Consent Order in April 2014, following its referral to the High Court for consideration of an application for Judicial Review.
 - Application SDNP/13/04878/FUL. This application was granted planning permission on 7 April 2014, and was again referred to the High Court for permission to seek leave for a Judicial Review. Leave was granted by Mr Justice Collins and the Commissioner understands that the matter will now move on to a full court hearing.
15. The Council informed the Commissioner that large numbers of documents relating to each of the planning applications could be found at the following web sites:

- <http://planningpublicaccess.southdown.gov.uk/online-applications/applicationsDetail.do?activeTab=documents&keyVal=MGT7H8TU1V000>
- <http://planningpublicaccess.southdown.gov.uk/online-applications/applicationsDetail.do?activeTab=documents&keyVal=MP1NPWTU1V000>
- <http://planningpublicaccess.southdown.gov.uk/online-applications/applicationsDetail.do?activeTab=documents&keyVal=MUNZ36TU1V000>

16. The Commissioner understands that a third application has now been made to the High Court seeking leave to apply for a Judicial Review of the decision taken by the Council. Opponents of the planning applications contest that operations at The Forge do not constitute development for the purpose of section 55 of the Town and County Planning Act 1990. The Council has advised the Commissioner of the Council's intention to contest this claim.

Is the requested information 'environmental information'?

17. Information is 'environmental information' if it meets the definition set out in regulation 2 of the EIR. If the information satisfies that definition it must be considered for disclosure under the terms of the EIR.
18. Under regulation 2(1)(c) of the EIR, any information on activities affecting or likely to affect the elements or factors of the environment listed in regulation 2 will be environmental information. One of the elements listed is land.
19. The Council has provided the Commissioner with a schedule of information which it disclosed to the complainant in its response of 4 December 2013. It has also provided the Commissioner with copies of documents in which information has been redacted in reliance of Regulation 13, and copies of documents which have been withheld in reliance of Regulations 12(4)(e) and 12(5)(b).
20. The Commissioner has examined the information the council has withheld from the complainant. He is satisfied that the information sought by the complainant is environmental information and consequently he considers that the request should be dealt with under the EIR.

Regulation 12(4)(e) – internal communications

21. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.

Is the information internal communications?

22. The first question to consider is whether the information is a 'communication' for the purposes of the Regulations. The Commissioner considers that a communication will encompass any information someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it.
23. Having examined the withheld information, the Commissioner is satisfied that where the Council has applied Regulation 12(4)(e) the information can be properly characterised as a communication for the purpose of the this exception.
24. There is no definition of what is meant by 'internal' contained in the EIR. In this case the information which the Council has withheld in reliance of Regulation 12(4)(e) constitutes internal emails sent between officers of the Council. The Commissioner is therefore satisfied that Regulation 12(4)(e) is engaged.
25. Where Regulation 12(4)(e) is engaged, it is subject to a public interest test required by Regulation 12(1). The test is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
26. When carrying out the test the Commissioner must take into account a presumption towards the disclosure of the information which is required by Regulation 12(2).

The public interest test

The public interest in maintaining the exception

27. In essence the public interest considerations relating to the Regulation 12(4)(e) relate to the protection of thinking space and the ability to have full and frank discussions without fear that the information will be disclosed.
28. In this case the Council asserts that it requires a 'safe space' to properly carryout its functions away from interference and distraction. It is concerned that disclosure of the information would affect the ability of

its officers to develop ideas effectively, to debate live issues with candour and to reach informed decisions.

29. The Council believes that disclosure of its internal communications would inhibit its free and frank discussions in the future and the resulting loss of frankness and candour would damage the quality of advice leading to poorer decision making – in essence disclosure would have a 'chilling effect'.
30. The Council believes that this is particularly relevant in respect of application SDNP/13/04878/FUL, where the application is subject to a Judicial Review.
31. In this case, disclosure of the internal communications to the complainant would allow him access to information which could be used to formulate an opposing position. He would have full knowledge of the Council's deliberations, in circumstances where the Council's legal officers would not have the same level of access.
32. Generally, once a decision has been taken the private thinking space or 'safe space' required to properly consider a matter is diminished and the sensitivity of the information is reduced. Here the matter is still live, being subject to further consideration through a Judicial Review. This was particularly so at the time the complainant made his request.
33. Following his examination of the withheld information, the Commissioner is satisfied that there is nothing in the withheld information which would add to the public's understanding of the reasoning behind the Council's actions, and which would increase the public interest in its disclosure.
34. The large amount of publically available information concerning the three planning applications is, in the Commissioner's opinion, sufficient to satisfy the public interest in there being a transparent planning process.
35. There is a clear public interest in allowing officials to communicate with one another about a particular matter, without fear of disclosure and before that matter is finally settled. If that information was to be disclosed prematurely, it could be used, as in this case, to challenge the decision via judicial review.

The public interest in the information being disclosed

36. The central public interest in the information being disclosed relates to retaining the openness and transparency of planning decisions which will ultimately affect an entire community.

37. The Commissioner notes that there is a strong argument that planning decisions and the process leading to those decisions should be as open and transparent as possible. Ideally all parties should be fully informed about the issues considered by the Council. The public should be satisfied that the final decisions have been made openly and fully explained.
38. The public affected by planning decisions should know all the facts and reasoning which lies behind them and consequently, being better informed, the Commissioner believes that the public would have a greater ability and be more inclined to actively participate in the decision making process.
39. Many of the arguments supporting greater openness rest in the decisions themselves and in the general openness of the planning process. This is generally provided by the availability of documents associated that process.
40. The decisions are to some extent distanced from the public interest favouring the disclosure of the withheld information. This weakens the public interest arguments in favour of disclosure in this case as the withheld information does not affect the Council's final decision.

Conclusions

41. The Commissioner has considered the representations made by the complainant and by the Council. He recognises the merit in those arguments favouring disclosure as well as those favouring continued reliance on Regulation 12(4)(e). The question of balancing the factors to determine whether the information should be disclosed is not an easy one in this case.
42. The Commissioner notes that, at the time of the complainant's request, two of the planning applications were still live, and that one remains the subject of a Judicial Review. Consequently the Commissioner considers that disclosure of the withheld information could reduce the thinking space which the Council had when it received the requests and which it currently has. The Commissioner considers that this could detrimentally affect decision making in the future and/or potentially lead to less full and frank advice being provided by officers of the Council.
43. On balance, the Commissioner has decided that greater weight has to be given to those factors which favour withholding the internal communications. He is particularly persuaded by the arguments advanced by the Council in respect of its officer's need for a 'safe space' in which to deliberate potentially controversial issues. He also recognises

the real danger of the 'chilling effect' which disclosure could have in respect of future planning issues and decisions.

44. The Commissioner has decided that the public interest lies in maintaining the exception in this instance and that the Council is entitled to rely on Regulation 12(4)(e) to withhold its internal communications.

Regulation 12(5)(b) – the course of justice

45. Regulation 12(5)(b) provides an exception from the duty to disclose information where the 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 inquiry of a criminal or disciplinary nature". The Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege.
46. Having reviewed the withheld information the Commissioner is satisfied that it attracts legal professional privilege. The information may be characterised as internal communications between the Council's in-house legal adviser and officers working in the Council's planning department: It is information which constitutes requests for legal advice or the provision of legal advice from a properly qualified person, or communications which discuss issues associated with that legal advice. Furthermore the withheld information relates to the period between the Judicial Reviews.
47. The Commissioner has seen no evidence which indicates that the withheld information has been shared with any third parties to the extent that its confidential character has been lost.
48. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the Information Tribunal highlighted the requirement needed for this exception to be engaged. It explained that there must be an "adverse" effect that would result from the disclosure of the requested information. Another Tribunal decision – *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the Tribunal interpreted the word "would" as being "more probable than not".
49. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023) the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests". The Commissioner accepts that disclosure of legal advice would undermine this important common law principle. He further accepts that disclosure would in turn

undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice.

50. In this case, the Council has advised the Commissioner that litigation privilege applies to the withheld information due to the anticipation of litigation when the request was made. The Commissioner accepts the Council's position and considers that disclosure of the legal advice would adversely affect the council's ability to defend itself should it be faced with a legal challenge in connection with the planning applications.
51. The Commissioner considers that the council should be able to defend its position against any claim made against it without having to reveal its position in advance, particularly as challenges may be made by persons who themselves are not required to disclose their positions. That situation would be unfair.
52. In view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the requested information would adversely affect the course of justice and he is therefore satisfied that regulation 12(5)(b) is engaged in respect of the information the council has withheld.

The public interest

Arguments in favour of disclosing the requested information

53. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis and how public authorities make their decisions. This in turn fosters trust in public authorities and may allow greater public participation in the decision making process.
54. In this case, disclosure of the requested information would help the public to understand some of the issues considered by the Council in respect of the planning applications associated with The Forge at East Meon. It would also allow the public to consider the basis on which legal advice was sought by the Council's officers and also the quality of the legal advice given by the Council's legal adviser.

Arguments in favour of maintaining the exception

55. In his previous decisions the Commissioner has expressed the view that disclosure of information relating to legal advice would have an adverse effect on the course of justice through a weakening of the general principle behind the concept of legal professional privilege. This view has also been supported by the Information Tribunal.

56. It is very important that public authorities are able to consult with their lawyers in confidence and be able to obtain confidential legal advice. Should such legal advice be subject to routine or even occasional public disclosure without compelling reasons, this could affect the free and frank nature of future legal exchanges and/or may deter the public authority from seeking legal advice in situations where it would be in the public interest for it to do so. The Commissioner's published guidance on legal professional privilege states the following:

"Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice."

57. Where a public authority is faced with a legal challenge, or a potential legal challenge, it is important that the authority can defend its position properly and fairly. Should the public authority be required to disclose its legal advice, its opponent would potentially be put at an advantage by not having to disclose its own position or legal advice beforehand.
58. The Commissioner considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a long-standing, well established and important common law principle. The Information Tribunal affirmed this in the *Bellamy* case when it stated:

"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."

59. This does not mean that the counter arguments favour public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect.

Balance of the public interest arguments

60. The Commissioner appreciates that there is a general public interest in public authorities being as accountable for the decisions they make.
61. However, having considered the content of the withheld information in the wider context of this case, the Commissioner has decided that the public interest arguments which favour withholding the requested information are greater than those which favour disclosure. He is satisfied that the public interest is best served in this case by

maintaining the council's right to obtain legal advice in confidence and for this information to be withheld.

62. The public interest in maintaining legal professional privilege is a particularly strong one. To outweigh the inherent strength of legal professional privilege would normally require circumstances where there are substantial amounts of public money are at stake, where the decision would significantly affect large numbers of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate authority.
63. Having considered this case and reviewed the withheld information, the Commissioner does not consider that there are any factors that would equal or would outweigh the particularly strong public interest inherent in this exception. The Commissioner considers that the Judicial Review with regards application SDNP/13/04878/FUL is likely to best serve the public interest by airing this matter in a public forum and by making public those documents which the Court considers to be relevant.
64. The Commissioner has decided that the council has properly applied regulation 12(5)(d) to the information sought by the complainant.

Regulation 13 – Personal data

65. Regulation 13 of the EIR provides an exception to disclosure of personal data where the applicant is not the data subject and where disclosure of the personal data would contravene any of the data protection principles.
66. In order to engage regulation 13 the information sought by the applicant must satisfy the definition of personal data provided by section 1(1) of the Data Protection Act 1990 ("the DPA").
67. Section 1(1) of the DPA defines personal data as:

"data which relate to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller."
68. The Commissioner notes that the withheld information subject to Regulation 13 consists of the identities, telephone numbers, and email addresses of persons who made representations to the Council about the planning applications.
69. The Commissioner considers that the withheld information has biographical significance to living individuals and must therefore be

treated as their personal data. He therefore finds that the information engages regulation 13 of the EIR.

70. In order to determine whether a public authority may disclose personal data under the regulation 13 of EIR, the public authority must determine whether such disclosure would not contravene the first data protection principle.
71. The first data protection principle states:

“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.”
72. In order to satisfy the first data protection principle the public authority must conclude that the processing is fair to the data subjects and also would satisfy at least one condition from Schedule 2 of the DPA, and, where the requested information is sensitive personal data, at least one condition from Schedule 3 of the DPA.
73. In this case the Commissioner has determined that the Council is correct to withhold the withheld information. The Commissioner considers that the disclosure of this information would be unfair to the owners the individuals concerned on the grounds that they would have no reasonable expectation that their personal data would be put into the public domain by the Council.
74. Notwithstanding the absence of fairness, the Commissioner considers that disclosure of the addresses would not satisfy any of the conditions contained in either of Schedule 2 of the DPA.

Right of appeal

75. 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

76. 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.
77. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF