

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

Decision notice

Date: 17 February 2015

Public Authority: Leeds City Council
Address: Civic Hall
Calverley Street
Leeds
West Yorkshire
LS1 1UR

Decision (including any steps ordered)

1. The complainant has requested all formal and informal comments made by a senior conservation officer at the council on planning applications made since 1 January 2012. The council claimed that the majority of information was available from its website and therefore applied Regulation 6(1)(b) (form and format of the information). However when it became clear to the council that the complainant's request also encompassed informal comments made on applications by the officer it also applied the exceptions in Regulation 12(4)(b) (manifestly unreasonable) and 12(4)(e) (internal communications).
2. The Commissioner's decision is that the council was correct to apply Regulation 12(4)(b) to the information. He has not therefore considered the application of the other exceptions further.
3. The Commissioner does not require the council to take any further steps.

Request and response

4. On 21 August 2014 the complainant wrote to the council and requested information in the following terms:

"Given what I have seen of his approach both in this case and the related case of the land at Kirklees Knowl (12/04046/OT), I have grave concerns with regard to the conduct of the SNCO. In view of these concerns, I request sight of all applications upon which [name of senior conservation officer redacted] has made comment, along with those comments between 1/1/12 and the present. This information is requested under the Freedom Of Information Act 2000..."

5. The council responded on 29 August 2014. It said that all of the comments of the officer would be available on the relevant planning application files on its website. It therefore applied Regulation 6(1)(b) to the information.
6. Following an internal review the council wrote to the complainant on 12 September 2014. It repeated that the officer's comments would be available from its website. Where information was not put onto its website this would be due to hosting issues or simply that it had not yet included them. It said that the information would be available for inspection at council officers in the relevant planning file.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way her request for information had been handled. She considers that the information should be provided to her as it is not easily accessible to her via the council website. She does not know which applications the officer has commented on and therefore would have to search each file. She therefore believes that this information is not reasonably accessible to her for the purposes of Regulation 6(1)(b). She also said that not all comments are available as in other applications she has had dealings with she could provide an example where important conservation comments from the officer were not included on the file, nor passed on to the planning committee, and only subsequently came to light.
8. The council initially excluded the officer's informal comments from the scope of the request. It argued that the word 'comment' has a specific meaning in planning law. It said that comments are formal pieces of correspondence which are taken into account by the planning case officer when determining an application. It argues that the concept of a 'comment' is entirely separate from the concept of an 'internal email'

which and it did not consider that the complainant was intending to argue that these fell within the scope of her request.

9. The complainant however wrote to the Commissioner to clarify that she fully intended her request to include all comments made by the officer, whether formal or informal, and so in her opinion internal emails which commented on particular applications would also fall within the scope of her request. She argued that as a member of the public she would not have recognised that there is a difference between the two forms of comments when making her request in order to make clear her intentions.
10. The Commissioner accepts the complainant's argument. The Commissioner also considers that it is clear from the complainant's correspondence with the council immediately following the request that she intended informal comments to fall within the scope of her request. The complainant referred the council to a specific example where informal comments had subsequently been made public which were not publically available, or even made available to the planning committee at the time.
11. The Commissioner has therefore taken the word '*comment*' to have its normal, general meaning for the purposes of this request and includes informal comments within the scope of the request. He therefore considers that the request includes informal comments, including any such as internal emails etc. To clarify however, the comments must relate to a planning application. The request does not encompass all internal emails from the council officer; only those which relate to planning applications.
12. The council said to the Commissioner that if he were to include such informal comments within the scope of the request then it also wished to apply both Regulation 12(4)(e) (internal communications) and Regulation 12(4)(b) (manifestly unreasonable) to the information. Given that the council had initially misunderstood the request and therefore construed it too narrowly the Commissioner considers that it is reasonable for it to reconsider the request as a whole and to apply new exceptions where it considers that these may be applicable. He has therefore taken into account the application of the exceptions in this decision notice.
13. The Commissioner notes that when responding to his questions the council identified that it could provide the complainant with a list of applications which the officer had provided comments on since April 2014 to the present as a means of allowing her to access some of the information she wished more easily. It was able to do this as it had

introduced a new data system into the council at that time which did allow it to identify relevant cases from April 2014 onwards.

14. Following the above the Commissioner considers that the complainant wishes the Commissioner to consider whether the council should provide her with a copy of the relevant information, or at the least, provide her with a list of the application reference numbers in order that she can carry out her own searches. She also wishes the council to provide informal comments made by the officer on planning applications.

Reasons for decision

Regulation 12(4)(b)

15. The Commissioner has firstly considered the application of Regulation 12(4)(b) to the information. The complainant has clearly requested a high volume of information which would require significant resources by the council to search for and respond to the request. The application of Regulation 12(4)(b) is therefore highly likely to be relevant to the question of whether the council should be required to fully comply with the request.
16. Regulation 12(4)(b) provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. The Commissioner is clear that the inclusion of "manifestly" in regulation 12(4)(b) indicates Parliament's intention that, for information to be withheld under this exception, the information request must meet a more stringent test than being simply "unreasonable". "Manifestly" means that there must be an obvious or clear quality to the unreasonableness referred to.
17. The Commissioner is of the view that this regulation provides an exception to the duty to comply with a request for environmental information in two circumstances: 1) where it is vexatious, and 2) where it would incur unreasonable costs for the public authority or an unreasonable diversion of resources. However, that is not to say that the exception is limited to these two circumstances only, as the Tribunal in the case of *DBERR v ICO and Platform* (EA/2008/0096) emphasised:

"It is clearly not possible to identify all situations in which a request will be manifestly unreasonable" (paragraph 37); there may well be other situations where regulation 12(4)(b) can apply."
18. In this case the council is arguing that responding to the request would amount to an unreasonable diversion of resources. The council says that

it does not hold a central database which would allow it to identify applications which the officer has had input into for the period requested. It also raised concerns about the personal nature of the information requested.

19. The council said that the majority of formal comments would be held on application documents and published in the planning section of its website. It therefore argues that this information is already available to the complainant. Formal comments are those which are taken into account by the planning officers and the planning committee when reaching decisions on planning applications.
20. The council recognises that the complainant would need to search each application in order to determine whether the officer had commented on the application or not. It says however that whilst that is the case it would also have to carry out the same search were it to be required to provide the information to her. It argued that this is not a good use of public resources as the complainant is able to search for this information herself. The council therefore considers that it was reasonable for it to direct the complainant to the website for this information.
21. The council confirmed that informal comments made by the officer would not be available on its website. It said that these may also not be held within the relevant paper application files.
22. The council argued that it would need to carry out a manual search of each application within the relevant period of time to determine whether it held any informal comments made by the relevant officer for the application file. The council pointed out that it would also have to search the emails of the officer and all other officers to determine whether relevant information was held (as the conservation officer may not have retained his copy). It said however that comments would not be held in for the entire period requested as the council does not retain emails for that period of time.
23. The complainant argues that the council failed to provide an estimate of the time it would spend if it were required to respond to the request. The council did however provide an estimate of the number of cases in which the officer is likely to have input to the Commissioner as an example of the difficulty it would face when locating the information necessary to respond to the request. Based upon the number of applications which the officer had made comments on since April 2014 the council estimated that he would have had formal input into around a 1000 cases over the period requested.

24. The Commissioner recognises that the search would need to be of a much larger number than this (i.e. all applications falling within the relevant period) in order to identify all of the relevant applications as it does not know which applications the officer has had provided comments on. The inclusion of informal comments within the request would be likely to mean that it would be substantially harder to determine this as these would be held on manual files. Additionally an email search would need to be carried out as described above.
25. The Commissioner recognises that a search of all planning applications would inevitably require a substantial degree of time and create a significant burden upon the council. It would amount to a manifestly unreasonable diversion of resources, particularly when considering that the complainant would be able to obtain formal comments via the council website herself. The Commissioner therefore accepts that the council was correct to apply Regulation 12(4)(b) to request.
26. The complainant said to the Commissioner that if she were to accept the council's arguments in this respect she would agree to narrow down the scope of the request to applications where more than 50 houses were concerned. The Commissioner however considers that this would not significantly narrow the scope of the searches which would be required. The council would still need to ascertain which planning files would be relevant to this narrowed request in the same way. It would need to search all files to ascertain whether the application involved 50+ houses before then checking whether the relevant officer had had any input into any of the cases it identified. Whilst the number of cases falling within the scope of the request would inevitably be smaller once relevant cases had been identified it would not particularly narrow down the scope of the initial searches which would be required. Again a significant amount of that information would also be available for the complainant to search herself on the council's website.
27. The council also highlighted to the complainant that her request was personal and related to the actions and performance of one particular individual. The Commissioner has concerns about the stated intention behind the request in this respect. Whilst not in itself vexatious it does raise arguments which the Commissioner considers can be taken into account in the consideration as to whether the request is manifestly unreasonable (as per paragraph 17 above). This is considered further in the public interest section below.
28. Having considered the above the Commissioner is satisfied that the council was correct to apply Regulation 12(4)(b) to the request.

The public interest

29. Regulation 12(1)(b) requires that where Regulation 12(4)(b) is engaged then a public interest test is carried out to determine whether the information should be disclosed even though the exception has been engaged. 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. When carrying out the test Regulation 12(2) provides a presumption towards the disclosure of the information.

The public interest in the information being disclosed

30. The central public interest in the information being disclosed is that it would allow interested parties to determine whether the actions of the council and, in particular, the relevant officer have been appropriate in the consideration of planning applications which would have an effect upon the environment.
31. The conservation officer's role is to determine and highlight any conservation issues with planning applications and provide advice and recommendations to planning officers and the planning committee for it to take into account when reaching its decision. As such recommendations may have a marked effect on whether a particular application is agreed or not. Where formal comments and recommendations are made these should be published alongside the other planning documents on the councils website.
32. The complainant argues that she has seen evidence that the officer's conduct has been questionable in two cases which she has been involved with. She also argues that the council has not been transparent and that it has lacked integrity in these cases. She said that in a previous case she dealt with evidence of a bat survey was not presented to the planning committee even though it was a strong argument in favour of the committee rejecting the planning application. The evidence subsequently came to light but was not published as part of the public documents relating to the application.
33. If applications involving conservation issues are not fully considered with all of the necessary information submitted to the planning committee then decisions may be taken without full access to the facts relating to an application. The decision may then result in environmental damage which may not otherwise have occurred.
34. The complainant considers that the information she has requested would allow her to analyse the officer's comments and whether they were submitted for consideration by the council in previous cases. She can

then determine whether important information was put before the planning committee, whether the analysis carried out was appropriate, and whether the planning committee therefore took into account all of the relevant facts.

35. On the face of it therefore the disclosure of any information which would demonstrate that the council's considerations were appropriate and had full knowledge of all of the facts in the circumstances is a strong argument towards disclosure and adds a further degree of protection to the environment.
36. The Commissioner considers however that there are stronger arguments for this to occur on individual applications where matters are questioned during the course of the decision making or the appeal process. There is a much weaker argument to provide a range of information on different applications, many of which will have now been completed and no further action left able to be taken (such as appeals).
37. The Commissioner notes however that the complainant has limited her requests to the comments made by one particular officer. It appears therefore that her concerns are not with council decision making as a whole in this area but primarily with the actions in respect of this one officer.
38. Nevertheless the overview this would allow on the officer's contribution to planning applications would provide a degree of insight into the councils and the officer's actions when considering applications which might have an effect on conservation issues. From the point of view of providing greater levels of scrutiny and accountability there is a public interest in the information being disclosed.

The public interest in the exception being maintained

39. The primary public interest in maintaining the exception relates to the significant burden which would be placed on the authority to carry out the searches which would be necessary in order to fully respond to the request. This is compounded by the fact that the majority of the information is already available to the complainant directly from the council's website.
40. The Commissioner recognises that requiring the council to carry out searches of the information which is already available from its website would effectively be a waste of public resources when the complainant is able to obtain that information herself. Whilst the Commissioner recognises that this would entail a large amount of work by the complainant in order to obtain this information the Commissioner

considers that the significant burden such searches would place on the authority are difficult to justify and would not be in the public interest.

41. Planning departments already seek to ensure that all of the necessary information/documentation on an application is made available to the public. It is only the nature of the complainant's request which causes difficulties in this particular instance. The issue is that the request is not specific to particular planning applications and as such the system in place does not easily provide access to the information she wishes. It is not searchable by the name of the officer. This is compounded by the volume of information she has requested. The Commissioner does not question that such a search would be both time consuming and burdensome upon the complainant, in the same way that it would be to the council.
42. Adding to this is the complainant's request for informal comments which would require further searches of the manual files held by the council as well as email records. This is likely to take a significant amount of time given the number of cases which the officer is likely to have had input into, together with the fact that no central file is held which would allow the council to draw off a list of relevant cases. The significant resources which the council would take in searching through the files would be taken from the time and resources which would otherwise be used by the council to carry out its primary functions.
43. The Commissioner also has concerns relating to the intention behind the complainant's request. Essentially the complainant is asking the council to use its limited resources in this way in order to obtain information which would allow her to identify any issues with a particular officer's performance, potentially with a view to levelling personal criticism against him.
44. She has argued that the request is not personal in nature. She said that:

"I strongly dispute that the matter is a personal one. On the evidence of the two recent cases in which I have been involved, two issues have arisen as being of serious concern:

 - *The conduct of [the relevant officer] in respect of both applications*
 - *What would seem to be an endemic lack of transparency in the conduct of the planning process within LCC."*
45. The Commissioner considers that the above statement contradicts her argument that the request is not personal. Seeking to check, or carry out a review of the work of one particular officer due to concerns about

his performance is a personal matter to the officer concerned. Whilst she has also argued that she wishes the information to review the transparency of the council in planning applications she has limited her request to the comments made by one conservation officer and stated her intention to review the officer's work. In addition to the burden upon the council from searching for the information this raises issues with the council's obligations under The Data Protection Act 1998.

46. Whilst allowing scrutiny of the council's planning approach as a whole is a strong public interest argument, there is also a strong public interest in protecting individual employees from personal attacks by members of the public. Accountability for planning decisions ultimately rests with the council and with the planning committee in particular rather than with individual officers. The officer is a reasonably senior officer, responsible for informing the planning committee of important facts, insights and providing recommendations into the effect of planning applications on conservation issues. He is however accountable to his employers, the council, rather than to the public directly. In this respect it is the council which should be held accountable for any failings it has in its decision making process.
47. Where the council's decisions in planning issues are likely to have a significant detrimental impact on the environment and an environmental officer has failed to provide any appropriate conservation information the council would need to address this with the officer. The complainant is able to raise concerns about his performance with the council however it is the council's role to investigate this further and take any issues up with the officer concerned. It is for the council to take action over any failures by its officers, not individuals or members of the public. The use of council resources in order to facilitate what could actually be little more than a fishing exercise in order to seek evidence to criticise the actions of that officer is not in the public interest.
48. A conservation officer's comments or recommendations may be an important aspect of in particular applications in that they make judgements on matters which affect conservation matters and potentially endangered flora and fauna. However in the context of this request, whether intentionally or not, the issue becomes a review of the officer's work and raises issues of employer confidentiality and the duty of care of employers towards their employees. Again this weakens any public interest argument in favour of requiring the council to expend resources to disclose information which would effectively facilitate actions which might ultimately lead to an employee receiving public criticism.

49. If there was an issue with the officer's performance which was affecting council decisions this is also likely to come to light through planning appeals. This is particularly the case if controversial decisions have been reached which have a marked effect on the local environment. Public inquiries may be required and planning inspectors would become involved going over the evidence this has been presented from both sides of the argument. It is likely that interested parties would identify that there were gaps in the evidence provided to the planning committee and raise concerns over this with the council or the inspector.
50. The Commissioner also considers that a disclosure of the informal comments would, within the context of this request, be a disclosure of personal data and that this would be unfair to the officer concerned. He has not however outlined his view of this further within this notice given his decision that Regulation 12(4)(b) applies.
51. The Commissioner considers that the resources which would be required to respond to the request, the steps that the authority already takes to publish relevant information, together with the motivations of the complainant in seeking that information provide a strong argument for the exception to be maintained. The Commissioner's decision is therefore that the council was correct to apply Regulation 12(4)(b) in this instance.
52. Having found that the council was correct to apply Regulation 12(4)(b) to the request the Commissioner has not found it necessary to consider the application of the other exception claimed by the council in this instance. The Commissioner would however note that in all likelihood the information requested by the complainant would be likely to be the personal data of the officer concerned in the context of the request. It would therefore be subject to the data protection principles of The Data Protection Act 1998.
53. Without going into further detail, the likelihood is that a disclosure of the officer's informal comments in the context of allowing the members of the public to review his work would be a breach of the first data protection principle and likely to be exempt under Regulation 12(3) as applied via Regulation 13 of the EIR.
54. The Commissioner has not found it necessary to reach a decision on the application of either Regulation 6(1)(b) or Regulation 12(4)(e) in this instance.

Right of appeal

55. 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

56. 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.
57. 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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