

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 September 2015

Public Authority: Cambridge City Council
Address: The Guildhall
Cambridge
CB2 3QJ

Decision (including any steps ordered)

1. The complainant has requested copies of four internal emails which are held by Cambridge City Council. The emails concern an unauthorised development on land within a residential area and to enforcement action taken by the Council and an appeal made by the complainant to the Planning Inspectorate. The Council has withheld the four emails in reliance on Regulations 12(5)(b) and 12(4)(e).
2. The Commissioner's decision is that Cambridge City Council has properly applied Regulation 12(5)(b) to the withheld emails and the Council is entitled to withhold them.
3. The Commissioner does not require the Council to take any further action in this matter.

Request and response

4. The complainant has asked the Council to disclose four emails. These emails were not disclosed to him when the Council responded to his previous requests for information.
5. The emails sought by the complainant passed between Building Control Officers and Planning Officers during the period 29 August 2012 and 28 September 2012: They relate to an investigation carried out at a specified address.
6. The complainant has previously made two requests for recorded information to the Council. His requests were dealt with under the Council's references 3377 and 3465.

7. The complainant's subsequent request for the four emails was responded to by the Council on 24 October 2014 under reference 3588.
8. On 24 October 2014, the Council issued a refusal notice to the complainant. The refusal notice explained that the emails fall to be considered under the Environmental Information Regulations 2004, and that they are being withheld in reliance on Regulation 12(4)(e) – the exception for internal communications and Regulation 12(5)(b) – the exception where disclosure would adversely affect the course of justice.
9. On 30 September 2014, the complainant wrote to the Council to complain about its response to his request.
10. Following the Information Commissioner's intervention, the Council wrote to the complainant on 26 February 2015. The Council's letter constituted an internal review of its decision to withhold the emails which the complainant seeks. The Council's reviewer determined that the emails were properly withheld in reliance of Regulations 12(4)(e) and 12(5)(b).

Scope of the case

11. The complainant contacted the Commissioner on 29 January 2015 to complain about the way his request for information had been handled. The complainant asked the Commissioner to determine whether the Council is entitled to withhold the emails which he seeks.
12. This notice is the Commissioner's decision in this matter.

Reasons for decision

Background information

13. The emails which the complainant seeks relate to an unauthorised development undertaken by the complainant, on land within a residential area.
14. The unauthorised development has been the subject of a planning investigation by the Council which commenced in 2012. The information sought by the complainant dates from this time.
15. A planning enforcement notice was served on 5 December 2013 and the Council's East Area Committee approved enforcement action.

16. In 2014 the complainant made an appeal to the Planning Inspectorate against the Council's planning enforcement notice. The appeal was dismissed on 12 September 2014 and the complainant was required to demolish the unauthorised development at the rear of his property.
17. The Council considers this to be an open planning enforcement matter.
18. The Council has advised the Commissioner that it may be required to take necessary action to secure compliance with its planning enforcement notice should the complainant fail to voluntarily comply with the notice by September 2015.

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

19. 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".
20. The Council does not claim that the withheld information is subject to legal professional privilege. Rather, the Council has withheld the four emails because they relate to an early stage of an investigation of a possible breach of planning control.
21. The Council is the local planning authority for the City of Cambridge and therefore it has responsibility for the statutory planning enforcement powers provided by section 171A of the Town and Country Planning Act 1990 (as amended).
22. The matter to which the withheld emails relate, has already been the subject of an appeal to the Planning Inspectorate and a decision has been made in respect of that appeal. As the compliance period has not yet passed, the Council holds the position that the matter remains unresolved.
23. The Commissioner's examination of the withheld emails substantiates the Council's position as stated above. The Commissioner has also examined copies of the Council's Planning Enforcement Notice and the Planning Inspectorate's Appeal Decision.
24. The Commissioner is satisfied that the emails relate to the Council's investigation of a possible breach of planning control, to a subsequent enforcement notice and to an appeal to the Planning Inspectorate.
25. The Commissioner notes that the compliance period attached to the enforcement notice has not yet expired. He therefore accepts that

further legal proceedings may be necessary to secure full compliance with that notice.

26. In its decision in *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".
27. The Commissioner accepts the Council's position that the complainant's unauthorised development remains 'open' and constitutes an uncompleted planning enforcement matter. He has no reason to doubt the Council's assertion that it has full intention to pursue compliance with its enforcement notice and therefore he is drawn to conclude that disclosure of the four emails would have a potentially adverse effect on any future proceedings in this matter.
28. On the Commissioner's understanding of the facts of this case the Commissioner considers that Regulation 12(5)(b) is properly engaged.
29. The Commissioner considers that disclosure of the emails could adversely affect the council's ability to present and secure the best case for compliance with its planning enforcement notice, should it be necessary to pursue this open matter further.
30. 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.
31. 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 emails the Council has withheld.

The public interest

Arguments in favour of disclosing the requested information

32. 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.

33. In this case, disclosure of the four withheld emails would help the public to understand some of the issues considered by the council in respect of the unauthorised development at the rear of the complainant's property.

Arguments in favour of maintaining the exception

34. The Commissioner must take into account the fact that the withheld emails are germane to a current and open planning enforcement matter, where future legal proceedings may be required to secure compliance.
35. He must give weight to the Council being able to properly discuss the enforcement matter in a 'safe' space, without its position being adversely prejudiced. This is especially the case where enforcement proceedings are not yet completed, and where disclosure could prejudice the Council's case to secure legal compliance with an extant enforcement notice and any future prosecution.
36. Planning enforcement matters relate to the Council's discretionary powers. In this case the Council has already determined that the public interest in respect of the unauthorised development is best served by exercising those powers. In making that determination, the Council has considered the complaints raised by members of the public and also the wishes of Councillors who took the initial decision to pursue enforcement action. The Council's decision was made with the clear and reasonable expectation that the Council, as local planning authority, would secure compliance with current planning controls.
37. The Commissioner must acknowledge that the Council has already spent significant time and resources in considering the complainant's property alterations: It has properly pursued enforcement compliance and has successfully defended its actions when the complainant mounted his appeal to the Planning Inspectorate.
38. The Commissioner must take this process into account and give appropriate weight to the Council's actions: He must give weight to the potential for even greater time and resources to be spent on this matter, should the withheld emails be disclosed and subsequently jeopardise the Council's position.
39. 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 documents which relate to its position, its opponent would potentially be put at an advantage by not having to disclose its own position or legal advice beforehand.

Balance of the public interest arguments

40. The Commissioner appreciates that there is a general public interest in public authorities being as accountable as possible for the decisions they make. In this case the Commissioner considers that accountability has been provided to a large extent by the serving of the Council's enforcement notice and by the serving of the Planning Inspectorate's decision.
41. Having considered the contents of the withheld emails and also 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.
42. The Commissioner is satisfied that the public interest is best served in this case by maintaining the Council's right to pursue planning enforcement matters within a safe space which allows its officers to discuss the case and give advice in confidence. The fact that the enforcement process is currently on-going is key to the Commissioner's decision.
43. The Commissioner's decision is that the Council has properly applied Regulation 12(5)(b) and it is entitled to withhold the emails which the complainant seeks.
44. The withheld emails are unquestionably internal communications: The Commissioner understands the Council's rationale underpinning its additional application of Regulation 12(4)(e) to those emails. Nevertheless, in view of his decision at paragraph 44, it is not necessary for the Commissioner to consider this matter further and he has not gone on to provide analysis of this.

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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF