

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 30 November 2015

Public Authority: Rotherham Metropolitan Borough Council
Address: Riverside House
Main Street
Rotherham
S60 1AE

Decision (including any steps ordered)

1. The complainant requested information from Rotherham Metropolitan Borough Council (the Council) relating to two planning applications.
2. The Council considered that Regulations 12(5)(e) (confidentiality of commercial or industrial information) and (f) (the interests of the person who provided the information) apply to some of the withheld information and that Regulations 12(4)(d) (unfinished documents) and (e) (internal communications) apply to all the withheld information.
3. The Commissioner's decision is that those Regulations are, for the most part, not engaged. He finds that while Regulation 12(4)(e) is engaged in respect of some of the information, the public interest favours disclosure of some of that information.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - disclose to the complainant those aspects of the withheld information identified in the annex to this decision notice.
5. 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

6. On 13 February 2015 the complainant wrote to the Council and requested information in the following terms:

"All communications and information relating to the planning applications RB2014/0719 and RB2014/1556 between:

RMBC employees, departments and agencies

RMBC and the applicants

RMBC and the applicants agents Life Long Energy/[name redacted]

These communications to include:

- 1. All notes, minutes and logs of meetings and discussions – both formal and informal – relating to these applications.*
- 2. Full details of all pre-application advice given to the applicants and/or their agents and the names of persons providing this advice.*
- 3. Full information regarding the details and instructions relating to the posting of site and street notices in connection with these 2 planning applications.*
- 4. Full records of all RMBC computer-related activity in connection with the amendments of documents on the RMBC website, together with the names and designations of those persons carrying out these activities and amendments and those persons responsible for authorising the amendments.*
- 5. Full details of all requests from the applicants and/or their agents to make amendments to these 2 planning applications.*
- 6. Reports and/or information provided for Planning Committee members.*
- 7. Details of all or any communications with the Campaign For the Protection of Rural England.*

Details, communications and information to include:-

-notes, memos and written communications

-letters

-emails, including deleted emails

-minutes of meetings

-records of meetings

-telephone call logs with notes if in existence

And all or any other information relating to these 2 planning applications and RMBC, their employees, the applicants and their agents.

Copies of neighbour comments are not required”.

7. The Council responded on 12 March 2015. It denied holding some of the requested information but confirmed it held the remainder. However, it refused to provide that information citing Section 21 of FOIA (information accessible to applicant by other means) as its basis for doing so. It explained that the information was held in planning files available to the public and provided the complainant with the relevant links.
8. The complainant requested an internal review on 17 March 2015, expressing surprise that no communications other than those on the planning website have taken place.
9. The Council sent her the outcome of its internal review on 26 May 2015. It revised its position, saying that it considers that the access regime the request falls to be considered within is the EIR.
10. It denied holding some of the requested information but confirmed that it holds internal communications within the scope of the request. In light of its revised view that EIR applies in this case, it refused to provide that information citing Regulation 12(4)(e) (internal communications) as its reason for doing so.
11. With respect to any advice that may have been given to the applicant and/or their agent, it considered that Regulation 12(5)(e) (confidentiality is provided by law to protect a legitimate economic interest) applies.
12. It also responded and provided an answer to those parts of the request concerning:
 - a summary of advice given to applicants;
 - the serving of street notices; and
 - whether the planning application has changed.

Scope of the case

13. The complainant contacted the Commissioner on 26 May 2015 to complain about the way her request for information had been handled.
14. By way of explanation about the two planning applications referred to in the request for information, she told the Commissioner:

"There have been 2 applications for this proposed wind turbine. The first, RB2014/0719, was withdrawn in May 2014. The second, RB2014/1556 was submitted in November 2014 and is still going through the planning process".
15. The planning applications specified in the request relate to a proposed wind turbine in Gildingwells.
16. In the course of her correspondence with the Commissioner the complainant raised a number of issues which are outside the scope of the Commissioner's remit. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the legislation he enforces and oversees.
17. During the course of the Commissioner's investigation, the Council cited two further Regulations, namely 12(4)(d) (unfinished documents) and 12(5)(f) (the interests of the person who provided the information). It also confirmed its application of Regulations 12(4)(e) (internal communications) and 12(5)(e) (confidentiality of commercial or industrial information).
18. In this case the Council considers that Regulations 12(5)(e) and (f) apply to some of the withheld information and that Regulations 12(4)(d) and (e) apply to all the withheld information.
19. The analysis below considers the Council's application of those Regulations to the withheld information. That information comprises email correspondence. Mindful of the complainant's request, the Commissioner considers any "neighbour comments" within that information to be out of scope of his investigation.

Reasons for decision

Is the information environmental?

20. Information is 'environmental information' if it meets the definition set out in regulation 2 of the EIR. If the information satisfies the definition

in regulation 2 it must be considered for disclosure under the terms of the EIR rather than the FOIA.

21. In this case the Council told the Commissioner that it deemed the information to be environmental:

"as it relates to a proposal which would ultimately affect the state of the elements of the environment, namely land or landscapes as noted in Regulation 2(1)(a)".

22. Regulation 2(1)(a) covers the state of the elements of the environment, including water, soil, land and landscape. Regulation 2(1)(c) provides that information is environmental where it is on:

"measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in [2(1)](a) and (b) as well as measures or activities designed to protect those elements".

23. Having considered the withheld information, the Commissioner is satisfied that the information requested by the complainant constitutes environmental information under regulation 2(1)(c).
24. He has reached this conclusion on the basis that the disputed information relates to a planning application for a proposed wind turbine – a measure likely to affect several of the elements of the environment referred to in Regulation 2(1)(a).

Regulation 12(4)(d) information in the course of completion

25. Regulation 12(4)(d) is engaged when the request relates to material that is still in the course of completion, unfinished documents or incomplete data.
26. The Council applied Regulation 12(4)(d) to all of the withheld information.
27. Regulation 12(4)(d) states:

"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data"

28. The aims of the exception are:

- to protect work a public authority may have in progress by delaying disclosure until a final or completed version can be made available. This allows it to finish ongoing work without interruption and interference from outside; and
- to provide some protection from having to spend time and resources explaining or justifying ideas that are not and may never be final.

29. The Council argued that the exception applied because the information related to a planning application which is still being considered. It told the complainant the issues are still being debated:

"As no date has yet been set for a decision to be made there is a continuing need for a 'safe space' to develop ideas, debate live issues and reach recommendations away from external interference and distraction".

30. The Commissioner has considered whether the withheld information relates to information in the course of completion. It is the Commissioner's view that the relevant consideration here is the information contained within each document itself and the purpose for which it was created not the overall application to which it relates.

31. The Commissioner acknowledges – and it is not in dispute - that, at the time of the request, the application was going through the planning process. However, the issue for the Commissioner to determine is whether the withheld information constitutes material which is still in the course of completion.

32. Having viewed the withheld information and considered the Council's arguments the Commissioner is of the view that it does not satisfy that test. The documents viewed are clearly finished items and the Council has failed to explain why they should be considered unfinished. Accordingly the Commissioner therefore considers that the withheld information is clearly not unfinished documents or incomplete data itself.

33. Consequently, the Commissioner has determined that the requested information did not relate to material in the course of completion at the time of the request and that the exception in regulation 12(4)(d) was not engaged.

Regulation 12(5)(e) confidentiality of commercial or industrial information

34. The Council also considers that Regulation 12(5)(e) and 12(5)(f) apply to some of the withheld information considered above. The Commissioner has first considered its application of 12(5)(e).

35. Regulation 12(5)(e) of EIR states that:

"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;"

36. The purpose of the exception is to protect any legitimate economic interests underlying commercial confidentiality.

37. Breaking down the constituent parts of the exception, the Commissioner considers that the disputed information must satisfy all four of the following conditions in order for the exception to be engaged:

- the information is commercial or industrial in nature;
- the information is subject to confidentiality provided by law;
- the confidentiality is provided to protect a legitimate economic interest; and
- the confidentiality would be adversely affected by disclosure.

38. It is not enough that disclosure might cause some harm to an economic interest. A public authority needs to establish (on the balance of probabilities – ie more probable than not) that disclosure would cause some harm.

39. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party.

40. In support of its application of the exception in this case, the Council simply said that the information relates to the location and measurements of a proposed turbine and is a commercial undertaking providing power through the turbine.

41. The Commissioner accepts that the planning application relates to the installation of a turbine. However he does not consider that the Council has adequately explained why the requested information is commercial or industrial information or stated how the confidentiality of the information in question is provided by law.

42. Furthermore, in order for the exception to be engaged the onus is on public authorities to demonstrate that some specific harm to a party or

parties' legitimate interests will ensue and to link this harm to the disclosure of specific information.

43. In this case, as the Council has not provided any evidence to explain why an adverse effect is more probable than not, the Commissioner has concluded that the Council has failed to demonstrate that the exception is engaged.
44. In light of that conclusion, the Commissioner has next considered the Council's application of Regulation 12(5)(f). The Council applied Regulation 12(5)(f) to all of the withheld information to which it had also applied Regulation 12(5)(e).

Regulation 12(5)(f) the interests of the person who provided the information

45. Regulation 12(5)(f) states that:

"a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(f) the interests of the person who provided the information where that person—

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure".

46. The purpose of this exception is to protect the voluntary supply to public authorities of information that might not otherwise be made available to them. In such circumstances a public authority may refuse disclosure when it would adversely affect the interests of the information provider. The wording of the exception makes it clear that the adverse effect has to be to the person or organisation providing the information rather than to the public authority that holds the information.
47. With regards to engaging the exception, a four stage test has to be considered, namely:
 - would disclosure adversely affect the interests of the person who provided the information to the public authority?
 - was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?

- did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?
 - has the person supplying the information consented to its disclosure?
48. As with all the exceptions in regulation 12(5), the threshold necessary to justify non-disclosure, because of adverse effect, is a high one. The effect must be on the interests of the person who voluntarily provided the information and it must be adverse.
49. In considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (ie more than trivial), and to explain why disclosure would, on the balance of probabilities, directly cause the harm.
50. In this case, the Council told the complainant:
- "The EIR exception at S12(5)(f) has been applied to information that has been provided to the Council by the applicants on a confidential basis and relates to planning advice and discussions. Disclosure of such information could be of commercial value to the applicant's competitors and therefore have an adverse effect on the applicant. The applicant has not consented to the disclosure of this information and would have no expectation that this information would be disclosed to the wider public by the Council".*
51. In its submission to the Commissioner the Council reiterated that view.
52. The Commissioner accepts that the Council sought the consent of the third party and that it was refused. However, notwithstanding that, the Commissioner considers that the Council has failed to explain why this exception is engaged: he is not satisfied that the Council has demonstrated how disclosure would adversely affect the interests of the third party who provided the information.
53. As the first criterion in the four stage test is not met, the test must necessarily fail. The Commissioner therefore finds the exception is not engaged.
54. The Council applied Regulation 12(4)(e) to all of the withheld information including the information to which it had also applied Regulations 12(4)(d), 12(5)(e) and 12(5)(f).
55. The Commissioner must therefore consider whether or not Regulation 12(4)(e) has been correctly applied before he can decide whether the information in scope should be withheld or disclosed.

Regulation 12(4)(e) internal communications

56. 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. The purpose of this exception is to allow a public authority to discuss the merits of proposals and the implications of decisions internally without outside interference.
57. The Commissioner acknowledges that the concept of 'internal communications' is broad and covers all internal communications, not just those actually reflecting internal thinking, and will include any information intended to be communicated to others or to be placed on file where others may consult it. However, the Commissioner considers that the underlying rationale behind the exception is that public authorities should have the necessary space to think in private.
58. Regulation 12(4)(e) is a class-based exception so it is not necessary to consider the sensitivity of the information in order for it to be engaged. A wide range of internal documents will therefore be caught. However, this exception is also subject to the public interest test outlined in regulation 12(1)(b) of the EIR.

Does the withheld information constitute 'internal communications'?

59. The EIR do not provide a definition of what constitutes an internal communication. However, the Commissioner accepts that, in general, communications within one public authority will constitute 'internal communications' while a communication sent by or to another public authority, a contractor or an external adviser will not generally constitute an internal communication.
60. During the course of his investigation the Council provided the Commissioner with a copy of the withheld information within the scope of the request. That information comprises emails exchanged between council employees, communications sent both internally and externally and communications with a third party.
61. The Commissioner has consulted his published guidance on this exception¹. That guidance considers various scenarios, including:

¹ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

- communications sent both internally and externally;
 - forwarded communications and attachments; and
 - emails and email chains.
62. Having considered the withheld information, and consulted his guidance, the Commissioner is satisfied that some, but not all, of the withheld information, falls within the class of information described in regulation 12(4)(e). He is therefore satisfied that regulation 12(4)(e) is engaged in respect of that information but that the information which does not engage the exception must now be disclosed.

The public interest test

63. As he is satisfied that regulation 12(4)(e) is engaged in respect of some of the information withheld by virtue of that exception, the Commissioner has gone on to consider the public interest test attached to the application of this exception, as required by regulation 12(1)(b) of the EIR. 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.
64. When carrying out the test the Commissioner must take into account a presumption in favour of disclosure of the information which is required by regulation 12(2).

Public interest arguments in favour of disclosing the requested information

65. The complainant told the Council:

"This is a case of a planning application for a wind turbine in Green Belt land, impacting upon the Conservation Area of Gildingwells and in a village locality which is classed as High Landscape Value – which is the highest protection that RBMC can afford any location. There has been a HUGE number of objections to this application – far beyond what might have been expected for say a kitchen extension. For you to decide – and I make the assumption that it is yourself who has decided- that the public interest is in withholding disclosure – is the wrong decision in this instance.....

I do not agree that disclosure of internal communications would hinder the process of free debate".

66. In favour of disclosure, the complainant also told the Council:

"If an officer has a valid professional opinion it will stand up to scrutiny...".

Public interest arguments in favour of maintaining the exception

67. In favour of maintaining the exception, the Council told the complainant that disclosure of internal deliberations would, for example, hinder the process of free debate. It also considered that disclosure:

"may discourage public service officers to provide their professional opinion by way of an internal communication".

68. The Council told the Commissioner that the requested information relates to a planning application and that the issues are still being debated. It explained that as the date for the decision to be made had not been set, it needed a 'safe space' to develop ideas. It also told him:

"As the matter is still under discussion the 'chilling effect' applies as disclosure would inhibit free and frank discussions in the future and that loss of frankness and conduct would damage the quality of advice and lead to poorer decision making".

69. While acknowledging the private interest of the complainant in this matter, the Council argued that disclosing the requested information does not serve a wider public interest.

Balance of the public interest

70. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exception. If the public interest in the maintenance of the exception does not outweigh the public interest in disclosure, the information in question must be disclosed.

71. There is always a general public interest in disclosing environmental information. This is derived from the purpose behind the EIR. In addition, there may be an argument for informing public debate on the particular environmental issue that the information relates to. Certainly where planning matters are concerned there is often a degree of contentiousness about planning projects due to the effect on the environment and on surrounding communities.

72. The Commissioner also accepts that there is an inherent public interest in the openness and transparency of public authorities and their decision making process.

73. In balancing the public interest arguments in this case the Commissioner has given due weight to the position that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away

from external interference and distraction. However, it is open to the Commissioner to consider the severity and extensiveness of any harm that disclosure might cause to such a safe space, or, in relation to the extent of any 'chilling effect' which the possibility of future disclosure might have on council staff's willingness to contribute uninhibited and robust advice.

74. A factor in assessing the weight of public interest arguments is the extent to which the information itself would inform public debate on the issue concerned. The Commissioner is mindful that information may be within the scope of a request but nevertheless shed little light on the issue itself. In that case the weight of the argument for disclosure may be less than it otherwise would be.
75. The Commissioner is also mindful that the requester's private interests are not in themselves the same as the public interest, and what may serve those private interests does not necessarily serve a wider public interest.
76. In this case, the Commissioner has recognised a public interest in preserving a private space in order to carry out the planning process. Taking all the above factors into consideration, the Commissioner finds that while the public interest favours withholding some of the withheld information where Regulation 12(4)(e) is engaged, the public interest favours disclosure in respect of the remainder.
77. The Commissioner has produced a schedule as an appendix to this notice which specifies the information to be disclosed.

Regulation 13 personal information

78. The Commissioner notes that the Council has not identified an exception to withhold third party personal data.
79. Notwithstanding this, the Commissioner is satisfied that information – to the extent that it relates to the identity of junior public sector employees - should continue to be withheld by virtue of Regulation 13 of the EIR.
80. In the Commissioner's experience the data subjects, to whom the personal data relates, would have no reasonable expectation that their personal data would be placed into the public domain as a result of this request for information. Nor would disclosure satisfy any of the conditions in Schedule 2 of the Data Protection Act 1998 to warrant the processing of their personal data. Therefore, any content that identifies junior Council employees should be redacted from the information before it is disclosed.

Other matters

Public interest submissions

81. The Commissioner has published guidance on the public interest test. In that guidance, he states:

"In carrying out the public interest test, the authority should consider the arguments in favour of disclosing the information and those in favour of maintaining the exemption. The authority should try to do this objectively, recognising that there are always arguments to be made on both sides".

82. In this case, the Commissioner considers that the Council failed to identify arguments in favour of disclosing the requested information.
83. The Commissioner expects that in future the Council will take the above into consideration when responding to a request for information.

Records management

84. During the course of the Commissioner's investigation, the Council appeared to experience some difficulty in establishing the information it had considered as being within the scope of the request. The Commissioner sought clarification from the Council of both the scope and content of the withheld information during the course of his investigation.
85. The Code of Practice issued under section 46 of the FOIA (the "Code") provides guidance to public authorities as to desirable practice in connection with the keeping, management and destruction of records. In relation to decisions about what records should be kept in order to meet corporate requirements, paragraph 8.1(d) recommends that authorities should take the following into account:

"The need to explain, and if necessary justify, past actions in the event of an audit, public inquiry or other investigation. For example, the Audit Commission will expect to find accurate records of expenditure of public funds. Or, if an applicant complains to the Information Commissioner's Office (ICO) about the handling or outcome of an FOI request, the ICO will expect the authority to provide details of how the request was handled and, if applicable, why it refused to provide the information."

86. The Commissioner directs the Council to the Code and expects that it will have due regard for its recommendations in its future handling of requests.

Multiple exceptions

87. In a case such as this where a public authority is citing multiple exceptions in respect of the same information, the Commissioner expects the public authority to ensure that the extent to which exception(s) apply - or whether it considers all the exceptions apply equally to all the information - is clear.
88. The Commissioner expects the Council, in future cases where multiple exceptions are relied on, to ensure that withheld information is clearly marked up to show the extent to which the exceptions apply.

Right of appeal

89. 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

90. 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.
91. 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

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