

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 17 February 2015

Public Authority: Hambleton District Council

Address: Civic Centre
Stone Cross
Northallerton
North Yorkshire
DL6 2UU

Decision (including any steps ordered)

1. The complainant has made two requests, on separate dates, for all communications between Hambleton District Council (the council) and an individual, that individuals business and its representatives.
2. The council responded to the two requests separately, but provided the same response to both in that it was withholding the information under regulation 12(5)(b) of the EIR and could neither confirm nor deny any further communications taking place. Relying on regulation 13(5) of the EIR and 40(5)(b) of the Freedom of Information Act 2000 (FOIA), as it considered it would reveal the personal data of the named individual.
3. The complainant is not satisfied with the council refusing his request.
4. The Commissioner's decision is that the council has correctly relied on regulation 12(5)(b) and was right to neither confirm nor deny the existence of any other communications taking place for both requests.
5. The Commissioner does not require the council to take any steps.

Request and response

6. On 2 June 2014, the complainant wrote to the council and requested information in the following terms:

"Would you please provide me with details of all contact from 1 January to the present day between officers or Members of Hambleton District Council and [name redacted] and/or his representatives concerning [business name redacted]? This should include copies of all emails, texts, letters, notes of meetings or telephone conversations."

7. The council responded on the 13 June 2014. It confirmed that it holds information in connection with:
 - A legal challenge under Section 288 of the Town and County Planning Act 1990.
 - A legal challenge under Section 289 of the Town and County Planning Act.
 - A matter relating to costs following a Planning Inquiry in 2013
8. The council refused to provide this information relying on regulation 12(5)(b) of the EIR as it considers disclosing the information would adversely affect the course of justice.
9. It also considered that regulation 13 of the EIR – personal data – was engaged with regards to this information.
10. Lastly, the council advised the complainant that it can neither confirm nor deny whether it holds any other information within the scope of the request other than what it has specified above. Relying on regulation 13(5) of the EIR and 40(5)(b)(i) of the FOIA to do this.
11. The complainant requested an internal review on the 18 August 2014. The council provided its outcome of its internal review on the 19 August 2014 maintaining its initial response.
12. The complainant contacted the Commissioner on 9 September 2014 as he was not satisfied with the council's refusal of the request.
13. Also on the 9 September 2014, the complainant made a second request similar to the one made on 2 June 2014:

"Would you please provide me with details of all contact from 1 January to the present day between Officers or Members of Hambleton District Council and [business name] representatives?"

This should include copies of all emails, texts, letters, notes of meetings or telephone conversations."

14. The council responded on the 15 September 2014, it withheld the information for the same reasons as it did for the 2 June 2014 request. Except that it stated that the information withheld under 12(5)(b) and regulation 13 also refers to third parties and contains their personal data.
15. The complainant requested an internal review to this decision on the 10 October 2014 and the council provided its internal review response on the 30 October 2014 maintaining its decision to withhold the information.

Scope of the case

16. The complainant contacted the Commissioner on the 13 October 2014 about the 9 September 2014 request as he was not satisfied with this being refused along with his 2 June 2014 request.
17. The Commissioner considers that as the two requests are similar, and from confirmation from the council that the withheld information and reasons for withholding it is the same for each request, he can determine whether the council were correct to refuse the information for both requests in this decision notice.
18. The Commissioner will consider this request in two parts.
19. Firstly, the Commissioner will determine if the council was correct to withhold the information it has under regulation 12(5)(b) of the EIR. He will only go on to consider if regulation 13 of the EIR applies to this withheld information if he finds that 12(5)(b) is not engaged to all or some of the information being withheld under this exception.
20. Secondly, the Commissioner will consider if the council was correct to neither confirm nor deny holding any other information, under regulation 13(5) of the EIR and 40(5)(b)(i) of the FOIA, that has not been withheld under regulation 12(5)(b).

Background

21. The council has been involved in enforcement action against [name redacted] in respect of his business, which he runs as a sole trader. The council has explained that there has been dissatisfaction from many local residents with regards to [name redacted] business activities and the way the council has handled the matter so far.

22. The council has advised that there have already been three planning inquiries with regards to these issues and the last inquiry was the subject of a planning inquiry decision letter dated 22 January 2014.
23. The council has advised the Commissioner that it is this last decision letter which was the subject matter of legal challenges under section 288 and 289 of the Town and Country Planning Act 1990, also generating a matter relating to costs for which the council and [name redacted] were each ordered to pay to a local action group.
24. The council states that notwithstanding the resolution of the two legal challenges, the situation has remained contentious between the council, [name redacted], the action group and residents.
25. The council's latest action is now in connection with a fuel facility, which it has informed the Commissioner was the subject of the earlier legal challenges, and continues to be the subject of criticism from some local residents. It is the legal position of the fuel facility that is key to the latest action and dispute taking place. Therefore the council has had to obtain legal advice to set out its position on this matter and likewise so has [name redacted] who has provided his position to the council, which is the information being withheld for this request.

Reasons for decision

Regulation 12(5)(b) of the EIR

26. Regulation 12(5)(b) of the EIR states that a public authority can refuse to disclose information if its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature

Is the exception engaged?

27. The council has advised the Commissioner that in applying regulation 12(5)(b) of the EIR, its intention is not to rely on it for solely legal professional privilege (LPP), but rather its case is based on the more generic concept of the "smooth running of the wheels of justice" as envisaged in the *Rudd v the Information Commissioner & the Verderers*

*of the New Forest (EA/2008/0020, 29 September 2008)*¹ case (paragraph 29).

28. The course of justice at regulation 12(5)(b) is a broad exception which encompasses any adverse effect on the course of justice and the Commissioner considers that it is not limited to only information that is subject to LPP. This allows for documents that are not subject to LPP to still be covered by the exception, as long as disclosure would adversely affect the course of justice 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 Tribunal affirmed this view in the case of *Surrey Heath Borough Council v Kevin McCullen and the ICO (EA/2010/0034)* when they acknowledged that the regulation covered more than just LPP.
29. The council consider that disclosing the information under the EIR rather than under the procedures that govern High Court litigation or Planning Inquiry costs awards has the potential to undermine the general confidence in the legal system and inhibit parties to litigation from setting out their case to one another.

In review of the above, the Commissioner is satisfied that all the withheld information falls within the scope of the exception. He must now consider whether disclosure of the information would result in adverse effect to the course of justice.

Adverse effect

30. The council consider that disclosure of the information at the time of the request would have had an adverse effect on the course of justice in that it would weaken the general confidence in the ability to conduct proceedings in the circumstances of a case of this nature. In particular, the council and [name redacted] should be able to expect that they can set out their legal case and disclose information about that case without fear that it would be disclosed to third parties outside of the requirements of the judicial process.

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[http://www.informationtribunal.gov.uk/DBFiles/Decision/i254/J%20Rudd%20v%20ICO%20&%20Verderers%20of%20New%20Forest%20\(EA-2008-0020%20%5bFER0148337%5d\)%20Decision%2029-09-08.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i254/J%20Rudd%20v%20ICO%20&%20Verderers%20of%20New%20Forest%20(EA-2008-0020%20%5bFER0148337%5d)%20Decision%2029-09-08.pdf)

31. The council also considers that disclosure of this information might inhibit the candour in communications between parties and again might adversely affect the resolution of disputes.
32. The council has told the Commissioner that the disputes about [redacted business name] are still current and the council needs the freedom to conduct litigation or disputes without being hindered by having its legal position scrutinised in detail.
33. Also, the council sees that it is unfair to parties in litigation or potential litigation if their legal arguments are revealed under the EIR when the legal stance of other parties do not have to be disclosed. And that [name redacted] would be entitled to assume that his legal position and communications should not be released to the public beyond the requirements of the judicial process.
34. The Commissioner on consideration of the above is satisfied that there is a real potential for disclosure to result in adverse effect on the council to conduct its decision in a litigation context and hinder communications between parties should the information be released under the EIR. Therefore the Commissioner has concluded that it is more likely than not that disclosure of the withheld information would result in an adverse effect to the course of justice.

The public interest test

35. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out his assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosure

36. The council considers that there is a general public interest in transparency and accountability in relation to its dealings with third parties in contentious planning disputes and the legitimate expectation of the public in being satisfied that these dealings are conducted in a proper and professional way.
37. Releasing the withheld information may also assist the public in understanding the legal issues, particularly in connection with the fuel facility.
38. The council also notes that there is a significant public interest in the planning matters at [business name redacted].

39. The complainant has provided the Commissioner with a copy of a Local Government Ombudsman (the LGO) report dated 12 April 2012 in which he states it has recorded maladministration by the council, all of which is in connection with the ongoing issues to do with this case between the council, the campaign group, local residents and [business name redacted].
40. The Commissioner has reviewed the LGO decision of this report and it did find, prior to April 2012, that the council's maladministration with this issue caused residents injustice and disturbance and made recommendations that the council consider taking action to try and stop the current use and provide funding to the villages of the area for projects of community benefit.
41. The Commissioner sees that these types of findings from the LGO would increase public interest in the council to be more transparent in actions it is taking and considering to take. Also if this withheld information was made available to the public then it may go some way towards rebuilding any lost confidence, in the council, that may have resulted from of the LGO findings.
42. But at the same time, the fact that there are bodies that the public can complain to about council actions does go some way to satisfy the public interest in ensuring that public authorities are acting as they should and if found not to be, appropriate remedies can be suggested or ordered by bodies such as the LGO.

Public interest arguments in maintaining the exception

43. The council consider that disclosing the information would not be in the public interest if the disclosure were to inhibit or adversely affect the conduct of proceedings if it had to disclose its legal stance outside of judicial proceedings.
44. The Council has stated that this matter is still live and ongoing and that disclosure of the information would also inhibit candour in communications between parties and may affect the resolution of disputes.
45. The council has advised the Commissioner that it has set out, in broad terms, what its strategy and approach is against the [business name redacted] and [name redacted] when it has been requested. It considers that this goes some way towards openness and transparency without hindering its ability to conduct litigation or disputes through detailed scrutiny.
46. The council does not consider revealing [name redacted] legal stance is in the public interest, unless it reflected the council's.

47. The Commissioner considers that there would still be a public interest in knowing what the legal position of [name redacted] is because it would allow them to comment and be more informed on the case as a whole.
48. In weighing the balance of the public interest arguments in this case, the Commissioner has given due consideration to the specific local interests as well as any wider public interest. Whilst the Commissioner accepts that these matters are not trivial, he does not consider that the weighting in favour of disclosure counterbalances the public interest in preventing adverse effect to the course of justice.
49. The Commissioner considers that the weighting is further shifted towards maintaining the exception by the fact that the requested information is still 'live'. The disclosure of the information, outside of the judicial process, would be likely to disadvantage the council's position in the overall case and he accepts that it would weaken the general confidence in the ability to conduct proceedings.
50. On this balance the Commissioner does not consider that there is enough compelling justification for disclosing the information and has therefore concluded that the public interest in maintaining the exception at regulation 12(5)(b) of the EIR outweighs the public interest in disclosure.
51. As the Commissioner has found that all of the information withheld under regulation 12(5)(b) of the EIR, as outlined in paragraph 7 above, is engaged, he has not gone on to determine if any of it is exempt under regulation 13 of the EIR.
52. The Commissioner will now go on to determine if the council were correct to neither confirm nor deny whether there has been other communications within the scope of the request.

Regulation 13(5) of the EIR & 40(5)(b) of the FOIA

53. The Commissioner must now consider whether the council are correct to neither confirm nor deny holding any other information within the scope of the request that has not been withheld under regulation 12(5)(b) of the EIR.
54. The Commissioner will consider both the EIR and FOIA aspect of the neither confirm nor deny, as the request was for 'all communications' and this could include both environmental and non-environmental information.
55. Regulation 13 sub-sections and section 40 of the FOIA generally apply to personal data held by a public authority and considered exempt from disclosure. Regulation 13(5) and 40(5)(b) of the FOIA further excludes a

public authority from confirming or denying whether it holds information if to do otherwise would reveal personal data of an individual and contravene any of the data protection principles.

56. Both of the complainants requests were for "*all communications*" between the council and [name redacted], [business name redacted] and its representatives for a specific time period.
57. The council has explained that if it did have any communications from [business name redacted], then it would have only come from [name redacted] who owns the business or it would be about [name redacted].
58. In the complainant's review request of the 10 October, he specifically points out that the information being requested is information about the business not [name redacted].
59. The council has stated that, as far as it is aware, [name redacted] and [business name redacted] are the same legal entity as [name redacted] runs his business as a sole trader albeit being traded under the business name. So any communication would not be to the business but to [name redacted] directly.
60. The Commissioner, on the council's submissions, accepts that any communication that it may or may not have had with regards [business name] would actually be direct communications to [name redacted].
61. On this, the Commissioner therefore considers that he needs to establish whether the council confirming or denying if other communications have taken place between itself and [name redacted] would constitute personal data of [name redacted].

Would confirming or denying whether other information is held constitute personal data?

62. Personal data is defined by the DPA as any information which relates to a living individual who can be identified from that data or from that data along with any other information in the possession or is likely to come into the possession of the data controller.
63. The Commissioner is satisfied that to confirm or deny if there was any other communications between [name redacted] and the council would constitute the personal data of [name redacted].

Would confirming or denying if there were other communications contravene any of the Data Protection Principles?

64. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal

data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and potential consequences of disclosure against the legitimate public interest in confirming or denying if further information is held.

Reasonable expectations

65. The council's reasons for relying on neither confirming nor denying is that [name redacted] is entitled to expect that his personal affairs, namely whether he is or is not communicating with the council is not disclosed to the general public particularly due to the contentious nature of matters relating to [business name redacted] and the tension between him and some local residents.
66. The council consider that [name redacted] may be distressed to know that the council is confirming or denying whether he is communicating with the council. Whilst the public is entitled to know that the council is dealing with planning enforcement matters at [business name redacted] it does not consider it needs to confirm if other communications are happening, or not, outside of this.
67. The council has stated that it believes that it can meet legitimate public interests by making statements about its ongoing activities in relation to enforcement and the other issues at [business name redacted]. It is implicit that it is having some contact with [name redacted] such as the service of formal enforcement documentation and that highlighted as being withheld under regulation 12(5)(b) of the EIR.
68. But to reveal whether there has or has not been communications of a less formal nature within the period stipulated in the request, the council does not consider it appropriate to confirm or deny the existence of this type of communication even if it could withhold the content of the communication itself.

Consequences of confirming or denying

69. The council consider that confirming or denying contact could inhibit any future contact from [name redacted] in relation to seeking solutions to the publically known issues at [business name redacted] and this would not serve the public interest.
70. The Commissioner is mindful that an individual may be caused distress to know that a public authority is revealing their personal data to the general public which would not be in their reasonable expectations.

Balancing the rights and freedoms of the data subject with the legitimate interest in disclosure.

71. The council consider that it is in the public interest in knowing whether or not it is communicating with [name redacted] regarding the planning issues highlighted in this case about [business name redacted]. But to know whether or not there has been communications outside of these issues, it considers there would be more public interest in knowing that the council is not divulging that sort of information into the public domain.
72. The complainant has referred to a previous decision notice² in which the Commissioner found that the public authority could not rely on section 40 of the FOIA to withhold information of a sole trader.
73. On reviewing that decision notice, the Commissioner, on considering the circumstances of that case determined that the requested information could not be withheld under section 40(2) of the FOIA. However, the information being withheld, for that case under section 40, was directly related to the issue that the request was about.
74. The information that the council is neither confirming nor denying to hold in this case is not the information directly related to the planning issues, but whether there has been any other communications outside of the planning issue.
75. As stated above, the complainant's request was for 'all communications' and this casts a wide net in that it would include any communication, including that outside of the ongoing planning issues.
76. The Commissioner on considering this sees that the communications that the council are refusing to neither confirm or deny having are communications that fall outside of the ongoing planning issues. If it were communications regarding the planning issues, that it was neither confirming nor denying, then there may be more weight in reasonable expectations for disclosure.
77. The council has though, confirmed that there have been communications with [name redacted] and his business, but this is only in relation to the

² https://ico.org.uk/media/action-weve-taken/decision-notices/2013/802230/fs_50450700.pdf

ongoing planning issues and that has been withheld under regulation 12(5)(b) of the EIR.

78. The Commissioner's view is that revealing whether or not other communications have been going on outside of the planning issues would be outside the individual's reasonable expectations and may cause distress to the individual should it be divulged to the general public if there has been other communications or not.
79. On this, the Commissioner's decision is that the council was correct to neither confirm nor deny whether there has been any other communications in this case.

Right of appeal

80. 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

81. 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.
82. 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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