

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

Date: 20 June 2017

Public Authority: London Borough of Bromley
Address: Civic Centre
Stockwell Close
Bromley
BR1 3UH

Decision (including any steps ordered)

1. The complainant submitted a request to the London Borough of Bromley (the Council) for communications between Council officers and councillors in relation to planning applications he had submitted. The Council withheld the information falling within the scope of the request on the basis of the exception contained at regulation 12(4)(e) (internal communications) of the EIR. The Commissioner is satisfied that the information falls within the scope of the exception. However, she has concluded that the public interest in maintaining the exception does not outweigh the public interest in disclosing the information.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the information falling within the scope of his request.
3. 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

4. The complainant submitted a request to the Council on 26 September 2016 seeking the following information:

'Emails and Documents Between Councillors and the the planning team relating to Holwood Farm Shop, BR2 6AB. Reference may include 16/02897/RECON, 15/03635/CONDIT, 15/03635/FULL3 Date range: From July 2015'
5. The Council responded on 26 October 2016 and confirmed that it held the requested information but considered it to be exempt from disclosure on the basis of regulation 12(4)(e) (internal communications) of the EIR.
6. The complainant contacted the Council on 27 October 2016 and asked it to conduct an internal review of this decision.
7. The Council informed him of the outcome of the review on 14 November 2016. The review upheld the application of regulation 12(4)(e).

Scope of the case

8. The complainant contacted the Commissioner on 5 December 2016 in order to complain about the way his request for information had been handled. The complainant disputed the Council's reliance on regulation 12(4)(e) as a basis to withhold the information falling within the scope of his request.

Reasons for decision

9. Regulation 12(4)(e) states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. Rather, as long as the requested information constitutes an internal communication then it will be exempt from disclosure.
10. The information falling within the scope of this case consists of emails between Council officers and a councillor. The Council argued that such information clearly fell within the definition of an internal communication.

11. The Commissioner accepts that that in the context of a local council an internal communication includes communications between an elected member and Council officers, in the same way that any communications within a central government department between ministers and civil servants would be considered to be internal communications. The Commissioner therefore accepts that the withheld information clearly falls within the scope of the exception provided by regulation 12(4)(e).

Public interest test

12. Regulation 12(4)(e) is a qualified exception and therefore the Commissioner must consider whether the public interest in maintaining the exception outweighs the public interest in disclosing the requested information. In doing so, the Commissioner recognises that regulation 12(2) of the EIR specifically provides that public authorities should apply a presumption in favour of disclosure.

Public interest arguments in favour of maintaining the exception

13. In its responses to the complainant the Council argued that withholding the information allowed local authorities to discuss the merits of proposals and the implications of decisions internally without outside interference. It also allowed Council officers to have a space to think in private when reaching decisions. The Council argued that disclosure of this information would harm the way local authorities make decisions or give advice because it would hinder the work and progress of all local authorities as they will be unable to freely discuss ideas for fear of their discussions becoming public, including discussions concerning confidential or controversial matters.
14. As part of her investigation the Commissioner asked the Council whether there were any specific arguments which supported withholding the information in question. In response the Council explained that the councillor and officer had an open discussion about the application and this was considered to be an internal discussion. The Council explained that it was concerned that release of the information would stifle future communication between officers and members who would be fearful that any communications they had could be placed in the public domain. The Council acknowledged that it was the principle of this type of discussion being able to occur in private which it was seeking to try and protect in order to ensure the effective running of the Council rather than anything specific in the information itself.
15. The Council also explained to the Commissioner that whilst the application to which the requested information relates has been determined, this did not preclude further applications or discussions pursuant to the application.

16. Finally, the Commissioner asked the Council to comment on the complainant's allegation that in considering this planning application it did not follow planning guidelines (see below for further details). In response the Council explained that it was satisfied that the conditions applied to the planning permission met the tests for planning conditions set out in the Planning Practice Guidance. The Council noted that the complainant has the right of appeal to the Planning Inspectorate in relation to this decision if he so wishes.

Public interest arguments in favour of disclosing the withheld information

17. The complainant acknowledged that there was a public interest in withholding information in respect of interdepartmental communications, however this was not the type of information he had requested. Rather his request specifically sought communications between Council officers and councillors. The complainant argued that in respect of communications with councillors, there are guidelines to ensure non pre-determination, openness and that no undue influence is exerted on officers. The complainant specifically referred the Commissioner to the following extracts from the Local Government guidelines 'probity in planning: the role of councillors and officers':

2.6 ... "It is important, therefore, that the process is characterised by open and transparent decision-making."

2.7 ... "planning authorities should make planning decisions affecting these interests openly, impartially, with sound judgement and for justifiable reasons. The process should leave no grounds for suggesting that a decision has been partial, biased or not well founded in any way."

6.12 ... "councillors should not put improper pressure on officers for a particular recommendation, and, as required by the code, should not do anything which compromises, or is likely to compromise, the officers' impartiality. "

... "provisions requiring the reasons for call in to be expressed in writing so that there is a record of decision, and should refer solely to matters of material planning concern."

18. The complainant argued that the planning process is structured to ensure openness, and that if information from councillors to officers is not publicly available then the system is not actually open, it is possible for decisions to be made prior to the public meetings, hence the public meetings simply become a box ticking exercise.
19. In the particular circumstances of this application, the complainant explained that conditions were attached to the development for which

there are strict guidelines which in his view were not followed. He explained that this caused a further round of application and significant delays to the development and the purpose of his request was to see if this was influenced or predetermined by councillors.

20. The complainant also argued that the planning matter was no longer live and therefore little weight should be afforded to the safe space for deliberation in line with the Commissioner's guidance on this exception.
21. Finally, the complainant argued that the design of both the planning system and the EIR is to promote fairness and transparency. If information of this nature is never disclosed then this essentially circumvents all the designs of the systems.

Balance of the public interest arguments

22. With regards to the arguments in favour of maintaining regulation 12(4)(e), although a wide range of information will be caught by the exception, in the Commissioner's view, the public interest should be focused on the protection of the internal deliberation and decision making processes. Arguments about protecting such deliberations and processes often relate to preserving a 'safe space' to allow a public authority to debate live issues away from external scrutiny. They also relate to preventing a 'chilling effect' on free and frank views in the future. The weight that applies to these factors will vary from case to case, depending on the timing of the request and the content and context of the particular information in question.
23. Furthermore, as the Commissioner's guidance on this exemption explains, there is no automatic public interest in withholding information just because it falls within this class-based exception. Neither should there be a blanket policy of non-disclosure for a particular type of internal document. As noted in the preceding paragraph, public interest arguments should always relate to the content and sensitivity of the particular information in question and the circumstances of the request.
24. The Commissioner has some sympathy with the Council's position. She accepts that in order to make effective decisions public authorities need to be able to discuss some matters away from public scrutiny, particular if those matters are controversial or sensitive. Furthermore, the Commissioner accepts that disclosure of communications which the participants considered to be private, as is the case with the withheld information sought by this request, would be likely to cause some risk of a chilling effect on similar discussions in the future. The public interest in maintaining the exception in the circumstances of this case should not be underestimated.

25. However, in the Commissioner's opinion the suggestion in the Council's responses to the complainant that disclosure of the withheld information would hinder the work and progress of *all* local authorities is a significant exaggeration of the consequences of a potential disclosure. Whilst the Commissioner would accept that disclosure risks having an impact on the nature of discussions between councillors and officials within this authority on planning matters, and potentially between the same parties on non-planning matters, she does not accept that disclosure simply of this information would have the sort of widespread chilling effect across other local authorities envisaged by the Council.
26. Furthermore, the Commissioner believes that the case for arguing that the public interest favours maintaining the exception is significantly weakened by the fact the Council has acknowledged that there is nothing specific in the communications that it is seeking to protect; rather it is the principle of these types of communication being kept private. As noted, the Commissioner understands why the Council considers this principle to be important. However, as the Commissioner has made clear in her guidance, there should not be a blanket policy of non-disclosure for a particular type of internal document.¹ Rather, the public interest in withholding particular information should always focus on the content and sensitivity of the specific information in question. In light of the Council's comments, and indeed based on her own review of the withheld information, the Commissioner is of the opinion that the information in question does not appear to be overly sensitive and this arguably reduces the likelihood of a chilling effect occurring if the information was disclosed.
27. With regard to the safe space arguments, the Commissioner acknowledges that the complainant may seek to challenge the outcome of the planning application, or indeed submit further related applications. However, as the planning application has been determined, the Commissioner believes that little weight should be given to the safe space arguments in the circumstances of this case.
28. Turning to the public interest arguments in favour of disclosure, the Commissioner wishes to note that it is not her role to comment on the validity of the complainant's allegations that planning guidelines were not followed in relation to this application. However, the Commissioner believes that the complainant has made some broader compelling arguments in respect of the public interest in the planning process being

¹ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf see paragraph 47.

open, transparent and accountable and that these arguments attract significant weight.

29. In light of this significant weight, and taking into account the presumption in favour of disclosure contained at regulation 2(2) of the EIR, along with the limited weight that she believes should be attributed to the public interest in maintaining the exception, the Commissioner has concluded that by a narrow margin the public interest favours disclosing the withheld information.
30. The Council therefore needs to provide the complainant with a copy of the information falling within the scope of his request.

Right of appeal

31. 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

32. 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.
33. 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

Jonathan Slee
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