

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 25 January 2019

Public Authority: Hertsmere Borough Council

Address: Civic Offices
Elstree Way
Borehamwood
Herts
WD6 1WA

Decision (including any steps ordered)

1. The complainant has requested information relating to a planning application. Hertsmere Borough Council confirmed that some of the information was not held and withheld other information under the exceptions for interests of the information provider (regulation 12(5)(f) and internal communications (regulation 12(4)(e)). During the Commissioner's investigation the council dropped its reliance on regulation 12(4)(e) but applied the exceptions for commercial confidentiality (regulation 12(5)(e)) and the course of justice (regulation 12(5)(b)) to withhold information.
2. The Commissioner's decision is that Hertsmere Borough Council complied with regulation 5(1) but that it breached regulation 11(4) and failed to demonstrate that the exceptions in regulation 12(5)(b) and regulation 12(5)(e) are engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
4. 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.

Background

5. The complainant has stated to the Commissioner that they believe Hertsmere Borough Council did not follow national and local planning policies in their consideration of the planning application to which the request relates. They also believe that the public authority misled the elected councillors on their Planning Committee by stating in the formal report to that committee that their recommendation was in line with all current planning policies.
6. The complainant has stated that they had specifically flagged up this suggested non-alignment with the relevant policies well in advance of the Planning Committee meeting and had continued to press their concerns with public authority officials after the Committee meeting but before promulgation and publication of the final decision.
7. The complainant's request, therefore, is an attempt to ascertain more information associated with their outlined concerns.

Request and response

8. On 21 July 2017, the complainant wrote to Hertsmere Borough Council (the "council") and requested information in the following terms:

"[details redacted]"

In relation to the above planning application, I am writing to request the following information covering the period, 1 January 2016 to 21 July 2017:

1) All notes of meetings and correspondence between Council officials and Griggs Homes (the applicant);

2) Any notes of internal discussions and deliberations between Council officials, including on any correspondence received from third parties; and

3) Any notes of discussions between Council officials and elected Councillors, including those on the Planning Committee"

9. The council responded on 18 August 2017 and withheld the information in part 1 of the request under the exception for interests of the information provider (regulation 12(5)(f)), withheld the information in part 2 of the request under the exception for internal communications (regulation 12(4)(e)) and confirmed that it did not hold the information in part 3 of the request.

10. Following an internal review the council wrote to the complainant on 21 August 2018. It revised its position and disclosed some information to the complainant, maintaining its reliance on the exceptions to withhold other information.

Scope of the case

11. On 15 November 2017 the complainant contacted the Commissioner to complain about the council's failure to respond to their request for internal review. Subsequent to being contacted by the Commissioner the council issued an internal review response on 21 August 2018.
12. During the Commissioner's investigation the council confirmed that, following the disclosure of further information to the complainant, it had withdrawn its reliance on regulation 12(4)(e). It also confirmed that it was not relying on regulation 12(5)(f). The council further confirmed that it was withholding information under regulation 12(5)(b) and regulation 12(5)(e). The Commissioner confirmed with the complainant that she would consider whether the council has correctly withheld information under these exceptions and whether it has disclosed all the relevant (non-excepted) information it holds.

Reasons for decision

Regulation 5 – duty to provide environmental information

13. Regulation 5(1) of the EIR states that "*...a public authority that holds environmental information shall make it available on request.*"
14. In this instance the complainant considers that the council has failed to provide all the relevant (non-excepted) information falling within the scope of the request.
15. The council provided the Commissioner with details of the searches it conducted to locate and retrieve any information falling within the scope of the request.
16. The council confirmed that all information held in relation planning application 17/0078/FUL, including pre-application discussions, is held electronically in the Planning Duty Management System (DMS), where all information is marked either 'open' or 'sensitive'. It explained that all open documentation can be inspected by the public and downloaded via Planning Portal on the council's website.

17. The council further explained that, if an internal note relevant to a planning application is brought into existence, it is the responsibility of the case officer to add it to the electronic file in the Planning DMS and to determine whether it is marked 'open' or 'sensitive'. The council confirmed that any original note would then be securely destroyed as is the case with all paper-based planning documentation after it has been uploaded to the Planning DMS.
18. The council confirmed that, as planning application 18/0078/FUL is a recent planning application and, as planning application files are kept indefinitely, there is no evidence of the destruction of any recorded information relevant to the complainant's request. However, given the complainant's concerns in this regard, the council directed its Information and Digital Services department to conduct an all-systems database search to include the council's email system using the search terms "[details redacted]" and "[address redacted]". It confirmed that this search did not locate any additional relevant information.
19. In addition to their general concerns about the extent of information provided, the complainant also provided the Commissioner with specific instances of perceived shortfalls in disclosures.
20. Firstly, the complainant provided the Commissioner with copies of third party correspondence which they stated had not been provided amongst disclosures made by the council in relation to part 2 of their request. The complainant acknowledged that this information would not fall within the scope of this part of the request, however, they suggested that the correspondence would have resulted in discussions and or deliberations within the council which would have generated information falling in scope. The Commissioner put this to the council and the council explicitly confirmed that no such notes or other information was held.
21. Secondly, the complainant also made reference to a meeting held between senior council officials in the week beginning 22 May 2017, to discuss points raised in emails sent to council officials by the complainant, in advance of a meeting of the Planning Committee on 25 May 2017. They suggested that a record should have been kept of this meeting and this should have been disclosed by the council.
22. The Commissioner put this to the council and the council confirmed that a technical briefing with members of the Planning Committee did take place on 23 May 2017, the purpose of which was for officers to respond to any technical questions associated with the forthcoming planning meeting of 25 May 2017. The council confirmed that it is not standard practice to minute or otherwise make records of technical briefings and that, therefore, the relevant information is not held.

23. Finally, the complainant highlighted that no internal discussions and deliberations between council officers from a specific date (22 March 2017) have been released. The complainant has argued that it cannot be the case that no notes were made of key meetings and/or telephone discussions after this date.
24. Again, the Commissioner put the complainant's concerns to the council and the council stated that, aside from the redacted information which it disclosed to the complainant at the internal review stage, discussions and deliberations between council officers may well have taken place but these were not recorded. The council confirmed that it had conducted a search of its DMS and no relevant information was found to be held. The council further confirmed that no notes or emails relating to any internal discussions on how to reply to associated correspondence from the complainant or their wife is held.
25. The Commissioner is mindful of the complainant's concerns regarding the extent of information disclosed and notes their expectations that further information should be held. However, having considered the searches conducted by the council and its conventions regarding the recording of information and manner in which records are created, she has concluded that, on the balance of probabilities, it has correctly confirmed that no further relevant information is held.
26. In light of the above, the Commissioner has concluded that the council complied with regulation 5(1) of the EIR.

Regulation 5(2) – time for compliance

27. Regulation 5(2) provides that authorities should disclose environmental information requested under regulation 5(1) of the EIR 'as soon as possible' and no later than 20 working days after the date of receipt of the request.
28. In this case the complainant submitted their request on 21 July 2017 but the council failed to disclose some of the information it holds until the time of the internal review, 21 August 2018. The Commissioner, therefore, finds that the council breached regulation 5(2) of the EIR.

Regulation 11 – internal review

29. Regulation 11 of the EIR sets out public authorities' obligations in relation to the duty to provide a complaints or 'internal review' procedure in relation to the handling of requests for information.

30. Regulation 11(1) states:

"...an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request."

31. Regulation 11(3) states:

"The public authority shall on receipt of the representations and free of charge—

(a) consider them and any supporting evidence produced by the applicant; and

(b) decide if it has complied with the requirement."

32. Regulation 11(4) states:

"A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations."

33. In this case the complainant made representations to the council under regulation 11(1) on 1 October 2017. After being prompted by the Commissioner the council issued its internal review response on 21 August 2018.

34. The Commissioner finds that the council breached regulation 11(4) of the EIR.

Regulation 12(5)(e) – commercial confidentiality

35. The council withheld information associated with part 1 of the request, specifically notes of meetings or correspondence between the council and the applicant (and/or their agents), including an associated viability report.

36. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest".

37. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She has considered how each of the following conditions apply to the facts of this case:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

38. The council has stated that pre-application discussions between itself and the developer regarding prospects for obtaining planning permission for the redevelopment of 25 London Road, including the developer's viability report, are commercial in nature.
39. Having viewed the information and considered the council's submissions it is clear to the Commissioner that it relates to a commercial activity, namely a developer's proposed redevelopment of land.

Is the information subject to confidentiality provided by law?

40. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
41. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
42. The council has stated that it considers confidentiality clearly attaches to discussions with a developer on the redevelopment of land in a manner that has the potential to add substantial development value to that land. The council has argued that the developer in this instance is entitled to consider such discussions (for which it has paid the council a fee) to be confidential in nature. It has further argued that the developer is also entitled to expect its viability appraisal report and the council's review of said report to be confidential in nature.
43. The Commissioner notes that the information is not trivial in nature and acknowledges that it was provided to the council with an expectation that it would be handled in confidence.
44. In view of the above, the Commissioner is satisfied that the information withheld under this exception is subject to confidentiality provided by law.

Is the confidentiality provided to protect a legitimate economic interest?

45. The Information Rights Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011) that, to satisfy this element of the exception, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
46. In the Commissioner's view it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm would be caused by the disclosure.
47. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She accepts that "would" means "more probably than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:

"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".
48. The council has stated that it considers this criterion of the exception is satisfied because confidentiality is required to protect the economic interests of the developer in relation to pre-application discussions and the viability of the proposed development, including the council's review of it. The council has argued that it is likely that disclosure of the information would adversely affect the interests of developer and be of benefit to its competitors. The council has also argued that disclosure would adversely affect the economic interests of its viability consultants.
49. The Commissioner's correspondence to the council invited its submissions and confirmed that, where ascribed adverse effects relate to third parties, she expected that it should ensure that it has either consulted with the party or parties in question or otherwise be able to demonstrate that it has direct knowledge of its concerns. The council confirmed that it did not consult with any of the third parties but that it felt it was able to identify harms to their interests that disclosure would cause.
50. In considering this matter the Commissioner has had regard for the decision of the First-Tier (Information Rights) Tribunal (the "Tribunal") decision in *Hartlepool Borough Council vs the Information Commissioner* (EA/2017/0057). In this case, in paragraph 54 of the decision, the Tribunal stated the following in relation to the affected party ("Peel")

"What Peel has completely failed to do, however, is to support its assertions with evidence. There are no witness statements, and no evidence or even arguments to link the disclosure of any specific aspect of the information with any specific business interests that would or would be likely to be prejudiced by its disclosure. Peel has not said, for example, that it is in the process of tendering for another development project which is comparable...."

51. In paragraph 55 the Tribunal goes on to say:

"The Commissioner had highlighted the need for a much greater level of specificity. Peel's response that it does not consider the Commissioner's request for a more "granular explanation" is reasonable, misses the point. The need for the explanation does not arise from the Commissioner's request. It arises because the onus rests with the party making the assertion that the exemption is engaged to make good its claim. So, for example, if a manufacturer of widgets were to claim that disclosure of information relating to its dealings with a particular commercial partner would or would be likely to prejudice its commercial interests, it would not be sufficient for it to say simply that the manufacture of widgets is a competitive business, that it enters into similar agreements as part of its business and will therefore suffer prejudice if the information became available to its competitors. It would need to demonstrate the link between the specific information in issue and the claimed prejudice. So for example, it might show that the information would disclose that it manufactures its widgets in a particular way that is cost effective, and that is not known by its competitors, or that it had structured its agreement in a way that is unusual in the industry by charging its widgets at an unusually low mark-up because of a commitment that it would provide training at a higher return than usual."

52. Whilst the Tribunal was referring to an instance of the application of section 43(2) of the FOIA, in relation to a party's commercial interests, the Commissioner considers that the principle, regarding the need for public authorities to identify explicit instances of harm and link this to the disclosure of specific information, is transposable to the facts of this case. Moreover, in order for regulation 12(5)(e) to be engaged, it must be shown that specific adverse effects *would* follow as a direct result on information being disclosed. There is, therefore, an enhanced need for public authorities to show a causal link between withheld information and claimed adverse effects.

53. In this case the council's submissions provide no detail whatsoever about the specific effects of disclosure nor do they explain how disclosure would result in actual harm to any party's legitimate economic interests. In order for the exception to be engaged it is not

sufficient to simply demonstrate that information is subject to confidentiality provided by law – it is not self-evident that the disclosure of such information would result in adverse effects to legitimate economic interests.

54. Having viewed the withheld information the Commissioner considers that a case might be made for engaging the exception but that the council has, in this instance, failed to make this. The absence of detail in its arguments leaves the Commissioner with the impression that the council has sought to apply the exception on a general basis without regard for the specific factors or the level of detail required. The Commissioner also considers that, in failing to directly consult with any of the relevant parties following receipt of the request, the council's arguments regarding potential harm do not reflect matters as they stood at the time of the request and, therefore, carry significantly less weight.
55. Whilst recognising that it might be that a case could be made for withholding the information, the Commissioner does not consider it to be her role to generate arguments on behalf of public authorities. In this case the Commissioner's letter of investigation clearly set out the level of detail required for engaging the exception and the council has failed to meet this threshold.
56. On the basis of the arguments provided the Commissioner has concluded that the council has failed to demonstrate that disclosure of the information would harm the legitimate economic interests of any person. As she has found that the exception is not engaged the Commissioner has not gone on to consider the public interest test.

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

57. The council redacted information from 3 emails disclosed to the complainant
58. Regulation 12(5)(b) provides that a public authority may refuse to disclose information to the extent that 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 inquiry of a criminal or disciplinary nature.
59. The council has stated that the withheld information consists of legal advice in relation to a section 106 Agreement and that it has been withheld "*...on reliance of regulation 12(5)(b) which protects solicitor client privilege*".

60. For regulation 12(5)(b) to apply to information subject to Legal Professional Privilege (LPP), public authorities must demonstrate that disclosure of the requested information would have an adverse effect on the course of justice.
61. The Commissioner and the Information Tribunal have previously acknowledged that disclosure of information subject to LPP may adversely effect the course of justice by undermining of the general principles of LPP and of the administration of justice. However, the Commissioner considers that it falls to public authorities to explain why, in a specific instance, disclosure would have such adverse effects and explain how disclosure would produce them.
62. In this case the council has provided no details of specific context within which legal advice was sought nor has it explained why disclosure would adversely affect the course of justice. Whilst the Commissioner recognises the importance of the principle of LPP, she does not consider it to be self-evident that information subject to LPP will always result in adverse effects. Being mindful of this and, given the importance of the general principle behind LPP and alive to the possibility that there may be merit in the application of the exception in this case, the Commissioner invited the council to make further submissions.
63. The council declined to make any further submissions, except to state that it considered that there was a strong public interest in maintaining LPP.
64. Having read the council's submissions the Commissioner does not consider that it has been shown that disclosure would result in adverse effects to the course of justice. The extremely limited nature of the council's submissions suggest to the Commissioner that it either does not understand its obligations under the EIR or that it has sought to withhold the information on a general basis without attempting to properly justify its position.
65. The Commissioner's initial letter of investigation advises all public authorities that they will be given one opportunity to set out their final position in relation to the handling of a request for information. The same letter also clearly specifies, as it did in this case, the details required in order to demonstrate that the threshold for engaging an exception has been met. Where a public authority does not provide adequate submissions the Commissioner does not consider it is her duty to generate arguments on its behalf. In this case the Commissioner gave the council a further opportunity to provide arguments in respect of its application of regulation 12(5)(b) but it declined to do this.

66. The Commissioner is fully aware of the importance of LPP as general principle and any decision which might result in information subject to LPP being released is not one she would take lightly. However, having considered the withheld information and the council's submissions, she has concluded that it has not been shown that disclosure would result in adverse effects to the course of justice. As the exception is not engaged the Commissioner has not gone on to consider the public interest test.

Other matters

67. Although they do not form part of this decision notice the Commissioner would like to note the following matters of concern.
68. During the handling of this complaint the council repeatedly failed to meet the deadlines set within the Commissioner's correspondence. This has had the effect of unnecessarily prolonging the Commissioner's investigation.
69. In view of this the Commissioner has concerns that the council might not be taking its responsibilities under the EIR seriously or that staff have not been provided with adequate training.
70. The Commissioner expects that, in future, the council will provide prompt responses to her enquiries.

Right of appeal

71. 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

72. 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.

73. 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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