

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

Date: 6 April 2021

Public Authority: Royal Borough of Windsor and Maidenhead
Address: Town Hall
St. Ives Road
Maidenhead
SL6 1RF

Decision (including any steps ordered)

1. The complainant has requested information regarding a planning application.
2. The Commissioner's decision is that the Royal Borough of Windsor and Maidenhead were correct to withhold information on the basis of regulations 12(5)(b) and 13(1). She also finds that on the balance of probabilities, the council does not hold any further information in scope of the request. However, the council responded outside of statutory timescales and therefore breached regulation 5(2) of the EIR.
3. The Commissioner does not require any steps.

Request and response

4. On 23 July 2019, the complainant requested information from the Royal Borough of Windsor and Maidenhead ('the council') in the following terms:

The request is made in reference to planning application 19/01714

"With regard to the statutory duty to validate the application, there has been a great deal of dialogue between the Authority and the developer. This was undertaken in the knowledge that a fresh application was going to be submitted (I request sight of this under Freedom of Information Act please)."

5. The complainant followed up the lack of a response with the planning department on 6 November 2019, then directly with the information governance team on 13 January 2020.

6. The complainant made a further request on 19 December 2019:

The request is also made in reference to planning application 19/01714

"I require under the Freedom of Information Act and Access to Information Act all correspondence, notes and minutes relating to this activity and legal advice sought and obtained."

7. On 20 December 2019 the council acknowledged the request of 19 December 2019, it also asked for further details of the previous request which had not yet been responded to.
8. On 22 January the council advised that they were applying regulation 7 (extension of time) to the request dated 19 December 2019.
9. On 12 February 2020 the council gave a single response covering both requests, it stated that it was attaching all of the information held by the council relating to application No.19/01714 as well as information relating to application 15/04147/FULL which led to the later application. It cited the following exceptions as the basis for withholding information: regulation 13(1) - personal data, and regulation 12(5)(b) - the course of justice and inquiries.
10. The complainant requested an internal review on 22 February 2020 on the grounds that they disputed the use of the exemptions cited and the belief that the council held further information.
11. The council provided the complainant with the outcome of an internal review on 20 March 2020 in which it upheld its position.

Scope of the case

12. The complainant contacted the Commissioner on 19 June 2020 to complain about the way the requests for information had been handled. Specifically, the complainant is dissatisfied with the delay in responding to the requests, disputing the application of the cited exemptions to withhold some information, and the complainant believes the council holds further information.
13. The Commissioner considers the scope of the case is to consider whether the council is entitled to rely upon regulation 13(1) and 12(5)(b), and whether, on the balance of probabilities, it holds any further information in scope of the requests. She will also consider if the council breached any procedural regulations in regard to the statutory timescales for responding.

Reasons for decision

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

14. Regulation 12(5)(b) of the EIR provides that a public authority may refuse to disclose information if to do so 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.
15. The Commissioner considers that the course of justice element of the exception is wide in coverage and accepts that it can include information about civil investigations and proceedings.
16. The successful application of the exception is dependent on a public authority being able to demonstrate that the following three conditions are met:
 - the withheld information relates to one or more of the factors described in the exception,
 - disclosure would have an adverse effect on one or more of the factors cited, and
 - the public interest in maintaining the exception outweighs the public interest in disclosure.

17. The Commissioner's guidance on the application of regulation 12(5)(b) confirms that the exception will be likely to be engaged if the information in question is protected by legal professional privilege (LPP). This is due to the adverse effect on the course of justice that would result through the disclosure of, otherwise confidential, information covered by LPP.
18. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTA (EA/2005/0023)* (Bellamy) as:

"... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation."
19. There are two categories of LPP – litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege applies when no litigation is in progress or contemplated. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.

Is the exception engaged?

20. The Commissioner has reviewed the withheld information:
 - ('Document 1') comprises independent legal advice sought by the council in relation to the handling of the planning application.
 - ('Document 2') relates to the independent legal advice sought and obtained by the developer of the site ('the Developer') in relation to the same application. The Developer shared the information with the council in the hope that their position would influence the council's decision regarding the original application.
21. The council has stated that for both documents the specific limb of Regulation 12(5)(b) which is relied upon is disclosure affecting the course of justice as the withheld information attracted legal professional privilege, and litigation privilege in particular.

22. The council advised that the course of justice in relation to the withheld information relates to planning enforcement procedures being pursued by the council, in response to a breach of an existing planning permission by the developer of the site.
23. The council advised that the legal advice sought in Document 1 would be used to support the decisions and actions of the council's Planning Enforcement Department relating to the breach.
24. The council advised that the legal advice in Document 2 would be used by the Developer to defend the works undertaken on the site, against the decisions and actions of the Planning Enforcement Department.
25. The council advised that it had not shared its own legal advice with the Developer or any third party.
26. The council advised that the Developer chose to share their legal advice with the Planning Enforcement Department, however they had maintained confidentiality of the information in any wider sense and did not consent for it to be shared with the world at large. As such the council confirmed that legal professional privilege still remains for Document 2.
27. The council maintains that disclosure of its own legal advice would adversely affect the strength of its position to defend its enforcement action and the decision to find the developer in breach of the original planning permission. If this confidential information were made public, it would be likely to cause harm to the council's management of the application.
28. The council reasoned that similar considerations apply to the Developer's advice. If the legal advice they had received were made public, the strength of their case and likelihood of their actions surrounding the development of the site to date being challenged by those third parties seeking to prevent development would be compromised and they would be set at a disadvantage.
29. The council advised that the planning enforcement department has received many complaints about the implementation of the planning application and that there is a live investigation into the development of the land. It stated that it is likely that further advice will be sought on both sides to supplement the existing advice.
30. The council advised that any resulting actions will be subject to appeal and judicial process, so any disclosure at this time may undermine or prejudice the council's position. Furthermore, the council considers that disclosure of any of the held legal advice would have a detrimental

impact on the legal process currently underway and would, therefore, result in a very real threat to the course of justice

31. Having viewed the withheld information and referred to the council's submissions the Commissioner is satisfied that the withheld information is subject to LPP and that it therefore falls within the scope of the exception.
32. In relation to adverse effects to the course of justice, following the decision of the Upper Tribunal in the case of *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC) (28 March 2012), the Commissioner considers that adverse effect upon the course of justice can result from the undermining of the general principles of legal professional privilege and of the administration of justice. Whilst the Commissioner accepts it is not a foregone conclusion that the disclosure of privileged information would adversely affect the course of justice; she considers that there would need to be special or unusual factors in play for this not to be the case.
33. The council has explained how the legal advice received by both the council and the Developer could compromise the enforcement of, or the defence of actions in relation to, a breach of a planning application. It has also confirmed that the matters were still live at the time the request for information was made.
34. Having considered the available evidence, the Commissioner has concluded that the information is subject to LPP and she is satisfied that it is more probable than not that disclosure of the information would adversely affect the course of justice, and that the exception provided by regulation 12(5)(b) is therefore engaged. She has therefore continued on to consider the public interest test.

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 her 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 in disclosure

36. The council acknowledges that arguments in favour of disclosure concern improving the transparency of the planning application process and the various decisions regarding development of the site.

37. The complainant is concerned that information has been suppressed in order to enable the planning application to proceed.
38. The complainant states that the withholding of the information has compromised their ability to raise final objections to the planning committee, and to a judicial review and appeal.

Public interest in maintaining the exception

39. The Commissioner acknowledges that there will always be a strong public interest in maintaining LPP due to the important principle behind it which safeguards openness in all communications between client and counsel to ensure access to full and frank legal advice. She accepts that the maintenance of LPP is fundamental to the course of justice.
40. The council argues that there is a direct and very real threat of harm caused to both sides' in the event that their confidential legal advice was made public.
41. The council advised that the development of the site in question was a particularly emotive and high-profile case amongst members of the local community, attracting substantial interest and dialogue between all involved over the past few years.
42. The council therefore considers that the arguments for maintaining the confidentiality of private legal advice surrounding the case due to its sensitivity and importance outweigh the interests of making this information public.

Balance of the public interest

43. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible in relation to their actions. She recognises that there may be a need for enhanced transparency and scrutiny of decision making in planning cases.
44. However, in line with previous decisions of the Information Tribunal, the Commissioner also considers that there will always be a strong public interest in maintaining LPP due to the important principle behind it which safeguards openness in all communications between client and lawyer to ensure access to full and frank legal advice. The Commissioner acknowledges that LPP is, in turn, fundamental to the course of justice.
45. The Council has stated that this investigation relates to compliance with a planning approval that was originally granted in 2016, and that disclosure of the information would be likely to adversely affect any related enforcement action in the future.

46. The Commissioner is mindful, therefore, that at the time of the request the withheld advice was still live and relevant for possible future actions. Whilst the complainant or others might disagree with the council's position, there are existing legal channels available for those wishing to challenge any actions taken. In order to justify circumventing these channels, and interfere with the course of justice, sufficiently weighty public interest factors will need to be present.
47. The Commissioner considers that the public interest in the context of the EIR refers to the broader public good. Where decisions made by authorities have a significant effect on the local community, the balance in favour of disclosure might carry enough weight to challenge the weight in favour of maintaining the confidence attached to LPP. Whilst the complainant has indicated that information has been suppressed to enable the application to proceed, the Commissioner has no firm evidence of a significant effect on the local community.
48. The Commissioner considers that it is highly likely that disclosing the information would compromise the legal position of the council and the Developer. This, in turn, would represent an unwarranted interruption of the legal process and would result in specific damage to the course of justice.
49. In view of the above, the Commissioner does not consider that the arguments in favour of disclosure in this case carry significant, specific weight. She has determined that, in the circumstances of this particular case they are outweighed by the arguments in favour of maintaining the exception under regulation 12(5)(b).
50. The Commissioner concludes that the council has correctly applied the exception and that, in this case, the public interest favours maintaining the exception.

Regulation 13(1) – personal data

51. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
52. In this case the relevant condition is contained in regulation 13(2A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the

¹ As amended by Schedule 19 Paragraph 307(3) DPA 2018.

processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').

53. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then regulation 13 of the EIR cannot apply.
54. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

55. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

56. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
57. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
58. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
59. The council included 252 pages of email correspondence in its response. The redacted personal data within this correspondence relates to the names and contact details of junior planning officers, members of the public and external solicitors details. The names and contact details of senior planning officers have been left unredacted, which the council confirms is in accordance with its internal procedures for making information public in the interests of transparency.
60. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to and identifies the data subjects outlined above. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
61. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under

the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

62. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

63. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

64. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

65. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

66. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.

67. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"².

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph

68. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the EIR, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
69. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

70. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
71. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
72. The complainant is concerned with transparency of information relating to the council's actions and decisions.

Is disclosure necessary?

73. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under

(dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.

74. In this case the names and contact details of senior planning officers have been disclosed. The Commissioner considers that the remaining redactions, being the names of junior officers, external solicitors and members of the public, do not detract from relaying the purpose or meaning of the disclosed emails.
75. The council contends that withholding of a very limited amount of personal information relating to names and contact details had no bearing on the legitimate interests in making the disclosure and did not adversely affect the reader's understanding of the conversations of the matters at hand.
76. The council also raised the point that discussions concerning the development were of an emotive nature, and the whole development has been a high-profile and sensitive issue for the local community. It was concerned that should specific comments on the subject be linked to individuals this would be likely to cause undue distress.
77. The Commissioner supports disclosing the names of senior planning officers, who will have decision making authority, for the purpose of transparency. However more junior council officers do not have such responsibility and therefore would not have a reasonable expectation of being publicly identifiable in the context of the withheld information. Nor would members of the public or employees of external organisations.
78. The Commissioner considers that disclosure of the content of the emails, including the names of senior officers, provides sufficient transparency in order to meet the complainant's legitimate interest in disclosure.
79. The Commissioner does not consider that the disclosure of the remaining names and contact details would further the legitimate interest in transparency and accountability of the council.
80. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing, and it is unlawful. It therefore does not meet the requirements of principle (a).

The Commissioner's view

81. The Commissioner has therefore decided that the council was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).

82. Since the end of the transition period following the UK's departure from the EU, the GDPR were replaced by the UK GDPR. As this request was received before the end of that transition period, the application of regulation 13(1) has been decided by reference to the GDPR. However the Commissioner is also satisfied that the disclosure of the personal data to which that exception was applied would not contravene the UK GDPR for exactly the same reasons.

Regulation 5(1) – Duty to make environmental information available on request

83. Regulation 5(1) of the EIR states that: "*a public authority that holds environmental information shall make it available on request.*" This is subject to any exceptions that may apply.

84. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. She will also consider the actions taken by the authority to check that the information is not held, and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held.

85. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072) in which it was stated that "*there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records*". It clarified that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test the Commissioner applies in this case.

86. In discussing the application of the balance of probabilities test, the Tribunal stated that, "*We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.*" The Commissioner has therefore taken the above factors into

account in determining whether or not further information is held, on the balance of probabilities.

The complainants view

87. The complainant is concerned that the council are withholding information which has compromised their ability to raise final objections to the planning application.
88. The complainant contends that information has been suppressed purposefully, such that the planning approval is secured.

The council's response

89. The council confirmed that all the information it holds in scope of the request has been identified.
90. It stated that searches were completed by the entire planning department, which includes the sections '*Planning Enforcement*', '*Planning Policy*' and '*Planning Development*'.
91. The council advised that officers in the planning department interrogated their systems to locate any information in scope of the request. This included details of previous planning applications associated with the site held which are held in the '*Planning system*', and the emails within officers' accounts. It argued that the volume of information supplied on 12 February 2020 is testimony to the thoroughness of the searches that were carried out.
92. The council confirmed that the majority of information supplied was provided by the planning officer who was assigned as the case officer for the site appertaining to the applications. This case officer had been assigned from 2018 onwards. However, the council no longer has access to any personal communications the previous case officer may have had regarding the original application for the site dating back to 2015.
93. The council advised that whilst no information had been deleted intentionally, it no longer holds any personal communications from the case officer who was assigned between 2015 and 2018, as this person has left the organisation. It therefore does not hold any information in respect of this aspect of the request.
94. The council advised of no further statutory or business reasons why further information should be held.

Conclusion

95. The Commissioner has been presented with no firm evidence to support the complainant's assertions that the council holds more information than it has disclosed.
96. The Commissioner is satisfied that sufficient searches were carried out to identify information and notes the high volume of emails that were identified and released. She also accepts that the personal communications of the case officer prior to 2018 are no longer available to the council.
97. It has been necessary for the Commissioner to balance the complainant's view that the council are suppressing information against the arguments forwarded by the council. In this case, the Commissioner has been unable to find any reasons to support the notion that further information should exist.
98. Having considered the council's responses, and in the absence of any tangible evidence to the contrary, the Commissioner is satisfied that, on the balance of probabilities, the council does not have any further information within the scope of the request.
99. The Commissioner therefore considers that the council complied with its obligations under regulation 5(1) of the EIR.
100. No steps are required.

Regulation 5(2)

101. Regulation 5(1) requires a public authority that holds environmental information to make it available on request.
102. Regulation 5(2) requires this information to be provided to the requester within 20 working days following receipt of the request.
103. The complainant made the original request for information on 23 July 2019.
104. The council gave a response on 12 February 2020.
105. The Commissioner therefore finds that the council has breached regulation 5(2) by failing to respond to the request within 20 working days.
106. However, as the response was issued no steps are required.

Right of appeal

107. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

108. 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.

109. 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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