

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 17 January 2023

Public Authority: High Peak Borough Council
Address: Buxton Town Hall
Market Place
Buxton
SK17 6EL

Decision (including any steps ordered)

1. The complainant requested information about a specific piece of land referred to in the minutes of two meetings. High Peak Borough Council (the Council) withheld the information under regulations 12(4)(e) (internal communications) and 12(5)(b) (course of justice). The Commissioner's decision is that some of the information constitutes the complainant's own personal data, and as such regulation 5(3) of the EIR applies. The Commissioner has also determined that the Council has correctly applied regulations 12(4)(e) and 12(5)(b) to the withheld information. However, the Commissioner also finds that the Council failed to respond to parts 8 to 12 of the request within 20 working days and has therefore breached regulation 5(2) of the EIR.
2. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Issue a substantive response to parts 8 to 12 of the request in accordance with its obligations under the EIR.
3. The Council 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 Freedom of Information Act and may be dealt with as a contempt of court.

Request and response

4. On 27 March 2022 the complainant wrote to the Council and referred to a specific area of land known as George Street Wood, Glossop, and two Council meetings on 18 November 2020 and 3 February 2021 at which the subject matter was discussed. The complainant requested information in the following terms:

"I would like you to supply me with full un-redacted copies of all material related to the above two meetings so I can scrutinise them for conflicts of interest, bias or inappropriate conduct or business dealings".

Specifically, in relation to the meeting on 8 November 2020 and a report which was considered to develop George Street Wood, Glossop the request asked for:

1. "A full and un-redacted copy of this report
2. A full and un-redacted copy of the minutes to this meeting
3. Full copies of all material and discussions used in preparation of this report.
4. Details and minutes of any previous meetings that dealt with 'a proposal to develop George Street Wood, Glossop.

The above should include copies of pages

PART 2

1. George Street Wood, Glossop (**Pages 3-14**)"

In relation to agenda item 12 of the meeting on 3 February 2021 the request asked for:

- "5. A full and un-redacted copy of this decision and all briefing notes/handouts issued to Councillors at or prior to the meeting related to my garden, what they call George Street Wood.
6. A full and un-redacted copy of the minutes to this meeting
7. Details and minutes of any subsequent meetings that dealt with 'a proposal to develop George Street Wood, Glossop

The above should include copies of **pages 41-58** of

PART II

12. Call in of IED – George Street Wood, Glossop"

In addition, the complainant referred to page 39 of the public reports pack and submitted the following request:

- "8. Was there a meeting held on 2nd February 2020 for Call in report – George Street Wood (part 2)

If so I would like

9. A full and un-redacted copy of the minutes of this meeting
10. A full and un-redacted copy of the minutes to the (part 1) meeting

I would also like to know

11. How many meetings have been held relating to my garden, the area HPBC are now calling George Street Wood?
12. The dates of these meetings
13. Why in previous FOI requests have I been assured that HPBC do not use the name George Street Wood – when clearly they do?"

In their request the complainant pointed out that they owned part of the land which was the subject of the request.

5. The Council responded on 8 April 2022 and stated that the information was exempt under regulations 12(4)(e) and 12(5)(b).
6. On 21 April 2022 the complainant requested an internal review of the Council's refusal to disclose the information requested. The complainant also pointed out that the Council had not addressed parts 8, 11, 12 and 13 of their request.
7. The Council provided the outcome of its internal review on 10 May 2022 and merely stated that it had nothing further to add to its initial refusal.

Scope of the case

8. The complainant contacted the Commissioner on 13 June 2022 to complain about the way their request for information had been handled.
9. The Commissioner advised the complainant that part 13 of the request was not a valid FOIA request as it was a request for an explanation/opinion rather than recorded information.

10. Having viewed a copy of the withheld information, the Commissioner considers that some of the information requested constitutes the complainant's own personal data. For clarity, a requester's own personal data is exempt under regulation 5(3) of the EIR. Personal data is defined by the Data Protection Act 2018 (the DPA) as any information relating to a living and identifiable individual. The separate right of access provided by article 15 of the General Data Protection Regulation (the GDPR) therefore applies.
11. In light of the above, the scope of the Commissioner's investigation is to consider whether the Council correctly withheld information relevant to parts 1 to 7 of the request. He has also considered whether the Council has complied with its obligations under the EIR in respect of its handling of parts 8 to 12 of the request.

Reasons for decision

Regulation 5(3) – the complainant's own personal data

12. Regulation 5(3) of the EIR provides that any information to which a request for information relates, is exempt information if it constitutes personal data of which the requester is the data subject.
13. Section 3(2) of the Data Protection Act 2018 ("the DPA") defines personal data as: "any information relating to an identified or identifiable living individual".
14. The two main elements of personal data are therefore that the information must relate to a living person, and that the person must be identifiable.
15. 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 or an online identifier; or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
16. 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.
17. The Commissioner notes that the complainant is referred to by name on a number of occasions within two of the withheld documents – one document comprising legal advice and one report considered by the Council. The complainant is clearly identifiable from the information and the information is significant and biographical to them. The Commissioner is satisfied that this information constitutes the

complainant's own personal data and he finds that the exception at regulation 5(3) of the EIR is engaged in relation to this information and the Council was not obliged by the EIR to disclose the information in question.

18. The Commissioner notes that the remaining withheld information could be released without disclosing the complainant's own personal data. He has therefore gone on to consider whether regulations 12(4)(e) and 12(5)(b) of the EIR applies to the information contained within the withheld information which does not constitute the complainant's own personal data

Regulation 12(4)(e) – internal communications

19. Regulation 12(4)(e) of the EIR provides an exception from disclosure to the extent that the requested information comprises 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 falls within the scope of the exception.
20. The information which has been withheld under regulation 12(4)(e) comprises two reports which were considered within the closed session of two Council meetings. The reports were considered exempt from publication pursuant to Schedule 12A of the Local Government Act 1972.
21. Having viewed the withheld information the Commissioner is satisfied that it constitutes internal communications and therefore regulation 12(4)(e) applies to the information.

The public interest test

22. Regulation 12(1)(b) requires that where the exception under Regulation 12(4)(e) 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. The Commissioner is mindful of the provisions of Regulation 12(2) which state that a public authority shall apply a presumption in favour of disclosure.
23. The Council has not submitted any specific representation in favour of disclosure in this case, however, it acknowledges that issues relating to the land in question have been highly controversial in the local community, particularly regarding ownership of the land in question. The Council maintains that the land is unregistered and despite its efforts no owner of the land has been found.

24. The complainant contends that they own part of the land in question and provided the Council with a copy of a possession order dated 30 January 2018.
25. The complainant advised the Commissioner that, up until 2016, the site was designated as a regeneration area. However, in 2016, the site was included in the Council's Local Development Plan (LDP) as a designated "Local Green Space". The complainant alleges that this was an "abuse of the LDP consultation process" and was done with the intention of depriving them of development opportunities on the land in question.
26. The complainant disputes the fact that that part of their garden has become known as "George Street Wood" and alleges that the Council is attempting to dispossess lawful owners/possessors of the land for development purposes. The complainant considers that the Council has withheld the information with the intention of shielding itself from public scrutiny. They have also alleged that certain councillors involved in consideration of matters relating to the site may have undeclared conflict of interest relating to their involvement with a pressure group known as "Friends of George Street Wood".
27. In relation to the public interest in maintaining the exception, the Council has argued that it needs a safe space to deliberate matters relating to the land in question. It considers that councillors should be "free to make decisions sober from the effects of community pressure in a private thinking space".
28. The Council stated that it does not want this matter to "become political and those intentions are best served if the matter is considered in private according to parliaments intentions under the Local Government Act". The Council pointed out that the matter is "live" in that discussions are still ongoing relating to the land in question, a valuation report was undertaken in November 2021, a further report has been prepared for consideration and a plan for use of the land is being developed. The Council also considers the matter is live in respect of ownership issues, land registry applications, and ongoing county court injunctions. The Council advised that it has recently received notification from the land registry that a third party has applied to have their interest in the land registered.
29. The Commissioner's guidance on this exception¹ explains that although a wide range of internal information will be caught by the exception,

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-4-e-internal-communications/>

public interest arguments should be focussed on the protection of internal deliberation and decision-making processes. This reflects the underlying rationale for the exception being that it protects a public authority's need for a 'private thinking space'

30. The Commissioner has carefully considered the arguments put forward by the complainant and by the Council. He recognises the legitimate public interest in disclosing information that would inform the public about decisions concerning activities that may have an impact (whether positive or negative) on the environment. In this case, the Commissioner accepts that disclosure would provide the public with information relating to plans for the land in question and would increase public participation in decision making.
31. The Commissioner notes the complainant alleges that refusing to disclose the information suggests that the Council has something to hide. However, it cannot be assumed that a refusal to disclose information is based on a desire to cover up wrongdoing. In the Commissioner's experience there are many cases where the withheld information may be relatively innocuous, but the act of disclosure would have a detrimental effect on the public authority's ability to conduct its business effectively. In any event, the Commissioner has not seen any evidence of wrongdoing, therefore the complainant's argument does not carry significant weight in this case.
32. The Commissioner notes that there is a clear difference of opinion in terms of ownership of the land in question. The complainant alleges that their business owns part of the land, and on the other hand the Council alleges that the land is unregistered. It is not within the Commissioner's remit to determine land ownership disputes, and as such the Commissioner has not taken this into account. However, he appreciates that the complainant has concerns about, and a possible direct interest in matters relating to the land in question. In view of the dispute concerning land ownership, the Commissioner acknowledges that the complainant in this case has a clear interest in accessing information relating to the land in question.
33. With regard to attributing weight to the public interest arguments in favour of maintaining the exception, the Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This may carry significant weight in some cases. In particular, the Commissioner considers that the need for a safe space will be strongest when the issue is still live.
34. In the circumstances of this case the Commissioner accepts that at the time of the request and at the time of the internal review, matters concerning the land in question were ongoing and are still ongoing at

the time of this decision notice. Furthermore, the Commissioner is satisfied that the issues covered in the withheld information are ones that relate to the outstanding matters concerning the land. The Commissioner is also conscious that the withheld information contains detailed and frank internal discussions about a complex and contentious matter. In light of the above compelling arguments, in the Commissioner's view, significant weight should be attributed to the safe space arguments in this particular case.

35. Whilst he accepts that the arguments in favour of disclosure in this case carry some weight the Commissioner does not consider that they match the weight of the arguments in favour of withholding the information. The Commissioner's conclusion is, therefore, that the public interest in the maintenance of the exception outweighs the public interest in favour of disclosure of the requested information.
36. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019):

"If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19)
37. As covered above, the Commissioner has concluded that the public interest in maintaining the exception at regulation 12(4)(e) outweighs the public interest in disclosure of the information. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(e) was applied correctly.

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

38. Regulation 12(5)(b) states 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
39. In this case, the Council has withheld two documents which comprise legal advice from Counsel regarding matters relating to the land in question. The Council considers the withheld information to be covered by legal professional privilege (LPP), specifically 'advice privilege'.

40. The Commissioner has viewed the withheld information and is satisfied that it constitutes confidential communications between a client and a professional legal advisor made for the dominant purpose of providing legal advice. He therefore considers the information to be covered by LPP on the basis of advice privilege. The Commissioner is aware of no evidence suggesting that this privilege has been waived
41. The Council has explained that the withheld information is considered to be live as matters relating to the land in question are still under consideration. As the withheld information is subject to LPP and relates to a live matter, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged. The Commissioner will now go on to consider the public interest test.

Public interest test

42. The Commissioner has taken into account the public interest factors in the disclosure of the information which he has already considered under his analysis of regulation 12(4)(e).
43. In terms of the public interest in maintaining the exception at regulation 12(5)(b), the Council argued that disclosure would provide public access to privileged information at a time when the matters to which the legal advice relates is live. The Council pointed out that disclosure would reveal the arguments, strengths and weaknesses of its position, which would in turn unbalance "the playing field under which adversarial proceedings are meant to be carried out". The Council explained that a further report on the subject matter of the land in question is currently being considered. The Council believes that there is a public interest in it having a safe space to consider legal advice without any external interference, particularly in cases like this when the matter is still live and sensitive.
44. The Council also considers that, based on the history of communications with the complainant, disclosure would also lead to significant further correspondence from the complainant about the matter, This would in turn have a detrimental impact in its ability to consider the matter through the proper channels. It does not consider this to be in the public interest.
45. The Council also explained that the barrister who provided the legal advice is self employed. As such the Council considers that they would have had no reasonable expectation that their work would be put into the public domain, where it could be reproduced. The Council is also of the view that disclosure of the legal advice would have an adverse effect

on its ability to retain Counsel in the future because of the fear that any legal advice they provide would be published.

46. In balancing the opposing public interest factors in this case, the Commissioner considers that it is necessary to take into account the in-built public interest in the importance of maintaining the principle behind LPP. LPP is a fundamental principle of justice, and it is the Commissioner's well-established view that the preservation of that principle carries a very strong public interest. The principle exists to protect the right of clients to seek and obtain advice from their legal advisers so that they can take fully informed decisions to protect their legal rights.
47. The Commissioner accepts that there will always be a public interest in transparency, accountability and in members of the public having access to information to enable them to understand more clearly why particular decisions have been made and certain processes followed. He also notes that the complainant in this case has a personal interest in the subject matter as they are claiming ownership to part of the land in question.
48. However, the Commissioner does not consider that, in this case, there are sufficient or compelling enough arguments in favour of disclosure which would override the inbuilt public interest in information remaining protected by LPP.
49. The Commissioner's decision is, therefore, that the balance of the public interests favours the exception being maintained. This means that the Council was not obliged to disclose the requested information.
50. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the Regulation 12 exceptions. As stated above, in this case, the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in Regulation 12(2), is that the exception provided by Regulation 12(5)(b) was applied correctly.

Parts 8 to 12 of the request

51. Parts 8 to 10 of the request asked whether a meeting was held on 2 February 2022 to discuss George Street Wood and if so, for the minutes of the meeting. Parts 11 and 12 asked for information about how many meetings had been held to discuss the land in question and the dates of any meetings.
52. The Council contends that it was entitled to deal with these requests as a service complaint/routine correspondence, however it has not provided

the Commissioner with any evidence that it has issued any kind of response to these requests.

53. The Commissioner considers that these are valid FOIA requests as they are asking for recorded information which the Council may or may not hold, for example, dates and minutes of meetings concerning the land in question.
54. Regulation 5(1) of the EIR states that a public authority that holds environmental information shall make it available on request. This is however subject to any exceptions that may apply. Regulation 5(2) states that such information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
55. As far as the Commissioner has been able to establish the Council has, to date, failed to address these requests under the provisions of the EIR despite him asking the Council to do so. As such, the Commissioner finds that the Council has breached regulation 5(2) of the EIR.
56. In light of the above, the Commissioner now requires the Council to issue a response to parts 8 to 12 of the request which complies with the provisions of the EIR. The Council should confirm whether it holds the information requested and either disclose the information held or issue a valid refusal notice in accordance with regulation 14.

Other matters

Internal review

57. The Commissioner wishes to comment more generally on the way the Council has handled this request for information. The Council's correspondence to the complainant on 20 April 2022 setting out the outcome of the internal review merely stated that "I have nothing further to add to my substantive reply to your request for information". It also stated that it would pass a copy of the letter on to the planning department and noted the complainant's intention to refer the matter to the Commissioner.
58. The FOIA section 45 Code of Practice provides guidance to public authorities on their responsibilities under the FOIA. Paragraphs 5.8 – 5.10 explain that the internal review procedure should provide a fair and thorough review of procedures and decisions taken in relation to the FOIA. It says that the public authority should "in all cases re-evaluate their handling of the request and pay particular attention to concerns raised by the applicant".

59. While the Council may have conducted a thorough internal review, the cursory nature of the response that was issued, does not demonstrate this.
60. The Commissioner has set out on his website the positive benefits for public authorities of conforming with the section 45 Code of Practice. These include improved public perception of an organisation, saving of staff time and potentially less resource being spent on dealing with complaints to the Commissioner.
61. The above issue will be logged and used by the Commissioner when considering the overall compliance of the Council.
62. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. This will align with the goal in his draft Openness by design strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA and EIR enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in his Regulatory Action Policy².

Access regime

63. In this case, the Council failed to recognise that some of the information held relevant to the request constitutes the complainant's own personal data and as such it did not consider it under the GDPR. Whilst the Commissioner cannot require a public authority to take action under the GDPR via a EIR decision notice, in view of his decision above he recommends that the Council should reconsider the request as a subject access request for the complainant's own personal data.

² <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

64. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

65. 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.
66. 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

Joanne Edwards
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