

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 2 June 2023

Public Authority: London Borough of Richmond upon Thames
Address: 44 York Street
Twickenham
TW1 3BZ

Decision (including any steps ordered)

1. The complainant requested information held by the London Borough of Richmond upon Thames (the council) relating to the stopping up of a particular highway.
2. The Commissioner is satisfied that the council is entitled to withhold some of the requested information under regulation 5(3) – personal data, and regulation 12(5)(b) of the EIR – course of justice.
3. The Commissioner also considers that the exception at regulation 12(4)(e) of the EIR - internal communications, is engaged; however, he has found that the public interest favours the disclosure of part of the information that is subject to this exception.
4. As the council failed to issue a refusal notice within 20 working days, and failed to carry out an internal review within 40 working days, the Commissioner has found a breach of regulation 14(2) and 11(4) of the EIR, respectively.
5. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
 - Release the information as highlighted in the confidential annex attached to this decision notice.

6. 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 Act and may be dealt with as a contempt of court.

Request and response

7. The council has the power to make a "stopping up" order in relation to highway land (this can include roads, streets, grass verges etc). Once a stopping up order is made, the highway rights to the land no longer apply, and there is a common law presumption that the "subsoil" of the area which is stopped up reverts to the landowners; the land can then be enclosed or developed by the landowner, subject to relevant planning consents.
8. On 2 August 2022, the complainant wrote to the council requesting information about its decision to refuse to stop up a public highway. The request was as follows:

"Please can you provide me with:

- (a) Any records you hold of the consideration by the Council [Person A name redacted] to stop up lane [area redacted] as set out in this firm's letter to [Person B name redacted] dated 2 February 2022 (attached); and
- (b) Any information (In whatever form) the Council holds relating to the "ongoing consideration and investigation for using this land to provide infrastructure of public amenity value for the area" as referred to in [Person B name redacted] email dated Monday 1 August and sent to [Person A name redacted] at 10:51 am (attached)

Such information to include (but not be limited to):

Records of any meeting (whether in person or virtual) or telephone conversations at which either of the above two matters were discussed;

Any formal reports on either of the above two matters;
Any internal or external correspondence (whether by email or otherwise, but excluding any emails to either this firm or [Person A name redacted]) relating to either of the above two matters."

9. The council responded on 14 September 2022, providing the complainant with copies of several emails; it confirmed that part of their content had been redacted under regulation 13 of the EIR.
10. The council advised the complainant that emails which formed communications between the client department and its legal adviser, were to be withheld under regulation 12(5)(b) of the EIR.
11. The council also advised that a further set of emails had been withheld under regulation 12(4)(e), regulation 12(5)(f) and regulation 13, of the EIR.
12. The council confirmed to the complainant that it had considered the public interest test and that this favoured maintaining the exceptions cited.
13. At the internal review stage, the council maintained its position that some of the requested information was subject to the exceptions at regulation 13, regulation 12(5)(b) and regulation 12(4)(e). However, it confirmed that it was no longer relying on the exception at regulation 12(5)(f); the council said that this was because it had been applied to correspondence sent by the complainant, who had made it clear in the request that they did not require copies of such information.

Scope of the case

14. The complainant has raised concerns about the council's decision to withhold information under regulation 12(4)(e) and regulation 12(5)(b) of the EIR; they state that they are not concerned about the council withholding any third-party personal data under regulation 13.
15. The withheld information which has been provided by the council for the Commissioner's consideration includes the emails that have already been released to the complainant in response to the request. As the only redactions to this information relate to third party personal data, which the complainant does not contest, the Commissioner has not taken this information into account when making his decision.
16. Whilst the complainant has also said that they do not require copies of emails sent between themselves and the council, the Commissioner will consider whether there is any other information relevant to the request that is subject to the exception at regulation 5(3) of the EIR.
17. The Commissioner will then decide whether the council is entitled to withhold any information under regulation 12(5)(b) and, if necessary, he will go on to consider regulation 12(4)(e) of the EIR.

Reasons for decision

Regulation 5(3) – personal data of the applicant

18. Where environmental information is the personal data of the requester, it is exempt from disclosure under regulation 5(3) of the EIR.
19. The council acknowledged in its responses to the request that the solicitor who made the request was acting on behalf of their client, i.e., it accepted that the request was, in effect, being made by that client (the complainant).
20. Whilst the council has not ever made explicit reference to the exception at regulation 5(3), the officer who carried out the internal review confirmed that they had identified some of the requested information to be the personal data of the complainant. They go on to say that they would be recommending that the council consider what information could be disclosed to them in response to a subject access request, and in accordance with the data protection legislation.
21. The Commissioner has decided that regulation 5(3) is applicable to the withheld information which is the complainant's personal data. The council is therefore not obliged by the EIR to disclose this information.

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

22. Regulation 12(5)(b) of the EIR exempts information from disclosure if doing 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.
23. The course of justice element of the exception is broad in coverage and encompasses, for example, information subject to legal professional privilege (LPP) and information about investigations or proceedings carried out by authorities.
24. The council has said that the information withheld under this exception consists of emails "between the client department and its legal adviser" which it considers to be legally privileged.
25. The Commissioner is satisfied that part of the withheld information consists of communications between council officers and the legal department, which primarily relate to requests for, and the provision of, legal advice. In addition, he has identified correspondence which conveys the legal advice. The Commissioner is satisfied that all of this information is subject to LPP.

26. The complainant has argued that the matter to which the request relates is closed as the council has confirmed that it is not agreeable to stopping up the relevant highway. Therefore, the complainant believes that there cannot be any adverse effect caused by the disclosure of the information.
27. The Commissioner has had regard to the case of [DCLG V Information Commissioner & WR \[2012\] UKUT 103 \(AAC\) \(28 March 2012\)](#), where the Upper Tribunal considered the significance of LPP under the EIR. It said that it was relevant to take into account any adverse effect on LPP (such as confidence in the efficacy of LPP) and the administration of justice generally, and not simply the effect on a particular case.
28. Whilst the Tribunal confirmed that it was not inevitable that the disclosure of information would adversely affect the course of justice, it suggested that there would need to be special or unusual factors in play for this not to be the case.
29. The Commissioner accepts that, in the circumstances of this case, the disclosure of the legal advice would undermine the important common law principle of LPP. This would, in turn, undermine a lawyer's capacity to give full and frank legal advice.
30. The Commissioner is satisfied that it is more probable than not that disclosure would adversely affect the course of justice and that regulation 12(5)(b) of the EIR is engaged in respect of the withheld information.

Public interest test

31. The complainant has argued that, in addition to the broader public interest in transparency and accountability, there is a strong public interest in understanding the council's reasons for refusing a request to stop up a highway, particularly in circumstances where it had previously indicated that such an application would be approved.
32. The council has acknowledged that there is a public interest in how it makes decisions, but that this is outweighed by the public interest in protecting the right to seek and obtain confidential legal advice in this instance.
33. The Commissioner recognises that there is a public interest in public authorities being accountable for decisions which concern planning activities, particularly when it relates to land currently accessible to the public in a residential area.
34. However, in the Commissioner's opinion, there is a strong public interest in safeguarding openness in all communications between client and

lawyer, to ensure access to full and frank legal advice, and good quality decision making.

35. The Commissioner's decision is that the balance of the public interest favours the exception being maintained in this case. This means that the council was not obliged to disclose the requested information that is subject to the exception at regulation 12(5)(b) of the EIR.
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.
37. As stated in the [Upper Tribunal decision of 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).

38. As covered above, in this case the Commissioner's view is that the balance of the public interest 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 to the complainant's request.

Regulation 12(4)(e) – internal communications

39. Regulation 12(4)(e) states that information is exempt from disclosure if it involves the "disclosure of internal communications".
40. The Commissioner is satisfied that the withheld information which is not subject to the exception at regulation 12(5)(b) consists of internal communications; this is because it forms communications that were sent between, and restricted to, officers within the council. The Commissioner therefore finds that regulation 12(4)(e) is engaged in respect of this information.
41. The Commissioner has therefore gone on to consider the public interest test.

Public interest test

42. The council has said that it receives numerous requests annually to stop up land, and that, in each instance, it requires a private space in which to consider and discuss such requests; it claims that disclosure of such information would curtail full and frank discussions and would undermine the process.
43. The council has argued that there is no evidence that there is a significant wider public interest in the disclosure of the information that has been requested, and that the only request it has received for the stopping up of the relevant highway is from the complainant.
44. The Commissioner recognises the importance of a "safe space", where council officers can have open and honest discussions before making decisions; he accepts that if officers were not able to speak freely and frankly in such situations, it may lead to more guarded discussions in the future. This could lead to poor quality decisions and less accountability, which would not be in the public interest.
45. However, in the Commissioner's view, the decisions made regarding the use, ownership and plans for a public highway do have a wider public impact than claimed by the council.
46. The council has also said that it receives numerous requests for the stopping up of land annually. Given this, in the interests of fairness, consistency and accountability, the Commissioner considers it to be important that the council is able to provide the public with its reasoning for accepting or rejecting such requests. Where possible, the public should also be made aware of plans and options being considered for the use of land, so that they have the opportunity to debate any proposals.
47. The Commissioner has decided that the public interest favours maintaining the exception at regulation 12(4)(e) where the disclosure of the withheld information would be likely to inhibit officers from speaking freely and frankly about matters in the future.
48. However, the Commissioner finds that the public interest favours the disclosure of the withheld information where, in his opinion, any potential impact to the "safe space" afforded by the exception is minimal, and where the disclosure of the information would provide further clarity and understanding of the decision that has been reached to refuse the stopping up of a highway.
49. The Commissioner therefore requires the council to disclose that part of the withheld information which is highlighted in the confidential annex attached to this decision notice.

Procedural matters

50. The council received the request on 2 August 2022, but only issued a refusal notice on 14 September 2022. In addition, whilst the council received the complainant's internal review request on 3 October 2022, its response was not issued until 30 January 2023.
51. As the council failed to issue a refusal notice within 20 working days, and failed to carry out the internal review within 40 working days, the Commissioner has found a breach of regulation 14(2) and regulation 11(4) respectively.

Other matters

52. As stated in paragraphs 18 - 21 of this decision notice, the Commissioner considers some of the withheld information to be the personal data of the complainant, who he considers to be the requester in this case.
53. The council has said in its recent correspondence to the Commissioner that whilst details of how a subject access request can be made were provided to the complainant on 9 March 2023, it did not receive a subject access request in response.
54. However, the Commissioner does not consider it good practice for the council to have required a further request to be made for information which, in essence, is the requester's personal data.
55. Whilst the Commissioner cannot require a public authority to act under the GDPR via an EIR decision notice, in view of his decision above, the council should now reconsider that part of the withheld information that is the requester's personal information, as a subject access request.

Right of appeal

56. 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

57. 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.
58. 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

Suzanne McKay
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