

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 March 2024

Public Authority: Mid Sussex District Council
Address: Oaklands
Oaklands Road
Haywards Heath
West Sussex
RH16 1SS

Decision (including any steps ordered)

1. The complainant requested information from Mid Sussex District Council ("the Council") relating to a specific planning application.
2. The Commissioner's decision is that on the balance of probabilities, the Council does not hold further information within the scope of the request which has not already been disclosed to the complainant or withheld under an exception. He also finds that the Council is entitled to rely on regulation 12(5)(b) (course of justice) to withhold some information within the scope of the request.
3. The Commissioner finds that the Council is entitled to rely on regulation 13(1) (personal data) to withhold some information within the scope of the request. However, it is not entitled to rely on regulation 13(1) to withhold a payment reference.
4. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld payment reference to the complainant.
5. 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

6. On 4 April 2023, the complainant wrote to the Council and requested information in the following terms:

“Please could you provide copies of all information as at the date of this letter in relation to the matters listed below, which is held by Mid Sussex District Council (‘MSDC’). For the purpose of this request, information shall include, but not be limited to:

- Type of information : includes all media, such as paper, electronic and micro-fiche;
- Source of information : includes that generated by BEIS or received from or generated by all third parties;
- Form of information : includes all records such as letters, memos, briefs, file notes (of meetings, telephone conversations or otherwise), emails, scanned documents, recommendations, forms, reports, presentations and photos.

For the avoidance of doubt, information shall include, but not be limited to, internal correspondence and meetings with other MSDC officials, members and their agents. The information subject to this request relates to all aspects of the following matters concerning an energy from waste plant at Holmsted Farm, Cuckfield Road, Cuckfield, West Sussex, RH17 5JF:

DM/22/2161

All information relating to this request for pre-application planning advice should be disclosed to me.

DM/22/2808

All information not publicised at the date of this letter on the MSDC planning portal relating to the above planning application should be disclosed to me.

To the extent that you feel you have any other information, which may be directly or indirectly related to the above areas and should be reasonably disclosed to permit a

better understanding of information already disclosed,
please do so.”

7. The Council responded on 11 May 2023 and provided the complainant with information within the scope of the request. On 5 June 2023, the complainant requested an internal review.
8. The Council provided the complainant with the outcome of its internal review on 18 August 2023 in which it provided the complainant with further information within the scope of the request. It also confirmed that it is relying on regulation 13(1) (personal data) of the EIR to withhold some information.
9. The Council provided the complainant with a further response to their request on 23 November 2023 in which it disclosed further information within the scope of the request. The Council also withheld some information but did not state which exception it was relying on to withhold the information.

Scope of the case

10. In their complaint to the Commissioner, the complainant stated that they consider the Council to hold further information within the scope of their request which has not been disclosed or withheld under an exception. They also stated that they do not consider the Council to be entitled to withhold any information within the scope of their request.
11. The Commissioner will therefore consider whether the Council holds further information within the scope of the request which has not been disclosed to complainant or withheld under an exception. He will also consider whether the Council is entitled to rely on regulation 13(1) (personal data) of the EIR to withhold some information within the scope of the request.
12. During the course of his investigation, the Council informed the Commissioner that it was withholding some information within the scope of the request as it considers the information to be subject to legal professional privilege. Therefore, the Commissioner will also consider whether the Council is entitled to rely on regulation 12(5)(b) (course of justice) to withhold some information within the scope of the request.

Reasons for decision

Regulation 5(1) – duty to make environmental information available

13. Regulation 5(1) provides that a public authority that holds environmental information shall make it available on request. This is subject to any exceptions that may apply.

The complainant's position

14. In their initial complaint to the Commissioner, the complainant stated that they do not consider the Council to have disclosed all the information it holds that falls within the scope of their request. The complainant highlighted particular areas where they consider the Council to hold further information which has not been disclosed. However, they stressed that they also consider the Council to hold information which does not fall into the areas outlined below that has not been disclosed.
15. The complainant considers the Council to hold information relating to EIA screening, such as a pre-screening checklist and correspondence between the planning application applicant and planning officer that falls within the scope of their request and has not been disclosed. They also consider the Council to hold information relating to a planning committee debrief which was referred to an email that was disclosed to them in response to their request.
16. The complainant considers the Council to hold further information that falls within the scope of their request relating to the amendment of a committee report. They also consider the Council to hold information relating to a statement made in a committee meeting regarding conflicts of interest.

The Council's position

17. In its submissions to the Commissioner the Council explained that information relating to planning preapplications or planning applications is held according to the relevant reference number in its document management system. It has therefore conducted a search of the preapplication files and application files held in its documents management system for information falling within the scope of the request using both the reference numbers 'DM/22/2161' and 'DM/22/2808' as search terms.
18. The Council explained that it has also conducted a search of Council officer's emails for information falling within the scope of the request using the same search terms. Any information located as a result of

these searches that falls within the scope of the request has been disclosed to the complainant with the exception of that which has been withheld under an exception.

19. The Council explained that information relating to EIA screening would be held in the relevant preapplication and application files. It therefore considers that any information held relating to EIA screening would have been located by its search of its preapplication and application files. The Council stated that it does not hold a pre-screening checklist as the officer who received the planning application clarified the EIA position at the preapplication stage and so a pre-screening checklist was not produced.
20. The Council explained that the officer in charge of the planning application has conducted a search of their emails for information relating to the amendment of a committee report. This search located one email within the scope of the request which has been disclosed to the complainant. The Council stated that it does not hold any information relating a planning committee debrief as the debrief took place verbally.
21. The Council explained that its solicitor has conducted a search of their emails for information relating to conflicts of interest that fall within the scope of the request. This search located information within the scope of the request. The Council has disclosed some of the information to the complainant but has withheld some information.

The Commissioner's position

22. The Commissioner is satisfied that the Council has carried out reasonable searches of its planning preapplication and planning application files for information falling within the scope of the request including information relating to EIA screening. He considers that when conducting its searches, the Council used appropriate and relevant search terms.
23. Furthermore, the Commissioner accepts the Council's reasoning for not holding a pre-screening checklist or information relating to a planning committee debrief. He considers that the officer in charge of the planning application and the Council's solicitor have conducted reasonable searches for information falling within the scope of the request.
24. Therefore, the Commissioner's decision is that on the balance of probabilities, the Council does not hold further information within the

scope of the request which has not already been disclosed to the complainant or withheld under an exception.

Regulation 13(1) – personal data

25. 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.
26. In this case the relevant condition is contained in regulation 13(2A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data (“the DP principles”), as set out in Article 5 of the UK General Data Protection Regulation (“UK GDPR”).

Is the withheld information personal data?

27. Section 3(2) of the Data Protection Act 2018 defines personal data as:

“any information relating to an identified or identifiable living individual.”

28. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
29. The Commissioner has viewed the information which the Council has withheld under regulation 13(1) of the EIR. The Council has withheld information from two emails between a Council planning officer and another individual. The Commissioner is satisfied that this information is personal data as it relates to the planning officer who is identifiable.
30. The Council has also withheld the name of a company owner and the names of the directors of that company from an email between two Council solicitors. He is satisfied that the name of the company owner and the names of the company directors relate to and would identify those individuals and so he considers that information to be personal data.
31. The Council has withheld a payment reference from a pre-application advice application form. Whilst it has stated that this information is personal data, the Council has not explained whose personal data it considers the information to be or how an individual would be identified from the information. It is not obvious to the Commissioner how the payment reference would relate to, or identify an individual and therefore, he does not consider the information to be personal data.

32. The Commissioner considers that the Council not entitled to rely on regulation 13(1) of the EIR to withhold the payment reference. He requires the Council to disclose this information.

Would disclosure contravene principle (a)?

33. The Commissioner will now consider whether disclosure of the withheld information which constitutes personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states:

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

34. In the case of a FOIA 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.
35. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is the information special category data?

36. Information relating to special category data is given special status in the UK GDPR. Article 9 of the UK GDPR defines “special category” as being personal data which reveals racial, political, religious, or philosophical beliefs, or trade union membership; and genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health, or data concerning a natural person’s sex life or sexual orientation.
37. Special category can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met. The Commissioner considers that the only conditions that could be relevant to a disclosure under FOIA are conditions (a) (explicit consent from the data subjects) or (e) (data made manifestly public by the data subjects) in Article 9.
38. Having viewed the withheld information relating to the planning officer, the Commissioner is satisfied that this information constitutes special category personal data. He has seen no evidence or indication that the planning officer has specifically consented to the disclosure of the information or that they have deliberately made the information public.

39. The Commissioner therefore considers that as none of the conditions for processing special category data have been met, there is no legal basis for the disclosure of the withheld information relating to the planning officer. Processing that information would breach principle (a) and so he considers that the Council is entitled to rely on regulation 13(1) of the EIR to withhold the information.

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

40. Article 6(1) of the UK 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.
41. 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”.
42. When considering the application of Article 6(1)(f) of the UK GDPR, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.
43. The Commissioner accepts that there is a legitimate interest in ensuring that the Council’s planning application process is transparent and open. However, he considers that disclosure of the name of the company owner and the names of the company directors is not necessary to meet the legitimate interest identified as the information is already available within the public domain on the Companies House website.
44. As the Commissioner has decided in this case that disclosure of the name of the company owner and company directors is not necessary to meet the legitimate interest identified, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for processing the information and it would be unlawful. It therefore does not meet the requirements of principle (a) (lawful processing).

45. The Commissioner's decision is that the Council is entitled to rely on regulation 13(1) of the EIR to withhold the name of the company owner and the names of the company directors.

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

46. Regulation 12(5)(b) allows a public authority to 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.
47. The Commissioner has viewed the information which the Council has withheld on the basis that it considers the information to be subject to LLP, specifically legal advice privilege. The Council has withheld an email from a Council planning officer to a Council solicitor as in that email the planning officer seeks legal advice from the solicitor. The Council has also withheld an email from one Council solicitor to another which relates to the planning officer's email. It considers the email from the solicitor to be subject to legal advice privilege as in the email the solicitor is seeking legal advice from another solicitor about the advice they intend to provide to the planning officer.
48. The Commissioner is satisfied that the email from the planning officer to the Council solicitor constitutes confidential communications between a client and a professional legal advisor, made for the purpose of providing legal advice. He therefore considers the email to be covered by LLP on the basis of advice privilege.
49. The Commissioner is also satisfied that the email from one Council solicitor to another which relates to the planning officer's email, is subject to legal advice privilege. Whilst the email is not between a client and a professional legal advisor, disclosure of the email would reveal information about a client and a professional legal advisor's communications. Specifically, it would reveal information about the planning officer's request for advice and the contents of any advice provided by the solicitor in response to that request.
50. The Council has also withheld part of an email from one Council solicitor to another Council solicitor. In the email a solicitor is seeking advice from another solicitor about a matter relating to the planning application referred to in the request and so the Council considers the information to be subject to legal advice privilege.
51. The Commissioner is satisfied that the part of the email that the Council has withheld is subject to legal advice privilege. Whilst the information

does not constitute communications between a client and a legal professional advisor as the information was sent from one solicitor to another, disclosure of the information would reveal the advice that a solicitor intends to provide the members of a planning committee, their client.

52. The Commissioner considers that as the withheld information is subject to LLP, its disclosure would have an adverse effect on the course of justice as it would undermine the general principles of LLP. Therefore, he finds that the exception at regulation 12(5)(b) is engaged. The Commissioner will now go on to consider the public interest test.

The public interest test

53. The Commissioner notes that the public interest inherent in this exception will always be strong due to the fundamental importance of the general principle of upholding legal professional privilege. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors. However, no such factors appear to be present in this case.
54. The Commissioner recognises that disclosure of the withheld information would assist the public's understanding of the Council's planning processes and planning decisions. However, as a significant amount of information relating to the planning application referred to in the request has already been disclosed to the complainant or is available within the public domain on the Council's planning portal, the Commissioner considers that in this case, disclosure of the withheld information would not be necessary for accountability or understanding to be obtained.
55. 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).

56. 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.

Other matters

57. The Commissioner is disappointed with the quality of the Council's submissions in this case. Whilst the Council has provided the Commissioner with submissions to support its position, the submissions did not include the level of detail the Commissioner expects. The Commissioner had to write to the Council multiple times to obtain further information from the Council in order to make his decision in this case.
58. In the future, the Council should in the first instance, provide the Commissioner with sufficient information so that he can make his decision. The Commissioner will log his concerns.

Right of appeal

59. 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:

60. 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

61. 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.

62. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Christopher Williams
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