

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

Date: 21 May 2020

Public Authority: West Berkshire Council
Address: Council Offices
Market Street
Newbury
RG14 5LD

Decision (including any steps ordered)

1. The complainant requested from West Berkshire Council (“the Council”) information regarding the agenda papers and minutes of the Environment Advisory Group (EAG) and the Transport Advisory Group (TAG). The Council responded to the request under the FOIA. It withheld the information under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) (prejudice to the effective conduct of public affairs) of the FOIA.
2. During the investigation, the Council was directed by the Commissioner to reconsider the request under the EIR. The Council reconsidered the request and applied regulation 12(4)(e) (internal communications) to withhold the information.
3. The Commissioner finds that the Council initially handled the request incorrectly under the FOIA and in doing so breached regulation 5(1) and regulation 14(1) of the EIR.
4. The Commissioner’s decision is that the Council correctly applied regulation 12(4)(e) of the EIR to the withheld information. Therefore, the Commissioner does not require the Council to take any steps as a result of this decision.

Background information

5. The withheld information in this case, consists of the EAG minutes, the TAG minutes and other documents relating to these meetings held on 23 and 25 July 2019. The matters discussed at these meetings were environmental topics, including plans for the expansion of Heathrow Airport.

Request and response

6. On 30 July 2019 the complainant wrote to the Council and requested information in the following terms:

"This is a Freedom of Information request for the agenda papers and minutes of the Environment Advisory Group on 23 July 2019, and the agenda papers and minutes of the Transport Advisory Group on 25 July 2019."

7. On 20 September 2019 the Council responded. It directed the complainant to the Council's website where the response showed that the information was withheld under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) (prejudice to the effective conduct of public affairs) of the FOIA. The Council stated that it did not consider the information qualified as environmental under the EIR.
8. On 30 September 2019 the complainant asked for an internal review of the Council's decision. She also asked the Council a number of questions regarding its response to her information request.
9. On 23 October 2019 the Council provided its internal review response and explained the reasons it considered the request under the FOIA and not the EIR. The Council also maintained its position to withhold the information under section 36(2) of the FOIA and stated its reasons.

Scope of the case

10. The complainant contacted the Commissioner on 30 October 2019 to complain about the way her request for information had been handled. Specifically, she disputed the Council's consideration of her request under the FOIA rather than the EIR, and its refusal to disclose the information requested.

11. Due to the nature of the information requested, the Commissioner's view was that it was likely to constitute environmental information as defined in regulation 2(1) of the EIR. Therefore, the Council was advised to reconsider the request under the EIR.
12. The Council reconsidered the request under the EIR and confirmed that it was applying regulation 12(4)(e) (internal communications) to withhold the information previously withheld under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of the FOIA.
13. The complainant was informed by the Council that it had reconsidered her request and confirmed that it was "*withholding any environmental information captured by your request, under regulation 12(4)(e) of the EIR*".
14. The following analysis focuses on whether the Council correctly withheld information under regulation 12(4)(e) of the EIR.

Reasons for decision

Regulation 2 – environmental information

15. Regulation 2(1) of the EIR defines what "environmental information" consists of. The relevant parts of the definition are found in 2(1)(a) to (c) which state that it is information in any material form on:

"(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements..."

16. The Commissioner considers that the phrase “any information...on” should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner’s opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc in question.
17. In this case the withheld information relates to measures which will have an impact on the use of land. The Commissioner notes that the information consists of environmental plans, feedback on consultations about planning, and issues regarding Heathrow expansion. This is an activity which is likely to affect many of the elements and factors referred to in regulations 2(1)(a) and (b) of the EIR.
18. For example, any development plans are likely to affect land and landscape, and will be likely to result in environmental factors such as energy and emissions.
19. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be on a measure affecting or likely to affect environmental elements and factors listed in regulations 2(1)(a) and (b). This is in accordance with the decision of the Information Tribunal in the case of Kirkaldie v IC and Thanet District Council (EA/2006/001)¹.
20. In view of this, the Commissioner has concluded that the Council initially handled the request incorrectly under the FOIA and in so doing breached regulation 5(1) of the EIR. As the Council subsequently corrected its handling of the request, the Commissioner does not require the Council to take any steps regarding this.

Regulation 14 – refusal to disclose information

21. The Commissioner has found that although the Council originally considered the complainant’s request under the FOIA, it is the EIR that actually apply to the requested information. Therefore, where the procedural requirements of the two pieces of legislation differ it is inevitable that the Council will have failed to comply with the provisions of the EIR.

¹ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i94/Kirkaldie.pdf>

22. As such, the Commissioner believes that it is appropriate to find that the Council breached regulation 14(1) of the EIR which requires a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the Council issued (and indeed its internal review) failed to cite any exception contained within the EIR as the Council actually dealt with the request under the FOIA.
23. Since the Council has subsequently addressed this failing, the Commissioner does not require it to take any steps in this regard.

Regulation 12(4)(e) – Internal communications

24. Regulation 12(4)(e) states:

*"For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that...
(e) the request involves the disclosure of internal communications."*

25. The Commissioner's published guidance² on this exception defines a communication as encompassing any information which someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it.
26. The EIR does not provide a definition of what is meant by "internal". However, the Commissioner's guidance provides clarification on the scenarios where communications can be defined as such. Such a scenario is where the communications have taken place solely within a public authority.
26. Regulation 12(4)(e) is a class based exception. This means that there is no requirement to consider the sensitivity of the information in order to engage the exception. However, the exception is subject to a public interest test under regulation 12(1)(b), and the exception can only be maintained should the public interest test support this.
27. The Council stated that it withheld the requested information under regulation 12(4)(e) as it considered it as internal communications.

² https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

28. The Council identified the following information as falling within the scope of the request, and stated that it all represents internal communication between internal advisory group officers and members of the Council. The communications include:
- Environment Advisory Group (EAG) document pack of meeting held on 23 July 2019
 - EAG minutes of meeting held on 23 July 2019
 - Transport Advisory Group (TAG) minutes of meeting held on 25 July 2019
 - TAG document pack of meeting held on 25 July 2019
 - TAG presentation on Heathrow Expansion
29. The Council outlined its reasons for applying regulation 12(4)(e). It stated that the information captured by the request is saved as a record by the Council, and that it is intended to be communicated and consulted on within the Council. For this reason, the Council considered the information qualifies as “communications”.
30. With regard to whether they are *internal* communications, the Council explained that the EAG and TAG meetings are internal advisory group meetings held between officers and members of the Council. It said that the minutes are saved and circulated within the Council and are not distributed to any external bodies. Therefore, the Council is of the view that the information qualifies as “internal communications”.
31. As referenced previously, the EIR does not define the meaning of “internal”. Consequently, in the absence of a definition, a judgement must be made that considers the context of the communications. In this case, the information comprises minutes of meetings (of 23 and 25 July 2019) held between advisory officers and members of the Council. Also comprising of other related documents for both the EAG and the TAG.
32. Having examined the withheld information, the Commissioner is satisfied that it comprises of communications that were solely “internal” to the Council. Therefore, this information engages regulation 12(4)(e).

Public interest test

33. Where regulation 12(4)(e) is engaged, it is subject to the public interest test required by regulation 12(1)(b). This is to ascertain whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

34. In carrying out her assessment of the public interest test, the Commissioner is mindful of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.
35. The Council and the complainant provided the Commissioner with their public interest test reasoning. This reasoning, along with other factors that the Commissioner considers relevant, are covered below.

Public interest in favour of disclosing the information

36. The Council considered factors for disclosing the information, and said it included accountability of the Council and ensuring an open and transparent process. It would contribute to public understanding and debate of matters that affect peoples' lives. Also, it would create an openness and transparency in decision-making processes, and scrutiny of actions and advice of public officials.
37. The complainant stated that the context of her request was "*the Council declaring a "Climate Emergency"*". Therefore, the complainant argued that the public interest in knowing the measures and discussions that are being considered, outweighs any possible "*distraction*". She considers there is a strong public interest in the release of the information and listed her points as follows:
 - *"It would increase transparency and accountability*
 - *It would increase public awareness and understanding – especially as the Council has declared a climate emergency*
 - *The public may wish to participate more fully in environmental decision making as a result*
 - *Far from damaging the provision of advice, disclosing this information could logically lead to it being better, more considered and more robust in the future."*

38. The Commissioner acknowledges that the content of the withheld information that concerns the expansion of Heathrow Airport relates to a matter of great importance as this expansion would be a very serious undertaking. This could have huge implications and any decisions would have an impact on the lives of many, especially residents living near Heathrow.

39. In relation to all of the withheld information, the Commissioner recognises that there is a strong public interest in disclosure as this would add to public understanding about the processes and decision making of the Council. In relation to the information that concerns Heathrow Airport, the Commissioner's view is that there is a particularly weighty public interest in favour of disclosure due to the implications of the decision making in this area.
40. However, the Commissioner's understanding is that, whilst the Council was a consultee in relation to Heathrow expansion, it was not a key decision maker on this matter. This somewhat limits the public interest in the disclosure of the information in question.

Public interest in favour of maintaining the exception

41. The Council argued that there is a need for a safe space for internal deliberation and decision-making processes. It said that the release of the requested information may create a "chilling effect" on the free and frank exchange of views and ideas in the future.
42. The Council provided a further explanation for its reasons for maintaining the exception:
- *"The TAG Group is an internal meeting designed to provide advice, scrutiny and challenge to the Executive Portfolio Holder for Highways and Transport and support the development of the Local Transport Plan and any other associated documents.*
 - *The EAG is an internal meeting designed to provide advice, scrutiny and challenge to the Executive Portfolio Holder for Environment and support the development of Environment Strategy and any other associated documents.*
 - *The EAG and TAG do not have any decision making powers and no decisions are made during such meetings on behalf of the Council.*
 - *The TAG and EAG Group is a safe space for officers and members to develop ideas, debate live issues away from external interference and distraction*
 - *Disclosure of these internal communications could jeopardise the public authorities' ability to think in private and discuss ideas in a free and frank manner.*
 - *The release of these internal communications is likely to create a 'chilling effect' on open discussions and debates and deter officers from being forthcoming with views and ideas."*

43. The Commissioner notes from the Council's submissions the purpose of the TAG and EAG meetings. These are designed to provide advice, scrutiny and to support the development of the Local Transport Plan and Environment Strategy and any other associated documents. She also notes that the EAG and TAG do not have any decision-making powers and that no decisions are made during such meetings on behalf of the Council. Therefore, whilst the withheld information provides background to decision making made by the Council, it does not record the process of decisions being made.
44. The Commissioner notes the importance of a "private thinking space" in order to allow the Council to carry out internal deliberation. The Commissioner considers that this is a valid public interest factor in favour of maintenance of the exception of considerable weight.

Balance of the public interest arguments

45. The Commissioner's guidance on the exception explains that although a wide range of internal information will be caught by the exception, 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".
46. 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.
47. The Commissioner considers that there will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation in environmental decision-making, all of which ultimately contribute to a better environment.
48. The weight of this interest will vary from case to case, depending on the profile and importance of the issue and the extent to which the content of the information will actually inform public debate. However, even if the information would not in fact add much to public understanding, disclosing the full picture will always carry some weight as it will remove any suspicion of "spin".

49. The complainant disputed the Council's arguments for withholding the information and she is of the view that its reliance "*on a 'chilling effect' is unsupportable where the Council tries to argue that all recorded information – now and in the future – is affected by courtesy of a 'generalised' approach, and will therefore prejudice the operation of these task groups.*"
50. It is clear that at the time of the request for information, planning projects were live and still under discussion. These planning projects were in addition to the Heathrow Expansion, and the Commissioner accepts that these were on-going. Allowing access when the decision is still to be made is likely to cause a higher degree of media and public interest or contacts from lobby groups which could ultimately delay final decisions and increase the costs and risks to planning projects. The Commissioner considers that if matters were closed, then the risk of prejudicing the process would be reduced. However, this is not the case, therefore the need to maintain the safe space gives more weight to the argument for maintaining the exception.
51. The Commissioner is mindful that the public interest is time and context sensitive and she accepts that, with the passage of time, the sensitivity of the information may diminish.
52. The Commissioner has considered the competing arguments. She accepts that there is a public interest in disclosure in promoting transparency and accountability around decisions made by public authorities. The Commissioner acknowledges that there is a public interest in allowing the public to better understand how these decisions are reached. There is particular public interest in information relating to planning processes, and that there is a public interest in disclosure of the information in question in order to inform about the spending of public money, transparency and increased participation over decision-making where environmental issues are involved, and also informing public debate.
53. The Commissioner accepts that there is a need for the Council to have a safe space for internal deliberation and decision-making processes. The Council should be able to communicate in private and discuss ideas in a free and frank manner where there is a need to do so.

54. The Commissioner understands that the release of internal communications may create a “chilling effect” on the free and frank exchange of views and ideas, also on future discussions and debates. These exchanges, she agrees, are necessary in order for the Council to take decisions based on advice and consideration of all of the options relating to environmental plans. The Commissioner accepts the risk of such an effect is likely to be higher if information is disclosed whilst the plans are live and ongoing.

Conclusion

55. The Commissioner considers that the argument for a safe space for internal communications carries significant weight in this case. Given the detrimental impact that disclosure may have on the quality of decision-making, there is a stronger public interest in not disclosing the withheld information.
56. The Commissioner’s decision is that the balance of the public interest favours maintaining the exception.
57. 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).
58. As covered 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 regulation 12(4)(e) was applied correctly. Therefore, the Council was not obliged to disclose the requested information.

Regulation 5 - duty to make available environmental information on request

59. Regulation 5(1) provides that a public authority that holds environmental information shall make it available on request. Regulation 5(2) requires that information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

60. In this case the complainant made her request for information on 30 July 2019. The Council did not provide its response until 20 September 2019.
61. The Commissioner's decision is that the Council did not comply with the requirements of regulation 5(2).

Right of appeal

62. 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

63. 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.
64. 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

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