

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 21 January 2021

Public Authority: Elmbridge Borough Council

Address: Civic Centre
High Street
Esher
Surrey
KT10 9SD

Decision (including any steps ordered)

1. The complainant has requested various communications relating to a planning enforcement matter. Elmbridge Borough Council ("the Council") disclosed some information and withheld the remainder under the exceptions provided by regulations 12(4)(e) and 12(5)(b) of the Environmental Information Regulations 2004 ("the EIR").
2. The Commissioner's decision is that the Council is entitled to withhold the information under regulations 12(4)(e) and 12(5)(b). However, the Council breached regulation 14 by failing to inform the complainant of its refusal within the time for compliance.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 6 March 2019, the complainant wrote to the Council and requested information in the following terms:

I wish to make a formal request to see all information held by the Council, including internal and external exchanges by e-mail, correspondence and telephone as well as visit reports relating to the dimensions of the extension at the Jolly Farmer public house, 41 Princes Road, Weybridge between 1 February 2019 and 8 March 2019.

The material should include any communications between building compliance and planning officers and Councillors; between officers and the architect, project managers and representatives of the Jolly Farmer in respect of the extension as completed allegedly in accordance with the formal planning permission given in respect of application 2016/0767; any material relating to the reported breach of planning controls (FS71625509) submitted in March 2018, including reports of measurements made by the planning compliance team in August 2018 and March 2019 ([redacted name]'s mails of 6 August and 6 March refer); and any material relating to potential consideration by and handling of the issue with the Planning Sub-Committee in the period from the submission of planning application 2018/1598 to [redacted name]'s e mail to me of 7 March asserting that the matter was closed and the extension was considered to be lawful.

5. The Council responded on 22 March 2019. It disclosed some information and stated that the remainder was withheld under sections 30 and 31 of the Freedom of Information Act ("the FOIA").
6. Following an internal review, the Council wrote to the complainant on 5 April 2019. It stated that the request should have been considered under the terms of the EIR, rather than the FOIA, and disclosed additional information that had been identified. It further stated that the previously withheld information was now withheld under regulations 12(4)(e) and 12(5)(b) of the EIR.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of the case to be the determination of whether the information can be withheld under regulations 12(4)(e) and 12(5)(b).

Reasons for decision

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

9. Under this exception a public authority can refuse to disclose information on the basis that "*...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*".
10. As explained in the Commissioner's guidance¹, the exception encompasses any adverse effect on the course of justice and is not limited to information only subject to legal professional privilege. As such, the Commissioner accepts that 'an inquiry of a criminal or disciplinary nature' is likely to include information about investigations into potential breaches of legislation, for example, planning law or environmental law.
11. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the First-tier Tribunal (Information Rights) highlighted the requirement needed for this exception to be engaged. It has explained that there must be an "*adverse*" effect resulting from disclosure of the information as indicated by the wording of the exception. In accordance with the Tribunal decision of *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word "*would*" is "*more probable than not*".

Is the exception engaged?

12. The Council has stated that the information withheld under this exception is information relating to its enforcement investigations. The Commissioner has interpreted this as being that information which does not represent internal communications between officers (for which the Council has stated that it wishes to rely upon regulation 12(4)(e)).

¹ https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

13. The Commissioner has reviewed this information and understands that it represents recent communications with the third party subject to a planning investigation.
14. The Council has stated that this investigation relates to compliance with planning approval that was originally granted to the third party in 2016, and that disclosure of the information would be likely to adversely affect any further enforcement action.
15. Having considered the context of the request it is understood by the Commissioner that the investigation represents an inquiry undertaken by the Council as the relevant planning authority. The Commissioner is aware that such inquiries are undertaken under the terms of the Town and Country Planning Act 1990 (as amended by the Planning and Compensation Act 1991), which allow a planning authority to investigate any unauthorised development and undertake enforcement action.
16. Having considered the Council's arguments, and reviewed the withheld information, the Commissioner recognises that the information represents communications with the third party that has been subject to the inquiry. The Commissioner has considered several similar requests seeking evidence of live planning inquiries, examples including FER0659765², FER0694917³, and FER00693502⁴. In those decisions, the Commissioner has consistently identified that the disclosure of information relating to such inquiries would adversely affect the course of justice through impacting public confidence in such inquiries being undertaken both appropriately, and with due regard to the rights and expectations of involved parties.
17. In view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the information would adversely affect the course of justice, and that the exception provided by regulation 12(5)(b) is therefore engaged.

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2013759/fer0659765.pdf>

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2173031/fer0694917.pdf>

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2258217/fer0693502.pdf>

The public interest test

18. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out her assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

The public interest in disclosure

19. Some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
20. In the circumstances of this case the Commissioner recognises that there is a public interest in ensuring that local authority decisions are subject to an appropriate level of openness, particularly where such decisions relate to the lawfulness of building works and their impact upon the environment.

The public interest in maintaining the exception

21. The Council has confirmed that, at the time of the request, the information represented recent steps it had taken in respect of the inquiry.
22. As such, the Commissioner recognises that the disclosure of the information would not only impede the Council from being able to undertake any further inquiry effectively, confidentially, and without outside influence, but would compromise the fair treatment expected by involved parties.
23. It is further noted that there has been a significant amount of transparency about the matter through the disclosure of related information, and there is no indication to the Commissioner that the Council has otherwise failed to properly consider the matter as part of its statutory duties.

The Commissioner's conclusion

24. The public interest inherent in this exception will always be strong due to the fundamental importance of the general principle of upholding the administration of justice, and in particular, the importance of not prejudicing inquiries.
25. In the circumstances of this case, the Commissioner understands that the request took place whilst the inquiry was live, or recently live. The Commissioner also notes that inquiry relates to a private party and their property, and it is reasonable to consider that the party will expect correspondence between them and the Council – in the context of the inquiry – to be considered with due regard to their expectations and rights. There is no indication to the Commissioner that the withheld information is already publicly known, or that the inquiry has been conducted improperly by the Council.
26. Having considered the above factors, the Commissioner is satisfied that the public interest test supports the maintenance of the exception.

Regulation 12(4)(e) – Internal communications

27. 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.

28. The Commissioner's public guidance on this exception⁵ 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.
29. 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.

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https://ico.org.uk/media/fororganisations/documents/1634/eir_internal_communications.pdf

30. 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.

Does the information represent internal communications?

31. The Council has stated that the information withheld under this exception are internal communications between officers.
32. The Commissioner has reviewed this information and understands that these internal communications take the form of file notes (containing site visit photographs) and email correspondence between officers. The subject matter of these internal communications is the planning inquiry referred to in the Commissioner's consideration of regulation 12(5)(b).
33. Having examined the withheld information, and considered the specific circumstances of its creation, the Commissioner is satisfied that it can be properly characterised as communications for the purpose of this exception.
34. As referenced previously, the EIR does not define the meaning of 'internal'. Consequently, in the absence of a definition, a judgment must be made that considers the context of the communications. In this case the information comprises emails sent between council officers for the purposes of their duties, as well as saved file notes. The Commissioner is therefore satisfied that the communications were 'internal' to the Council, and that regulation 12(4)(e) is engaged.

The public interest test

35. 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. In carrying out her assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

The public interest in disclosure

36. The Council has acknowledged that the disclosure of such information can promote transparency and accountability about the Council's

decision making. In the circumstances of this case, disclosure would allow the public to understand internal deliberations relating to the planning inquiry.

The public interest in maintaining the exception

37. In this case the Council has argued that it is important that Planning Compliance officers be able to communicate and exchange views on enforcement issues openly using the facts and merits of the matter. Such deliberations need to take place in a safe space, as should such information be routinely disclosed under the FOIA, this would be likely to cause a chilling affect on officers' discussion.

The Commissioner's conclusion

38. The Commissioner has reviewed the public interest arguments, in addition to the withheld information.
39. The Commissioner recognises that there is a public interest in ensuring appropriate transparency in relation to planning inquiries, the outcomes of which may have an impact on the environment.
40. However, the Commissioner is also aware that the information relates to a planning inquiry that was live, or recently live, at the time of the request, and that communications represents discussion between officers about the Council's position. The Commissioner also recognises that the information therefore relates to a matter that may be subject to further action or consideration, and as noted by the Commissioner in decision notice FER0693502⁶ – which likewise considered internal communications in the context of the planning inquiry – any impact on officers ability to discuss the inquiry frankly would lead to poorer quality decision making, and such a situation is not in the public interest.
41. The Commissioner also notes that there has been significant transparency about the matter, and - as noted for regulation 12(5)(b) -

⁶ <https://ico.org.uk/media/action-weve-taken/decision-notice/2018/2258217/fer0693502.pdf>

there is no indication to the Commissioner that the Council has handled the inquiry improperly.

42. Having considered the above factors, the Commissioner is satisfied that the public interest test supports the maintenance of the exception.

Regulation 14 – Refusal to disclose information

43. Regulation 14 requires that where a public authority refuses to disclose information under an exception, a notice is issued stating that fact within 20 working days.
44. In this case the Council applied the wrong legislation whilst handling the request, and subsequently did not apply regulation 12(4)(e) and 12(5)(b) until internal review stage; the outcome of which was provided outside the time for compliance. On this basis the Commissioner finds a breach of regulation 14.

Right of appeal

45. 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

46. 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.
47. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
Head of FoI Casework and Appeals
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF