

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 17 May 2022

Public Authority: North Devon District Council
Address: PO Box 379
Barnstaple
EX32 3GR

Decision (including any steps ordered)

1. The complainant requested from North Devon District Council ("the Council") information relating to specified planning applications. The Council disclosed held information, subject to redactions under the exceptions provided by regulation 13 (Personal data) and regulation 12(5)(f) (Interests of the person who provided the information) of the EIR. The complainant subsequently disputed the application of regulation 12(5)(f).
2. The Commissioner's decision is that the Council was entitled to withhold the information under regulation 12(5)(f).
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 1 February 2021, the complainant wrote to the Council and requested information in the following terms:

“[In respect of planning applications 63290 and 70908]

... copies of the written records of relevant meetings of officers, and of meetings of planning committee members setting out in detail the reasons for decisions made, together with relevant reports (other than those already disclosed on the NDC website), background papers, correspondence (digital and traditional) and other relevant documents, which may require to be supported if necessary by affidavits in due course.”

5. The Council responded on 26 February 2021. It disclosed held information, subject to redactions under the exceptions provided by regulation 13 (Personal data) and regulation 12(5)(f) (Interests of the person who provided the information).
6. On 12 March 2021, the complainant sought an internal review, on the basis that they disputed the withholding of information under regulation 12(5)(f).
7. Following an internal review, the Council wrote to the complainant on 13 April 2021. It maintained the application of regulation 12(5)(f).

Scope of the case

8. The complainant contacted the Commissioner on 29 April 2021 to complain about the way their request for information had been handled, and specifically that the Council was not entitled to withhold information under regulation 12(5)(f). The complainant also queried whether the Council was correct to consider the information under the terms of the EIR.
9. The scope of this case and of the following analysis is whether the Council was correct to consider the information under the terms of the EIR, and if so, was entitled to rely upon regulation 12(5)(f) to withhold the information.

Reasons for decision

The withheld information

10. The withheld information comprises one email, which was been redacted within a chain of email correspondence. In making this determination, the Commissioner has independently viewed a copy of the email.

Does the withheld information fall under the terms of the EIR?

11. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;*
 - (d) *reports on the implementation of environmental legislation;*
 - (e) *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
 - (f) *the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*
12. The Commissioner has considered the withheld information and recognises that it directly relates to a planning application. As such, the Commissioner considers that the information can be characterised as representing measures (under regulation 2(1)(c)) that will affect, or be

likely to affect, the elements and factors referred to in regulation 2(1)(a) and regulation 2(1)(b) respectively. The Commissioner therefore considers that the information should be dealt with under the terms of the EIR.

Regulation 12(5)(f) – Interests of the information provider

13. Regulation 12(5)(f) states:

For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(f) the interests of the person who provided the information where that person—

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure...

14. The Commissioner's published guidance on this exception¹ explains that its purpose is to protect the voluntary supply to public authorities of information that might not otherwise be made available to them. In such circumstances a public authority may refuse disclosure when it would adversely affect the interests of the information provider. The wording of the exception makes it clear that the adverse effect has to be to the person or organisation providing the information rather than to the public authority that holds it.

15. The guidance also explains that, with regard to engaging the exception, - and as recognised by the First-tier Tribunal (Information Rights) in the case of *John Kuschnir v Information Commissioner and Shropshire Council (EA/2011/0273)*² - a four stage test has to be considered, namely:

¹https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf

²https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i750/2012_04_25%20Mr%20Kuschnir%20decision.pdf

- Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?
 - Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?
 - Has the person supplying the information consented to its disclosure?
 - Would disclosure adversely affect the interests of the person who provided the information to the public authority?
16. Where the four stages of the test are satisfied, the exception will be engaged. The public interest test will then determine whether or not the information should be disclosed.

Who is the information provider?

17. The Council has stated that it considers the information provider to be a private individual who wrote the email. This private individual originally sent the email to a Councillor, who in turn, forwarded the email to the Council in their role of an elected representative raising a concern on behalf of a member of the public.
18. The complainant contests that the Council is incorrect, and that the information provider is the Councillor who forwarded the email to the Council, rather than the private individual.
19. The Commissioner has therefore considered this aspect before proceeding further.
20. The Commissioner is aware that the exception provides (at regulation 12(5)(f)(i)) for information that has otherwise passed from an original provider, through a public authority as an intermediary, to a further public authority as a receiver. In such a scenario, the Commissioner's published guidance on the exception explains that the exception remains applicable, so as to "*ensure that the free flow of information from the original provider is protected*" (paragraph 39). The guidance further explains that, whilst the intermediary may also be categorised as an information provider for the purposes of the exception, the focus of the
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exception will usually be on the harm to the original information provider, rather than to the intermediary (paragraph 40).

21. Elected representatives, such as local councillors, are not classed as public authorities for the purposes of the EIR. However, in making this determination the Commissioner nonetheless considers it useful to have regard to the scope of the exception - as indicated in the wording of regulation 12(5)(f)(i).
22. In the circumstances of this case, it is evident to the Commissioner that the original information provider was the private individual. Whilst the Councillor may also be interpreted as being an information provider (albeit as an intermediary) for the purposes of the EIR, the guidance clearly indicates that the focus of the exception should be on the original information provider, and that this should form the basis on which the exception is first considered.
23. The Commissioner has therefore concluded that the Council is entitled to apply the exception on the basis that the information provider is the private individual.

Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?

24. The Council has confirmed that the private individual was not under, and could not have been placed under, any legal obligation to supply the information.

Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?

25. The Council has confirmed that the information was not supplied in circumstances where it would be entitled to disclose it apart from under the EIR. The Council has elaborated that the email correspondence was not formal submission, such as to its Planning unit, but a communication submitted by a private individual to their Councillor as an elected representative.

Has the person supplying the information consented to its disclosure?

26. The Council has stated that it has spoken directly to the private individual, who has stated that they do not consent to the public disclosure of the information under the EIR and were not otherwise aware that the email would come to be held by the Council.

Would disclosure adversely affect the interests of the person who provided the information to the public authority?

27. In considering whether there would be an adverse effect on the interests of the person who voluntarily provided the information, the Council needs to identify harm to the person's interests which is real, actual and of substance, and to explain why disclosure would, on the balance of probabilities, directly cause harm.
28. There is no requirement for the adverse effect to be significant – the extent of the adverse effect would be reflected in the strength of arguments when considering the public interest test (i.e., once the application of the exception has been established). However, a public authority must be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur. The need to point to specific harm and to explain why it is more probable than not that it would occur reflects the fact that this is a higher test than 'might adversely affect', which is why it requires a greater degree of certainty. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party's interests.
29. The Council has stated that the email correspondence was submitted by the private individual to their Councillor as an elected representative, and not the Council.
30. The Council considers that disclosure of the information would adversely affect the private individual by undermining their right to correspond with their elected representative in the expectation of confidence.
31. Having had regard to the context in which the Council holds the information, the Commissioner recognises that the information represents correspondence between a private individual and their Councillor as an elected representative. It is evident to the Commissioner that the Councillor relayed this correspondence to the Council in their role as an elected representative.
32. In such a scenario, the Commissioner recognises the importance of the private individual's right to correspond with their elected representatives with the expectation of confidence. The disclosure of the information would have a significant adverse effect on their ability to exercise that right, not only through the public disclosure of correspondence that they clearly considered to be confidential, but also the chilling affect on their willingness to correspond with their Councillor in the future.
33. Having considered the above, the Commissioner is satisfied that the disclosure of the information would adversely affect the interests of the

private individual. He has therefore concluded that the Council was correct to apply the exception provided by regulation 12(5)(f).

The public interest

34. As the exception is engaged for the information, the Commissioner has considered the associated public interest test required by regulation 12(1)(b). The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. When carrying out the test the Commissioner must bear in mind the presumption towards disclosure provided in regulation 12(2).

The public interest in disclosure

35. 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.
36. In the circumstances of this case, the Commissioner recognises that disclosure of the information would provide public transparency about the correspondence that Councillors are submitting to the Council in their role of elected representatives, particularly in the context of planning applications.

The public interest in maintaining the exception

37. The Commissioner recognises that the disclosure of the information would undermine the expectation of confidence held by the private individual about their correspondence with their Councillor as an elected representative.
38. There is a clear and compelling public interest that members of the public are able to correspond with their elected representatives in the expectation of confidence. Should this not be so, this would inhibit the public from corresponding candidly with their representatives about their concerns, and in turn, damage said representatives' ability to receive such correspondence, and further, to raise it with public authorities.

Balance of the public interest

39. Having considered the withheld information, the Commissioner recognises that it is only held by the Council on account it being forwarded by the Councillor in their role as an elected representative pursuing a concern raised by a member of the public.

40. The Commissioner is of the view that there is an inherently strong public interest that members of the public should be able to voluntarily provide information to their elected representatives in the expectation of confidence. In the circumstances of this case, the Commissioner does not consider that there is an at least equally strong public interest in favour of disclosure.
41. The Commissioner has therefore concluded that, in this case, the balance of the public interest favours maintaining the exception.
42. 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).
43. 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 the exception provided by regulation 12(5)(f) was applied correctly.

Other matters

44. The Commissioner notes that it is likely the withheld information in this case would also represent personal data under the terms of the Data Protection Act 2018. If so, the Council would have been entitled to withhold it under the exception for personal data provided by regulation 13.

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: 0203 936 8963

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

Daniel Perry
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