

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

Date: 25 May 2022

Public Authority: London Borough of Lewisham
Address: Town Hall
Catford
London
SE6 4RU

Decision (including any steps ordered)

1. The complainant submitted a request to the London Borough of Lewisham (the Council) seeking information about a specific planning application, in particular information relating to the consideration of that application at the Council's Planning Committee. The Council disclosed some information but sought to withhold further information on the basis of regulations 12(4)(e) (internal communications) and 13(1) (personal data) of the EIR.
2. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of regulation 12(4)(e) or regulation 13(1). However, he has also concluded that the Council breached regulation 5(2) given its delays in responding to the request.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the Council on 8 September 2020:

'I wish to request any information or communications email or written regarding planning application DC/20/115966 either in favour or against. This should include all communications from to and from Councillors, the Planning and Legal departments, Planning officers and Planning Committee Members and The Chair of Planning Committee B. Also any investigations by the council into the voting or when council members joined the meeting of Committee B at the meeting on the 16th July 2020 or any investigations that have taken place by any representative of Lewisham Council concerning Planning application DC/20/115966.

I especially would like to see any communications between the Chair of Planning Committee B and the Members of that Committee regarding the meeting on July 16th 2020 all communications mentioning that meeting before during and after the meeting. This is the meeting that discussed application DC/20/115966.'

5. The Council responded to the request on 4 November 2020. The Council provided the complainant with a number of documents falling within the scope of her request. However, the Council explained that the Planning team may hold further documents which would need to be reviewed before they could be considered for disclosure and that the Council would contact her in relation to such information by 6 November 2020.
6. The Council contacted the complainant again on 17 December 2020 and provided her with an additional document. However, the Council explained that further documents were being withheld on the basis of the exceptions at regulations 12(4)(d) (material in the course of completion), 12(4)(e) (internal communications) and 5(3) (first party personal data) of the EIR. The Council also explained that information disclosable to her under the subject access provisions under data protection legislation would be provided to her within the next five working days.
7. The complainant contacted the Council on 17 December 2020 and asked it to conduct an internal review of this response.
8. The Council informed her of the outcome of the internal review on 8 January 2021. The review upheld the application of the previous exceptions in the EIR. The review also noted that information held by

local councillors acting in their capacity as elected members on behalf of their constituents is not subject to the legislation and therefore was not included in its response to her.

Scope of the case

9. The complainant contacted the Commissioner on 22 January 2021 in order to complain about the Council's decision to withhold information falling within the scope of her request. She was also dissatisfied with the time it took the Council to process her request.
10. During the course of the Commissioner's investigation, the Council reassessed what information it held which fell within the scope of the request. This led to it locating correspondence exchanged by Councillors which it now accepted fell within scope of the request.
11. Following this reassessment, the Council disclosed some further information to the complainant on 6 April 2022 with redactions to parts of the documents being made on the basis of regulation 13(1) (personal data exception).
12. At this stage, the Council also confirmed to the Commissioner that information redacted from documents previously disclosed to the complainant during its original processing of the request was exempt on the basis of 12(4)(e) and that it was also seeking to withhold, in full, a number of documents on the basis of either that exception or on the basis of regulation 13(1). The Council no longer sought to rely on regulation 12(4)(d) to withhold information.
13. This decision notice therefore focuses on determining whether the information withheld by the Council on the basis of regulations 12(4)(e) and 13(1) is exempt from disclosure under the EIR. The Council's processing of the complainant's subject access request is not a matter which can be considered in a decision notice.

Reasons for decision

Regulation 12(4)(e) – internal communications

14. Regulation 12(4)(e) states that information is exempt from disclosure if it involves 'the disclosure of internal communications'. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. Rather, as long as the

requested information constitutes an internal communication then it will be exempt from disclosure.

15. The Commissioner has considered the information withheld by the Council on the basis of this exception and he is satisfied that all of it constitutes internal communications and therefore regulation 12(4)(e) applies to this information.

The public interest test

16. 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.
17. 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).

Public interest in disclosing the information

18. In her submissions to the Commissioner, the complainant explained that her planning application was considered in the Planning Committee meeting referred to in the request. She explained that in her view the vote to approve her planning permission was miscounted by the clerk and a result in her favour was recorded as a result against the application. The complainant explained that this resulted in two Councillors making complaints about the maladministration of the meeting. The complainant explained that the Councillors had suggested that she made a FOI request to the Council to ask for all communications about the meeting and any complaints against, or in support of, the application.
19. The complainant explained that the information the Council (originally) disclosed only dated from before the meeting and that one email which was disclosed was completely redacted with the exception of the title 'Urgent' visible. The complainant explained that in her view the Council was refusing to disclose the remainder of the information to cover up the fact that it knew that the meeting was maladministered. The complainant noted that part of the Council's reasoning for withholding the information was because it concerned a complaint about a Councillor. However, the complainant argued that this was untrue; rather her complaint concerned maladministration by the Council. She

emphasised that she was seeking Council communications with Councillors about a public meeting and in her view it was not defensible to withhold information concerning complaints raised by her Councillors or the Council's response to such complaints.

20. For its part, the Council acknowledged 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 and more effective public participation in environmental decision making, all of which ultimately contribute to a better environment.

Public interest in maintaining the exception

21. The Council argued that internal deliberation and decision making should be protected by preserving a 'safe space' for officers to debate issues away from external scrutiny. It argued that such a space allows for the exchange of free and frank views, the debate of live issues and for the Council to reach decisions away from external interference and distraction.
22. In the particular circumstances of this request the Council confirmed that at the time of the request, and at the time of the internal review response, the matters under consideration remained ones which were live. This was because the planning appeal remained ongoing and the case made by the complainant in her appeal against the planning decision and enforcement notice included issues that are discussed in the withheld information.
23. Furthermore, the Council argued that even if the matter was no longer live, in its view there was still a considerable public interest in withholding the information given the possible chilling effect on officer discussion and debate. In support of this position the Council explained that the withheld information contained discussions, debates and enquiries about a complex case. It argued that disclosure of the information would mean that it was unlikely that such discussions would be fully explored in the same way again and that this was against the wider public interest.

Balance of the public interest test

24. 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. The safe space arguments 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.

25. In the circumstances of this case the Commissioner accepts that at the time of the request and at the time of the internal review, matters concerning the planning application were still ongoing. Furthermore, the Commissioner is satisfied that the issues covered in the withheld information are ones that are related to the outstanding matters concerning the planning application. The Commissioner is also conscious that the withheld information contains detailed and frank internal discussions about a complex and contentious planning matter. In light of the above, in the Commissioner's view, significant weight should be attributed to the safe space arguments in this particular case.
26. With regard to the Council's reference to chilling effect arguments, public authorities often argue that disclosure of internal discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and lead to poorer decision making. However, public officials charged with giving advice are expected to be impartial and robust in meeting their responsibilities, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, the possibility of a chilling effect cannot be dismissed out of hand and if the issue in question is still live, then arguments about a chilling effect on those ongoing internal discussions are likely to carry significant weight.
27. As discussed above, in the circumstances of this case the Commissioner is satisfied that at the time of the request (and at the point of the internal review) the Council's discussions in relation to this matter were ongoing. This, allied to the content of the withheld information which as also noted above contains frank internal discussions, means that in the Commissioner's view there is a genuine risk that disclosure of the withheld information could have a chilling effect on how similar planning matters are discussed in the future.
28. Turning to the public interest arguments in favour of disclosure, the Commissioner recognises that the complainant, and indeed two local Councillors, have particular concerns about the conduct of the Planning Committee in question. The Commissioner appreciates the seriousness of the allegations made and he accepts that there is arguably a broader public interest in the Council being transparent about how it handled such allegations, beyond simply the complainant's personal and direct interest in this issue. Disclosure of the information withheld on the basis of this exception, a small part of which predates the planning meeting, with the remainder post dating the meeting, would provide considerable insight into Council's consideration of such concerns. Disclosure would also provide some further insight, in addition to the information already

disclosed, into the Council's preparations and views of the planning application prior to the meeting taking place. As result the Commissioner considers the public interest arguments in favour of disclosure attract considerable weight.

29. However, even taking into account the presumption in favour of disclosure, in the Commissioner's view there is greater public interest in maintaining the exception given the cumulative weight that he considers should be attributed to the safe space and chilling effect arguments.

Regulation 13(1) – personal data

30. 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 regulations 13(2A), 13(2B) or 13(3A) is satisfied.
31. In this case the relevant condition is contained in regulation 13(2A)(a)¹. 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 ('GDPR').
32. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then regulation 13 of the EIR cannot apply.

Is the information personal data?

33. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

34. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
35. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or

¹ As amended by Schedule 19 Paragraph 307(3) DPA 2018.

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

36. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
37. The information which the Council had withheld on the basis of regulation 13(1) consisted of the names of Council officers and more substantive information about another individual. In respect of the latter individual, in addition to being their personal data, the Council also considered the information in question to be special category data.
38. Information relating to special category data is given special status in the GDPR. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the 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.
39. Having reviewed the information in question, the Commissioner is satisfied that all of the information withheld on the basis of regulation 13(1) both relates to, and identifies, the individuals concerned. The information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
40. Furthermore, the Commissioner is satisfied that the information which the Council has withheld concerning a particular individual also qualifies as special category data. The Commissioner cannot elaborate on why this is the case without revealing the content of the information itself.
41. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
42. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

43. Article 5(1)(a) of the GDPR states that:

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

44. In the case of an EIR 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.
45. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
46. In addition, if the requested data is special category data as some of the information withheld by the Council is, then in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.
47. The Commissioner considers that the only Article 9 conditions that could be relevant to a disclosure under the EIR are (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject).
48. The Commissioner has seen no evidence or indication that the individual concerned has specifically consented to the information which constitutes special category data being disclosed in response to the EIR request (and thus effectively placing the information into the public domain) or that they have deliberately made this data public.
49. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing the information which the Commissioner accepts is special category data would therefore breach principle (a) and so this information is exempt under regulation 13(1) of the EIR.
50. With regard to the names of the Council officials (ie the withheld information which does not constitute special category data) 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'².

² Article 6(1) goes on to state that:-

51. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the EIR, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
52. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

53. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
54. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
55. For the reasons discussed above, the Commissioner considers that there is a legitimate interest in the disclosure of information falling within the

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

scope of the request. This is in order to provide further transparency in relation to how the planning application in question was considered and how the Council considered the allegations of maladministration.

Is disclosure necessary?

56. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
57. In the Commissioner's view it is not sustainable to argue that disclosure of the names of the officials is necessary; disclosure of such information would not add significantly to the public's understanding of this subject matter.
58. Therefore, as the Commissioner has decided that disclosure of the names of the officials is not necessary to meet the legitimate interest in disclosure, he has not gone on to conduct the balancing test in respect of this information. As disclosure is not necessary, there is no lawful basis for processing this information and it is unlawful. It therefore does not meet the requirements of principle (a). The Commissioner has therefore decided that Council is entitled to withhold the names of the officials under regulation 13(1), by way of regulation 13(2A)(a).

Regulation 14 - Refusal to disclose information

59. Regulation 5(1) of the EIR states that, subject to any exceptions, environmental information must be made available on request.
60. Regulation 5(2) requires that the information be made available promptly, and in any event no later than 20 working days after the date of receipt of the request. Under regulation 7(1), a public authority may extend this time to 40 working days in total if it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so. If this is the case, under regulation 7(3) the public authority must inform the requester that they need this additional time to process the request within 20 working days of the request itself.
61. In the circumstances of this case the complainant submitted her request on 8 September 2020 but the Council did not respond until 4 November 2020, 40 working days later. However, as noted above, if a public authority wishes to extend the timeframe for responding to a request to 40 working days, it needs to have previously advised the requester of

this; it did not do so in this case. In any event, the Council's response to the request was not completed until it issued its further response on 17 December 2020.

62. In light of the above the Commissioner finds that the Council breached regulation 5(2) of the EIR.

Right of appeal

63. 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

64. 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.
65. 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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