

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 28 November 2023

Public Authority: Blackpool Borough Council
Address: Town Hall
Blackpool
FY1 1NA

Decision (including any steps ordered)

1. The complainant requested information from Blackpool Borough Council ("the Council") regarding a planning application. The Council has withheld the information requested in part one of the request, citing regulation 12(4)(e) (internal communications) and regulation 12(5)(b) (course of justice) as its bases for doing so and denied holding any information within the scope of part two of the request.
2. The Commissioner's decision is that:
 - The Council is entitled to rely on regulation 12(4)(e) to withhold all of the information withheld on this basis, other than one email for which the exception is not engaged.
 - The Council is entitled to withhold the remainder of the information within the scope of part one of the request (excluding the information not considered in this notice as described in paragraphs 8-10 of this notice) under regulation 12(5)(b).
 - On the balance of probabilities, the Council does not hold any information within the scope of part two of the request.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.

- Disclose the email for which he has determined regulation 12(4)(e) is not engaged (as described in paragraph 15 of this notice).
4. 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

5. The complainant made the following request for information to the Council, they made the first part of the request on 3 March 2023 and the second part of the request on 6 March 2023:
1. "I would like to request all communication regarding the recent planning application for [address redacted] between Council officers. I would particularly request any between [name redacted], [name redacted], and [name redacted], on this matter please but any others between departments are requested too please."
 2. "I would like to add to this request - I would like information about any meetings that were held to discuss this planning application including dates, times, agendas, minutes, attendees and actions taken."
6. The Council responded on 4 April 2023. It withheld the information requested in part one of the request, citing regulation 12(4)(e) of the EIR (internal communications) as its basis for doing so. It refused part two of the request under regulation 12(4)(a) of the EIR (information not held). It maintained this position at internal review.

Scope of the case

7. During the course of the Commissioner's investigation the Council applied a new exception to some of the withheld information. It applied the exception at regulation 12(5)(b) of the EIR (course of justice) on the grounds that this information is subject to legal professional privilege.
8. The Council also stated in its submissions to the Commissioner that some of the attachments to the emails withheld under regulation 12(4)(e) were already in the public domain and accessible to the complainant. The attachments which the Council stated are in the public domain and already accessible to the complainant are as follows:

- The Officer Assessment which forms part of the published planning application file
 - The Planning Decision Notice which forms part of the published planning application file
 - The Public Notice which forms part of the published planning application file.
9. The Commissioner accepts that these documents are already available to the complainant as they are in the public domain and also relate to a planning application made by a company of which the complainant is a director. From the complaint made to the Commissioner it is clear that the complainant is seeking additional information regarding the Council's decision making beyond that already available to them. This notice will therefore not consider whether this information should have been disclosed in response to this request as the Commissioner does not consider this to be within the scope of the complaint made to him.
10. In addition, the Commissioner notes that one of the documents withheld under regulation 12(5)(b) (course of justice) is a copy of the legal opinion provided by the barrister acting on behalf of the company of which the complainant is a director. For the same reasons given in the paragraph above, this notice will not consider whether this information should have been disclosed in response to this request.
11. Excluding the information covered in paragraphs 8 - 10, this notice covers:
- Whether the Council is entitled to withhold the information it has withheld under regulation 12(4)(e) on this basis,
 - Whether the Council is entitled to withhold the information it has withheld under regulation 12(5)(b) on this basis,
 - Whether, on the balance of probabilities, the Council is correct to state that it does not hold any information within the scope of part two of the request.
12. Where the Commissioner has decided that information is exempt from disclosure under one exception he will not consider whether it is also exempt under a second exception.

Reasons for decision

Regulation 12(4)(e) - internal communications

13. Regulation 12(4)(e) of the EIR states that information is exempt from the duty to disclose 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 the exception will be engaged.
14. The withheld information in this case consists of emails between Council staff. With the exception of one email, these emails have not been sent to any external recipients or received from any external senders.
15. One email, was sent from one member of Council staff to an external party, copying in another member of Council staff. The Commissioner's view is that this email is within the scope of the request as it does constitute communication between Council officers, specifically the sender and the cc'd recipient, despite not being solely between Council officers. However, as it is not solely between Council officers and was sent to an external party it cannot be considered an internal communication. The exception is therefore not engaged for this email and the Commissioner orders disclosure of this email.
16. For all of the other emails, which are solely between Council staff, the Commissioner is satisfied that the withheld information falls within the definition of internal communications and therefore, he finds that the exception is engaged. The Commissioner will now go on to consider the public interest test for this information.

Public interest test

17. With regards to the public interest test, the Council acknowledged that there will always be some public interest in disclosure, to promote the transparency and accountability of public authorities.
18. The Council also outlined arguments in favour of maintaining its reliance on regulation 12(4)(e). It stated that the primary public interest argument in maintaining the exception is a safe space argument. That is that public authorities need a safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction. It highlighted the fact that the Commissioner's guidance states that the need for a safe space is strongest when the issue is still live. Regarding the need for a safe space in this particular case, it stated Council officers needed a safe space to debate and seek internal advice on complex legal planning matters from their peers or superiors to

enable the Council to arrive at a lawful decision for the interest of the public and residents of Blackpool.

19. It also relied on a chilling effect argument. That is that the disclosure of internal discussions inhibits free and frank discussions, and that the loss of frankness and candour damages the quality of advice, leading to poorer decision-making. It highlighted the fact that the Commissioner's guidance states that the weight accorded to chilling effect arguments depends on the circumstances of each case, including the timing of the request, whether the issue is still live and the content and sensitivity of the information in question. It stated that the planning decision is still subject to appeal mechanisms, therefore the Council still considers the matter live.
20. With regards to why it considers that on balance the public interest in maintaining the exception outweighs that in disclosing the withheld information the Council stated that it considers that there is a significant amount of information already in the public domain regarding the Council's consideration of the planning application and that the requester's private interests are not the same as the public interest and what may serve those private interests does not necessarily serve a wider public interest. It also stated that it considers the public interest in ensuring that the Council's ability to maintain a safe space to seek advice from peers and have free and frank discussions about the application is not prejudiced outweighs what it considers to be the "limited value of transparency and accountability" in this case.
21. The complainant has stated that they consider the public interest in the disclosure of this information to be high as they believe the Council has not followed the correct process as regards the planning application, the complainant believes the Council has not followed its own policy when reaching its decision about the application. The complainant alleges that Council officers have "conspired between them to find an illegal way to refuse a planning decision" and their refusal to provide the withheld information amounts to a cover up of corruption.
22. The Commissioner acknowledges that the public interest in disclosure of information revealing corruption would be significant. However, having viewed the withheld information the Commissioner does not consider that there is anything to suggest that the withheld emails are evidence of such a serious allegation.
23. He acknowledges that the withheld information does relate to a decision that the complainant believes to have been made incorrectly and that, in addition to the general public interest in transparency regarding how Councils handle planning applications, the question of whether the

Council did follow its own policy does increase the public interest in the disclosure of the information.

24. Nevertheless, the Commissioner considers that the significant amount of information already in the public domain about decision making in relation to this planning application goes a long way in meeting the general public interest in transparency regarding how the Council has handled the application.
25. On the question of whether the Council did follow its own policy, the Commissioner considers the fact that there are other avenues open to the complainant to challenge how the Council handled the planning application if they believe the Council did not have a legal basis on which to refuse their application to be relevant here. Indeed, the Commissioner understands that the appeals process is ongoing. Whilst there is a public interest in favour of disclosure to support scrutiny of the Council's actions here, this public interest may be better served by the ongoing appeal process.
26. The Commissioner accepts the Council's argument that the maintenance of a safe space for Council staff to discuss this matter, which the Commissioner notes is still a live issue, is a significant factor in favour of maintaining the exception. Discouraging Council staff from discussing planning matters freely and frankly would not be in the public interest.
27. The Commissioner's decision is therefore that the public interest in maintaining the exception outweighs that in disclosure and the Council is therefore entitled to withhold the emails under regulation 12(4)(e).
28. 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).
29. 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(4)(e) was applied correctly.

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

30. 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.
31. In this case the Council has applied this exception on the grounds that the information is subject to legal professional privilege. Specifically it states that the information is subject to legal advice privilege.
32. The Council has applied regulation 12(5)(b) to some of the internal emails it withheld under regulation 12(4)(e), as the Commissioner has already determined that the Council was entitled to withhold this information under regulation 12(4)(e) he will not consider whether the Council applied regulation 12(5)(b) correctly to this information.
33. Instead he will consider only whether the Council was entitled to rely on regulation 12(5)(b) to withhold the information that has been withheld on this basis alone. This information comprises two emails sent from the Council to external Legal Counsel and a document which contains legal advice provided to the Council by its barrister.
34. Legal advice privilege applies to confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice. Having viewed a copy of the withheld information, the Commissioner is satisfied that legal advice privilege applied to the withheld information. The Commissioner is aware of no evidence suggesting that this privilege has been waived.
35. The Commissioner's established view is that disclosure of information subject to LPP, particularly legal advice which remains live and relevant, will have an adverse effect on the course of justice.
36. The Council has explained that the withheld information relates to an ongoing live matter, that being a planning application which is still subject to appeal. As the withheld information is subject to legal professional privilege and relates to a live matter, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged. The Commissioner will now go on to consider the public interest test.

Public interest test

37. 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.
38. The Commissioner understands the complainant's concerns in relation to this matter; however, planning law provides remedies for addressing concerns about planning decisions. Whilst disclosure of the information might assist the public understanding of the council's position the Commissioner is not convinced that disclosure is necessary for accountability or understanding to be obtained.
39. The Commissioner's decision is, therefore, that the balance of the public interests favours the exception being maintained. This means that the Council was not obliged to disclose the requested information.

Regulation 12(4)(a) – information not held

40. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information "to the extent that it does not hold that information when an applicant's request is received".
41. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request). For clarity, the Commissioner is not expected to prove categorically whether the information is held.
42. The Council's position is that it does not hold any information within the scope of part two of the request, which was for, "information about any meetings that were held to discuss this planning application including dates, times, agendas, minutes, attendees and actions taken".
43. The Council stated in its submissions to the Commissioner that no meetings were held to discuss the application, it therefore does not hold any information. In order to ensure that any information within the scope of this part of the request was identified the Council consulted with the relevant officers, who confirmed that no such meeting took place.

44. The Commissioner is satisfied that the Council has adequately explained why it does not hold the information requested and is aware of no grounds to doubt this explanation.
45. The Commissioner is satisfied in this case that, on the balance of probabilities, no information within the scope of part two of the request is held by the Council.

Right of appeal

46. 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

47. 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.
48. 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

Victoria James
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