

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

Decision notice

Date: 23 June 2014

Public Authority: Cornwall County Council
Address: New County Hall
Treyew Road
Truro
Cornwall
TR1 3AY

Decision (including any steps ordered)

1. The complainant has requested emails received by a councillor objecting to a planning application which the complainant had made which had not been published on the planning file on the council's website.
2. The Commissioner's decision is that the council was not correct to apply Regulation 13, Regulation 12(5)(f) or Regulation 12(4)(e) to the information, however small sections can be redacted relating to the contact details of third parties.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the remaining information to the complainant.
4. The public authority 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. On 3 October 2013 the complainant wrote to a councillor and requested information in the following terms:

"Further to my verbal request made on 27.9.13, (which you refused), along with my written request made on 28.9.13, (which you appear to have ignored), to have access to the emails you have in your possession and which relate to public objections to my planning application.

Please forward to me all of the emails you have received from the public relating to my planning application which you are dealing with in your position as a county councillor. If you feel there is a confidentiality issue then I will have no objection if individual details are redacted."

6. The council responded on 22 November 2013. It said that the information was exempt under Regulation 12(5)(f) (voluntary supply), 12(4)(e) (internal communications) and Regulation 13 (personal information)
7. Following an internal review the council wrote to the complainant on 30 December 2013. It upheld its original view.

Scope of the case

8. The complainant initially contacted the Commissioner on 19 November 2013 to complain about the way his request for information had been handled. He considers that the council should have disclosed more information on the objections it had received in response to his request.
9. The information which it had disclosed to him was (for the most part) redacted details of the correspondence he had had with the relevant councillor.
10. The Commissioner considers that the complaint relates to whether the information which the complainant sought is held, and whether it should be disclosed to him.
11. During the course of the Commissioner's investigation the complainant wrote to the Commissioner and offered a compromise request. He said that he would be willing to withdraw his request for the emails if the council would:

*"Confirm that [the councillor concerned] has not received any email **directly from the general public** which relates to my planning application.*

and to further confirm that the one email [the councillor] has from the public and which appertains to my application was NOT sent directly to [the councillor] but was forwarded to him by a member of Newquay

Town Council and came from a [name of member of the public redacted]."

12. The council responded to the Commissioner on 24 April 2014 regarding this compromise offer. It said that it could not agree to the compromise offer on the basis that this in itself would disclose information which was exempt. It said that whilst it could confirm that the councillor had received emails, it was not able to confirm either the names or identities of the senders or the numbers of emails which had been received.
13. The Commissioner has therefore concentrated on the initial request as a whole within this decision notice.

Reasons for decision

Regulation 5 (3)

14. The Commissioner notes that part of the information which was exempted under Regulation 12(5)(f) was in fact information which the council received from the complainant. Personal data belonging to the applicant is exempt under Regulation 5(3) however that information may be available to him via section 7 of the Data Protection Act 1998. The council did not claim the exception in this regard and chose to rely upon Regulation 12(5)(f) for this information. This initially led to confusion by the applicant in the first instance. The Commissioner has however used his discretion to apply Regulation 5(3) in order to simplify the issue.
15. The Commissioner has done this as he understands that the complainant was not seeking information which he himself had provided to the council regarding his planning application. The Commissioner has therefore excluded this from consideration within this notice, but the council should have considered the right of the complainant to obtain a copy of any personal data held about him by it under the DPA.
16. The complainant and the council should however be aware that although the information is exempt under the Regulations the council needs to consider whether any information is the personal data of the complainant which should be disclosed to him under section 7 of the DPA.

Regulation 12(5)(f)

17. Regulation 12(5)(f) states that information can be withheld where its disclosure would have an adverse affect upon:

- (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;*
18. The Commissioner has identified that the following criteria need to be considered in order for the exception to be engaged:
- a. Could the authority have required the provider to provide that information?
 - b. Is the authority entitled to disclose that information otherwise than in response to a request under the Regulations
 - c. Has the provider consented to the disclosure of the information
 - d. Would a disclosure of the information have an adverse effect upon the interests of the developer?
19. The council has submitted its arguments in favour of the exception applying.
20. The council confirmed that *"The information includes emails between the applicant and planning officers, emails between Newquay Town Council, an objector and planning officer, emails between an objector and Councillor Hicks, emails between planning officers and emails between planning officers and Councillor Hicks."*
21. The complainant argues that he had been told verbally by the councillor that he had received a number of objections to the application but that he was subsequently told by the council that only one objection was received by the councillor concerned. He subsequently believes that the councillor did not receive any emails from members of the public objecting to the application directly. He believes that the emails were forwarded to the councillor by a town council.
- a) Did the council have the ability to require the information from the provider?
22. The information requested is correspondence between the councillor and third parties relating to the planning application.

23. The Commissioner is satisfied that the council could not have required any individual(s) to provide it with copies of any correspondence which it received in this way.

b) Is the council otherwise entitled to disclose the information?

24. The Commissioner has considered whether the authority would be entitled to disclose the information otherwise than via a request under the Regulations.

25. The information relates to a planning application submitted by the complainant. In general, in order to create a transparent planning process all objections to a planning application are published alongside the application itself on the council's planning portal, or are available for inspection at the relevant council offices.

26. Following on from the above however, there is an onus on councillors to be transparent about their dealings with parties regarding planning applications where this ultimately might affect the decision. The Commissioner notes that in his position as ward member, the relevant councillor 'called in' the application to full council to make a decision.

27. Any member of the council who writes to their councillor objecting to a planning application should therefore have a degree of expectation that their objections may be published as part of the formal planning process. The Commissioner is therefore satisfied that there could be no expectation of confidentiality between the parties.

28. Aside from this, although the provider did express a wish that some information should be held in confidence the council responded clarifying that it is unlikely to be able to do so.

29. The Commissioner also notes that the council has said that it must publish all documentation which leads to the decision being taken, however it does not have to publish information which is not used in the process of reaching a decision. However it also clarified that the published objections contained the same information. The Commissioner therefore notes that although the same details may have been raised in the formal objections, the correspondence did address matters which were relevant to the decision and which may have been considered as part of the decision to refuse the application. It is therefore likely that the council could, or should have published the correspondence as part of the formal objections which were taken into account in the decision.

30. As the expectation would be that the information may be disclosed then a disclosure of the information would also not breach the first data protection principle of the Data Protection Act 1998. This is considered further below in the section relating to Regulation 13.

31. If that is the case then the council would be able to disclose the information other than in response to a request under the Regulations.

c) Has the provider of the information consented to the disclosure of the information?

32. The council says that it sought the consent of the provider of the information to its disclosure. It said that

"In relation to the emails provided by an objector, following third party consultation with the individual concerned they have clearly stated that they consider the emails to be private and do not wish them to be disclosed."

33. The third party has therefore not consented to the disclosure of the information to the complainant.

d) Would a disclosure of the information have an adverse effect upon the interests of the provider of the information?

34. The Commissioner has considered whether the disclosure would have an adverse effect upon the interest of the individual(s) whose information has been withheld. His opinion is that the individual(s) would be identified by a disclosure of the information whether or not direct information on their identities was redacted.

35. The disclosure of that information would have some direct adverse effect as the complainant would have knowledge of any objections they have raised, and the council argues that this may lead to harassment. However the Council has provided no evidence why it considers that that would be the case. The Commissioner notes that objections have been published on the council's planning portal but the council has not provided any information which suggests that this has led to harassment of the objectors by the applicant. The evidence therefore suggests that, contrary to the council's argument, this would not be the case. The complainant, for his part, is simply seeking a better understanding of the background to the decision and whether the relevant councillor acted appropriately.

36. There would however be an adverse effect due to the loss of privacy which the correspondents currently have over their correspondence and their opinions regarding the application. Whilst this would however also be the case with formal objections which are published with the planning application the Commissioner recognises that a formal objection may be written in a different style to private correspondence over an issue.

Conclusion

37. Having considered the above, the Commissioner considers that the council has failed to demonstrate that the exception is engaged for the withheld information. The council failed to demonstrate any adverse effect would occur beyond the normal adverse effect of publishing objections on the planning portal. Similarly he considers that the third party would not have any great expectations that his correspondence could remain private given that the normal procedures for planning objections is that these are published alongside the application on the planning portal of the councils website.
38. It is clear that planning objections which are taken into account when the decision is made should be published as part of the normal planning procedures. Whilst the council has argued that the objections were noted in the published objections there is a strong argument that the issues which were raised were relevant to the decision making process, and therefore that they should, or could have been published by the council as part of the normal process. The council was therefore entitled publish the information as a relevant document to the decision and therefore to disclose the information to the complainant other than through a request under the Regulations.
39. The Commissioner therefore considers that Regulation 12(5)(f) was not applicable.

Regulation 13 – personal data

40. Regulation 13 of the EIR provides an exception where a request relates to third party personal data.

41. Regulation 13(1) EIR states that:

"To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data".

42. Regulation 13(2) EIR states that:

"The first condition is-

(a) In a case where the information falls within any paragraphs (a) to (d) of the definition of 'data' in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –

(i) any of the data protection principles

Is the information personal data?

43. Personal data is defined in section 1 of the Data Protection Act (DPA) as follows:

'.....data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into possession of, the data controller; and includes any expression of opinion about the individual and indication of the intentions of the data controller or any person in respect of the individual.'

In this case the withheld information relates to information provided by an objector(s) to a councillor relating to the complainant's planning application. He is satisfied that the information falling within the scope of the request is partially personal data belonging to third parties. The Commissioner must therefore consider whether disclosure of that personal data would breach any of the data protection principles.

44. The Commissioner notes that contact details, addresses and email addresses of any third parties should be redacted from any information which is disclosed. As disclosures under the Act are considered to be to the whole world it would not be fair for the purposes of the first data protection principle for contact information of a private individual to be disclosed in response to a request. He has not therefore considered this further below.

Would the disclosure of the information contravene any of the data protection principles?

45. As mentioned, for Regulation 13 to apply the disclosure of personal data must contravene any of the data protection principles or section 10 of the DPA. The relevant principle in this case is the first data protection principle.

46. The first data protection principle states:

'Personal data shall be processed fairly and lawfully and, in particular shall not be processed unless –

At least one of the conditions in schedule 2 [DPA] is met.....'

47. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data,
- The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed?
- Whether there is a pressing social need for the information to be disclosed
- If the above are met, whether there is a relevant schedule 2 condition which allows for the disclosure of the information.

48. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be demonstrated that there is a pressing social need for a disclosure of the information to the public which overrides the expectations of the individual or any detriment that may be caused.

Would a disclosure of the information be fair?

49. The main question which the Commissioner needs to consider when deciding whether a disclosure of the information would be fair is whether the data subject would have an expectation that their information will be disclosed, or whether that would have been obvious at the time that they provided the authority with their information.
50. In this case the information was provided to the council as part of an objection to a planning application. In general the planning process is open and transparent, and objectors to applications understand that their formal objections will form part of the planning file and will be published on the authority's website in order for interested parties to view. This would clearly place any objector with an expectation that their objection (and information about them making their objection) would be disclosed.
51. However, beyond official objections there is nothing to prevent individuals writing to relevant councillors and seek their opinion or their backing for a particular stance on an application. The council in this case was clear however that planning applications are decided purely on the basis of the official documentation and that if the information provided is used as part of the decision making process then it must be published as part of the relevant documentation.
52. The question for the Commissioner is whether it would be fair for any correspondence sent privately, outside of the normal planning application process, to subsequently be disclosed.

53. The Commissioner is satisfied that the information was intended to sit outside of the normal planning objection process. The correspondence was additional correspondence over the issue.
54. Correspondence with a councillor over an issue may not always be sent with a view to it being held in confidence. Clearly as a councillor is a political representative for his or her constituents those corresponding with them must have some degree of expectation that the councillor might need to use that information to best represent their case, further a particular cause, demonstrate a fact or opinion or to simply to raise an issue in council. The Commissioner would therefore considers that members of the public who write to councillors should not have an overarching expectation that the information they provide will be held in confidence unless they specifically asked for this to be the case, or because the matter was sensitive in some way. A planning objection or an opinion on a planning application is generally not considered to be a sensitive matter.
55. There is no direct evidence that the writers intended that the information be held in confidence by the councillor. It might be surmised that there was an expectation that by writing to the councillor the information would not be disclosed on the council website, however there is no evidence that is the case.
56. The Commissioner has noted above that where the matter of confidence was raised, the council clarified that it would be unlikely to be able to be hold in confidence by the council, although it may not be under an obligation to publish information which did not form part of the information relied upon to reach a decision on the application.
57. The Commissioner notes that council has argued that the general content of the withheld information is already known as it is repeated as part of formal objections made and published on its site. He also notes that the complainant has been provided with various responses from the council as to who wrote objections and who was involved in correspondence. Various sources have however provided different responses and so the complainant has been left unsure as to the exact nature of the correspondence he is seeking.
58. Having taken the above into account the Commissioner is satisfied that the third party should have had a degree of expectation that that information may be published as part of the normal planning procedures, in spite of the fact that he may not have intended it to be.

Is there a pressing social need for the information to be disclosed?

59. The complainant has raised valid concerns that where planning applications are concerned then all objections should be disclosed and considered as part of the normal planning process. He has highlighted that if private correspondence with councillors is generally withheld in this way objectors could make false allegations about the application and that this would prevent the right for the applicant to reply or disprove these.
60. The Commissioner would also highlight that there is a public interest in all correspondence of this sort being disclosed in order to prevent lobbying over larger development applications and in order to provide a greater degree of transparency on the actions of elected members. Where particularly contentious applications are in question there is clearly a social need for the actions of councillors to be seen to be 'whiter than white' and completely above board. This would increase the level of trust which people have in such decisions. Whilst this is simply an application for an annex to an existing building and therefore not particularly contentious in the wider sense the impact that the decisions have on the residents in the area, including the complainant, do require that decisions are fair, and 'seen to be fair'. The actions of a councillor and objectors to the application which cannot be seen by the applicant does weaken this to a large degree.
61. The Commissioner also notes that there appears to have been a lack of transparency as regards some aspects of the background to the case. The complainant alleges that he was told by the relevant councillor that a number of objections had been made to him, however the council has subsequently confirmed that was not the case. There is therefore a public interest in allowing scrutiny of what actually occurred in order that the planning process remains as transparent and as open as possible.
62. Whilst account cannot be taken of the personal interests of the complainant in requesting the information the alleged lack of transparency does undermine the trust which people may have that planning decisions are taken fairly and appropriately, and it might be argued, could undermine trust in the councillor personally. This is therefore a wider issue than the complainant's own personal concerns of interests.
63. The document '*Probity in Planning for councillors and officers*' issued by the Local Government Association in 2013 provides guidance on the way in which officers and elected members should act when facing planning application issues.

64. In the background section of this document the guidance states:

"One of the key aims of the planning system is to balance private interests in the development of land against the wider public interest. In performing this role, planning necessarily affects land and property interests, particularly the financial value of landholdings and the quality of their settings. Opposing views are often strongly held by those involved.

Whilst councillors must take account of these views, they should not favour any person, company, group or locality, nor put themselves in a position where they may appear to be doing so. It is important, therefore, that planning authorities make planning decisions affecting these interests openly, impartially, with sound judgement and for justifiable reasons.

The process should leave no grounds for suggesting that those participating in the decision were biased or that the decision itself was unlawful, irrational or procedurally improper."

65. Given the apparent discrepancies in the information provided to the complainant there is a pressing social need to rectify this and clarify that the planning process was dealt with appropriately.
66. The Commissioner notes that the 'Probity in Planning' document accepts that lobbying is a perfectly normal part of a planning proposal or application. It sets out that there is nothing inherently wrong with elected members receiving correspondence and taking the issues raised into account providing they do not predispose themselves to decide an issue in a particular way prior to being involved in any decision over the application. They must also make their decision based upon the official information which forms part of the application documentation rather than other information they may be a party to.
67. The Commissioner notes that a disclosure of such correspondence between the parties would to an extent provide clearer evidence of the probity with which councillors and/or officers have conducted themselves over matters. Where the relevant information is not otherwise sensitive there is a stronger argument for such correspondence to be disclosed.
68. The Commissioner is satisfied that in this case the information is not otherwise particularly sensitive. He is also satisfied that whilst the objector(s) may have not have had the intention that their correspondence would be disclosed, any expectation that it would not be would not be strong given the normal transparency of the planning process.

Schedule 2

69. Having found that a disclosure of the information would be fair to the individual the Commissioner must also consider whether one of the conditions for processing (i.e. in this case disclosing) the personal data in schedule 2 of the DPA would apply. He considers that the relevant criteria in question is section 6(1) which states that:

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

70. In this case the relevant parties to consider are the public as a whole. The Commissioner has considered this and is satisfied that the condition is met in this case. The general discrepancies alleged by the complainant in the statements made by the council and the councillor have raised a question of probity in the actions of the council in making its decision, which the council has failed to properly explain in its responses to the complainant. The public as a whole has a right to transparency in planning decisions, and disclosing the information in question would alleviate some the discrepancies and shed light on the actions of the councillor and the planning department's actions. A disclosure of the correspondence which was received from third parties is not unwarranted in this case due to the general expectation of transparency, and the normal process of publishing planning objections during the planning process.
71. The Commissioner's decision is therefore that whilst Regulation 13 does allow for addresses and contact details to be redacted, the remaining correspondence is not exempt from disclosure under Regulation 13.

Regulation 12(4)(e)

Is the information internal communications?

72. Regulation 12(4)(e) was applied to correspondence between council officers and members within the council.
73. The Commissioner considers that where information is provided to external third parties then that information does not fall within the scope of the exception. For instance an email between officers within the council which is copied to an external contractor will not be a purely internal communication and cannot therefore fall within the scope of the exception in Regulation 12(4)(e). It is no longer a purely internal communication.

74. The Commissioner notes that some of the withheld information is correspondence between the town council and the county council. Additionally information received from objectors cannot fall within the scope of this exception. This information cannot fall within the scope of the exception. Regulation 12(4)(e) is not applicable to this information.
75. However some of the information does relate to internal correspondence between council staff, including the councillor. This information is internal communications and therefore falls within the scope of the exception.
76. The Commissioner has therefore considered the public interest test required by Regulation 12(1)(b).

The public interest in the exception being maintained

77. The central purpose of this exception is to protect the thinking space of public authorities and to allow them to discuss matters and reach a decision in a full and frank manner.
78. Arguments about protecting internal deliberation and decision making processes will often relate to preserving a 'safe space' to debate issues away from external scrutiny, and preventing a 'chilling effect' on free and frank views in future. The weight of these factors will vary from case to case, depending on the timing of the request and the content and context of the particular information in question.

Safe space arguments

79. 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.
80. The need for a safe space will be strongest when the issue is still live. Once a public authority has made a decision, a safe space for deliberation will no longer be required and the argument will carry little weight. The timing of the request will therefore be an important factor.
81. Public authorities may also need a safe space for a short time after a decision is made in order to properly promote, explain and defend its key points. However this sort of safe space will only last for a short time, and once an initial announcement has been made there is also likely to be increasing public interest in scrutinising and debating the details of the decision.
82. In this case the request for information was made on 30 October 2013. A decision had been made by this point to refuse the application,

however the final decision to refuse the application was not made until 13 December 2013. The issue was therefore still live to an extent when the complainant made his initial request for information to the council.

83. The Commissioner notes therefore that if the council had disclosed the information at the time of the request, this was during the period when the council were actively considering the planning application and the relevant planning officer was considering the application. Should that information have been disclosed at that time then it is possible that this would have led to additional correspondence and arguments from the parties when a final decision had not been taken by the council. This could have led to increased workload on the planning department which may ultimately have led to delays occurring overall. However it is also fair to say that the council has acknowledged that all relevant issues were already available from its website. The Commissioner is therefore satisfied that in this respect any additional work would have been limited as the issues were already known about. The Commissioner is also satisfied that the intention to refuse the application had already been communicated to the applicant.

Chilling effect arguments

84. As regards the chilling effect arguments, the Commissioner recognises that where sensitive information may be disclosed as a result of a request correspondence between the parties might not be as full and frank. As stated however, in this case the Commissioner is not convinced that the information is particularly sensitive as the majority of the main issues are disclosed in the published documents, and the complainant is already aware of much of the background to the decision.
85. It is also the case that as the planning process is intended to open and transparent, any chilling effect arguments must be limited as the prospect of disclosure would always be in the background to planning discussions of this nature.
86. The Commissioner does not therefore consider that a disclosure of this information would be likely to lead to any chilling effect upon correspondence within the council in this case.

The public interest in the information being disclosed

87. As considered above, where the internal correspondence is concerned there is still a great deal of public interest in transparency as regards the background to the decision and on the actions of the officers and members concerned regarding this case. Public trust in the integrity of the planning system is an important requirement.

88. The complainant has been left in a position where he feels he was misled by the relevant councillor and that the decisions which was taken was to an extent led by issues which he is not aware of. The Commissioner therefore considers that there is a strong public interest in the information being disclosed in order to demonstrate whether the council's actions were appropriate in this case.
89. A failure to provide documentation could also be seen to be damaging the intended openness of planning decisions in this case. Although the reasons for the refusal have been provided within the planning decision, due to the responses which the complainant had received from the council or the councillor he has been left with reservations about the way he, and his application have been treated. Given the contentious nature of many planning applications, including this one, there is a public interest in ensuring that decisions are taken appropriately with all parties aware of the issues which led to the decision and that elected members have acted appropriately. The alleged discrepancies with which the council has responded to questions from the complainant have left him in a position where he is not convinced that this is the case in this instance. In a wider sense, it is important for the council to demonstrate to the community as a whole that it has acted appropriately.

The balance of the public interest

90. Having considered the above, the Commissioner is satisfied that the public interest in the exception being maintained does not outweigh that in the information being disclosed in this case. The issues which the complainant has outlined have clearly raised concerns. The Commissioner notes that the information is not significantly sensitive and therefore considers that the public interest in providing greater transparency over the issues outweighs any public interest in maintaining the exception.

Right of appeal

91. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

92. 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.
93. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF