

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

Decision notice

Date: 31 August 2018

Public Authority: Ards and North Down Borough Council
Address: FOI@ardsandnorthdown.gov.uk

Decision (including any steps ordered)

1. The complainant requested information about the way that an earlier request for information had been handled. Ards and North Down Borough Council ('the Council') provided some information but withheld other information under regulation 12(4)(e) and 13. The Commissioner's decision is that regulation 12(4)(e) is engaged but the public interest in maintaining the exception is outweighed by the public interest in disclosure. However, the Commissioner has determined that the Council correctly applied regulation 13 to third party personal data.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information which has been withheld under regulation 12(4)(e).
3. 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

4. On 24 April 2017, the complainant wrote to the Council and referred to a request for information he submitted to the Council on 13 February 2017. He requested information in the following terms:

"all communications generated by the council with respect to my FOI request for copies of these TPOs"

5. The Council responded on 23 May 2017 and provided emails held in relation to the request subject to some information being redacted under regulations 12(4)(e) and 13.
6. On 29 May 2017 the complainant wrote a detailed email to the Council expressing dissatisfaction with its handling of the request and its decision to withhold information. He also sent a further email to the Council on 30 May 2017 referring to the Council's constitution. He pointed out that any redacted information other than information which had been withheld for data protection reasons should be disclosed in accordance with the provisions of Annex 12 of Part 4 of the Council's Constitution relating to openness.
7. The Council responded on 7 June 2017 and upheld its decision not to release the remaining information held relevant to the request. The Council referred the complainant to the ICO if he remained dissatisfied.

Scope of the case

8. The complainant contacted the Commissioner on 21 June 2017 to complain about the way his request for information had been handled.
9. The scope of the Commissioner's investigation into this complaint is to determine whether the Council should disclose the remaining information held relevant to the request of 24 April 2017.

Reasons for decision

Background

10. The request which is the subject of this notice is for communications relating to the Council's handling of an earlier request for information which the complainant submitted on 13 February 2017.
11. One part of the 13 February 2017 request was for a list of Tree Preservation Orders ('TPOs') in the last five years, broken down year by year, including the reasons and evidence to remove the TPOS. On 15 March 2017, the complainant requested a copy of each individual TRO. On 31 March 2017 the Council advised that it held a public register of TPOs which could be viewed at its offices by appointment.

12. On 31 March 2017 the complainant asked whether the Council could provide electronic copies of the TPOs in question. The Council wrote to the complainant on 12 April 2017 and confirmed that work had commenced to comply with the request. However, the Council advised that it estimated it would take 28.5 hours to provide electronic copies of the 131 TPOs. It referred to the 18 hours appropriate limit under section 12 of the FOIA and requested a fee of £262.50 to process the request (28.5 hrs – 18 hrs X £25 per hour).
13. At 10:13 am on 12 April 2017 the complainant refined his request to the most recent 83 TPOs to bring compliance within 18 hours of work. At 5:09 pm on the same day, the Council confirmed that the 83 TPOs had been put on a removable media source and were ready to collect.
14. The complainant was surprised at the speed at which the Council had been able to deal with the refined request, in light of its contention that it would take 13 minutes per TPO to make it available electronically. He raised a number of queries about the Council's estimate for compliance with the request and the actual work that had been conducted to process the request. After he had reviewed the 83 TPOs, the complainant pointed out, based on the metadata of the files, all the information had been scanned prior to the Council requesting a fee to process the request.
15. The Council provided details of the work undertaken to process the request and confirmed that scanning was only one of the tasks involved, for example, the documents would have to be re-stapled and re-filed once scanned. The Council maintained that its estimate was reasonable.
16. On 24 April 2017 the Council confirmed that it would provide electronic copies of the full TPO register free of charge. Once the complainant had reviewed the full register, he established that, based on the metadata, all of the files had been scanned prior to the Council requesting a fee of £262.50 on 12 April 2017.
17. Based on the facts above, the complainant has expressed concern to both the Council and the Commissioner that:
 - a. The Council requested a fee to comply with a request which had already been completed.
 - b. The Council requested a fee for work which would never be done as the request was complied with within the 18 hour time period allowed under section 12 of the FOIA
 - c. The Council provided false information about the work undertaken to comply with the request in order to cover up issues referred to in points a and b.

Regulation 12(4)(e) – internal communications

18. Regulation 12(4)(e) provides that a public authority may refuse a request for environmental information if the request involves the disclosure of internal communications. Consideration of this exception is a two-stage process; first it must be considered whether the request would involve the disclosure of internal communications. Secondly, this exception is qualified by the public interest. This means that the information must be disclosed if the public interest in maintaining the exception does not outweigh the public interest in disclosure.
19. Regulation 12(4)(e) is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. It is only necessary to demonstrate that the information falls within the category defined by the exception.
20. The Commissioner considers that the concept of a communication in this context is broad and will encompass any information someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it. An internal communication is also a communication that stays within one public authority.
21. In this case the withheld information consists of entire emails and parts of emails sent internally between council officers who are deliberating on, drafting and finalising responses to the complainant's previous information request. The Commissioner is therefore satisfied that the withheld information falls within the definition of an internal communication and regulation 12(4)(e) is engaged.

Public interest in favour of disclosing the requested information

22. The Council confirmed to the Commissioner that it had taken into account the inherent presumption in favour of disclosure as required by Regulation 12(2).
23. The Council also acknowledged the need for it to operate in an open and transparent manner when making decisions. Disclosure would provide clarity to the complainant on the internal discussions which took place regarding the handling of, and the decision made in relation to, his earlier request for information.
24. As referred to in the background section of this notice, the information which has been withheld under regulation 12(4)(e) relates to the Council's handling of a previous request for information which the complainant submitted. The complainant has raised a number of concerns relating to the fee which the Council initially charged for

complying with the request. The Commissioner considers that disclosure of the withheld information will provide further clarity and transparency relating to the Council's handling of the request in question.

The Public interest arguments in favour of maintaining the exception

25. The Council contends that disclosure of information relating to detailed discussions on the development of a response to be issued to the complainant would have an *"adverse and corrosive effect.....on the safe space in which officers discuss how the Council should respond"*. The Council considers that the safe space where views are exchanged is an important aspect of its operation and disclosure would *"erode that space and have a chilling effect on it"*.
26. The Council acknowledges that in this case the severity of the chilling effect is likely to be *"minor but it could solidify officer concern about the release of internal communications, which may have a severe impact on the organisation more broadly"*. It does not consider that this is in the public interest and believes disclosure would have a negative impact on transparency and openness in the Council.
27. The Council also pointed out that it had sought to apply the exception at regulation 12(4)(e) in a balanced and proportionate manner, redacting only information which related to internal discussions. The Council provided documents to the complainant relating to the development of its response, and the Council considers that this disclosure would satisfy the need to promote transparency and openness in its operation.

Balance of the public interest test

28. The Commissioner recognises that, inherent in the exception provided by regulation 12(4)(e), is the argument that a public authority should be afforded private space for staff in which issues can be considered and debated, advice from colleagues be sought and freely given and ideas tested and explored to protect the integrity of the deliberation process. The Commissioner also recognises that public authorities often require a safe space in which to debate issues without the hindrance of external comment and to develop their policies or opinions free from outside interference. However the Commissioner has to consider the specific information in dispute in this case in order to determine whether this safe space is still relevant and important.
29. The Commissioner considers that the need for a safe space will be strongest when an issue is still "live". Once a public authority has made a decision, a safe space for deliberation will no longer be required and the Commissioner has previously adopted the approach that the public interest will sway more towards disclosure. 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 form 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.

30. In this case the Commissioner notes that, at the time of the request, a decision had been made by the Council to withdraw its request for a fee and provide all of the information requested free of charge. The request for information which is the subject of this notice was submitted the same day that the Council agreed to provide the information free of charge. However, based on the evidence available to the Commissioner, she understands that the decision to withdraw the fee and provide the information was highly unlikely to have been revisited in the near future. In light of the above the Commissioner therefore considers that the need for private thinking space on the subject matter had therefore diminished.
31. The Council has argued that disclosure would inhibit officers and members in the future. These arguments are known as the chilling effect and public authorities often argue that disclosure of internal discussions will inhibit free and frank discussions and the loss of frankness and candour will damage the quality of advice and lead to poorer decision making. The Council has acknowledged, however, in this case the severity of the chilling effect is *"likely to be minor but it could solidify officer concern about the release of internal communications"*. The Commissioner is sceptical about broad arguments about a chilling effect on future unrelated discussions, but accepts that arguments about a chilling effect on continuing discussions are likely to carry some weight. Accordingly, in terms of any chilling effect the Commissioner considers that the timing of a request, whether the issue is still live and the content and sensitivity of the information are key factors to take into account in attaching weight to such arguments.
32. In this case whilst the Commissioner accepts that the process of handling information requests generally was "ongoing" at the time of the request, a decision had been made not to proceed with the proposal to charge a fee to comply with the complainant's earlier request. The Commissioner considers that, in effect, deliberations and discussions, advice-giving and exchanging of views about the subject matter had therefore come to an end. Therefore, whilst the Commissioner has given some weight to the Council's arguments in terms of any chilling effect, she does not consider that the Council has made adequate public interest arguments about the severity or extensiveness of any inhibition that would enhance this weighting.

33. As outlined in the background section of this notice, and also in paragraph 24, the complainant has raised a number of concerns about the handling of the request to which the withheld information relates, and specifically the fee that the Council initially stated was payable to process the request. The Commissioner has not made any formal assessment as to the reasonableness of the fee which the Council intended to charge as the Council subsequently withdrew the fee request and provided the information free of charge. However, the Commissioner considers that where there is a suspicion of wrongdoing or a lack of public confidence in a particular process there is a public interest in presenting the full picture. The Commissioner cannot assess whether there has been maladministration or other wrongdoing. Even if wrongdoing is not an issue, there is a public interest in fully understanding the reasons for public authorities' decisions, to remove any suspicion of manipulating the facts, or 'spin'. In view of the allegations relating to the administration of the Council's fee charging regime in this case, the Commissioner considers that there is a strong case here for transparency to reassure the public and enhance public understanding of the matter.
34. In reaching a decision on where the public interest lies in this case, the Commissioner has given weight to the fact that the subject matter associated with the request was not "live" at the time of the request as a decision had been made to withdraw the fee and provide the information free of charge. In addition, the Commissioner has taken into account the nature and content of the actual withheld information, which is fairly innocuous and does not appear to be particularly sensitive but rather highlights the Council's thinking process behind its handling of the request in question. She further recognises that there is an express presumption of disclosure within the EIR.
35. Based on the representations provided by the Council, the Commissioner does not consider its chilling effect and safe space arguments to be compelling enough to warrant the non-disclosure of this information. She considers there are public interest factors in favour of disclosure of at least equal weight and therefore, in accordance with regulation 12(2) of the EIR, she has concluded in this case that the public interest in maintaining this exception is outweighed by the public interest in favour of disclosure.

Regulation 13 – the exception for third party personal data

36. Regulation 13 of the EIR provides an exception to disclosure of personal data where the applicant is not the data subject and where disclosure of

the personal data would contravene any of the data protection principles.

Is the requested information personal data?

37. In order to engage regulation 13 the information sought by the applicant must constitute personal data as defined by section 1 of the Data Protection Act 1998 ('the DPA'), which was the appropriate legislation at the time of the request. It defines personal information as data which relates to a living individual who can be identified:

- from that data,
- or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

38. In this case, the information which the Council has withheld under regulation 13 comprises exchanges between two individuals about their private lives, and information about an individual's annual leave arrangements. The information has no relevance or bearing on the subject matter of the request ie the Council's handling of a previous request, but are included within a chain of emails relating to the issue. Having seen the withheld information the Commissioner accepts that it constitutes the personal data of the individuals concerned.

Would disclosure breach one of the data protection principles?

39. Having accepted that the information requested constitutes the personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles. She considers the first data protection principle to be most relevant in this case. The first data protection principle has two components:

- personal data shall be processed fairly and lawfully; and
- personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

Would disclosure be fair?

40. In considering whether disclosure of the information requested would comply with the first data protection principle, the Commissioner has first considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered the reasonable expectations of the individual concerned, the nature of those expectations and the consequences of disclosure to the individual. She has then balanced

against these the general principles of accountability, transparency as well as any legitimate interests which arise from the specific circumstances of the case.

41. The Council confirmed that the individuals whose personal data had been withheld had been consulted in relation to the request and refused consent. It considers that this demonstrates a clear expectation on the part of the individuals that their personal data would remain private and not disclosed into the public domain.
42. The Council also confirmed that the posts occupied by the individuals are not senior management or management posts and are therefore considered more junior roles. The Council also confirmed that the individuals have public facing roles. The individuals have public facing roles to the extent that they interact with the public in respect of the roles they undertake. The individuals have limited decision making responsibilities (as part of a wider group), relating specifically relating to the roles they undertake. One individual is not responsible for decisions regarding expenditure however the other one is able to authorise expenditure up to £10,000, again relating to expenditure within their particular department.
43. The Commissioner notes that the withheld information comprises exchanges of a personal nature which has no relevance to the work related discussions in other emails within the chain of emails, and in one case, information relating to an individual's annual leave arrangements. The Commissioner is satisfied that the individuals in question would have a reasonable expectation that their personal data would not be released into the public domain.
44. Given the reasonable expectations of confidentiality and the nature and content of the withheld information, the Commissioner considers that disclosure into the public domain would give rise to an unfair and unwarranted intrusion on the individuals' privacy in the circumstances of this case.
45. The Commissioner accepts that there is a legitimate interest in disclosure of information which would promote accountability and transparency. However, the Commissioner does not consider that any legitimate interests of the public in accessing the information are sufficient to outweigh the individual's right to privacy in this case. In conclusion, the Commissioner finds that disclosure would be unfair and would therefore contravene the first data protection principle. As the Commissioner has decided that the disclosure would be unfair, and therefore in breach of the first principle of the DPA, she has not gone on to consider whether there is a Schedule 2 condition for processing the

information in question. The Commissioner therefore upholds the Council's application of regulation 13 to the information.

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.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

David Teague
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