

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

Date: 23 June 2020

Public Authority: Somerset County Council
Address: County Hall
The Crescent
Taunton
Somerset
TA1 4DY

Decision (including any steps ordered)

1. The complainant requested planning related information in relation to a proposed housing scheme. Somerset County Council (the 'Council') provided some information but withheld the remainder citing Regulation 12(4)(e) of the EIR, the exception for internal communications. During the course of the Commissioner's investigation, the Council revisited the withheld information and subsequently disclosed a letter and emails which it said did not constitute 'internal communications' as they had been shared externally with the developer. The Council maintained that Regulation 12(4)(e) applied to the two remaining memos in scope of the request.
2. The Commissioner's decision is that the Council was correct to consider this request under the EIR. She also finds that it has applied Regulation 12(4)(e) to the remaining withheld information correctly. She concludes that the weight of the public interest lies in maintaining the Council's application of this exception.
3. However, she finds that the Council breached Regulation 5(2) of the EIR by failing to respond to the request within the statutory 20 working days' time limit. The Commissioner does not require the Council to take any remedial steps to ensure compliance with the legislation.

Background

4. The Commissioner understands that the request set out below relates to a proposed development of up to 60 homes at a particular site, where there were concerns expressed including the pedestrian access proposals.¹
5. Although this post-dates the request under consideration in this notice, the Commissioner notes that a public meeting was organised in November 2019 for interested parties to raise any remaining concerns about, or objections to, the above proposal.²
6. As is evident from the wording of the request, the complainant in this case is a local councillor. The Commissioner understands that a senior Council officer spent time with the complainant at the above planning meeting.
7. At the outset of the Commissioner's investigation, the withheld information consisted of a number of emails, a letter and two memos; however, some information was disclosed by the Council during the Commissioner's investigation. Further details are set out in the 'Scope' section of this notice.

Request and response

8. On 31 July 2019, the complainant wrote to the Council and requested information in the following terms:

"The [Bruton] Town Council has now had a chance to consider the revised Access arrangements produced in support of this outline planning application, which it did last night. I am therefore writing on behalf of the Council to confirm that the Council is recommending rejection of the application on the basis (amongst other things) that these arrangements do not meet the requirements of the National Planning Policy Framework. I will be writing separately to South Somerset District Council in confirmation.

¹ <https://brutontowncouncil.gov.uk/2019/11/22/our-district-council-approves-the-brewham-road-south-development/>

² <https://brutontowncouncil.gov.uk/2019/11/16/your-last-chance-to-influence-the-decision-about-the-brewham-road-south-development/>

The [Bruton Town] Council also agreed that I should ask you to provide us full details of the methodology used by your safety team to reach its conclusions, including all reports they have passed on to you, and details and times of any site visits and observations undertaken. I making this request under the provisions of the Freedom of Information Act 2000."

9. The Council responded, late, on 26 September 2019. It provided some information within the scope of the request, namely confirmation that site visits had taken place (but dates and times were not given nor withheld by citing an exception), together with some detail about the process, but refused to provide the remainder. The Council cited the following EIR exception as its basis for doing so: Regulation 12(4)(e) – internal communications, and concluded that the associated public interest test favoured withholding this information.
10. The complainant requested an internal review on 30 September 2019, part of which included specific questions about the methodology used in making planning decisions. The Council provided its internal review on 6 November 2019 in which it maintained its original position in relation to Regulation 12(4)(e). However, it now provided the dates and times of the site visits and responded to the complainant's questions about the methodology which had been followed.

Scope of the case

11. The complainant contacted the Commissioner on 27 November 2019 to complain about the way his request for information had been handled.
12. His grounds of complaint included the following (emphasis as highlighted by the complainant):

*"A) The County Council has given almost no new information about the methods it used **in this particular case**. There are no grounds for withholding this information.*

*My request was about the methods used by the County Council's safety audit team to reach its conclusion **in this particular case**. To date the only information that I have received specific to the advice given to the Planning Authority on 17 July 2019 is the dates and times of site visits undertaken. To get even that information took more than three calendar months..."*

13. The complainant also submitted various public interest arguments to support his view that the information should not be withheld, which are set out later in this notice.

14. In addition, the complainant set out his suggested remedy for his complaint, which included the following:

- *A full chronology of all internal and external communications that took place to develop the highways advice.*
- *Disclosure of any report which reaches a conclusion, completed checklist or similar audit tool, communication to an external party such as the developer or the planning authority with appropriate explanation.*

15. The Commissioner raised all of the complainant's submissions, including his public interest arguments, with the Council as part of her investigation.

16. In response to the complainant's points in paragraph (12) above, the Council told the Commissioner that:

"As explained in the initial response, there were a number of options proposed for the development and the first couple were rejected. Taking account of the SCC [Somerset County Council] view, the developer proposed an amended scheme which was acceptable to SCC as a statutory consultee.

The Council does not hold a document which could explain to [the complainant] the specific methodology applied when creating Council's recommendation report.

In order to produce such, we would have to create new information (the Planning Liaison Officer would need to write a report detailing what was done, when etc).

Whilst we do not have a specific document relating to the methodology applied to this case or a general procedural document, we did try to provide a better insight in to the process at internal review and a senior council officer spent time with [the complainant] at Planning Committee on 19th November to further explain this.

An SCC Planning Liaison Officer (PLA) is responsible for producing a final recommendation document on behalf of SCC as a statutory consultee in the planning process. This is submitted to the planning authority (in this case South Somerset District Council) to help inform their decision regarding permission for the development. The recommendation report supplied by SCC is put in the public domain via SSDCs planning portal.

In order to create a recommendation report, the PLA will assess the components and implications of the scheme and use their

professional knowledge and judgement to determine who, within SCC, they need to contact for advice (e.g. highways officers, flood prevention team etc). They will also consider the policies, standards and guidance which apply to the proposal. SCC receive an average of 9000 applications for consultations and they will vary in terms of complexity and relevant factors. Given this, no single approach or procedure applies.

Once the PLA has sought and received the relevant internal advice, he will consider it all alongside the relevant legislations, policies, standards and guidance. He will use professional judgment [sic] (his own and that of other SCC professionals) to assess the weight applied to each factor in favour or against the scheme. Having taken all the specific factors in to account, he will produce a final recommendation report.

It is the view of the PLA that sharing notes or records of internal professional consultations and discussions which fed in to the decision report would be misleading and unhelpful. Any such notes are essentially unfinished elements of the final recommendation report and cannot be taken in isolation – the final report is drawn from all these elements with consideration of all relevant legislation, policy etc and the decision of the Council is made in that context.

Having discussed the matter again with the relevant officers, whilst (as explained) we do not hold a specific document that would show the methodology in this case, the PLA has put together a document showing who he consulted with and when in order to create his published report (attached).

The Council maintains its position to exempt notes, documents etc relating to the internal consultations and discussions feeding in to our published recommendation (exception 12(4)(e)). I would note here, and apologise, that SCC has likely caused confusion by referring to an internal 'safety audit'. In discussing this point specifically, it is felt that the use of the term 'audit' does not accurately reflect what was done, which was an internal consultation with regards to safety."

17. In response to the complainant's suggested remedy, the Council said:

"The Council does not hold a chronology as requested and it would likely be impossible to create a fully accurate one (there may have been phone calls between officers which did not require case notes or minuting etc). To create one based on what notes and records are held would be a prolonged exercise.

However, as stated above, the PLA has, in the interests of openness, put together a summary of his consultations which informed his decision report.

As explained above, we maintain the exception in relation to the internal communications previously requested, held, but not supplied. The original request made to the Council did not ask for communications between SCC and external parties such as the developer and the Planning Authority. If [the complainant] would like to make a request for these then the Council will undertake to assess and respond to the request within the provisions of the FOIA/EIR."

18. Although not obliged to do so, the Council chose to copy to the complainant its entire investigation response, as sent to the Commissioner. At the Commissioner's suggestion, and particularly given that the Council had done the work outlined above, the Council also provided the complainant with the PLA's consultation summary (which it had chosen to create), redacted for personal information.

19. On 7 March 2020, the complainant wrote to the Commissioner with his comments following receipt of the above information from the Council. As well as comments relating to the Council's public interest considerations, he submitted the following:

*"My original request for information clearly states that it is the methodology used by the **safety team** to reach its conclusions that I wanted to understand. The bulk of the correspondence I have received relates instead to the actions of the Planning Liaison Officer."*

20. The Commissioner sought consent from the complainant to raise his issues with the Council, which he refused. However, the Commissioner made it clear that, whilst noting the complainant's preference for her to reach her decision without contacting the Council again, she reserved the right to do so should she find it necessary in order to complete her investigation and make a fully informed decision.

21. In the absence of any objection from the complainant, the Commissioner deemed it necessary to contact the Council in light of his comments about the "safety team" and ask it to revisit the request in view of this statement, particularly given that the Council's responses to date had focussed on the actions of the Planning Liaison Officer ('PLO', previously abbreviated to 'PLA' by the Council).

22. On 31 March 2020, the Council advised the Commissioner as follows:

"I have spoken further to the service and they do not feel that there is any more they are able to supply in relation to [the

complainant's] request. The 'Safety Team' are internal SCC colleagues who the PLO will speak to when forming the Council's response, as statutory consultee, to the planning application. They do not have a direct role in writing the response but will make an assessment and provide a professional view to the PLO when asked to do so. That happens by way of internal 'discussion' which can be written or verbal. In this case, the extent of the Road Safety Auditor's assessment is contained in the memo that he sent the PLO and was subsequently shared back to the developer in the emails we have sent you."

23. The Commissioner relayed this response to the complainant who questioned the apparent 'external' sharing of some of the withheld information with the developer, and thereby the validity of the Council's citing of Regulation 12(4)(e) (internal communications) in relation to this document.
24. The Commissioner raised this matter with the Council on 21 April 2020. It confirmed that the developer was external to the Council on 11 May 2020. At the Commissioner's request, the Council then revisited all the withheld information to reconsider exactly what had been shared externally with the developer.
25. Subsequently, the Council revised its position in relation to the withheld emails and disclosed all of them, plus a letter, to the complainant on 9 June 2020. It maintained that Regulation 12(4)(e) applied to the two remaining memos as they had not been shared externally.
26. The complainant did not raise any concerns in relation to the disclosed information; however he asked the Commissioner to issue a decision notice in respect of the Council's handling of his request and for her to consider its public interest stance in relation to the remaining withheld information.
27. The Commissioner has considered whether the Council was correct to handle the request under the EIR and whether it was entitled to rely on Regulation 12(4)(e) to withhold some of the requested information, namely two memos.

Reasons for decision

28. The Commissioner has first considered whether the requested information constitutes environmental information.

Regulation 2 - Is any of the information environmental?

29. Information is environmental if it meets the definition set out in regulation 2 of the EIR, namely "...any information in written, visual, aural, electronic or any other material form on-

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);"

30. The Commissioner considers that any information within the scope of the request that the Council held would be information relating to planning matters. She believes that it would be likely to be information about "measures" affecting the elements of the environment, and therefore would be environmental information under regulation 2(1)(c).

31. The Commissioner is therefore satisfied that the request asks for environmental information as per Regulation 2(1)(c) and that the EIR is the correct statutory instrument to apply to the request.

Regulation 12(4)(e) – internal communications

32. The Council has confirmed that it is relying on Regulation 12(4)(e) of the EIR to refuse to comply with part of the complainant's request.

33. As the Council advised the complainant, the remaining withheld information in this case consists of two memos relating to a proposed new housing scheme (dated 12 June 2019 and 17 July 2019), between the Council's Infrastructure Engineering Service and its Planning Liaison Officer.

34. Regulation 12(4)(e) states:

"12.-(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

(e) the request involves the disclosure of internal communications."

35. The EIR do not provide a definition of what is meant by 'internal'. The Commissioner's guidance on this exception³ defines a communication as encompassing any information which someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it. The communications have to have taken place solely within a public authority.

36. The underlying rationale behind the exception is that public authorities should have the necessary space to think in private. The original European Commission proposal for the Directive⁴ explained the rationale as follows:

"It should also be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns [...] internal communications."

37. However, the exception is drafted broadly and covers all internal communications, not just those actually reflecting internal thinking. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. A wide range of internal documents will therefore be caught, although in practice the application of the exception will be limited by the public interest test under Regulation 12(1)(b), and the exception can only be maintained should the public interest test support this.

³ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

⁴ (COM(2000)0402)

38. Essentially, an internal communication is a communication that stays within one public authority. Once a communication has been sent to someone outside the authority, it will generally no longer be internal.
39. The Commissioner has reviewed the remaining withheld information, consisting of one memo considering a number of traffic calming and pedestrian access options, and the other commenting on the proposals.
40. Having considered the sender and recipient of the memos, the Commissioner is satisfied that both were employed by the Council at the time of the request. She has noted the Council's assurances that neither memo has been shared outside the public authority. Therefore, the Commissioner is satisfied that both memos clearly fall within the description of 'an internal communication' and therefore engage Regulation 12(4)(e).
41. Next, the Commissioner has gone on to consider the public interest test; despite Regulation 12(4)(e) being engaged, the information may still be disclosed if there is sufficient public interest in doing so.
42. In his initial complaint to the Commissioner, the complainant had provided arguments to support his position that regulation 12(4)(e) is not engaged. These are public interest arguments rather than arguments that the information in question cannot be categorised as internal communications. The Commissioner will therefore consider the complainant's arguments as part of her consideration of the public interest test.
43. Following disclosure of the previously withheld emails and letter, the complainant did not provide the Commissioner with any additional public interest arguments to those set out below.

The public interest test

44. 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. The Commissioner is mindful of the provisions of Regulation 12(2) which state that a public authority shall apply a presumption in favour of disclosure.

Public interest in favour of disclosing the information

The complainant's view

45. The Commissioner has included all of the points raised by the complainant, although, in her view, some of the points are more process related than strictly public interest disclosure arguments. However, they

do provide context to his arguments so the Commissioner has set out the complainant's arguments as presented to her.

46. The complainant provided the following in support of his view that the remaining withheld information should be released (the parts in bold text are as emphasised by the complainant):

"B)The Town Council's view is that the County Council has applied the public interest test incorrectly, and thereby reached the wrong conclusion. In our view there is now an overwhelming public interest in understanding the methods by which the Highway Authority reached its conclusion, the factors in favour of disclosure heavily outweighing those factors in favour of exemption. There are at least four factors in favour of disclosure.

***Firstly**, in the most literal sense of the phrase, there is public interest in this particular, matter, at least in Bruton. A petition opposing the application was signed by well over 500 local residents: nearly a quarter of the town's adult population. A residents' group was set up to oppose the application, and members of the public addressed both the Planning Authority's committees. A local news service thought the issue sufficiently newsworthy to publish an article⁵ about it. Members of the Bruton public are openly questioning how Somerset Highways can have reached the view that these proposals are safe.*

***Secondly**, the decision to agree new development in a small country town such as Bruton, and thereby increase its population by nearly 10%, is one of the more significant decisions that a Planning Authority can take, and one that is unlikely to be popular. In this particular case the decision to be taken was about whether a road in our parish should be reconfigured in a way that in the view of local residents and their elected local council appears to be dangerous for pedestrians. This is not an academic decision: it has real consequences for significant numbers of people.*

There is therefore a strong public interest in this decision being taken fairly and reasonably, on the basis of all the relevant information, and in it being seen to be being taken in this way.

⁵ <https://www.somersetlive.co.uk/news/somerset-news/bruton-council-use-lorry-test-3414885>

Where the decision appears wrong, there is also a clear public interest in transparency, so that the decision can at least be understood, even if not accepted.

The Planning decision is taken by politicians, informed by the professional advice they receive from their own planning officers and other technical advisers, such as the Highway Authority. There is a presumption in law in favour of development, so if the technical advice favours approval, as it did in this case, the onus is on objectors to provide evidence as to why that advice should be set aside.

In this case the Town Council, and others, were questioning the conclusion of the Highway Authority's assessment. The Planning Committee processes do not allow for cross-examination of the Highways evidence. The only route available to the Town Council to test the Highways Advice was to request further information. The effect of non-disclosure of Highway's methods was to seriously restrict one democratically elected body's ability to understand and, if necessary, challenge the views of another public body, and to make its case to a third. The non-disclosure could, potentially, have adversely affected a democratic process.

***Thirdly**, there is a public interest in one arm of local government continuing to have confidence in another and being able to represent that confidence to the general public. Our residents frequently come to us about Highways matters, and Highways frequently come to us for local knowledge and advice. The Town Council has not and will not make a practice of wasting valuable officer time with repetitive challenges and requests for information. This is the only request of this nature that we have made of the County Council in the past four years. It needed to be taken seriously. It was not.*

*Unfortunately, the response we have received to date has served to undermine rather than enhance this confidence and created a fresh and **fourth** public interest in disclosure. This is because the Review Response implies that the Highways Advice may have overstated the formality and thoroughness of the processes used, in order to attach additional and unwarranted weight to its conclusions.*

The Highways Advice states that time has been taken to 'fully assess' the proposals in the light of local concern. It states that the various different proposals were 'sent for safety audit'. Although it is noticeable that the Advice does not actually say so, it seems reasonable to assume that a 'safety audit', whatever that might be, had taken place. The Initial Response supports

this understanding, by asserting that 'Safety Audits cannot be issued'. As a former professional in another field I would understand a safety audit to be a review of the proposals against a range of predetermined criteria, possibly with checklists and scores, resulting in an overall conclusion or rating. Importantly, this is likely to have been the understanding of the Planning Authority. This, or something like it, is certainly what the Highways Advice implies.

However, the Review Response states that 'SCC undertakes internal safety reviews, having regard to HD19/15 and other guidance as appropriate, but to inform officer decision making, this is not a formal Road Safety Audit'. On close reading the Review Response does not actually say whether an internal safety review (whatever that might be) was carried out in this particular case. Instead it describes 'consultation and communication with a spectrum of internal specialists.'

It is conceivable, and consistent with the text in the Review Response, that all that happened was that the Planning Liaison Officer forwarded the proposals to one other officer in the Safety Audit Team, who then, following visits to the site, sent back an email with his or her opinion of the safety of the proposals. It could therefore be that nothing has been disclosed because nothing exists to be disclosed.

If the process was as described in the Review Response, and a formal safety audit has not taken place, this should have been made clear to the Planning Authority. This lack of clarity about what has actually been done is seriously undermining of confidence, engendering as it does, suspicion that the Highways Advice has overstated the formality and thoroughness of the process in order to convey additional and unwarranted weight to its conclusions. One public authority may have misled another. There is now a strong public interest in this suspicion being allayed.

Turning to application of the public interest test, it is, or should be, the County Council's duty to identify, consider, and give weight to the factors in favour of disclosure as they relate to the circumstances of this particular request. The County Council has completely failed to do this, even when some of the factors in favour of disclosure are pointed out to it. The Initial Response mentions transparency as the only factor in favour. The Review Response mentions 'a general and specific public interest'. It is not clear what this is, or how it has been weighted.

The Review Response repeats the error made in the Initial Response, by listing as a factor against disclosure 'release of the individual internal communications... would present a potentially confusing and misleading picture'. As my Request for Review makes clear, this is irrelevant to the public interest test.

The County Council has firstly ignored the numerous and strong factors weighing towards disclosure, and secondly continued to rely on an irrelevant factor weighing against disclosure. It has therefore got the balance completely wrong."

The Council's view

47. The Council submitted the following in favour of disclosure:

"Whilst we maintain our position in relation to the use of 12(4)(e), we do acknowledge that the specific interests of the Bruton residents and Town Council should have been referenced in the public interest test and that the test could have been more robust in its explanation:

Factors in favour of disclosure:

- General transparency – presumption in favour of disclosure.*
- Specific interest from the local residents and the Town Council.*
- Maintaining the Town Council's confidence in SCC and their ability to communicate that to residents."*

Public interest in favour of maintaining the exception

48. The Council provided that the following statements in favour of maintaining the exception:

"The internal communications which informed the professional judgment [sic] of the Planning Liaison Officer are draft components of the final report. They are individual, specifically focussed, professional viewpoints which are designed to assist the PLA during his thinking time and decision making. Taken in isolation and without access to the associated discussion, challenge and professional application of the PLA they would be likely to be misleading.

In order for the Council to make a decision (the published recommendation report), it is essential to have time to think in private – the free and frank exchange of views between professionals.

Disclosure, and any public scrutiny resulting from it, may result in officers providing less detailed advice in relation to future requests.

Collective responsibility. The final recommendation report is the definitive and collective view of Somerset County Council in relation to the consultation on this scheme."

Balance of the public interest arguments

49. In terms of the balance of the public interest arguments the Council submitted the following:

"Whilst the Council operates with a presumption in favour of disclosure and recognises the strength of local public interest in the planning decision and how it was reached, the Council feels that the arguments in favour of withholding the internal documents, notes, emails etc which informed the final recommendation report holds more weight (60/40). There is only one definitive collective view of the Council in relation to the consultation on this scheme and this has been submitted to the Planning Authority and placed in the public domain. The internal consultation documents in abstract do not wholly and accurately reflect the Council's collective view and could lead to public misunderstanding of the Council's position. Furthermore, it is our view that the information in question represents the council's 'thinking time' and that placing that in the public domain is likely to engender briefer input from professionals in the future."

50. The Commissioner's guidance explains that although a wide range of internal information will be caught by the exception, public interest arguments should be focussed on the protection of internal deliberation and decision making processes. This reflects the underlying rationale for the exception being that it protects a public authority's need for a 'private thinking space'.
51. 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. This 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, as was the case here.
52. The Commissioner considers 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, a free exchange of views, and more effective public participation in environmental decision making, all of which ultimately contribute to a better environment.

53. The weight of this interest will vary from case to case, depending on the profile and importance of the issue and the extent to which the content of the information will actually inform public debate. However, even if the information would not in fact add much to public understanding, disclosing the full picture will always carry some weight as it will remove any suspicion of 'spin'.
54. In this case the complainant has identified significant public concern about the proposed development.
55. The Commissioner notes that there have been a number of public meetings relating to this proposal and that the final recommendation report is in the public domain via South Somerset District Council's planning portal.
56. It is clear that, at the time of the request the planning issue was live, being still under consideration. The Commissioner considers that if the matter was closed then the risk of prejudicing the planning process would be reduced. However, this is not the case, therefore the need to maintain the safe space gives more weight to the argument for maintaining the exception.
57. The Commissioner considers that the public interest in maintaining a safe space for decision making and averting disruption to the process outweigh the arguments for transparency, and therefore, on balance, favours maintaining the exception.
58. Having considered the balance of the public interest arguments, the Commissioner has concluded that the Council correctly applied regulation 12(4)(e) to withhold the information and that the public interest in this case favours maintaining the exception.

Regulation 5(2) – duty to make available environmental information on request

59. Regulation 5(1) states the following:

"a public authority that holds environmental information shall make it available on request."

60. Regulation 5(2) states that such information shall be made available -

"as soon as possible and no later than 20 working days after the date of receipt of the request."

61. The Council breached regulation 5(2) of the EIR by responding beyond the statutory timeframe of 20 working days.

Other matters

62. In this case, had the Council correctly read the request from the outset and noted that the complainant wanted the information relating to its "safety team", this is likely to have reduced the time taken in this case. Further had the Council identified that the withheld emails and letter had been shared externally with the developer at an earlier stage, this would also have alleviated some of the delay and resulting frustration on the complainant's part.
63. The Commissioner would remind the Council to ensure that it reads and interprets future FOI and EIR requests carefully and that it properly reviews any recorded information held relevant to those requests before determining whether any if it can be withheld. She notes that, in this case, the majority of the withheld information was disclosed by the Council during her investigation as a result of its failure to identify that this had already been shared externally.
64. The Commissioner notes the Council's attempts to be 'open' in giving the complainant a copy of its investigation response (as sent to the Commissioner), which it was not obliged to do. She also recognises that the Council chose to create and ultimately disclose a document showing whom the PLA consulted with, and when, in order to produce his published report on the proposed scheme.
65. Whilst noting the Council's explanation that the original request was contained in an email chain initially being dealt with 'in the normal course of business' and that it was inadvertently not recognised as being an FOI request straightway, the Commissioner has made a record of the delay in the Council's original response which may form part of any future monitoring process should this occur repeatedly. She is satisfied that there was no delay in handling the internal review in this case given that under the EIR, a public authority has 40 working days in which to provide its review outcome.
66. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft Openness by Design strategy⁶ to improve standards of

⁶ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our Regulatory Action Policy⁷.

⁷ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

67. 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@justice.gov.uk

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

68. 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.

69. 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

Carolyn Howes
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