

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 2 November 2022

Public Authority: Kirklees Metropolitan Borough Council

Address: Civic Centre
3 Market Street
Huddersfield
HD1 1WG

Decision (including any steps ordered)

1. The complainant requested from Kirklees Metropolitan Borough Council ("the Council") information relating to pre-application advice sought by a prospective developer. The Council withheld the requested information under regulations 12(4)(e) (internal communications), 12(5)(e) (confidentiality of commercial information), 12(5)(f) (interests of the information provider) and 13 (personal data) of the EIR.
2. The Commissioner's decision is that the Council was entitled to withhold the requested information under regulations 12(4)(e), 12(5)(f), and 13, and that all other information has been disclosed. The Commissioner has not found it necessary to consider the application of regulation 12(5)(e) as the information falls under the other exceptions.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 10 June 2021, the complainant wrote to the Council and requested information in the following terms:

“I am contacting you to make a formal request under the Environmental Information Regulations 2004 (EIR) to see any pre application advice and correspondence that the council have given to and received from ISG (Developers on behalf of Amazon) regarding proposed warehouse development on land identified in the Local plan (E1831)”

5. The Council responded on 21 July 2021. It disclosed held information, subject to redactions under the exceptions provided by regulations 12(4)(e), 12(5)(e), 12(5)(f) and 13.
6. Following an internal review, the Council wrote to the complainant on 12 October 2021. It maintained its earlier response.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way their request for information had been handled, and specifically that the Council was not entitled to withhold information under the cited regulations, and that further information was held.
8. The scope of this case and of the following analysis is whether the Council was entitled to rely upon regulations 12(4)(e), 12(5)(f) and 13 to withhold the requested information, and whether any further information is held.

Reasons for decision

The withheld information

9. The withheld information is contained across twenty-six documents. The Commissioner has reviewed these documents in conjunction with the applied exceptions.

Regulation 12(4)(e) – Internal communications

10. Regulation 12(4)(e) of the EIR states that information is exempt if it represents internal communications.
11. Regulation 12(4)(e) is a class-based exception. This means that there is no requirement to consider the sensitivity of the information in order to engage the exception. The exception is subject to a public interest test under regulation 12(1)(b), and the exception can only be maintained should the public interest test support this.
12. The Council has applied regulation 12(4)(e) to sections within two documents. The Commissioner has reviewed the information and is satisfied that it represents internal communications between the Council's officers about pre-application advice sought by a prospective planning applicant. As such, the Commissioner is satisfied that regulation 12(4)(e) is engaged.
13. When considering whether the public interest favours maintaining the exception or disclosing the requested information, the Commissioner has taken into account that there is a public interest in openness and transparency by the Council. Disclosure of the information would provide public assurance that officers are giving requests for pre-application advice appropriate consideration.
14. However, the Commissioner also recognises that the purpose of pre-application advice is to address any potential issues or difficulties with development proposals at an early stage of the planning process, and prior to submitting a formal planning application. The Commissioner considers that the ability for officers to discuss such requests with frankness and candour ensures that the process is able to function robustly, and subsequently provide pre-application advice that is proper. The Commissioner is also aware that at the time of the request, the matter was live and no formal planning application had been received by the Council.
15. Having considered the public interest arguments, the Commissioner finds the public interest in protecting the Council's ability to discuss pre-application requests frankly and without inhibition to be the stronger argument.
16. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019):

"If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of

disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).

17. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(e) was applied correctly.

Regulation 12(5)(f) – Interests of the information provider

18. Regulation 12(5)(f) of the EIR states that information is exempt if it would adversely affect the interests of the information provider.
19. Regulation 12(5)(f) is an adverse-affect exception. This means that there is a requirement to consider whether disclosure would result in a harmful consequence in order to engage the exception. The exception is subject to a public interest test under regulation 12(1)(b), and the exception can only be maintained should the public interest test support this.
20. The Council has applied regulation 12(5)(f) to sections within one document.
21. The Council has stated that the information provider is a prospective planning applicant seeking pre-application advice. The Council has further stated that there is no formal or legal requirement for the applicant to make a request for pre-application advice, and that the applicant has confirmed to it that they do not consent to the public disclosure of the information in question.
22. In respect of the adverse affect that the Council considers would have on the applicant, the Council has stated:

"The Council believes that to disclose contributions from third parties would discourage third parties from providing information to the Council for its consideration for fear of disclosure of confidential information. In this case information was provided voluntarily by third parties with no expectation on behalf of those parties that it would be made public, and that the parties have clearly expressed a view that disclosure would be likely to cause commercial prejudice and breach of confidence. This would subsequently lead to it being likely that third parties would be reluctant to provide further information on a voluntary basis for fear of this being placed in the public domain and would

therefore inhibit third parties from expressing their views in future on projects such as this.”

23. The Commissioner has reviewed the information and recognises that it represents information that has been provided to the Council by the applicant. The Commissioner is also satisfied that the disclosure of the information would adversely affect the interests of the applicant. As such, the Commissioner is satisfied that regulation 12(5)(f) is engaged.
24. When considering whether the public interest favours maintaining the exception or disclosing the requested information, the Commissioner has taken into account that there is a public interest in openness and transparency by the Council. Disclosure of the information would provide transparency about the information that had been provided by the applicant to the Council.
25. However, the Commissioner has taken into account that it represents a third party's request for pre-application advice, the purpose of which is to address any potential issues or difficulties with development proposals at an early stage of the planning process, and prior to submitting a formal planning application. The Commissioner recognises that the ability for planning applicants to provide information to the Council is integral to the pre-application process, which ultimately serves to save both Council and planning applicant from spending unnecessary resources on planning applications that are not likely to succeed due to unrealised issues. The Commissioner is also aware that at the time of the request, the matter was live and no formal planning application had been received by the Council.
26. The Commissioner considers that the public's right to challenge a planning application is not affected by the non-disclosure of the requested information. That right can be properly exercised during the formal planning process. The Commissioner does not consider that it is the purpose of the EIR to circumvent existing procedures within planning law and the mechanisms for public scrutiny which already exist. Whilst he acknowledges that facilitating public engagement with environmental issues is one of the general principles behind the EIR, he does not consider that, in this case, disclosure of the withheld information would assist in furthering this principle, at least not to the extent that any public benefit would outweigh the public interest in protecting the interests of the information provider.
27. Having considered the public interest arguments, the Commissioner finds the public interest in protecting the applicant's provided information to be the stronger argument.

28. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019):

“If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...” and “the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations” (paragraph 19).

29. As covered above, in this case the Commissioner’s view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner’s decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(f) was applied correctly.

Regulation 13 – Personal data

30. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requestor and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
31. In this case the relevant condition is contained in regulation 13(2A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data (“the DP principles”), as set out in Article 5 of the UK General Data Protection Regulation (“the UK GDPR”).
32. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (“the DPA”). If it is not personal data then regulation 13 of the EIR cannot apply.
33. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

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

Is the information personal data?

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

“any information relating to an identified or identifiable living individual”.

35. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

36. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

37. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

38. In the circumstances of this case, having considered the withheld information across 26 documents, the Commissioner is satisfied that the information relates to identifiable individuals. He is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.

39. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

40. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

42. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

43. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

44. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that “*processing shall be lawful only if and to the extent that at least one of the*” lawful bases for processing listed in the Article applies.
45. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:
- “processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”².
46. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the EIR, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

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

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

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA and Schedule 3, Part 2, paragraphs 53 to 54 of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

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

47. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

48. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requestor's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requestor is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
49. In this case the Commissioner recognises that the complainant is pursuing a legitimate interest in the form of accountability and transparency, with regards to pre-application advice that has been sought by the prospective developer.

Is disclosure necessary?

50. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
51. Having had regards to the circumstances of the information, the Commissioner perceives that the need for accountability and transparency is met though the statutory planning process, as part of which the public are able to view, and challenge, a planning application.
52. It is also noted that, whilst the personal data of junior officers and third-party individuals has been redacted, the Council has otherwise disclosed the remainder of the information relating to the pre-application advice (with the exception of that withheld under the above exceptions), including the identities of senior officers.
53. Having considered this, the Commissioner is not satisfied that disclosure of the personal data is necessary, as the legitimate interests in accountability and transparency have been met by alternative measures.
54. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, he has not gone

on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

The Commissioner's view

55. The Commissioner has therefore decided that the Council was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).

Regulation 5(1) – Duty to make available environmental information on request

56. Regulation 5(1) states that any person making a request for information is entitled to have that information communicated to them. This is subject to any exceptions that may apply.
57. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
58. In other words, in order to determine such complaints, the Commissioner must decide whether on the balance of probabilities a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request).
59. The complainant believes that further recorded information may be held, and specifically discussions between the Head of Planning and the prospective developer. This is because the complainant understands that the Head of Planning has referred to such discussions in a letter (to the prospective developer) dated 30 June 2021.
60. The Commissioner referred the Council to the complainant's concern. The Council has confirmed that it has conferred with the Planning Service and that it has not identified any other recorded information beyond that under consideration as part of this case, and which relates to the subject specified by the request.
61. Having considered the above, there is no compelling evidence available to the Commissioner that suggests that further recorded information is held. The terms of the EIR only relate to recorded information, and unless verbal discussions have been otherwise requested, such as in minutes, the Commissioner cannot conclude that such information is likely to be held.

62. Having considered the above, the Commissioner has concluded that, on the balance of probabilities, no further information is held.

Right of appeal

63. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

64. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
65. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Daniel Perry
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