

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

Date: 9 January 2023

Public Authority: Lewes District Council
Address: Southover House
Southover Road
Lewes
BN7 1AB

Decision (including any steps ordered)

1. The complainant has requested information regarding a number of planning applications.
2. Lewes District Council provided some information, and it withheld some information on the bases of Regulation 13 (personal information), and Regulation 12(5)(f) (Interests of the information provider) of the EIR. It also stated that some information was not held.
3. The Commissioner's decision is that Lewes District Council was correct to withhold information on the bases of Regulation 13 and Regulation 12(5)(f). Furthermore that, on the balance of probabilities, the council does not hold some of the requested information and therefore Regulation 12(4)(a) of the EIR applies to this element of the request.
4. The Commissioner does not require any steps.

Request and response

5. On 8 April 2022 the complainant requested information from Lewes District Council ("the council") in the following terms:

"FOI request related to LW/16/0282 and its subsequent sub-applications LW/20/0052, LW/21/0426, LW/21/0484, LW/21/0791,

LW/21/0792, and the work environment in which these applications have been / are being processed:

1) With regard to application LW/16/0282 and its subsequent sub-applications LW/20/0052, LW/21/0426, LW/21/0484:

- a. Who was/were the case officer/s for each application?
- b. Was a documented decision-making process followed?
- c. Please provide a copy of the decision process used.
- d. Who approved each application?
- e. Please provide the officer reports upon which the approvals were based.

2) With regard to application LW/16/0282 and its subsequent sub-applications LW/21/0791 and LW/21/ 0792:

- a. Who are/have been the involved case and approving officer/s?
- b. What are the specific reasons for their delayed approval?
- c. What decision process has been / is being followed?
- d. Please provide a copy of the decision process (if different from above).
- e. What is the schedule / plan to deal with these applications (if still not approved)?

3) What level of general qualifications, and which specifically recognised planning qualifications, do each of the case and approving officers that have been, and still are, involved in the above-mentioned applications, hold?

4) Please provide a copy of the planning department complaint register since 2016 when the original application LW/16/0282 was approved.

5) Have any of the officers who have dealt with the above-mentioned applications received any internal warnings / disciplinary action against them since 2016 and, if so, how many?

6) What documented, formal, internal training has each of the above-mentioned officers received with regard to standard planning application and approval procedures, and/or any other relevant internal guidelines specific to Lewes Planning Department, since 2016?

7) Backlog of applications:

- a. What is the target timeline for deciding internally approved applications following the consultation period?
- b. As at 31/3/22, how many applications, within the approval authority of Lewes Planning Department, were still pending decision after the target period for decision, following consultation, had elapsed?

8) Please confirm whether or not you have any documented internal guidance or procedures with regard to the following topics related to the consideration and approval of planning applications (that were in place at the time the above-mentioned applications were processed) and, if so, please provide copies:

- a. Categorisation of applications as either Non-Material Amendments or Minor Material Amendments
- b. Posting of applications / amendments to approved applications on the planning website
- c. Posting of public comments on the planning website
- d. Public consultation
- e. Elements to consider in reaching an informed judgement for approval / refusal of applications (that do not need to go to planning committee) and writing of reports used to support the subsequent planning decisions
- f. Enforcement of planning conditions set by the Planning Department

9) In various responses to my Stage 1 + 2 complaints regarding the above applications, Lewes Planning has acknowledged a lack of professionalism, a drop in service standards, procedural failings sufficient to warrant staff training, a case conference, and an external independent peer review of procedures, report writing and signing off cases. Lewes Planning has also indicated that training has taken place and steps have been outlined to address identified issues going forward. Please can you provide relevant communications/documents (with the date written) showing:

- a. The key findings and outcomes (as documented and communicated internally) of the case conference resulting from my complaint/s.

- b. The steps identified by the Head of Planning to address issues going forward (ref. Stage 2 response)
- c. Any specific changes to procedures already made based on the findings of the case conference (illustrated with guidance in place before and after the change)
- d. The terms of reference and proposed timing of the external independent peer review

10) Please provide copies of Lewes District Council / Planning Department guidance relating to the payment of damages / compensation"

- 6. On 24 April 2022 the council responded. It provided some information within the scope of the request but refused to provide the remainder. It cited the following exceptions as its basis for doing so: Regulation 13 (personal data) and Regulation 12(5)(f) (interests of the person providing the information) of the EIR. The council also advised that some information was not held.
- 7. The complainant requested an internal review on 26 April 2022.
- 8. The council wrote to the complainant with the outcome of its internal review on 14 June 2022. It provided some further information but upheld its original position to withhold information on the basis of Regulations 13 and 12(5)(f) of the EIR, and maintained that some information was not held.

Scope of the case

- 9. The complainant contacted the Commissioner on 6 June 2022 to complain about the way their request for information had been handled.
- 10. The Commissioner agreed with the complainant that the scope of their case would be to determine whether the council:
 - is entitled to rely on Regulation 13 to withhold information in scope of question 3;
 - is entitled to rely on Regulation 12(5)(f) as a basis for refusing to provide information in scope of 9b and 9d;
 - holds further information which is in scope of questions 6, 8a and 9a.

Reasons for decision

Regulation 13 - personal data

11. Regulation 13(1) provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in Regulation 13(2A), 13(2B) or 13(3A) is satisfied.
12. In this case the relevant condition is contained in Regulation 13(2A)(a). 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 ('UK GDPR').
13. The council provided information to the complainant in its initial response to question 3), being that: "All officers except one have either graduate or post graduate planning qualification as well as being a member of or working towards membership of the Royal Town Planning Institute."
14. The complainant responded that they require details of which officers hold which specific planning qualifications, or which officer does not hold a graduate or post graduate qualification. The council withheld this information on the basis of Regulation 13(1).
15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. In this case, the council has withheld information relating to the qualifications of specific council officers. The Commissioner is satisfied that the withheld information is personal data as it relates to and identifies specific council officers. Therefore, the information falls within the definition of 'personal data' in section 3(2) of the DPA.
17. Disclosure under either FOIA or the EIR is effectively an unlimited disclosure to the world at large, without conditions.
18. The Commissioner acknowledges that the complainant considers that they have a legitimate interest in disclosure of the withheld personal information.
19. However, the Commissioner must balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms.

20. In this case, the Commissioner is satisfied that the individuals concerned would have the reasonable expectation that their personal data would not be disclosed to the wider world in response to an EIR request. Disclosing their personal data would be likely to cause them harm or distress.
21. The complainant states that the information in relation to the whole request is required because "I consider the information withheld by the Council key to both properly understanding the true nature and extent of the Council failings, and their level of commitment to address them, as well as informing my complaint to the LGO in this regard."
22. Providing the requested information would single out one named officer who does not hold a graduate or post graduate qualification. The Commissioner considers that all individual council officers have a strong and reasonable expectation that information relating to their qualifications will remain confidential to them and their employer.
23. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that disclosing the information in question would contravene a data protection principle as it would not be lawful. Therefore, he has decided that the data is exempt under Regulation 13(1) by virtue of 13(2A)(a).
24. It follows that the Council is entitled to withhold this information.

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

25. Regulation 12(5)(f) of the EIR states that: "a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(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 it or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure"

26. As with all the Regulation 12(5) exceptions, the Commissioner considers that, in order to demonstrate that disclosure "would adversely affect" a

confider's interests, a public authority must demonstrate that the adverse effect is more likely than not to occur.

27. The council confirmed to the complainant that the withheld information in scope of questions 9b and 9d is the External Peer Review of the department ("The Peer Review").
28. The council advised the Commissioner that the Peer Review was coordinated by the Planning Advisory Service¹ ("PAS") (part of the Local Government Association) for the council, based on information supplied by council officers.
29. In his guidance on 12(5)(f)², the Commissioner confirms that it is possible for an employee of a public authority to provide information to his employer on a voluntary basis. This will usually arise where a staff member volunteers information outside the terms and conditions of their employment, it is likely to comprise the subjective and personal opinion of the employee which was not made in the usual course of employment, and so would qualify as information provided to the authority.
30. The council explained that the officers provided information on a voluntary basis, with an expectation of confidence. It argued that the officers would not expect the information to be shared with the world at large.
31. The council argued that releasing the document could have significant consequences for the officers involved. It argued that information should not be released to the public ahead of any internal decisions to share the information within the council.
32. The council stated that releasing the information would also affect morale within a team which already has time pressures connected with high workloads and alongside handling a number of service failure complaints from customers.
33. The Commissioner appreciates that officers will have provided their comments on the basis that the information would remain confidential. This will have allowed officers to share their candid opinions with PAS in a free and frank manner.

¹ [Who we are and what we do | Local Government Association](#)

² [eir voluntary supply of information regulation.pdf \(ico.org.uk\)](#)

34. Having reviewed the withheld information, the Commissioner considers that disclosure, would (that is more likely than not) adversely affect the interests of the individual officers. There could be an emotional impact if officers believe information shared in confidence may be attributed to them. Furthermore there could be a detrimental effect on relationships between colleagues in the department.
35. Having considered the council's explanation, the Commissioner is satisfied that the disclosure of the information would adversely affect the interests of the council officers providing the information for the review. He has therefore concluded that the council was correct to apply the exception provided by Regulation 12(5)(f).

The public interest

36. As the exception is engaged for the information, the Commissioner has considered the associated public interest test required by Regulation 12(1)(b). The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. When carrying out the test the Commissioner must bear in mind the presumption towards disclosure provided in Regulation 12(2).

The public interest in disclosure

37. Some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
38. The complainant argues that poor service standards, delays and failings by the planning department has impacted town residents. Furthermore that questionable decisions by the council have resulted in loss of amenity to residents. He states that there is a public interest in understanding whether the council has made plans which will properly address these issues, and that the information is also needed to better inform a case with the Local Government Ombudsman ("LGO").

The public interest in maintaining the exception

39. The council has provided details of the detrimental impact on individuals and the morale of the planning team, as summarised above.
40. The council states that it is mindful that staff were willing to provide honest information for the review and were not expecting this information to be released. Should the information be released, staff would not be so willing to provide honest reviews of the department in the future.

Balance of the public interest

41. The Commissioner has taken into account that there is a public interest in openness and transparency by the council regarding the steps it is taking to improve the service standards in the planning department. Disclosure of the withheld information would provide some transparency.
42. However, the Commissioner has also taken into account that it is based on information provided on a voluntary basis from council officers who expected the review to be confidential.
43. The Commissioner considers that the ability of council officers to provide their candid views confidentially is integral to the process of collecting information for such peer reviews. Officers may be reluctant to engage in such reviews in the future if the information is disclosed.
44. The Commissioner considers that there is a strong public interest in maintaining trust such that improvement initiatives are effective in gathering information and identifying where changes are required.
45. The Commissioner has also considered the timing of the request. The information contained within the Peer Review had not been shared within the department at the time of the request. The council has stated that sharing the information publicly and ahead of internal communication could be detrimental to the morale of staff. The Commissioner considers that this may have a harmful effect on the effective working of the planning department which would not be in the public interest.
46. The council has voluntarily engaged in the Peer Review coordinated by PAS. The Commissioner considers that this demonstrates that the council is taking steps to address the poor service standards raised by the complainant.
47. The Commissioner considers that the complainant's ability to raise a case with the LGO is not affected by the non-disclosure of the requested information.
48. Having considered the public interest arguments, the Commissioner finds the public interest in withholding the requested information to be the stronger argument.
49. 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).

50. 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 12(4)(a) – Information not held

51. The council argues that it does not hold any further information falling in scope of questions 6, 8a and 9a. It has therefore applied Regulation 12(4)(a) (information not held).
52. In the council's response to the complainant regarding question 6, it advised that officers gained expertise through experience of different types of applications. This is in addition to the previously specified graduate or post graduate planning qualification and working towards membership of the Royal Town Planning Institute.
53. The council further explained to the Commissioner that self-learning is derived from exposure to a number of applications that range in content and complexity. This has been "on the job training" via mentorship with senior colleagues, and case file discussions direction with the team leader. The council stated no further information is held which is in scope of question 6.
54. In the council's response to 8a, it provided the complainant with a checklist against which Non-Material Amendments are considered. The complainant then asked the council to provide copies of the checklists completed for the applications LW/20/0052 and LW/21/0484. The council advised that no records had been kept but that "the team have been informed of their responsibilities in regard to processing applications."
55. In the council's request response to question 9a), for key findings and outcomes of the case conference resulting from the complainant's complaints, it stated that ""no records are kept and as mentioned in earlier emails the team have been informed of their responsibilities in regard to processing applications."
56. The council advised the Commissioner that this type of information, were it recorded, would be kept on either the council's Electronic Data

Records Management System (W360) and, or MS Outlook. It confirmed that it had searched both systems.

57. The council explained to the Commissioner that "we have searched again as a result of this current investigation and no records exist. This communication must therefore have been oral."
58. The council further explained that the communication relating to the findings of the case conference were verbally communicated to the team. It advised that the case conference involved the lead officer checking back-office systems to understand the nature of the proposal, the consultation regime used and the officer report and their recommendation. Having informed themselves of the results of these investigations, they orally reported to the Head of Service, who instructed again orally that the finding should be communicated to the wider team. The council confirmed that this scenario is not an uncommon approach when the planning department are dealing with high volume and dynamic issues that require attention at pace and at short notice.
59. The EIR do not determine what information "should" be held. Rather it provides the public with access to information that "is" held. The Commissioner, therefore, is not required to determine whether or not the records should have been kept.
60. There is no contradictory evidence available to the Commissioner that indicates the council's position is wrong.
61. On this basis, the Commissioner has concluded that, on the balance of probabilities, no further information is held by the council, falling within the scope of the complainant's requests.

Right of appeal

62. 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

63. 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.
64. 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

Janet Wilson
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