

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 13 March 2023

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

Decision (including any steps ordered)

1. The complainant requested information from Cornwall Council (“the Council”) about a planning application. The Council provided some information within the scope of the request but refused to provide the remainder, citing the exception under regulation 12(5)(f) of the EIR (adversely affect the interests of the person who provided the information). During the course of the Commissioner’s investigation the Council confirmed that some of the withheld information had been withheld under regulation 13 of the EIR (the personal data exception).
2. The Commissioner’s decision is that the Council is entitled to rely on regulation 12(5)(f) and regulation 13 of the EIR to withhold the withheld information. The Commissioner is also satisfied that, on the balance of probabilities, the Council has provided the appropriate information to the complainant and no further information within the scope of the request is held.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 7 March 2022, the complainant wrote to the Council and requested information in the following terms:

“All communications with the LPA concerning planning application PA21/12651. No communications from the portal, the agent or on behalf of the applicant are required as I already have these.”

5. The Council responded on 6 April 2022. It provided some information within the scope of the request but refused to provide the remainder, citing the exception under regulation 12(5)(f) of the EIR (adversely affect the interests of the person who provided the information).
6. The complainant requested an internal review on 9 May 2022 and queried why they had not received a transcript for a telephone call referred to within the disclosed information.
7. Following an internal review the Council wrote to the complainant on 4 September 2022. It upheld its position regarding its application of the exception under regulation 12(5)(f) of the EIR and stated that as the calls were not recorded, no information was held regarding the calls.
8. During the course of the Commissioner’s investigation the Council confirmed that some of the withheld information had been withheld under regulation 13, the personal data exception, in addition to the information withheld under regulation 12(5)(f).

Reasons for decision

Regulation 12(5)(f) - adversely affect the interests of the person who provided the information

9. 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”

10. In this case the information withheld under regulation 12(5)(f) comprises three emails sent by a member of the public to the Area of Outstanding Natural Beauty (AONB) team at the Council raising concerns about the planning application, specifically about the impact on the AONB, and the attachments to those emails.

Would disclosure adversely affect the interests of the person who provided the information to the public authority?

11. The Council states, “the third party has objected to disclosure of the email and has said that they fear reprisals from individual developers with vested interests in the area. Disclosure therefore would adversely affect the third party’s mental wellbeing. The third party has also said that disclosure would prevent them from communicating freely and openly with the Council in future”.
12. 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.
13. While the Commissioner does not consider that reprisals would be more likely than not to occur, he does accept the Council’s argument that it is more likely than not that disclosure of the information would adversely affect the third party’s mental wellbeing given that they have stated that they fear such reprisals should the information be disclosed.

Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?

14. The Council states, “the third party was not under any legal obligation to supply the email that was withheld. The email was sent as part of a public consultation regarding a planning application”.
15. The Commissioner agrees that the third party was not under any legal obligation to supply the information to the Council, there is no requirements for members of the public to comment on planning applications.

Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?

16. The Commissioner's guidance states, "where information has been provided by another person, public authorities will only be able to disclose it if there is no duty of confidence or they have a specific power to do so."
17. The Council states, "the contents of the email sent by the third party were not supplied under circumstances in which the Council was entitled to disclose. The third party has advised they emailed the AONB department with their opinions. The third party has noted that they had made what they were willing to make public via the Council's planning portal, and do not agree to the disclosure of their email between themselves and the Council".
18. The Commissioner notes that the complainant believes that, as the information on the planning portal is public, all information provided to the Council relating to the planning application should be made public.
19. During the course of his investigation the Commissioner consulted with the Council regarding whether there is any obligation for it to make such information public. The Council's position is that there is no specific requirement for them to make this information public.
20. On that basis, the Commissioner is therefore satisfied that the Council was not entitled to disclose the information apart from under the EIR.

Has the person supplying the information consented to its disclosure?

21. The Council states, "a third-party consultation was carried out and the third party objected to disclosure of their email to the Council".
22. The Commissioner therefore considers the exception engaged, he has gone on to consider the public interest test.

The public interest test

23. The Council took the following factors in favour of disclosure in to account:
 - "Will increase access to information held by the authority, and allow scrutiny of the public authority's decisions."
 - "Could make reasons for the authority's decision more evident and increase public understanding on the issues. An informed

and involved public helps to promote good decision making by public bodies.”

- “Could enhance the scrutiny of the authority”
- “Enhanced transparency of local authority actions and activities – ensuring justice and fair treatment for all”

24. The Council took the following factors in favour of maintaining the exception in to account:

- “A third-party objection has been provided to the release of the information, arguing that the information was provided in confidence and that it would breach UK GDPR Principle a) processed lawfully, fairly and in a transparent manner in relation to that third party.”
- “Trust and Confidence in the Council would be damaged, the public would be less likely to freely and openly share information with the Council.”
- “The third party has advised they are fearful of reprisals should the information be released. Release would adversely affect the third party’s mental wellbeing and could possibly place them at risk of abuse/harm.”
- “Decrease public participation in decision making/council processes if the public are concerned their information and/or contribution that they understood to be provided in confidence would be disclosed in the public domain.”
- “Any information relevant to the approval/disapproval of the planning application provided by the third party to the Council will have been considered and where appropriate included in the AONB report relating to this application.”
- “The third party has already made publicly available the concerns they have regarding the application via the Council’s online planning portal. Releasing the email would provide limited additional information to the public.”

25. The Council concluded that, on balance, the public interest in maintaining the exception outweighs that in disclosing the withheld information.

26. The Commissioner recognises the public interest in transparency regarding planning issues, however in his view the information already in the public domain goes a long way in meeting this public interest and

the public interest in transparency is outweighed by the public interest in maintaining the voluntary supply of environmental information from private persons to public authorities.

27. The Commissioner's decision is therefore that the Council was entitled to rely on regulation 12(5)(f) to withhold the information.

Regulation 13 – personal data

28. 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.
29. 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 ('UK GDPR').
30. The information that the Council has withheld under regulation 13 comprises information about both members of the public and Council staff redacted from the information disclosed to the complainant. Specifically names and contact details of Council staff and names, contact details and other identifying information about members of the public who contacted the Council about the planning application.
31. The Commissioner considers that the information clearly relates to those individuals and is therefore their personal information.
32. The Commissioner acknowledges that there is a legitimate interest in disclosure of the withheld personal information, in that to do so would provide greater transparency regarding this specific planning application.
33. However, the Commissioner must balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms.
34. 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.

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

35. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' 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).
36. The Commissioner's decision is therefore that the Council is entitled to withhold this information.

Regulation 12(4)(a) – information not held

37. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information "to the extent that it does not hold that information when an applicant's request is received".
38. Where there is some dispute between the amount of information identified 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 decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request). For clarity, the Commissioner is not expected to prove categorically whether the information is held.
39. In this case, the complainant has stated that they believe that the Council holds further information within the scope of the request as the Council has not provided any copies of internal communications.
40. During the course of his investigation the Commissioner asked the Council to provide details of how it had ensured it had identified all information held within the scope of the request.
41. The Council provided details of the searches it has carried out, including the search terms and timeframe for the search.
42. The Commissioner is satisfied in this case that, on the balance of probabilities, the Council has provided the appropriate information to the complainant and no further information is held in relation to the request in accordance with regulation 12(4)(a) of the EIR.

Right of appeal

43. 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

44. 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.
45. 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

Victoria James
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