

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 23 May 2023

Public Authority: Spelthorne Borough Council
Address: Knowle Green
Staines-upon-Thames
Middlesex
TW18 1XB

Decision (including any steps ordered)

1. The complainant has requested information relating to the decision to add a property to the Local list of Buildings and Structures of Architectural and Historic Interest.
2. The Commissioner's decision is that Spelthorne Borough Council (the Council):
 - On the balance of probabilities, has now disclosed all the recorded information it held at the time of the request.
 - Has correctly relied on regulation 12(5)(b) and regulation 12(4)(e) when refusing to provide some of the requested information.
 - Was entitled to rely on regulation 13 in the manner that it has done.
 - Breached regulation 5(2) of the EIR by failing to disclose information within 20 working days.
3. The Commissioner does not require the Council to take any further steps, as it has since disclosed additional information. the following steps to ensure compliance with the legislation.

Request and response

4. On 8 July 2022, the complainant wrote to the Council and requested information in the following terms:

"The supply of any relevant internal Council documentation, correspondence (including emails), memoranda, file notes, text messages or other records of communications, submissions, advice and/or reports associated with:

1. the decision to amend the Staines Conservation Area. For the avoidance of doubt, please do **not** send us copies of the consultation responses relating to the Staines Conservation Area Consultation; and
 2. the requests by members to seek the inclusion of the Property on the Local List, and the decision to add the Property to the Local list. For the avoidance of doubt, please do **not** send us copies of any public consultation responses relating to the local listing decision; and
 3. our client's notification, and subsequent application for prior approval to demolish the Property, dated 25 February 2022 and the Council's decision to refuse prior approval. For the avoidance of doubt, please do **not** send us copies of any comments or response made by the public relating to the application for prior approval."
5. The Council responded on 4 August 2022. It provided some information within the scope of the request, but withheld the rest under section 40(2) and section 40(3).
6. Following an internal review, the Council wrote to the complainant on 30 September 2022. It now dealt with the request under EIR and provided some additional information, but advised the remaining withheld information, was exempt from disclosure under the exceptions of regulation 12(5)(b), regulation 12(4)(e) and regulation 12(3) of the EIR.

Scope of the case

7. The complainant contacted the Commissioner on 19 October 2022, to complain about the way their request for information had been handled.
8. In the complainant's submission to the Commissioner, they advised that they believed the Council held more information than it had disclosed and that the Council was not entitled to rely on regulations: 12(5)(b), 12(4)(e) and 12(3).
9. The Commissioner's investigation therefore focuses on whether the Council is entitled to rely on the above exceptions and whether, on the

balance of probabilities, the Council holds more information within the scope of the request.

Reasons for decision

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

10. Regulation 5(1) of the EIR requires that a public authority which holds environmental information shall make it available on request.
11. 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.”
12. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner makes a decision based on the civil standard of the balance of probabilities. In other words, to determine such complaints, the Commissioner must decide whether, on the balance of probabilities, a public authority holds any further information which falls within the scope of the request (or was held at the time of the request).

The complainant’s position

13. The complainant explained that they have not been provided with an initial proposal to review the conservation area.
14. The complainant also advised that they had not been supplied with any draft documents, leading up to Environment and Sustainability Committee on 11 May 2022. The complainant explained that no draft documents for the later dated report on 27 June 2022, or the supplementary report dated 31 August 2022 were provided.
15. The complainant supplied the Commissioner with evidence that information within the scope of the request had been disclosed to a tribunal, but was not provided to the complainant at the time of the request. The complainant therefore believes that this and additional information could have been missed when searches were conducted.

The Council's position

16. The Council explained to the Commissioner that an archival search of the Principal Planning Officer's email was undertaken to check for information within the scope of the request.
17. The Council advised the Commissioner that once the internal review was requested, a full search of the entire Council's email and Teams Chat System was undertaken by the ICT Department. The search terms used were "Debenhams", as the building is a former Debenhams building and "Staines Conservation Area".
18. The Council stated it widened its searches to all emails sent by, or received by any member of staff within the Council over the last 6 years. The Council explained that this search generated approximately 400 emails (some of which were duplicates). The Council explained that 313 of the 400 emails were not within the scope of the request.
19. Councillors were also requested to provide any emails from personal accounts, WhatsApp messages or text messages in connection with the Stains Conservation area. The Council confirmed that this search did not reveal any additional information within the scope of the request.
20. The Council informed the Commissioner that there are no relevant paper records in relation to the requested information. It advised that there were also no staff consultations recorded, despite informal discussions between staff, the manager and head of service taking place.
21. The Council explained that it would be unusual for informal discussions between employees within the same service department to be recorded. This would be a considerable resource and time burden to record daily interactions between employees. It did explain that minutes or action notes would be made for formal meetings, but not for informal discussions relating to this case.
22. The Council informed the Commissioner that records are only deleted in line with retention schedules. It also explained that planning retention periods are long¹ and that no recorded information relevant to the scope of this request had been deleted.
23. The Council explained that information regarding listed buildings and conservation areas, is required to be held to comply with legislation.

¹ [Retention Schedule Planning V3 \(2\).pdf](#)

However, there is no statutory requirement to consult on Conservation Area Designation. The Council advised that as there is no statutory requirement to consult on Conservation Area Designation, nor is there a statutory requirement to retain the information provided to the original requester.

24. The Council explained to the Commissioner that staff and councillors are required to store all documents on approved software/locations. For this reason, the Council advised that it did not undertake a search for documents, as any relevant information would be held in the planning system.
25. It did confirm that there had been a draft of the Conservation Area appraisal, which was only altered minimally in the form of typos and was uploaded as an appendix to the "E&S report".
26. During the course of the Commissioner's investigation, the Council identified some additional correspondence that fell within the scope of the request. This was eventually disclosed to the complainant, with personal data redacted.

The Commissioner's Decision

27. The Commissioner has reviewed the evidence provided by the complainant and notes that the correspondence in question is dated after the original request. The Council is only expected to disclose information it held at the time the request was made, so the information that the complainant has identified, as outlined in paragraphs 23-25, falls outside of the scope of the request.
28. The Commissioner is satisfied that relevant information would be held in the Council's planning system, which had been searched for information within the scope of the request. The Council's additional searches have located further information – which has now been disclosed. The Commissioner is therefore satisfied that, on the balance of probabilities, the Council has now disclosed all the information that it held at the time of the request.

Regulation 12(5)(b) - the course of justice

29. Regulation 12(5)(b) of the EIR states that information is exempt if disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry or a criminal or disciplinary nature. Regulation 12(5)(b) is a broad exception including, but not restricted to information attracting Legal Professional Privilege (LPP). The purpose of the exception is to ensure that there should be no disruption to the administration of justice.

30. In this case, the Council has withheld information under regulation 12(5)(b) on the basis that the information is covered by LPP.
31. The Tribunal in *Woodford v IC (EA/2009/0098)* confirmed that the test for adversely affect in relation to LPP would be met by the general harm which would be caused to the principle of LPP, without needing to demonstrate that specific harm would be caused in relation to the matter covered by the information, "There can be no doubt that disclosure of information otherwise subject to legal professional privilege would have an adverse effect on the course of justice."
32. Consideration of the specific circumstances is however required when addressing the public interest test. Regulation 12(5)(b) will be engaged if the information is protected by LPP and this claim to privilege could be maintained in legal proceedings.
33. There are two types of privilege - litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal advisor acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
34. The Council explained that it believed the withheld information would fall under litigation privilege as it was sent by a solicitor to the Council's officers in the Planning department and relates to matters that are the subject of litigation.
35. The Council confirmed that, if the withheld information was disclosed, it would more likely than not adversely affect the course of justice. The Council explained this is because it would involve public access to privileged information regarding an ongoing case.
36. The withheld information would also provide the public with the legal information, arguments and conclusions which the Council has. It confirmed that this would therefore cause an unlevel "playing field", which would go against normal practice for such proceedings.
37. Having reviewed the withheld information, the Commissioner is satisfied that it is covered by LPP and therefore its disclosure would adversely affect the course of justice. LPP is such an important cornerstone of our justice system that any breach of LPP will, by definition, adversely affect the course of justice. It is not necessary to demonstrate any specific effect on the contemplated litigation in order to engage the exception.

He and will now consider the public interest in the requested information.

Public interest test

38. The Council explained that there is a legitimate public interest in promoting the accountability and transparency of public authorities.
39. The Council acknowledged that there is a strong public interest in the planning process.
40. The Council however stated that there is a greater need for clients to receive clear and unguarded advice from their lawyers. It also advised that there is a substantial public interest in maintaining the confidentiality of communications between lawyer and client. This will ensure the client can speak freely and frankly with their adviser to obtain appropriate legal advice, which is a fundamental requirement of the English Legal system.
41. It concluded that if the requested information was released, it may undermine other legal procedures that govern access to court records and information held for inquiries.
42. Whilst the Commissioner recognises there is a public interest in a council being transparent and accountable regarding its actions. This has to be weighed against the very strong public interest arguments in favour of maintaining a claim of LPP.
43. Because of its very nature and the importance of it as a long-standing common law concept, there will always be a strong argument in favour of maintaining LPP. The Information Tribunal recognised this in *Bellamy v Information Commissioner and Secretary of State for Trade and Industry (ES/2005/0023)*² when it stated that: "...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest. It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...."

² *Bellamy v Information Commissioner and Secretary of State for Trade and Industry (ES/2005/0023)*

44. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, such as circumstances where substantial amounts of public money are involved, where a decision will affect a substantial amount of people, or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. The Commissioner is not persuaded that such factors are present in this case.
45. The Commissioner's decision is that the balance of the public interests favours the exception being maintained. This means that the Council was not obliged to disclose the requested information.

Regulation 12(4)(e) – Internal correspondence

46. Under regulation 12(4)(e) of the EIR, a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. This exception covers all internal communications and the sensitivity of the information is not a consideration for the exception to be engaged.
47. The withheld information in this case comprises of emails between council staff; largely between planning development officers within the Council and its solicitors, including attachments. The Commissioner is satisfied that all of the withheld information falls within the definition of internal communications, therefore the exception is engaged. The Commissioner has gone on to consider the public interest test.

Public interest test

48. The Council advised that there was a legitimate public interest in accountability and transparency of public authorities and how they act on behalf of the public.
49. The Council also acknowledged that there would be a strong public interest in the planning process and therefore the disclosure of the requested information.
50. The Council explained that the public interest is however, best served by protecting the Council's private thinking space. Releasing details of draft material into the public domain would distract public debate. Instead debate may focus on secondary issues such as any deficiencies in the information or the difference between a draft and a final version. There is a risk that public debate would be distracted and therefore seriously impact on the council's resources.
51. The Council also explained that there is a public interest in enabling officials to get on with the job in hand without having to defend a preliminary position.

The Commissioner's decision

52. After considering the above factors, and having applied the presumption in favour of disclosure, the Council determined that the public interest favours maintaining the exception.
53. Having reviewed the withheld information, the Commissioner considers the importance of council officers having the safe space for free and frank conversation outweighs the public interest in this information. If the requested information was disclosed, it would lead to Councillors and Council Officers no longer corresponding with frankness and candour. This could in turn lead to poor decision making and damage the quality of advice provided, which would not be in the public interest.
54. Regulation 12(4)(e) of the EIR requires a public authority to apply a presumption in favour of disclosure. The Commissioner has taken this into account when assessing the public interest and is still satisfied that the information should be withheld.

Regulation 13 – personal data

55. 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 requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
56. In this case the relevant condition is contained in regulation 13(2A)(a)³. 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').
57. The first step for the Commissioner is to determine whether the withheld information constitutes personal data, as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then regulation 13 of the EIR cannot apply.
58. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

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

Is the information personal data?

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

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

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

61. 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.

62. 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.

63. The Council withheld the names, personal addresses, personal email addresses and other personal data of members of the public and other individuals. It also withheld the names of its junior staff members and ex-employees and their email addresses.

64. The Commissioner is satisfied that the withheld information in this case is personal information. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.

65. 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.

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

Would disclosure contravene principle (a)?

67. 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.”

68. 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.

69. 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

70. 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.

71. 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.”⁴

72. 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.
- II. Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question; iii.
- III. Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

⁴ 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”

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

Legitimate interest test:

74. Although the complainant explained that they were interested in the requested information, in order to understand the basis on which the Council's decisions were made and ensure it was acting properly and lawfully.
75. The Commissioner is not satisfied that disclosing the redacted information would provide any additional substantive information and therefore he is not satisfied that there is a legitimate interest in the withheld information.
76. The Commissioner is also satisfied that the legitimate interest expressed by the complainant has been achieved when the Council disclosed the information it has. The personal information would add little value to the complainants request and this would be too intrusive.
77. The Commissioner has therefore decided that disclosure is therefore not necessary, the Council was therefore entitled to rely on Regulation 13 when withholding most of the requested information.

Procedural matters

78. The Council breached regulation 5(2) of the EIR in dealing with this request as it failed to disclose all the environmental information that it held, that wasn't subject to an exception, within 20 working days.

Right of appeal

79. 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

80. 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.

81. 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

Roger Cawthorne
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