

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

Date: 30 November 2023

Public Authority: North Norfolk District Council
Address: Council Offices
Holt Road
Cromer
Norfolk
NR27 9EN

Decision (including any steps ordered)

1. The complainant requested information from North Norfolk District Council ("the Council") about the Environmental Health Team's assessment of a poultry farm and correspondence between the Environmental Health Team and the Planning Department about planning applications for a site close to the poultry farm. The Council withheld the requested information citing regulations 12(5)(f) (interests of information provider) and 13 (personal data) of the EIR as its bases for doing so. The Commissioner has proactively applied regulation 12(4)(e) in place of regulation 12(5)(f).
2. The Commissioner's decision is that the Council is entitled to withhold the withheld information under regulation 12(4)(e) and regulation 13 of the EIR.
3. The Commissioner does not require further steps.

Request and response

4. On 23 January 2023, the complainant wrote to the Council and requested information in the following terms (numbering added for ease of reference):

“1. Any and all reports and/or assessments produced by the Environmental Health Team at North Norfolk District Council between January 2022 and January 2023 pertaining to Bluebell Poultry Farm on Bacton Road in North Walsham.

2. Any and all emails sent between the Environmental Health Team and the Planning Department pertaining to application PF/21/2650 or PPTDC/21/2650 between 05/10/2021 and 20/01/2023.”

5. The Council responded on 6 March 2023. It refused to provide the requested information citing the following exemptions:

- a. Section 31(1)(g) of FOIA – prejudice to law enforcement
- b. Section 40(2) of FOIA – personal information
- c. Section 43(2) of FOIA - prejudice to commercial interests.

6. The complainant requested an internal review on 16 March 2023.

7. Having been informed that the Commissioner had accepted this case for investigation on 15 June 2023, the Council provided an internal review on 27 June 2023. It maintained its reliance on the three exemptions listed above as the bases for withholding the requested information. It also stated, “...in addition I consider that the Council could have properly considered and applied the exemption under section 41 to withholding some of the information where information was provided to the Council in confidence...”.

Scope of the case

8. During the course of his investigation the Commissioner asked the Council to reconsider the request under the EIR as, having had sight of the withheld information, he considers that it is environmental information as defined under regulation 2(1) of the EIR and the request should therefore have been considered under the EIR.

9. The Council reconsidered the request under the EIR and withheld the requested information under regulations 12(5)(f) (interests of information provider) and 13 (personal data) of the EIR.
10. During the course of the Commissioner's investigation the Council also confirmed that it does not hold any information within the scope of part two of the request. The withheld information comprises a single written report and in excess of 100 videos and photos which are referenced and described in the report. In reaching his decision the Commissioner viewed a sample of the videos as to watch all the footage would have placed a disproportionate burden on his limited resources.
11. The Commissioner considers that regulation 12(4)(e) (internal communications) is a more appropriate exception to apply to the withheld information than regulation 12(5)(f). He has therefore exercised his discretion and has proactively applied regulation 12(4)(e) in place of regulation 12(5)(f).
12. This notice considers whether the Council is entitled to rely on regulation 12(4)(e) and regulation 13 to withhold the withheld information.

Reasons for decision

Regulation 12(4)(e) Internal communications

13. Regulation 12(4)(e) of the EIR states that information is exempt from the duty to disclose if it involves the disclosure of internal communications. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. Rather, as long as the requested information constitutes an internal communication then the exception will be engaged.
14. The withheld information in this case consists of an internal Council report written by a Council officer from the Environmental Protection Team for Council officers who were considering a planning application for the construction of housing on a site sharing a boundary with the poultry farm. As well as the written report itself, the accompanying images and videos (taken by the Council officer who attended the poultry farm site) which are referenced in the report have also been withheld. The information contained within the report focusses on identifying issues that would give rise to complaints from any potential future occupiers of the application site.
15. In its submissions to the Commissioner the Council stated that the report has been used internally only. The Commissioner is not aware of

any evidence to suggest the report has been provided to any external recipients.

16. The report does contain information provided to the Council officer who attended the poultry farm by the company that operates the farm, however, the Commissioner's guidance¹ is clear that communications can still be internal if they record discussions with third parties or contain information received from third parties. It is the form of the communication that is important, rather than its content.
17. The Commissioner is satisfied that the withheld information falls within the definition of internal communications and therefore, he finds that the exception is engaged. The Commissioner will now go on to consider the public interest test for this information.

Public interest test

18. The Commissioner acknowledges that there is a strong public interest in ensuring there is transparency about how planning decisions are made.
19. However, the Commissioner accepts that public authorities need a safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction. The need for a safe space is strongest when the issue is still live.
20. At the time of the request the planning decision was still subject to appeal, a planning appeal form was submitted the same day that the request was made. The Commissioner therefore considers that the issue was live at the time of the request. He therefore accepts that, in the circumstances of this case, at the time of the request, the Council needed a safe space to determine its position on the planning application.
21. In addition, the Commissioner considers that the planning system itself, including the appeals process, goes a long way in meeting the public interest in transparency regarding how planning decisions are made.
22. In this case, the fact that there were concerns about the poultry farm impacting the suitability of the application site for residential development was already in the public domain at the time of the request. The Commissioner considers the public interest in disclosure of

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/regulation-12-4-e-internal-communications/what-are-internal-communications/#record>

the detailed report on this matter to be relatively limited as it would add little to the public's understanding of how the decision was reached.

23. The Commissioner's decision is therefore that the public interest in maintaining the exception outweighs that in disclosure and the Council is therefore entitled to withhold the emails under regulation 12(4)(e).
24. 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).

25. In this case, the Commissioner's view is that the balance of the public interest 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) has been applied correctly.

Regulation 13 - personal data

26. 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.
27. In this case the relevant condition is contained in regulation 13(2A)(a)². 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').
28. The Council has withheld images of individual people and of car numberplates on the grounds that this is the personal data of the people pictured and the owners of the cars.

² As amended by Schedule 19 Paragraph 307(3) DPA 2018.

29. The Commissioner is satisfied that the requested information is the personal data of the people pictured and the owners of the cars as they can be identified and should this information be disclosed their involvement with the activities of the poultry farm would be disclosed to the world at large.
30. The Commissioner acknowledges that the complainant considers that they have a legitimate interest in disclosure of the withheld information.
31. However, the Commissioner must balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms.
32. 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. The company that operates the farm consented to the visit by the Council officer and the taking of photos and video footage on the understanding that this information would be used for an internal Council report only. This was therefore the expectation of those on site at the time.
33. In addition the Council states that the data subjects are concerned that, although the farm operates under Environmental Agency best available technique, if they are identified they would be targeted by animal rights protestors and similar groups. On this basis the Commissioner accepts that disclosing their personal data would be likely to cause them harm or distress.
34. The Commissioner does not consider there to be any wider public interest in disclosure of the withheld information.
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. It follows that the Council is entitled to withhold this information.

Right of appeal

37. 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

38. 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.
39. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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