

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

Date: 28 September 2023

Public Authority: East Riding of Yorkshire Council
Address: County Hall
Beverley
East Yorkshire
HU17 9BA

Decision (including any steps ordered)

1. The complainant has requested information about a planning enforcement matter relating to their property. East Riding of Yorkshire Council ("the Council") disclosed some information but withheld some under regulation 12(4)(e) (Internal communications) and regulation 12(5)(f) (Interests of the information provider) of the EIR.
2. The Commissioner's decision is that the Council has correctly applied regulations 12(4)(e) and 12(5)(f) and has otherwise disclosed all held recorded information. However, the Council breached the requirement of regulation 5(2) (Time for compliance) in disclosing information out of time.
3. The Commissioner does not require further steps.

Request and response

4. On 6 January 2023, the complainant wrote to the Council and requested information in the following terms:

“Please provide all recorded information relating to complaints associated with my property. I have been informed that several complaints have/were made relating to planning issues both before and during my ownership. I appreciate that these complaints/reports are confidential but I would appreciate if you could inform me of their existence, number, nature and if they originate from one or more individuals.

Please also provide details of any meetings/notes/emails which my property has been discussed. In particular those meetings/notes/emails relating to planning applications [redacted planning application numbers]”
5. The Council responded on 21 March 2023. It disclosed information subject to redactions under regulation 13 (Personal data) and directed to where some information could be publicly accessed.
6. Following an internal review, the Council wrote to the complainant on 19 April 2023. It disclosed further information and confirmed that some information was withheld under regulations 12(4)(e) and 12(5)(f).

Scope of the case

7. The complainant contacted the Commissioner on 16 May 2023 to complain about the way their request for information had been handled, and specifically that the Council had incorrectly withheld information under regulations 12(4)(e) and 12(5)(f), and further, had not disclosed some specific recorded information.
8. The Commissioner considers that the scope of his investigation is whether the Council has correctly applied regulations 12(4)(e) and 12(5)(f), and whether it holds some specific recorded information.

Reasons for decision

Context

9. The Commissioner understands that the request relates to a planning matter relating to the complainant's property, and complaints made by the public the Council.

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 internal email correspondence. The Commissioner has reviewed the information and is satisfied that it represents internal communications. As such, the Commissioner is satisfied that regulation 12(4)(e) is engaged.
13. The Commissioner must next consider the balance of the public interest. In doing so, he has taken into account the EIR's express presumption in favour of disclosure and the public interest in transparency and accountability.
14. The Commissioner recognises in this case that there is a public interest that public authorities are appropriately open and transparent about their decision-making processes. This is particularly so in respect of concerns about planning enforcement.
15. However, the Commissioner also recognises that there is a strong public interest in ensuring that the Council is able to discuss planning enforcement candidly and without external influence. The Council argues that the removal of this safe space would damage its ability to consider breaches of planning permission and whether enforcement action is required. The Council further argues that the matter in this case remains live and may yet result in enforcement action – such as due to continued breach of planning regulations.
16. The Commissioner has considered a significant number of prior cases relating to requests for internal communications about live planning

enforcement matters. Examples include IC-121238-S3Q4¹, IC-47943-P9L7², FS50783890³, and FER0693502⁴.

17. In those cases, the Commissioner consistently found there to be a significant public interest that local planning authorities are able to consider such matters in a safe space. Having considered the circumstances in this case, the Commissioner considers that his findings in those prior cases are applicable here.
18. Having considered the public interest arguments, the Commissioner finds the public interest in protecting the Council's ability to discuss planning enforcement in a safe space to be the stronger argument.
19. 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).

20. 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.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4023943/ic-121238-s3q4.pdf>

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2619155/ic-47943-p9l7.pdf>

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2615018/fs50783890.pdf>

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2258217/fer0693502.pdf>

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

21. Regulation 12(5)(f) of the EIR states that information is exempt if it would adversely affect the interests of the information provider.
22. 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.
23. The Council has applied regulation 12(5)(f) to a complaint to it by a member of the public. The Council has explained that this complaint would have been made to it in the expectation of confidence, to be considered by the Council as a public authority. The disclosure of such information would inhibit the individual from making such complaints in the expectation of confidence and may place them at risk of harm through their identification.
24. The Commissioner has reviewed the information and recognises that it represents information that has been provided to the Council by a member of the public. The Commissioner is also satisfied that the disclosure of the information would adversely affect the interests of that individual. As such, the Commissioner is satisfied that regulation 12(5)(f) is engaged.
25. 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.
26. However, the Commissioner is also aware that the information is a complaint from a member of the public. There is a strong public interest that members of the public are able to feel able to submit complaints to the Council without fear of public disclosure. This is particularly so where the content of the complaint may reveal the individual's identity and place them at risk of harm.
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 5(1) – Duty to make available environmental information on request

30. 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.
31. 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.
32. In other words, in order to determine such complaints, the Commissioner must decide whether on the balance of probabilities a public authority holds additional information which falls within the scope of the request (or was held at the time of the request).
33. In this case, the complainant argues that the Council has failed to disclose all held information. This is because the Council has disclosed that ‘1’ complaint has been made to it, whilst the complainant argues that they are aware of more.
34. The Council has stated to the Commissioner that all received complaints are logged on the relevant case file. The case file relating to the complainant’s address contains only one complaint.
35. The Commissioner considers that the Council has provided a clear explanation of how relevant information is held, and how it has established how many complaints it holds. There is no compelling evidence available to the Commissioner that suggests the Council’s position is incorrect.

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

Regulation 5(2) – Time for compliance

37. Regulation 5(2) states that information should be made available no later than twenty working days after the date of receipt of the request.
38. In this case the Council did not respond and disclose information until outside of twenty working days. On this basis the Commissioner finds a breach of regulation 5(2).

Right of appeal

39. 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

40. 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.
41. 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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