

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

**Date:** 24 September 2019

**Public Authority:** Ribble Valley Borough Council  
**Address:** Council Offices  
Church Walk  
Clitheroe  
BB7 2RA

**Decision (including any steps ordered)**

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1. The complainant has requested information about the approval of planning applications and the involvement of named staff. The Council refused the request citing sections 21 – information accessible to applicant by other means; 40 – personal information; and 41 – information provided in confidence, of the FOIA.
2. The Commissioner’s decision is that Ribble Valley Borough Council is entitled to rely on section 21 for some of the information requested but not all, and that sections 40 and 41 are engaged. She also finds that for the part of the request falling under the EIR, regulation 6(1)b is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information for questions 1-8 of the request in the form and format requested.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 13 August 2018, the complainant wrote to Ribble Valley Borough Council and requested information in the following terms:

*'We wish to make the following request under the Freedom of Information Act 2000. Could you please reply in electronic format, ideally excel with the following information:*

- 1) *Detail how many applications for planning consent were received by the planning office in the immediate last 24 months and provide the reference numbers;*
- 2) *Detail how many of the aforementioned applications were granted and provide their reference numbers;*
- 3) *Detail how many of the rejected applications were the subject of appeal and provide their reference numbers;*
- 4) *Detail how many of the applications received were assigned to [redacted name] and provide their reference numbers;*
- 5) *Detail how many of those applications were approved and provide their reference numbers;*
- 6) *Detail how many of [redacted name] decisions were the subject of appeal and provide the reference numbers;*
- 7) *Detail how many of the applications at request 1 above were submitted by [redacted name] and how many of those were determined by [redacted name];*
- 8) *Of those determined by [redacted name] in the aforementioned were granted; and*
- 9) *Provide a copy of all complaints made in respect of [redacted name];*
- 10) *Please provide a copy of all communications in the last 6 years with Stonyhurst College or their agents relating to applications, and in particular, to any agreement / understanding that [redacted name] does not deal with their applications'*

On 22 August 2018 the complainant supplemented his request with the following:

- 11) *'Please provide a copy of the planning office file relating to applications 3/2108/0395 and 3/2017/1021 to include case notes, memos and emails between staff members – however informal they appear to be.*
- 12) *Please provide a copy of [name redacted] disciplinary history and HR file.'*

6. The Council responded on 12 September 2018. For questions 1-8 and 10 it signposted the complainant to its planning portal to retrieve the requested information directly. For question 11 it provided information about how to access planning files at the Council's offices, and costs for hard copy reproduction. For question 9 it refused to supply any information citing section 41 of the FOIA – information provided in confidence. For question 12 it confirmed holding the information but refused to provide it citing sections 40(2) and 40(3) of the FOIA – third party personal data.
7. The complainant requested an internal review on 9 October 2018 (although he did not challenge the Council's response to question 11). The Council sent the outcome of its internal review on 2 November 2018. It upheld its original position, and now referred specifically to section 21. It also provided some information on the status of applications.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 8 February 2019 to complain about the way his request for information had been handled. He did not consider that signposting to the Council's planning portal was a reasonable response from the Council due to the search parameters being so limited. It would require the searcher to view every application in the timescale of the request and find the information on each individual file. He also considered that the use of section 41 for question 9 (complaints made) to be irrelevant as it would be held in the online planning file, should one know where to search. For question 12, the complainant considered that as the staff member concerned is a public official in high office, complaints made against are a matter of public interest.
9. The Commissioner therefore considers the scope of the case to be whether the Council is entitled to rely on sections 21, 40(2) and 41 of the FOIA to refuse to disclose the information requested; and whether the Council has dealt with the request under the correct information access regime.

## Reasons for decision

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### EIR or FOIA?

10. The Commissioner first considered whether the request should be dealt with under the FOIA or EIR. In order to determine this, she draws attention to this summary definition environmental information:

*'Environmental information is any information on:*

- the state of the elements of the environment and the interaction among these elements;*
- factors affecting or likely to affect those elements;*
- measures or activities affecting or likely to affect those factors or elements, or designed to protect those elements;*
- reports on the implementation of environmental legislation;*
- cost-benefit and other economic analyses and assumptions used within the framework of those measures and activities; and*
- the state of human health and safety, conditions of human life, cultural sites and built structures in as much as they are or may be affected by those'*

11. Although the request concerns planning applications, which in most cases would be considered a measure affecting the elements, for questions 1-8 it is clear that the information sought is simply numerical, and not about the nature or content of the applications. She therefore considers that this is sufficiently removed from actually impacting the environment to not be covered by Regulation 2(1) of the EIR and thus fall under FOIA.

12. For question 9, the information relates to complaints. These concern the planning application process and the staff involved. Again this is too far removed from affecting the environment and therefore falls under FOIA. Question 12 concerns a staff member's HR file and is clearly not environmental. The only question that the Commissioner determines should be dealt with under the EIR is 10, which concerns the communications / correspondence about the planning applications Stonyhurst College. This is because the information sought directly concerns the specific content of those applications; it is not numerical.

## **Section 21 – information reasonably accessible by other means**

13. Section 21 of FOIA/EIR states that

*(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.*

14. The Council has applied section 21 to questions 1-8 and 10 of the complainant's request, signposting him to the Council's planning portal.

15. The complainant did not consider this signposting to be reasonable, explaining to the Commissioner that the search parameters on the portal available to the public are limited and that for questions 1-8 and 10 'it would be necessary to view every application uploaded by the Council and most of the documents attached hereto, when what is actually being requested is very narrow in its parameters'.

16. As part of her investigation, the Commissioner asked the Council to demonstrate how the searching the planning portal would provide the information without difficulty, as having viewed it herself she could not see how the information could be found without searching through the records pertaining to each planning application.

17. The Council responded with:

*'The applicant has requested.....information about planning applications over a two year period. The front page of the planning portal includes a link to the advanced search option. By entering the appropriate dates, all applications in that period can be accessed. This will provide information of all reference numbers (question 1) and the total number of applications displayed at the top the page.'*

18. It goes on to explain that clicking on each application number, it is possible to find the information in answer to questions 2-8. For question 10, the portal can be searched by 'Stonyhurst College'. Correspondence not on the portal can be accessed by arrangement at the Council's Offices. The Council denies that there was any arrangement for the named Council Officer not to deal with Stonyhurst College applications, and therefore there is no information available.

19. The consideration of reasonableness applies to the information itself *and* the circumstances of the applicant themselves. This means that that a public authority can take into account these circumstances when deciding whether the information is reasonably accessible. The Council argues that as the applicant is a solicitor whose practice area includes planning, he has an awareness of and ability to navigate the planning portal without difficulty.

20. The Commissioner herself put the Council's arguments to the test, and whilst not a planning expert, considers she is likely to have at least similar search abilities to the complainant. She found the following:

- Question 1: A search for applications received between 12/8/16 and 12/8/18 (24 months) reveals 2287 applications, with 10 showing per page. To get the specific reference numbers, the complainant would have to view 229 web pages and make a note of the ten application numbers on each page to get the information he has requested.
- Questions 2-8: To gather the information for these questions, each application number would have to be clicked on (of which there are 2287), and the application information read on each page. The information would then need to be extracted manually and tallied to provide the complainant with the information sought.
- Question 10: A search under 'Stonyhurst College' reveals 78 potential applications. Associated documents are shown when clicking on the application number and are labelled according to their content e.g. Ecology Assessment, Highway Response etc.

21. The Commissioner draws attention to information in her guidance on section 21 and to the following tribunal decision:

*'In Christopher Ames v Information Commissioner and the Cabinet Office (EA/2007/0110, 24 April 2008) the applicant requested specific information relating to the executive summary of the Iraq Weapons of Mass Destruction dossier. Section 21 was applied by the public authority on the basis that the information was available on the Hutton Inquiry website. Although the Tribunal found that the information was not in fact on the website, it went on to make the point that should there have been any information on the website that answered the request, "it would not necessarily follow that the material was reasonably accessible to Mr Ames so as to allow the Cabinet Office to rely on section 21."*

*The Tribunal expressed doubt that, where a public authority is asked for a very specific piece of information which it holds, it would be legitimate for the authority to tell the applicant that the information can be found on a large website (such as that of the Hutton Inquiry), even if the applicant is well informed. **In other words, it is unlikely to be reasonably accessible to the applicant if a large amount of searching is required in order to locate the information.** In such circumstances, the authority would be expected to provide a precise link or some other direct reference as to where the information could actually be found.*

22. For questions 1-8 the Council has provided the complainant with the *source* of the information he seeks, but not the information itself. He requires numerical data concerning applications, some of which is in the context of a specific member of staff. Whilst this information may be *technically available* to the complainant, she does not consider it to be *reasonably accessible* as, similar to the *Ames* case above, in excess of 2287 pages would need to be searched, read, the information extracted manually and then tallied. The complainant's planning knowledge would offer no advantage to undertaking this search and would make it no easier than anyone else able to search specific web pages. For question 1-8, the Commissioner therefore concludes that section 21 is not engaged.
23. For question 10, the information sought is copies of correspondence specifically pertaining to planning matters. As such, regulation 2(1)(c) is relevant and, in the Commissioner's view, the EIR is the appropriate regime. That being so, the Commissioner has transposed the arguments in place for section 21 of the FoI into Regulation 6(1)(b) of the EIR.
24. Based on the Commissioner's search, she is able to view this information through the portal and although it requires searching and viewing specific planning applications, these are easily found and the correspondence is labelled. The Commissioner therefore considers this to be reasonably accessible to the complainant and consequently Regulation 6(1)(b) is engaged. For information falling within question 10 that is held but not available through the planning portal, this can be viewed by arrangement at the Council's Offices. For the information concerning the removal of the handling applications by a specific member of staff, the Council denies this arrangement exists and therefore no information is held.

#### **Section 40 - personal data**

25. Section 40(2) of the FOIA 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 section 40(3A)(3B) or 40(4A) is satisfied.
26. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.



processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').

27. 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 section 40 of the FOIA cannot apply.
28. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

*Is the information personal data?*

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

*"any information relating to an identified or identifiable living individual".*

30. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
31. 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.
32. 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.
33. The Council has withheld a named employee's HR file and disciplinary record. The Commissioner considers without doubt that this is personal data as defined above.
34. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles. The most relevant DP principle in this case is principle (a).

*Would disclosure contravene principle (a)?*

35. 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".*



36. In the case of an FOIA 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.
37. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

*Lawful processing: Article 6(1)(f) of the GDPR*

38. 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”<sup>2</sup>.*

39. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

- (a) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- (b) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

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<sup>2</sup> 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, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) 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”.*

(c) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

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

*Legitimate interests*

41. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
42. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
43. The complainant has requested the HR file and disciplinary history of a Council employee involved in planning decisions. He is concerned about the conduct of the employee, particularly in relation to planning decisions with which the complainant and his architect are involved. As a public official in high office, the complainant believes that any complaints about the employee are a matter of legitimate and public interest given his authority and control over planning developments.

*Is disclosure necessary?*

44. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
45. The Commissioner accepts that transparency of decision-making in public authorities is a primary foundation of the FOIA. However, the planning decisions made by the employee are publicly available on the website for all to view. The employee's HR file and disciplinary history are not in themselves concerned with public complaints about planning decisions – these are operational matters that would not be recorded on an HR file and as the Council notes, are of common occurrence in the planning environment. The Commissioner does not therefore consider that disclosure of the employees HR file and disciplinary history would

satisfy any legitimate interests concerning the transparency of the handling of planning applications by the employee.

46. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

*The Commissioner's view*

47. The Commissioner has therefore decided that the Council was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

**Section 41 – information provided in confidence**

48. Section 41 of the FOIA states:

*(1) Information is exempt information if –*

*(a) it was obtained by the public authority from any other person (including another public authority), and,*

*(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

49. The Council has withheld the information relating to question 9 of the request – copies of complaints made in respect of an employee. In order for section 41 to be engaged, the following criteria must be fulfilled:

- the authority must have obtained the information from another person;
- its disclosure must constitute a breach of confidence;
- a legal person must be able to bring an action for the breach of confidence to court; and
- that court action must be likely to succeed.

50. In this case the complaints were made by members of the public concerning the handling of planning applications and therefore the Council has obtained this information from other people.

51. The Council has argued that the complaints are not trivial to those who have made them and are made with an implied obligation of confidence. The Commissioner notes that the complaints relate specifically to the

personal experiences people have received from the planning service and considers this to be personal in nature, as opposed to complaints about matters such as street lighting which is a public matter.

52. The Council accepts that it is unable to identify any specific detriment in disclosure of the information save for the general right to privacy. The Commissioner draws attention to the decision in *Bluck v ICO and Epsom and St Helier University NHS Trust (EA/2006/0090)* where the Tribunal noted that an invasion of privacy and home life in itself constituted a detriment. In practice therefore, where the information relates to a personal matter, the public authority is not required to demonstrate a tangible detriment (such as financial loss). The Commissioner therefore considers that disclosure of the complaints would constitute a breach of confidence.
53. The complainant maintains that the complaint information is already in the public domain, through information available on the planning portal, should one know where to look (i.e. which application has a complaint lodged against it). The Commissioner has tested this and finds it is not the case: information about formal appeals are available on applications, but these are not the same as complaints contained in the withheld information.
54. Having established that the disclosure of the information would constitute a breach of confidence, the Commissioner must now assess whether a legal person could bring the matter to court and have a real prospect of success. Whilst section 41 is an absolute exemption and not subject to the public interest test, by virtue of identifying the prospect of succeeding in the courts, a public authority will need to consider defence arguments, which essentially would centre around the public interest in disclosure.
55. Previously, the courts have taken the view that the public interest in maintaining confidentiality could only be overridden on exceptional grounds, for example where there is evidence of illegality. However this has changed over time and in light of the Human Rights Act, with Article 8 – the right to privacy and family life, competing with Article 10 – right to freedom of expression (which includes the freedom to receive and impart information and ideas). The effect of these developments is to modify the public interest test into a test of proportionality.
56. In this case, the Council has argued that both the privacy of those making complaints and the staff member they concern should be considered. Neither parties would expect this information to be disclosed to the public under a FOIA request. The complaints were made several years ago, and have been dealt with under the relevant complaints procedures within the Council. Additionally it is common to

receive complaints about planning decisions as it is often a contentious area of Council activity. Consequently there is nothing unusual about such complaints. The Council therefore concludes that there is not sufficient public interest in disclosure of the information so as to be able to defend any actionable breach.

57. Whilst the Council has considered the strength of any actionable case in terms of the importance of confidentiality, it has not given complete consideration to the specifics of a public interest defence. The Commissioner therefore considers this herself.
58. There is always a public interest in ensuring that public authorities remain transparent, accountable and open to scrutiny. In this case, where planning decisions can have a major impact on people's personal and professional lives, transparency of these decisions is key to establishing a fair and accessible process. However, the complaints received by the Council do not concern the person who made the FOIA request, nor his planning applications. Whilst he has concerns about the conduct of the employee who is named in these complaints, he has himself the right to complain about the handling of his own planning applications, which the Commissioner understands he has exercised. The Commissioner does not therefore consider the public interest in the disclosure of these complaints to override the confidentiality of those making the complaints. To do so would undermine the complaints process itself as well as intrude on individuals' right to privacy. Consequently she concludes that section 41 is engaged.

## Right of appeal

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59. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

60. 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.
61. 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 .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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