

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 10 August 2023

Public Authority: Bristol City Council
Address: City Hall
College Green
Bristol
BS1 5TR

Decision (including any steps ordered)

1. The complainant requested various information in respect of a members briefing held on 17 August 2022 by Bristol City Council (the 'Council'). The Council provided some information, but refused to provide the video of the briefing, originally relying on section 40(2) of the FOIA (personal information) to withhold the information. During the course of the Commissioner's investigation the Council amended its position and reconsidered the request under the EIR. It continued to withhold the video recording on the basis that it contained personal information (regulation 13) but also cited regulation 12(4)(e) (internal communications) as a further exception to the whole of the recording. The Commissioner's decision is that the Council was entitled to rely on regulation 12(4)(e) to withhold the video recording. However, the Commissioner has also recorded a breach of regulation 5(2) as the Council failed to respond to the request within the required timescales. The Commissioner does not require any steps

Request and response

2. On 1 September 2022, the complainant wrote to the Council and requested the following information:

"At the development management committee meeting on 24 August Councillor [redacted] referred to a members briefing on affordable housing held on 17 August. The reference was made 45 minutes into the committee meeting...

Would you provide a copy of the presentation, any supporting briefing papers and any meeting note, transcript or video of the proceedings..."

3. The Council responded on 9 February 2023. It provided a copy of the presentation slides entitled 'Viability in Planning' which was delivered to Councillors during the Member Briefing. It confirmed that it did not hold any supporting briefing papers or meeting notes and refused a copy of the video recording on the basis of section 40(2) FOIA.
4. Following an internal review the Council wrote to the complainant on 9 March 2023. It upheld its original decision to refuse to provide a copy of the video recording on the basis of section 40(2) FOIA. It also confirmed that a transcript of the briefing did not exist and stated that it did not consider it reasonably practicable to create a transcript from the recording to disclose, with or without redactions. The Council added that this was in line with section 11 FOIA which concerns the means by which communication is made. The Council further confirmed that it was not applying section 40(2) to the whole of the video, but did not have the software facilities to redact elements of personal information embedded in the recording.

Scope of the case

5. The complainant contacted the Commissioner on 24 January 2023 initially to complain about the Council's failure to respond to their request for information. Following the Council's response and subsequent internal review, they complained about the substance of the response.
6. The complainant was not satisfied with the delay in the Council's response. They also expressed dissatisfaction with the Council's application of section 40(2) FOIA. The complainant also stated that there were means available to provide the relevant information without disclosing personal data, and argued that if the Article 6(1) (requirements for lawful processing) of the UK GDPR and the three stage test is engaged, the legitimate interest test had not been properly considered making the balancing test flawed, and subsequent decision to withhold faulty.

7. During the course of the Commissioner's investigation the Council reconsidered the request under the EIR and sought to rely on regulation 13 and regulation 12(4)(e).
8. The scope of the Commissioner's investigation is to consider the Council's reliance on the exceptions specified.

Reasons for decision

Is the requested information environmental?

9. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
10. As the information is concerned with 'Viability in Planning' and it has been well established that planning constitutes a 'measure' under

regulation 2(1)(c) of the EIR, the Commissioner agrees that the requested information falls within the definition of environmental information. The Council was therefore correct to reconsider the request under the EIR.

Reasons for decision

Regulation 12(4)(e) – internal communications

11. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. Regulation 12(4)(e) is a class based exception so it is not necessary to demonstrate prejudice or harm to any particular interest in order for it to be engaged.
12. However, regulation 12(4)(e) is subject to the public interest test, therefore where the exception is engaged, the Commissioner must also consider whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure of the disputed information.
13. The Commissioner's guidance on regulation 12(4)(e)¹ defines the concept of communications as 'broad and will encompass...letters, memos, and emails, but also notes of meetings or any other documents if these are circulated or filed so that they are available to others'.
14. The information which has been withheld under regulation 12(4)(e) is the video recording of a Councillors' briefing held on 17 August 2022. The Council has confirmed that the briefing was recorded for internal training and development.
15. The complainant has stated that the Council's internal review letter refers to an intention to share the video recording with Councillors who did not attend the briefing, and to hold it as a training resource. However, as stated above, the briefing was recorded for internal training and development and the Council has confirmed that the information referred to above has not been disseminated outside of the Council.
16. Having viewed the withheld information the Commissioner is satisfied that it constitutes internal communications and therefore regulation

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/>

12(4)(e) applies to the information. The Commissioner has therefore gone on to consider the public interest test required by regulation 12(1)(b) of the EIR.

Public interest test

Factors in favour of disclosure

17. The Council has acknowledged the general public interest in transparency and accountability.
18. The Council also considers that there is a specific public interest in the disclosure of information provided to Councillors as it can inform decisions that Councillors make on behalf of their constituents.
19. The complainant has alleged that the Council's track record and sufficiency of provision of affordable housing as a 'planning gain' from private sector housebuilding is of public interest in Bristol. They have stated that it is covered in the press and a headline concern when the public respond to planning applications.
20. The complainant has argued that the influence this particular briefing had on a local application being considered at the time was evident in that an application recommended for refusal, was approved by members.
21. The complainant has further argued that the fact that opinions formed during the members briefing on affordable housing could, and has influenced planning decisions, makes disclosure a matter of compelling public interest so as to avoid suspicions that members are determining planning applications with pre-set views or closed minds.
22. The complainant further argued that if the opinions of Councillors have been shaped or influenced by the briefing on affordable housing, then there is a clear and compelling public interest argument to release the video, as not disclosing it undermines public confidence that the proper process is being applied in the consideration of planning applications.

Factors in favour of maintaining the exception

23. The Council has argued that its Councillors, along with all of its employees require a safe space to communicate in relation to training sessions which contain a question and answer component. It has further argued that employees must feel sufficiently free to ask questions in a safe environment and without fear of revealing any ignorance or misunderstanding on their part in order for training to be successful.

24. The Council considers that disclosure of this information would result in a chilling effect whereby staff members and Councillors would be less willing to discuss the content of the training openly, which would harm their learning and result in lower quality decisions made on behalf of the people they represent.
25. The Council has also stated that in this particular case, the slides of the presentation have been disclosed.
26. The Council considers that the balance of the public interest is overwhelmingly in favour of maintaining the exception.

The Commissioner's conclusion

27. The Commissioner would highlight that 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, and only where there is an overriding public interest in maintaining the exception should information not be released in response to a request.
28. The Commissioner has also carefully considered the arguments both for, and against disclosure and accepts there is a public interest in disclosure insofar as this would promote transparency and accountability of training briefings and ultimately with regard to decisions taken by a public authority.
29. However, the Commissioner considers that whilst the complainant may disagree with the Council's decisions in relation to a planning application, this does not in itself, constitute a legitimate public interest argument for disclosure. The remedy for addressing such concerns is via the planning appeal process.
30. The Commissioner recognises that authorities will need a safe space to develop ideas, debate issues and reach decisions away from external interference and distraction, and that this will apply equally to training briefings. Nevertheless, the Commissioner is sometimes sceptical of public authority arguments regarding 'chilling effects', as officials should be able to defend their positions and be undeterred by the possibility of future disclosure of information.
31. However, the Commissioner considers that delegates on training briefings should be able to ask questions and make comments freely without fear that a recording of the briefing or training course would be disclosed to the world at large at a later date. In this case therefore, he considers that the 'safe space' and 'chilling affect' arguments made by the council are weighty factors in favour of maintaining the exception, as the freedom to ask questions or make comments without fear that

they would be disclosed into the public domain at a later date is essential for the effective delivery of training.

32. Furthermore, the Commissioner notes that the presentation slides from the briefing have already been disclosed to the complainant, which in his view, goes a significant way in meeting the public interest in terms of transparency.
33. The Commissioner has therefore concluded that in all the circumstances of the case, the balance of public interest is weighted in favour of maintaining the exception.
34. It follows therefore, that the Council was entitled to rely on regulation 12(4)(e) to withhold the information. As the Commissioner is satisfied that regulation 12(4)(e) applies in this case, he has not gone on to consider the Council's reliance on regulation 13.

Procedural matters

Regulation 5 – Duty to make available environmental information on request

35. Regulation 5(1) of the EIR provides a general right of access to environmental information held by public authorities. Whilst regulation 5(2) concerns the timescales for response and states:

“Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.”
36. The Commissioner notes that the complainant submitted their request on 1 September 2022. However, the Council did not respond to the request until 9 February 2023 and it appears only after the Commissioner's involvement.
37. The Commissioner considers that this is an unacceptable delay, but accepts that it was an oversight on the part of the Council and not indicative of its usual timescales for responding to requests for information under the EIR. Nevertheless, the Commissioner has recorded a breach of regulation 5(2) of the EIR.

Right of appeal

38. 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

39. 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.
40. 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

Catherine Dickenson
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF