

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

Date: 21 October 2024

Public Authority: Reigate & Banstead Borough Council
Address: Town Hall
Castlefield Road
Reigate
Surrey
RH2 0SH

Decision (including any steps ordered)

1. The complainant has requested information about several planning applications. Reigate & Banstead Borough Council (“the Council”) disclosed some information. It withheld a small amount of information, citing regulation 12(4)(e) (Internal communications) of the EIR.
2. The Commissioner’s decision is that regulation 12(4)(e) is engaged, but the public interest in maintaining the exception is not sufficiently strong to overcome the presumption in favour of disclosure at regulation 12(2). He also finds that the Council breached regulation 11(4) of the EIR by failing to complete the internal review within 40 working days.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information, with appropriate redactions to conceal personal data.
4. The Council must take these steps within 30 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 5 January 2024, the complainant wrote to the Council and requested information in the following terms:

“This is a request for information under the Freedom of Information Act 2000. I would like to be provided with the following information, in electronic format the planning applications I have listed:

- All correspondence between applicants, objectors and council officers
- Notes of telephone calls between applicants, objectors and council officers
- All correspondence between council officers
- Notes of meetings between council officers, applicants and objectors
- Notes from the council's back office planning system

For the following applications:

[address and reference number redacted] Validated: Mon 06 Nov 2023

[address and reference number redacted] Validated: Wed 21 Dec 2022

[address and reference number redacted] Validated: Tue 18 May 2021”.

6. The Council responded to the request on 2 February 2024. It disclosed the information it said it held (with redactions for personal data, which the complainant has not challenged) and provided a link to public comments and consultation responses on its website.
7. There was then an exchange of correspondence in which the complainant expressed the view that further information was held, and the Council said that it was not.
8. The complainant asked for an internal review on 18 February 2024, stating that he thought more information was held.

9. Following the Commissioner's intervention, the Council provided the outcome of the internal review on 5 June 2024. It said further searches had located some emails between Council officers and members, which were being withheld under regulation 12(4)(e) of the EIR, with the public interest favouring maintaining the exception.

Scope of the case

10. The complainant contacted the Commissioner to complain about the way his request for information had been handled, prior to receiving the internal review. On receipt of the internal review, his concerns were as follows:

"1) The amount of time it has taken for the internal review which is well beyond their target of 40 working days

2) That the council has decided to treat my FOI request under the EIR, it was clearly a request under FOI and they have changed their interpretation of what I have asked for

2) [sic] The internal review identified material that had not been disclosed previously, contrary to their first response saying that all information was disclosed. This material is correspondence between officers and members, something that was not even mentioned previously. This shows, at the very least, a failure in their records management system.

3) I would like the ICO to review the information withheld to advise whether it really does come under exemption [sic] that they have stated in their correspondence."

11. The analysis below considers the above points. The complainant has not disputed the redaction of personal data in the disclosed information, and so the Commissioner has not considered it in this decision notice.

Reasons for decision

Is the requested information environmental?

12. The complainant considers that the request should have been dealt with under FOIA. However, if information falls within the definition of "environmental information" at regulation 2(1) of the EIR, any request for it must be considered under the EIR.

13. Regulation 2(1) of the EIR defines 'environmental information' as 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).
14. The request is for information relating to specific planning applications. The Commissioner has viewed the small amount of withheld information and can confirm that it, too, is concerned with a particular planning application. The Commissioner considers that this is information on measures likely to affect the elements and factors referred to in regulation 2(1)(a). He therefore considers that it was correct to consider the request under the EIR.

Internal review and identification of new information

15. Under the EIR, requesters are entitled to ask for an internal review to be conducted and regulation 11(4) requires the public authority to provide the outcome within 40 working days.

16. In this case, the Council exceeded the maximum 40 working days permitted to conduct the internal review. This was a breach of regulation 11(4) of the EIR. The Council has apologised to the complainant for the delay. It explained to the Commissioner that it was due to a particular staffing issue, which has since been addressed.
17. As regards the Council's changed position in respect of the new information it located, a public authority is permitted to change its position on a request at the time of the internal review, if it comes across new information as a result of its reconsideration of the matter (this is part of the reason for having an internal review process).
18. Having checked his monitoring records, and the small number of decision notices he has previously issued against the Council¹, the Commissioner has seen no evidence that the Council has persistently or repeatedly failed to locate information that it holds, when responding to requests. This appears to have been an isolated instance. Nevertheless, he has made a record of it for monitoring purposes and will revisit it if he becomes aware of further, similar breaches.

Regulation 12(4)(e) - Internal communications

19. Regulation 12(4)(e) provides an exception for information which constitutes an 'internal communication'. In order for the exception to be engaged it needs to be shown that the information in question constitutes a communication within one public authority, specifically, the authority to which the request is made.
20. The Council withheld a brief exchange of emails relating to the planning applications referred to in the request. It considers the emails to constitute internal communications as the emails were sent between a council officer and a councillor.
21. When considering whether the communication is 'internal', it will depend on the capacity in which the councillor was engaging with the Council. The Commissioner has previously considered the various roles fulfilled by councillors in his decision notice against the London Borough of Camden².

¹ <https://icosearch.ico.org.uk/s/search.html?collection=ico-meta&profile=decisions&query=&f.By+authority|publicAuthority=Reigate%20and%20Banstead%20Borough%20Council>

² https://ico.org.uk/media/action-weve-taken/decision-notices/2012/713050/fs_50422800.pdf

22. The Commissioner has viewed the withheld information and he considers that the email exchange occurred in the context of the councillor acting as a member of the Council and that the email exchange comprised an internal communication. He is therefore satisfied that regulation 12(4)(e) of the EIR is engaged.

Public interest test

23. Although regulation 12(4)(e) is engaged, it is necessary to consider whether the public interest nevertheless favours the information being disclosed. The Upper Tribunal³ has clarified that the public interest test must take account of matters as they stood at the date of the initial response (ie 2 February 2024).
24. When considering the public interest, regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure.

Public interest in disclosing the information

25. The Council acknowledged the general public interest in making official information available, as it can increase public participation in decision making and enhance the transparency and accountability of public authorities. It would also allow the public to have a better understanding of the planning process.

Public interest in maintaining the exception

26. The Council said the withheld information comprises observations, comments and recommendations regarding a planning application. It argued that the purpose of the exception is to create a protected space within which a public authority can reflect and engage in such internal discussions.
27. It considered it important that it has a safe space to debate issues relating to the proposal away from public scrutiny and disclosure of the withheld information could have an effect on the free and frank exchange of views in the future. It said:

“The Council stipulates that the public’s right to challenge a planning application is not affected by the non-disclosure of the requested information. That right can be properly exercised during the formal planning process. Whilst we acknowledge that facilitating public

³ <https://caselaw.nationalarchives.gov.uk/ukut/aac/2022/104>

engagement with environmental issues and procedures is one of the general principles behind the EIR, the argument for a safe space for internal communications carries significant weight in this case. The council has released some internal communications already. This does show that the council is proactively providing information and not just issuing a blanket refusal to provide all internal communications.

Given the detrimental impact that disclosure may have on the quality of decision making, there is a stronger public interest in not disclosing the withheld information.”

The Commissioner’s decision

28. The Council’s position is that the public interest favours it having a ‘safe space’ to consider the planning application. The Commissioner’s guidance on regulation 12(4)(e)⁴ addresses ‘safe space’ arguments. It makes it clear that they will only have significant value when the issue to which they relate is ‘live’:

“The ICO accepts you need a safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction. This may carry significant weight in some cases.

The need for a safe space is strongest when the issue is still live. Once you have made a decision the argument will carry little weight. The timing of the request is therefore an important factor.”

29. The Commissioner has referred to the planning application in question on the Council’s planning portal and notes that it was decided in December 2023, around three weeks before the request for information was submitted. The Council’s consideration of the planning application was, therefore, no longer ‘live’ at that point.
30. To the extent that its arguments touch on the ‘chilling effect’ that disclosure would have on the free and frank nature of future discussions, the Commissioner’s guidance also notes that they will be at their strongest when an issue is still live. Once relevant discussions have finished, the arguments become more speculative and it is harder to make convincing arguments about a generalised chilling effect on all future discussions within a public authority.

⁴ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-4-e-internal-communications/the-public-interest-test/>

31. As noted above, the application had been decided at the time the request was received, and so was not 'live'. Furthermore, the Commissioner notes that the content of the withheld information is similar to some information which was included in the disclosure made on 2 February 2024. In view of this, it is not clear to him why the Council considers the withheld information to be of such sensitivity that it should continue to be withheld. The Council has not offered any reasons why this is the case.
32. As noted above, regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when considering the public interest test. In light of the above findings, the Commissioner is not persuaded that the Council's arguments are sufficiently compelling that they outweigh the presumption in favour of disclosure.
33. Therefore, in the circumstances of this case, the Commissioner considers that the presumption in favour of disclosure should prevail and the Council must now take the steps in paragraph 3.

Right of appeal

34. 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

35. 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.
36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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