

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

Date: 31 August 2022

Public Authority: The Royal Borough of Kingston upon Thames
Address: Guildhall 2
High Street
Kingston upon Thames
KT1 1EU

Decision (including any steps ordered)

1. The complainant submitted a request to the Royal Borough of Kingston upon Thames (the Council) seeking all information it held relating to particular planning applications. The Council disclosed some information in response to the request but redacted or withheld additional information on the basis of the following exceptions within the EIR: 12(4)(e) (internal communications), 12(5)(b) (course of justice), 12(5)(d) (confidentiality of proceedings), 12(5)(f) (interests of the person who provided the information), 12(5)(e) (confidentiality of commercial or industrial information) and 13 (personal data).
2. The complainant challenged the Council's decision to withhold information falling within the scope of her request. She also argued that the Council was likely to hold further information falling within the scope of her request.
3. The Commissioner's decision is that the Council is entitled to withhold information on the basis of regulations 12(4)(e), 12(5)(b) and 13. However, the Commissioner has concluded that regulations 12(5)(f) and 12(5)(e) do not provide a basis to withhold any of the information. The Commissioner has also concluded that the Council does not hold any further information falling within the scope of the request beyond that disclosed to the complainant or withheld from disclosure.

4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - From the file entitled 'Consultation 181280 LEG' provide the complainant with an unredacted copy of the letter dated 21 September 2018 to the Council from Amro Vantage including enclosures to the letter.
 - From the file entitled 'Consultations 1812827 FUL' provide the complainant with an unredacted copy of the letter from Historic England to the Council dated 5 November 2018.
5. 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 FOIA and may be dealt with as a contempt of court.

Request and response

6. The complainant submitted the following request to the Council on 14 January 2021:

'Under FOI, I ask again, please send me all the records held as documents or any other recorded format ie in any format at RBK on these planning application:

 1. Planning application 12/12940/FUL and 12/12940 at 165-183 Clarence St KUT (Greencoat House) variation of conditions to reduce disabled parking and increase ordinary parking and replacement of cycle store in new location.
 2. Planning application 18/12827 and 18/12830 Legal Agreement at 165- 183 Clarence St KUT (Greencoat House) removal of conditions 2 of PP 11/12251/FUL to allow unlimited 24/7 third party parking at Greencoat House.
 3. PROCEDURE RULE No 30 MATTERS OR URGENCY in PART 4A of the Constitution Planning application 12/12827/FUL and 12/12830 Legal Agreement at 165-183 Clarence St KUT (Greencoat House) removal of condition 2 of PP 11/12251/FUL to allow unlimited 24/7 third party parking at Greencoat House where Ian Thomas CEO granted permission under Procedure Rule.'
7. The Council responded on 26 January 2021. The Council explained that the information was considered to be exempt from disclosure on the basis of regulation 12(4)(e) (internal communications) of the EIR. It

explained that it had concluded that the public interest favoured maintaining this exception, noting that information on these planning applications was already available on its online planning database (to which it provided a link).

8. The complainant contacted the Council on 26 January 2021 and asked it to undertake an internal review of its reliance on regulation 12(4)(e).
9. The Council informed her of the outcome of the internal review on 26 February 2021 (albeit it transpired during the Commissioner's investigation that the complainant did not receive a copy of this response). The internal review upheld the application of regulation 12(4)(e) and provided links to two documents concerning two of the planning applications. The review explained that the other applications mentioned in the request had been withdrawn so the documents were not available online.

Scope of the case

10. The complainant contacted the Commissioner on 28 May 2021 in order to complain about the Council's handling of her request. More specifically she raised concerns about its reliance on regulation 12(4)(e) and what she understood (at that point) to be the failure of the Council to complete the internal review.
11. Following the Commissioner's intervention the complainant was provided with a copy of internal review and upon provision of this she confirmed that she wished to continue with her complaint.
12. The Commissioner confirmed this to the Council on 6 July 2021 and asked it to provide him with a copy of the information withheld on the basis of regulation 12(4)(e) and submissions to support its reliance on this exception.¹
13. The Council responded to the Commissioner on 30 July 2021 and provided him with a copy of the information it was seeking to withhold. It explained that it was no longer seeking to withhold the information on the basis of regulation 12(4)(e) but instead considered it to be exempt

¹ The Commissioner's correspondence with the Council in relation to this matter has been a lengthy one during which time the Council's position in respect of this request changed a number of times. In order to clarify the nature of the Council's position the Commissioner has included details of this correspondence in this notice.

from disclosure on the basis of regulation 12(5)(d) as the information related to pre-planning applications.

14. The Commissioner contacted the Council on 6 August 2021 and raised the following queries or points: some of the information which the Council argued was exempt from disclosure was actually online; none of the information appears to relate to pre-planning applications so he was unclear as to the Council's basis of citing regulation 12(5)(d); and, the information provided to the Commissioner referred to objections being received about some of the applications but there was no evidence of these objections in the information provided.
15. The Council contacted the Commissioner on 11 August 2021 and explained that the information regarding pre-planning had not been provided as part of its previous response; it provided these to the Commissioner at this stage.
16. The Commissioner contacted the Council on 1 September 2021 and explained that the pre-planning documents provided post dated the request and therefore were out of scope of the request. The Commissioner therefore asked the Council to confirm whether it actually held any pre-planning documents within the scope of the request. The Commissioner noted that the Council's previous response had also not addressed his query about whether it held information about the objections to the applications.
17. The Council contacted the Commissioner on 7 September 2021 and confirmed that it had located further information relevant to the request. The Council also confirmed that it did not hold any information about objections to the applications.
18. The Council informed the Commissioner on 20 September 2021 that it had now provided the complainant with documents for the three applications listed in the request. The Commissioner noted that some, albeit not all, of these documents were available online. As per his correspondence of 6 August 2021, the Commissioner explained to the Council that he was not persuaded that regulation 12(5)(d) applied to such information and that he intended to issue a decision notice ordering the Council to disclose this information.
19. The Council responded on 21 September 2021 and explained that it was concerned about disclosure of information concerning pre-planning applications and asked for the opportunity to make further representations to the Commissioner. The Commissioner agreed to this.
20. The Council contacted the Commissioner again on 8 October 2021 and accepted that the pre-planning application information was (as suggested by the Commissioner on 1 September 2021) out of scope of the request. With regard to the remaining information, the Council

explained that it would disclose this to the complainant with the only redactions being those on the basis of the personal data exception.

21. The Council provided this information to the complainant on 12 October 2021.
22. In response the complainant contacted the Council on 12, 13 and 14 October 2021 and questioned whether it held more information falling within the scope of her request.
23. The Commissioner contacted the Council on 22 October 2021 and explained that as part of his investigation he would need to address the complainant's concerns that it held more information falling within the scope of the request than had been located by the Council to date. Therefore, the Commissioner asked the Council to address the following points:
 - The Commissioner explained that in his view the request sought all recorded information the Council held about the planning applications in question. The request was not limited to official documents which formed part of the planning file for each application. Rather, the request would also encompass any additional recorded information about these applications, for example (but not limited to) email exchanges (internal and external), meeting notes, records of telephone calls, other correspondence etc. In light of this, the Commissioner asked the Council to clarify how it had interpreted the request.
 - The Commissioner explained to the Council that if it had interpreted this request more narrowly than set out above, then it needed to undertake further searches to locate any relevant information.
 - The Commissioner asked the Council to explain the nature of these searches (including any further searches, if these were necessary).
 - The Commissioner asked the Council to address the various points raised in the complainant's emails of 12, 13 and 14 October 2021 about whether it held further information falling within the scope of the request.
 - Finally, the Commissioner explained that if the Council located further information falling within the scope of the request in light of additional steps it took, then it should disclose this to the complainant or, if exempt, provide this to the Commissioner confirmed which exceptions it was seeking to rely on.

24. The Council responded to the Commissioner on 5 November 2021. It accepted that it had not previously interpreted the request broadly enough. It explained that it had now conducted further searches and would provide the information located to the complainant, albeit that some information would be redacted or withheld in full as it was considered to be exempt from disclosure on the basis of regulations 12(5)(b), 12(4)(e), 12(5)(d), 12(5)(f) and 13 of the EIR.² The Council also provided the Commissioner with details of the searches it had undertaken to locate the information and also addressed each of the queries raised by the complainant in her emails of 12, 13 and 14 October.
25. The Council disclosed this additional information to the complainant on 9 November 2021.
26. In view of the above, the scope of this decision notice is to determine:
- whether the information redacted from the documents disclosed to the complainant, and the further information that is being withheld, is exempt from disclosure on the basis of the exceptions cited by the Council; and
 - whether the Council holds any further information falling within the scope of the request, beyond that either disclosed or redacted.

² In later submissions to the Commissioner which focused on whether further information was held, the Council also noted that it considered information between developers, planners and legal concerning the legal agreement are also exempt under regulation 12(5)(e) commercial confidentiality.

Reasons for decision

Regulation 12(5)(b) – The course of justice

27. The Council withheld some email correspondence on the basis of regulation 12(5)(b). This states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. The threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse effect. 'Would' means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.
28. The course of justice element of this exception is very wide in coverage, and can encompass, amongst other types of information, material covered by legal professional privilege (LPP).

The Council's position

29. The Council explained that this exception applied because the correspondence in question involved communications with a lawyer at the public authority and advice sought from, and provided by him, to a legal agreement associated with one of the planning applications in question. (Although not explicitly stated by the Council, the Commissioner understands its position to be that such information attracts LPP and, more specifically, advice privilege.)

The Commissioner's position

30. With regard to the applicability of legal professional privilege, for advice privilege to apply, the information must record communications that were confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
31. Having considered the withheld information the Commissioner notes that it constitutes communications with an internal lawyer at the Council and that the dominant purpose of these communications is the seeking or provision of legal advice. The Commissioner therefore accepts that the information attracts advice privilege. Furthermore, in the Commissioner's opinion the disclosure of information which attracts LPP presents a real risk of adversely affecting the course of justice.
32. Regulation 12(5)(b) is therefore engaged.

The public interest test

33. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out his assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.
34. The Council did not provide any specific public interest arguments to support its reliance on this exception.
35. The Commissioner understands from the complainant's submissions to him that she has significant and long running concerns regarding planning matters at the site in question, matters which she explained have impacted directly on her quality of life. In light of this, she wanted access to all of the information the Council held about the planning applications in question to better understand the decisions that had been made about these applications.
36. The Commissioner appreciates that the complainant has clear concerns about, and a direct interest in, the planning applications in question. Disclosure of the information withheld on the basis of this exception would provide some further insight into one aspect of the applications, namely a legal agreement that was put in place between the Council and developer. Disclosure could therefore, to some extent, add to the public's understanding of the matters associated with these applications beyond the information available via the planning portal.
37. However, in the Commissioner's opinion there is a very considerable public interest in protecting information covered by LPP in order to ensure that the confidence in this principle is maintained. Furthermore, in the circumstances of this case the Commissioner understands that the legal advice relates to a recent matter and in his view this adds additional weight to the public interest in favour of maintaining the exception. In light of the above, the Commissioner has concluded that the public interest in maintaining the exception contained at regulation 12(5)(b) outweighs the public interest in disclosure of the information withheld on the basis of this exception.
38. As noted above, 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).

39. For the reasons discussed 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)(b) was applied correctly.

Regulation 12(5)(d) - confidentiality of proceedings

40. The Commissioner understands that the Council considers the information withheld on the basis of regulation 12(5)(b) to also be exempt from disclosure on the basis of regulation 12(5)(d). In light of the Commissioner's findings in relation to the former exception, he has not considered the Council's reliance on regulation 12(5)(d) to withhold this information.

Regulation 12(4)(e) – internal communications

41. The Council also sought to withhold information on the basis of regulation 12(4)(e). This states that a public authority may refuse to disclose information to the extent that the request 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.
42. The Commissioner has reviewed the information in question and is satisfied that it constitutes communications between officials within the Council and therefore falls within the scope of the exception. Regulation 12(4)(e) is therefore engaged.

Public interest test

43. The complainant's arguments to support her position that the public interest favours disclosure of the withheld information are set out above.
44. For its part, the Council argued that the public interest favoured maintaining the exception as disclosure would prevent the free and frank exchange of views between officers who require a safe and private thinking space when carrying out decision making.
45. With regard to the balance of the public interest test, disclosure of the information withheld on the basis of this exception would provide some insight into certain matters considered internally by the Council in

relation to issues concerning two of the applications. However, such insight would arguably be relatively limited. In contrast, the Commissioner accepts that disclosure of the information at the time of the request would have encroached upon the safe space the Council legitimately needed to consider matters arising from the applications in question. As a result the Commissioner has concluded that the balance of the public interest favours maintaining the exception. Again, in reaching this decision the Commissioner has taken into account the presumption in favour of disclosure.

Regulation 12(5)(f) – interests of the person who provided the information

46. The Council also sought to withhold some information on the basis of regulation 12(5)(f) which states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect:

‘(f) the interests of the person who provided the information where that person—

- (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
- (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
- (iii) has not consented to its disclosure’

47. In support of its reliance on this exception, the Council argued that it owed a duty of confidence to the developer whilst negotiating the legal agreement.

48. The Commissioner has considered the information to which the Council has applied this exception and whilst he accepts that the three criteria in the exception appear to be met, the Council has not offered any specific submissions which set out why disclosure of the information would harm the developer’s interests. On this basis the Commissioner has concluded that the exception does not apply.

Regulation 12(5)(e) – confidentiality of commercial or industrial information

49. Regulation 12(5)(e) provides an exception to the extent that disclosure of the information in question would adversely affect: ‘the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest’.

50. As noted below at footnote 2, the Council only cited this exception in its submissions to the Commissioner in the context of the response as to whether further information falling within the scope of this request was held. In doing so it simply noted that this exception applied to correspondence between developers, planners and legal concerning the legal agreement. The Commissioner has not received any further or more specific submissions from the Council to support its view that this exception applied. In light of this, and in view of his findings and comments above in relation to regulation 12(5)(f), the Commissioner has concluded that regulation 12(5)(e) does not apply to any of the information which the Council is seeking to withhold.

Regulation 13 - personal data

51. Regulation 13(1) of the EIR 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.
52. In this case the relevant condition is contained in regulation 13(2A)(a)³. 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').
53. 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 regulation 13 of the EIR cannot apply.
54. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

56. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

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

57. 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.
58. 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.
59. The Commissioner is satisfied that the information which the Council has withheld on the basis of regulation 13(1) does constitute personal data. This is on the basis that it constitutes the names and contact details of Council officials or the names and contact details of individuals who have objected to one of the applications. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
60. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
61. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

62. 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".

63. In the case of an EIR 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.
64. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

65. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
66. 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"⁴.

67. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the EIR, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
68. 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

69. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, 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.
70. 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.

⁴ 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, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA and Schedule 3, Part 2, paragraphs 53 to 54 of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) 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".

71. The Commissioner acknowledges that there is a legitimate interest in disclosure of information about how the Council has handled planning applications, particularly in light of the concerns the complainant has about them.

Is disclosure necessary?

72. '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 EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
73. However, the Commissioner is not persuaded that disclosure of the information withheld on the basis of this exception is necessary in order to meet such an interest. In this case, disclosure of the details of the Council's staff would not further the public's understanding of how the planning applications were actually processed. Nor, in the Commissioner's view, would disclosure of the personal data of the individuals who contacted the Council about these applications.
74. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, he 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).
75. The Commissioner has therefore decided that the Council was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).

Regulation 5(3) – first party personal data

76. Regulation 5(3) states that: 'To the extent that the information requested includes personal data of which the applicant is the data subject' a public authority does not need to make information available under the EIR.
77. The Commissioner notes that there is considerable amount of information which has been withheld which constitutes the complainant's own personal data, including significant amounts of her own correspondence with the Council. The Commissioner accepts that on the basis of regulation 5(3) the Council is under no obligation to provide such information to the complainant under the EIR. (Although the Commissioner notes that as recorded below, the Council has offered to process a subject access request for the complainant under data protection legislation in respect of such information.)

Document to which no exceptions have been applied

78. The Commissioner has also established that there is a document in the file supplied to him by the Council entitled 'Consultations 1812827 FUL' which contains a letter from Historic England to the Council dated 5 November 2018. The Council did not appear to specify which exception it was seeking to rely on in relation to this letter but the Commissioner is satisfied that none of the exceptions cited by it provide a basis to withhold this letter.

Does the Council hold any further information falling within the scope of the request?

79. In cases such as this where there is some dispute as to the amount of information falling within the scope of the request, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any further information which falls within the scope of the request.
80. With regard to whether the Council was likely to hold any further information falling within the scope of this request, the Commissioner asked the Council to explain the searches it had undertaken to locate information falling within the scope of this request and to explain why these searches would have been likely to locate all of the information in scope.
81. The Commissioner has reproduced these questions, and the Council's responses, below:
82. **Question:** What searches have been carried out to locate information falling within the scope of the request and why would these searches have been likely to retrieve all relevant information?
Response: The Council's initial search was a thorough search of the Planning IT business system Uniform/Idox. No further IT system was searched. The Council now accepted that its interpretation of the request had been too narrow and following a wider search it was happy to provide the complainant with additional information.
83. **Question:** Please describe thoroughly any searches of relevant paper/electronic records and include details of any staff consultations. If searches included electronic data, which search terms were used and please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.
Response: The Council explained that it had now searched all information and correspondence across its IT systems and provided the Commissioner with the 'IT ticket' raised as evidence of this search.

84. **Question:** Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed? If so, does the Council have a record of the destruction of this information?

Response: No information has been destroyed in relation to these applications.

85. **Question:** What does the Council's formal records management policy say about the retention and deletion of records of this type?

Response: Information in relation to Planning Applications are retained for 15 years after construction is completed.

86. As noted above, during the course of the Commissioner's investigation the complainant contacted the Council and raised a number of specific queries about the lack of certain pieces or types of information from that disclosed to her. The Commissioner asked the Council to provide him with a response to each of the points raised by the complainant. It did so, and its responses to the complainant's various queries are set out below:

Complainant's email of 12 October 2021

87. **Query:** Are RBK, really trying to say that no other recorded discussions were had over a period of some 4 years about this site that were not recorded in any format except a small email chain ? That is clearly not right as RBK's decision making then was weak and unevidenced.

Response: The Council explained that it had addressed this above in its submissions to the Commissioner.

88. **Query:** From what I can see my objections over 4 years are not there.

Response: All objections have been included in the folder 'Information within scope' which was provided to the Commissioner.

89. **Query:** From what I can see there is no evidence of why this had to be a decision made under the emergency rules used in Covid times

Response: No recorded information is held on this matter as no decision was made under the emergency rules used in Covid times

90. **Query:** From what I can see there is no email trail with officers from me and internally about me.

Response: This correspondence that identifies the complainant is therefore exempt under regulation 13. The Council explained that it would be happy to provide all correspondence under a subject access request.

91. **Query:** From what I can see there is no email trail of discussion with the planning enforcement officers either

Response: This information is exempt under regulation 12(4)(e). This correspondence has been provided unredacted to the Commissioner.

Complainant's email of 13 October 2021

92. **Query:** The developer asks to see the objections to his planning application , there is just nothing after that email. So either RBK never sent them or they are missing. Why can I not see my own?

Response: These have been provided included in the information folder 'Information within scope' under a sub folder 'Objections' and provided to the Commissioner.

93. **Query:** RBK's workings on the planning applications are not shown.

Response: All recorded information has been provided.

94. **Query:** The decision and discussion why this is a decision that has to be made under the Covid emergency provisions are not shown. For the benefit of the ICO this was suddenly an urgent planning decision and allegedly the CEO or a delegated Director was only supposed to make decisions using this emergency powers to not holding a committee because of the need to use what limited resources there were wisely during lockdown in March 2020 There should be a load of emails or written notes or letters up to the CEO's office making out the case to ask the CEO to agree in the circumstances. This is key for me as I could not figure out why the is decision had to be made with such urgency using those emergency powers avoiding a committee where the public can be heard.

Response: No recorded information is held on this matter as no decision was made under emergency rules.

95. **Query:** The decision that Mr Naylor as Assistant Director is to look at it, not the CEO are not shown.

Response: No recorded information is held on this matter.

96. **Query:** The web pages are not shown so I still do not know what the applications was still showing as pending in October 2020.

Response: This point is not clear, it is not clear which web pages are being referred to.

97. **Query:** Majority of what I have been sent was already in the public domain so it is unlikely between 2018 – 2020 there are just about 15 emails mainly about the legal agreement that went between SLLP and the developer more so as its all v chatty – lots of "Hi" greetings and so on. Where is the instruction to SLLP?

Response: SLLP is the Council's legal service and all correspondence with lawyers concerning the legal agreement are exempt under regulation 12(5)(b) course of justice. The correspondence between developers, planners and legal concerning the legal agreement are also exempt under regulation 12(5)(e) commercial confidentiality and regulation 12(5)(f) protection of the interests of a voluntary information

provider. Again, this information has been provided unredacted to the Commissioner.

98. **Query:** There was also supposed to be a planning enforcement file open – where is that and my request for enforcement ?

Response: Information within the planning enforcement file is exempt under regulation 12(4)(e): internal communications and regulation 12(5)(b): the course of justice and inquiries exception.

99. **Query:** The FOI shows the legal agreement was being worked up pre the application being listed. That is not supposed to happen, the legal agreement follows the planning consent granted and you see that planning condition often in granted planning permissions. . So it looks to me to be pre determination here which is not for the ICO but this puts it into context for the ICO why RBK are hiding on this.

Response: This is not a request for recorded information. The matter cannot be addressed under the EIR.

Complainant's email of 14 October 2021

100. **Query:** In addition allegedly meeting(s) were held with the ward councillors who are Jon Tolley, Fiona Boulton and Rebekah Moll on this site. At full Council on 12/10/21 the Leader of the Council claimed the Opposition was not interested in planning applications and reeled off a list of dates when briefings, face to face meetings, video meetings, emails and telephone calls were offered to councillors to take part for one site. So how is it the Leader was able to obtain such extensive detail on one site yet RBK cannot produce any record of allegedly all 3 councillors having had some sort of direct contact from planning officers to be able to say to yes we have no problem with the Pay and Display car park, which Barry Lomax the Development Control Manager has claimed has happened.

This is very important, it either shows the 3 cllrs have no problem with the continuing planning breach or Mr Lomax as an officer was not honest with me. So if it was a meeting or walk around there must be evidence of those arrangements, if email or of by phone where are those emails or tel notes? . Why is there no record yet the Leader was able to tell full Council detailed dates of even when tel calls were made by planning officers to talk about sites.

Response: From our IT search, no information was located in relation to this point.

The Commissioner's position

101. The Commissioner has carefully considered the Council's response to his questions. On the basis of these responses, and in particular the detailed IT searches with it undertook across all of its systems for any

documents relating to the applications cited in the request during the course of his investigation, the Commissioner is satisfied that on the balance of probabilities the Council does not hold any further information beyond that located and disclosed to the complainant or which it is seeking to withhold.

102. The Commissioner appreciates that the complainant has raised numerous concerns (as set out above) as to whether further information is held. However, in light of the Council's reply to these queries, also above, he sees nothing to justify him having to vary his findings in the above paragraph.

Right of appeal

103. 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

104. 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.

105. 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

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