

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 22 March 2017

Public Authority: Aylesbury Vale District Council
Address: The Gateway
Gatehouse Road
Aylesbury
Bucks HP19 8FF

Decision (including any steps ordered)

1. The complainant has requested information relating to a planning application. Aylesbury Vale District Council disclosed some information and withheld other information under the exceptions for internal communications (regulation 12(4)(e)) and the course of justice (regulation 12(5)(b)).
2. The Commissioner's decision is that Aylesbury Vale District Council complied with regulation 5(1), breached regulation 5(2) by disclosing some information outside the statutory time limit, and correctly applied regulation 12(4)(e) to withhold some of the requested information.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 13 May 2016, the complainant wrote to Aylesbury Vale District Council (the "council") and requested information in the following terms:

(In relation to planning application: 15/02671/AOP)

(1) Any and all correspondence (and for the avoidance of doubt this includes internal correspondence between officers) in association with the consideration of the planning application.

(2) Any notes of meetings held in respect of the application, whether between officers, or between meetings

(3) Any and all internal reports and/or memoranda relating to the determination of the application and the issue of either the "outline refusal" or the "refusal".

5. The council responded on 16 June 2016. It disclosed some information, and withheld other information under the exceptions for internal communications (regulation 12(4)(e)) and the course of justice (regulation 12(5)(b)).
6. Following an internal review the council wrote to the complainant on 23 August 2016 and disclosed further information. It confirmed that it was maintaining its reliance on the exceptions to withhold other information.

Scope of the case

7. On 23 September 2016 the complainant contacted the Commissioner to complain about the way the request for information had been handled.
8. The Commissioner confirmed with the complainant that her investigation would consider whether the council had disclosed all the non-excepted information it holds and whether it had correctly withheld other information under regulation 12(4)(e) and regulation 12(5)(b).

Reasons for decision

Regulation 5 – duty to provide environmental information

9. Under regulation 5(1) of the EIR public authorities holding environmental information must make it available on request. Regulation 5(2) of the EIR requires authorities to comply with regulation 5(1) within 20 working days.
10. Following the internal review, the council disclosed some correspondence to the complainant falling within the scope of part 1 of the request.
11. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
12. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
13. To assist with this determination the Commissioner approached the council with a range of standard questions which she routinely asks in such cases. The questions and summaries of the council's responses are set out below.

What searches were carried out for the information falling within the scope of this request and why would these searches have been likely to retrieve any relevant information?

14. The council confirmed that emails, paper records and files were searched to try and find the information requested.

If searches included electronic data, 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?

15. The council confirmed that all the searches identified in the Commissioner's question were carried out.

Was any recorded information ever held relevant to the scope of the complaint's request but deleted/destroyed?

16. The council explained that information would have been held by officers that have since left the council. It confirmed that the information would have been destroyed prior to the request being received.

If recorded information was held but is no longer held when did the council cease to retain the information?

17. The council confirmed that, as part of its Leavers Procedure, all emails are destroyed after two weeks. It explained that officers which might have held information associated with the request who had left the council prior to the request would have been subject to this procedure.

If the information is electronic data which has been deleted, might copies have been made and held in other locations?

18. The council confirmed that no other copies of the information are available. It stated that all possible locations had been searched.

Is there a business purpose for which the requested information should be held? If so what is this purpose?

19. The council stated that there was no business purpose for which the information should be retained.

Are there any statutory requirements upon the council to retain the requested information?

20. The council stated that there are no statutory requirements to retain the requested information

21. Having considered the searches conducted by the council the Commissioner is satisfied that, on the balance of probabilities, it is likely that information relevant to the scope of the request would have been retrieved.

22. In relation to information held by former council officers and deleted in accordance with the council's records management policy, the Commissioner is mindful that there are strong benefits for a public authority to have good records management policies, including retention schedules. The Commissioner considers that if an authority can show that information was deleted in accordance with these there will be no requirement to advise the applicant of this or communicate such information to them.

23. The Commissioner has not been presented with any evidence which contradicts the council's position that all relevant non-excepted information that is held has been disclosed.
24. In view of the searches undertaken, the fact that there are no statutory or business purposes for retaining the information and the council's retention and deletion policies the Commissioner has concluded that the council has complied with regulation 5(1) of the EIR. However, in disclosing the information outside the statutory time limit the council breached regulation 5(2).

Regulation 12(4)(e) – internal communications

25. The council has withheld information falling within the scope of request parts 1 and 3 under both regulation 12(4)(e) and regulation 12(5)(b).
26. Regulation 12(4)(e) of the EIR states:

“For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that...

(e) the request involves the disclosure of internal communications.”
27. 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 its engagement.
28. The withheld information consists of emails between council officers in relation to the planning matter referred to in the request.
29. Having considered the council's explanations and referred to the withheld information the Commissioner is satisfied that the withheld information constitutes internal communications and that the exception at regulation 12(4)(e) is, therefore, engaged.
30. The Commissioner considers that the underlying rationale behind the exception is that public authorities should have the necessary space to think in private. The original European Commission proposal for the Directive (COM(2000)0402) explained the rationale as follows:

“It should also be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be

entitled to refuse access if the request concerns [...] internal communications.”¹

31. Although a wide range of internal information might be caught by the exception, the Commissioner is of the opinion that, following the above European Commission proposal (which the EIR are intended to implement), public interest arguments should be focussed on the protection of internal deliberation and decision making processes.
32. The Commissioner considers that these factors must then be balanced against the public interest in disclosure. Regulation 12(2) specifically provides that public authorities should apply a presumption in favour of disclosure. This means that a public authority may have to disclose some internal communications, even though disclosure will have some negative effect on internal deliberation and decision making processes.

Public interest in disclosure

33. The Commissioner acknowledges the presumption in favour of disclosure inherent in regulation 12(2) of the EIR. She also accepts that there is an inherent public interest in the openness and transparency of public authorities and their decision making process.
34. The council has acknowledged that there is a general public interest in disclosing the information.
35. The complainant has argued that disclosing the information would assist its understanding of the planning decision.

Public interest in maintaining the exception

36. The council has argued that it is essential that its officers have the opportunity to think in private when discussing difficult and sensitive matters prior to reaching a decision.
37. The council has confirmed that the withheld information represents internal discussions relating to a planning decision that would potentially have a significant impact on the local community. It has stated that the application in question relates to a proposal to develop a greenfield site for the purpose of up to 95 dwellings.

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0402:FIN:EN:PDF>

38. The council has further argued that the matter was particularly sensitive because it was aware that it had made a procedural error during the planning decision process, which it had acknowledged and corrected. It has argued that this heightened the possibility that its decision would be challenged. Disclosing the information in this context would make it less likely that officers would be willing to engage in free and frank discussions, resulting in poorer decision making.

Balance of the public interest

39. The Commissioner accepts that there is a general public interest in public engagement in decision making processes, particularly where they relate to the use of land. However, except in cases where there are specific concerns that a process is not being correctly followed, where sufficient information is not being made available or where there is evidence of malpractice, the Commissioner does not consider that this general interest justifies disclosures made outside of the planning process.
40. The Commissioner acknowledges that, as the planning applicant, the complainant has a valid interest in accessing the information, however, the public interest in the context of the EIR relates to the broader public interest rather than to the interests of individuals or specific businesses. Although the council has acknowledged that it made a mistake during the planning application determination procedure in this case there is no evidence that it has conducted any malpractice or that it has otherwise displayed intent to pervert the planning process.
41. The Commissioner notes that the complainant disputes the council's argument that disclosing the information would undermine the council's decision-making process in the event of a challenge. The complainant considers that this confuses the determination of the planning decision with the pursuit of an appeal. However, the Commissioner considers that information relating to the planning decision, specifically discussions about the content of the decision, would be relevant in any appeal since it would reveal details of the decision making process, exposing and undermining council officers' free and frank engagement.
42. The Commissioner is mindful that the planning decision has been published in accordance with the planning application procedure so interested parties have access to the grounds for the formal decision. She considers that there are also mechanisms within planning law for parties to seek redress or to challenge the council's decision. The Commissioner does not see any specific public interest reason in this case which warrants disclosing information outside of this process and is

satisfied that disclosure would result in harm to the council's ability to discuss and carry out decision making in a safe space.

43. For the reasons set out above the Commissioner considers that, in all the circumstances of the case, the public interest in maintaining the exception set out in regulation 12(4)(e) outweighs the public interest in disclosure and she therefore accepts that the internal communications in question should be withheld.
44. As she has found that the information is excepted under regulation 12(4)(e) the Commissioner has not gone on to consider the application of regulation 12(5)(b) to the same withheld information.

Right of appeal

45. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. 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.
47. 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
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