

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 July 2023

Public Authority: Welwyn Hatfield Borough Council
Address: The Campus
Welwyn Garden City
AL8 6AE

Decision (including any steps ordered)

1. The complainant requested information relating to a planning application. Welwyn Hatfield Borough Council (the "council") disclosed some information and withheld other information under the exception for internal communications (regulation 12(4)(e)).
2. The Commissioner's decision is that the council correctly applied regulation 12(4)(e) to the withheld information but that it failed to carry out an internal review within the statutory time limit and breached regulation 11(4).
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 6 February 2023 the complainant wrote to Welwyn Hatfield Borough Council (the "council") and requested the following information:
 - "1. By way of an FOI request can you please provide me with copies of correspondence passing between council officers internally or with external parties, draft reports on the application, file notes and each and every other piece of information held by the council that touch or concern Application No: [redacted]
 2. As a second FOI request, will you please provide me with copies of correspondence passing between council officers inter and any external parties, draft reports, file notes and each and every other piece of information held by the council that touch or concern the communications passing between [redacted] of the council from February 2021 onwards subsequent upon the determination of application reference [redacted].
5. On 6 March 2023 the council responded. It disclosed the information in part 1 of the request and withheld the information in part 2 under the exception for internal communications (regulation 12(4)(e)).
6. On 16 March 2023 the complainant asked the council to reconsider its handling of the request. There followed subsequent correspondence between the parties but the council did not carry out a formal internal review.

Scope of the case

7. On 22 May 2023 the Commissioner confirmed with the complainant that he had accepted their complaint for investigation.
8. The complainant asked the Commissioner to consider whether the council correctly withheld some of the requested information under regulation 12(4)(e).
9. Noting that the council did not carry out an internal review the Commissioner directed it to reconsider the request and provide a review response to the complainant.

10. On 13 July 2023 the council issued an internal review response to the complainant which disclosed some previously withheld information. In relation to some outstanding information, the council confirmed that it was maintaining its reliance on regulation 12(4)(e) to withhold this. The Commissioner has considered whether the council is entitled to rely on the exception in this case.

Reasons for decision

Regulation 12(4)(e) – internal communications

11. Regulation 12(4)(e) provides that information is exempt from disclosure if it 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 it will fall under the exception.
12. The withheld information in this case consists of correspondence between council officers regarding the planning application named in the request. The Commissioner is satisfied that the information constitutes internal communications and that the exception is, therefore, engaged.
13. When regulation 12(4)(e) is engaged, the public authority must carry out the public interest test. Under regulation 12(1)(b), the public authority can only withhold the information if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Furthermore, under regulation 12(2), it must apply a presumption in favour of disclosure.
14. The Commissioner's guidance for public authorities confirms that public interest arguments should focus on the protection of internal deliberation and decision-making processes. This reflects the underlying rationale for the exception which is to protect a public authority's need for a 'private thinking space'.¹ This needs to be weighed against the competing public interest factors in favour of disclosure. The Commissioner has considered the relevant factors below.

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/the-public-interest-test/>

Public interest in disclosure

15. The council has acknowledged that there is a genuine public interest in transparency around planning decisions.
16. The Commissioner recognises that disclosing information relating to planning decisions can enhance accountability, facilitate public engagement and provide reassurance in the effectiveness and probity of the decision making process.
17. The complainant has a genuine, personal interest in the disclosure of the information as they are the agent for the planning application identified in the request. The complainant has argued that, as decisions had been made in relation to the planning application and a previous application, there was no need for a safe space to be maintained. In the complainant's view the substantive matter is not a live one and that, therefore, disclosure would not have an impact on the council's capacity for effective decision making.

Public interest in maintaining the exception

18. The Commissioner recognises that authorities will need a safe space to develop ideas, debate issues and reach decisions away from external interference and distraction. This may carry significant weight in some cases, particularly when the issues in question are still live or only recently decided.
19. The council has argued that the requested information relates to a planning enforcement case which is still considered to be live. The council has argued that communications were exchanged between officers regarding the planning application and subsequent planning enforcement case in the belief that they would be private.
20. The council has also argued that, in addition to the live status of an enforcement case, the planning application in question follows an earlier, similar application from the complainant. The council considers that there is, therefore, a need to maintain the integrity of officers' safe space for deliberation of the issues as it is likely that the information will be continue to be relevant to these processes.

21. In its submissions the council made reference to previous decision notices issued by the Commissioner in comparable cases and suggested that the conclusions reached were transferable here².

Balance of the public interest

22. The Commissioner recognises that there is a public interest in the openness and transparency of the decision making process to approve planning applications. He also recognises that there is a public interest in the accountability of local government regarding that decision.
23. 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. However, he also considers that the 'safe space' and 'chilling affect' arguments made by the council are weighty factors in favour of maintaining the exception in this case, as planning applications are frequently controversial. He is satisfied that disclosure would be likely to prevent council officers corresponding internally with frankness and candour, which could damage the quality of advice and may lead to poorer decision-making in the future.
24. Furthermore, the Commissioner notes that information relating to this application has already been disclosed to the complainant, which in his view, goes a significant way in meeting the public interest in terms of transparency.
25. The Commissioner recognises that the complainant has their own strong personal interest in the information currently being withheld, as it concerns a planning application they are directly involved with. However, the Commissioner is not persuaded that there is a strong wider public interest in disclosure, which is a relevant consideration given that a disclosure under EIR is a disclosure to the world at large. The information refers to a single planning application, which would likely be of interest only to a small number of people. The wider public interest here is in protecting the integrity of and effectiveness of the council's decision-making in respect of planning law.

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4025537/ic-227893-b1t3.pdf>; <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4023573/ic-159327-n0m4.pdf>

26. In addition, whilst the complainant may disagree with the council's decisions in relation to the 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.
27. The Commissioner recognises that the need for a safe space is strongest when an issue is still live. The timing of the request is therefore an important factor. This was confirmed by the Information Tribunal in *DBERR v Information Commissioner and Friends of the Earth* (EA/2007/0072, 29 April 2008).
28. Given the often contentious nature of planning decisions, the Commissioner considers that councils should be able to have a free and frank exchange of views to enable robust decision-making. Combined with the fact that some information has already been disclosed and that the information relates to live issues, he considers that the importance of enabling internal deliberations to inform decision making, which is what the exception is designed to protect, outweighs the public interest in disclosure. The council is therefore entitled to rely on regulation 12(4)(e) to withhold the information.
29. In reaching this decision the Commissioner referred to the previous decision notices cited by the complainant above and he considers that the conclusions reached in those notices are transposable to this case.

Regulation 11 – internal review

30. Regulation 11 of the EIR covers public authorities' obligations in relation to the carrying out of internal reviews of the handling of requests for information.
31. In essence, any expression of dissatisfaction with the handling of a request an authority receives should be treated as a request for an internal review. There is no obligation for requesters to submit their review request via any specific procedure provided by authorities in this regard.
32. Regulation 11(4) requires authorities to provide an internal review decision within 40 working days of the date of receipt of a request for review. In this case the complainant submitted their review request on 16 March 2023 but the council did not carry out a formal review until July 2023.
33. The Commissioner has, therefore, concluded that the council failed to comply with regulation 11(4) in this case.

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.

Signed

Christopher Williams
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Information Commissioner's Office
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