

Environmental Information Regulations 2004 (EIR) Decision Notice

Date: 30 August 2019

Public Authority: London Borough of Croydon
Address: Bernard Weatherill House
8 Mint Walk
Croydon
CR0 1EA

Decision (including any steps ordered)

1. The complainant requested information relating to pre-application advice regarding a specified property. The London Borough of Croydon provided most of the requested information and withheld some information in reliance on the exception at regulation 13 of the EIR (third party personal data). Following an internal review the Council sought to rely on regulation 12(4)(b) on the basis that the request was manifestly unreasonable.
2. The Commissioner's decision is that the Council wrongly applied regulation 12(4)(b) to the request. However she also finds that the Council was entitled to rely on regulation 13 in respect of the withheld information. The Commissioner does not require any steps to be taken.

Request and response

3. The complainant requested the following information, relating to a specified planning application, from the Council on 26 February 2018:

Please provide any information relating to [Name of Council employee]'s advice, including but not restricted to copies of the following:

- *the completed Request for Pre-Application Advice form,*
- *evidence of fee payment,*
- *the Applicant's cover letter,*
- *letters/emails of consultation WITH internal/external consultees,*
- *comments/observations BY internal/external consultees,*
- *details of any meeting arrangements,*

- *notes of any pre-application meeting[s], and*
 - *the case officer's advice letter[s] or email[s].*
4. The complainant did not receive a response, and requested an internal review on 13 June 2018.
 5. The Council issued a substantive response to the request on 21 June 2018. The Council disclosed the requested information, save for the names of Council staff below "Head of Service" level. The Council did not cite an exception from disclosure but said this was custom and practice.
 6. The Council communicated the outcome of the internal review to the complainant on 4 October 2018. This stated that the Council had issued a response on 24 April 2018. It went on to say that the request was now considered by the Council to be manifestly unreasonable. Therefore the Council was now refusing the request in reliance on the exception at regulation 12(4)(b) of the EIR.

Scope of the case

7. The complainant contacted the Commissioner on 8 October 2018 since he remained dissatisfied about the way his request for information had been handled. The complainant argued that the Council ought to have disclosed all of the requested information to him.
8. The Commissioner understands that the withheld information in this case comprises the names of certain Council staff. The Council seeks to rely on the exception at regulation 12(4)(b), and also seeks to rely on the exception at regulation 13 in respect of the withheld information.
9. Accordingly the Commissioner has first considered whether the Council was entitled to refuse the request as manifestly unreasonable. If the Commissioner accepts the Council's reliance on regulation 12(4)(b) she will not be required to consider the exception at regulation 13.

Reasons for decision

Regulation 12(4)(b): is the request manifestly unreasonable?

10. Regulation 12(4)(b) of the EIR provides an exception from disclosure to the extent that the request is manifestly unreasonable. The term "manifestly unreasonable" is not defined in the EIR. However the Commissioner follows the lead of the Upper Tribunal in *Craven v*

*Information Commissioner & DECC.*¹ In this case the Tribunal found that there is, in practice, no difference between a request that is vexatious under the FOIA and one which is manifestly unreasonable under the EIR, – save that the public authority must also consider the balance of public interest when refusing a request under the EIR.

11. A differently constituted Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that “vexatious” could be defined as the “*manifestly unjustified, inappropriate or improper use of a formal procedure*”.
12. The Upper Tribunal’s approach in this case was subsequently upheld in the Court of Appeal. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.

The Council’s position

13. The Commissioner invited the Council to explain why it considered the complainant’s request of 26 February 2018 to be manifestly unreasonable. The Commissioner pointed out that the Council appeared to have considered the request dated 26 February 2018 along with requests made several months later, as opposed to considering the circumstances at the time of that particular request. The Commissioner also suggested that it was more difficult to claim that a request was manifestly unreasonable when the Council had failed to comply with the procedural requirements of the EIR in terms of the time taken to respond.
14. In response, the Council argued to the Commissioner that it had a right to apply a new exemption or exception at any stage. It referred the Commissioner to the arguments set out in its internal review letter of 4 October 2018 but did not provide any additional arguments to explain its application of regulation 12(4)(b).
15. The Commissioner accepts that a public authority may at any stage seek to rely on an exemption or exception not previously claimed. The Commissioner will consider any new claims, but it remains for the public authority to demonstrate that the exemption or exception has been properly applied. If the public authority fails to do so, the

¹ *Craven v Information Commissioner & DECC* [2012] UKUT 442 (AAC)

Commissioner cannot be satisfied that it is entitled to rely on the exemption or exception claimed.

16. The Commissioner has considered the Council's letter of 4 October 2018. It reproduces large portions of the Commissioner's published guidance regarding regulation 12(4)(b). It also makes general comments about the number of requests for information and requests for internal review submitted by the complainant. The Council expresses the opinion that the complainant's requests "*are of no value to the complainant*" and points out that the issues raised in the requests had been full considered by the Council in the normal course of planning business.
17. The Commissioner does not see any evidence in this letter to suggest that the Council has considered the specific request of 26 February 2018. Rather, it appears that the Council included this request in its consideration of a number of further requests made by the complainant some months later. The Commissioner observes that the Council took four months to respond to the request of 26 February 2018, and a further four months to complete an internal review, by which time a number of further requests had been made.
18. As indicated to the Council, the Commissioner is of the opinion that it is more difficult reasonably to assess a request as manifestly unreasonable where the public authority has clearly failed to handle it in accordance with statutory requirements. The Council failed to respond to the request of 26 February 2018 within the 20 day time for compliance, ie by 25 March 2018. It subsequently failed to meet the 40 day statutory time limit for completing an internal review, whereas had it done so, the Council may well have completed its handling of this request before any of the other requests had been received.
19. Accordingly the Commissioner does not accept that the further requests received by the Council should have been taken into account when considering whether the request of 26 February 2018 was in fact manifestly unreasonable. The Commissioner finds that the exception is not engaged and is therefore not required to consider the balance of the public interest. The Commissioner has gone on to consider the Council's reliance on the regulation 13 of the EIR.

Regulation 13: personal data of third parties

20. Regulation 13(1) says that information shall not be disclosed where it is the personal data of an individual other than the applicant, and where disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998

(DPA98).² The Council has maintained to the Commissioner that disclosure of the information would be unfair and would thus contravene the first data protection principle.

21. The Commissioner is satisfied that the information in question is personal data of individuals other than the complainant. This is because the individuals could be identified from their names and contact information, and this information clearly relates to the individuals themselves. The Commissioner has therefore gone on to consider whether disclosure of this information into the public domain would be unfair and thus contravene the first data protection principle.
22. When considering the fairness and the first data protection principle the Commissioner will generally take the following factors into account:
 - the individuals' reasonable expectations of what would happen to their information;
 - whether disclosure would cause any unnecessary or unjustified damage or distress to the individuals concerned (ie the consequences of disclosure);
 - whether disclosure of the information is necessary to meet a legitimate interest; and
 - whether the legitimate interest in disclosure is sufficient to justify any negative impact to the rights and freedoms of the individuals as data subjects.
23. The Council advised the Commissioner that its junior staff expected that their personal data would not be disclosed into the public domain. The Commissioner acknowledges the importance of protecting staff who may be responsible for communicating information rather than making decisions based on it. Disclosure of personal information relating to junior staff would risk wrongly attributing personal accountability for such decisions. The Commissioner accepts the Council's argument that this would be likely to cause distress to the individuals concerned.

² New data protection legislation came into force (the General Data Protection Regulation and the Data Protection Act 2018) on 25 May 2018. However, this request and the time for compliance with this request predates that new legislation. The applicable data protection legislation is therefore the DPA98.

24. The Commissioner recognises that in some cases it may be appropriate to disclose a junior official's name into the public domain, but does not consider that this is such a case. While there is a legitimate interest in transparent decision making, the Commissioner is not persuaded that, in the circumstances of this case, disclosure of personal data relating to junior officials is necessary to serve this interest. It adds little or nothing to the legitimate interest in understanding how decisions are made by public authorities.
25. In his request for internal review the complainant challenged the Council's decision to withhold the names and contact details of junior staff. His grounds for dissatisfaction were not considered by the Council because it changed reliance to regulation 12(4)(b) at this stage. For this reason the Commissioner has considered them below.
26. Firstly, the complainant pointed out that the Council had failed to cite the exception it was relying on to withhold the information. The Commissioner agrees that the Council ought to have cited regulation 13, and has commented on this further at "Procedural Matters" below. However, she observes that the complainant in this case identified regulation 13 as relevant, therefore it appears that he has not suffered any disadvantage. As set out at paragraph 24 above, these redactions do not add anything material to the legitimate interest in understanding how decisions are made.
27. The complainant also argued that the Council appeared to have redacted information that was not personal data, for example the words "From", "Sent" and "To" from an email header. The Commissioner does not consider this to be a reasonable ground for complaint since the redaction does not misinform the public, and by the complainant's comment it is easy to work out what information has been redacted.
28. The complainant appears to be making the argument that further information may have been wrongly redacted, but the Commissioner has not seen evidence that this is in fact the case.
29. The complainant pointed out that regulation 12(2) of the EIR provides that a public authority should apply a presumption in favour of disclosure. However, this applies to the exceptions at paragraphs 12(4) and 12(5). Regulation 12(3) states that third party personal data shall not be disclosed otherwise than in accordance with regulation 13, which is not subject to the public interest test at regulation 12(1)(b).

30. The complainant further argued that some of the officials' names were already publicly available via published information. The Commissioner acknowledges this, but remains of the view that it is not necessary to disclose the names in this particular case.
31. Finally, the complainant disputed the relevance of a previous decision referred to by the Council in its refusal notice.³ The complainant argued that it did not relate to a "similar request" as indicated by the Council, and stated that it was listed on the ICO website as under appeal to the Information Tribunal.
32. The Commissioner understands that the decision notice referred to by the Council related to a case where the public authority sought to withhold the names and contact details of junior staff. Therefore, although the business of the public authority is not comparable, the Commissioner is of the view that the analysis set out in the decision notice is of relevance to the case in question. In any event she understands that the Tribunal dismissed the appeal as out of time.
33. For the above reasons, the Commissioner is satisfied that disclosure of the personal information relating to junior officials would be unfair and in breach of the first data protection principle. Consequently, the Commissioner finds that the Council was entitled to rely on regulation 13 of the EIR as a basis for withholding this information.

Procedural requirements

Regulation 5(2) – time for compliance

34. Regulation 5(2) of the EIR states that, subject to exceptions, a public authority is required to make environmental information available no later than 20 working days after the date the request is received.
35. In this case the Council took nearly four months to respond, clearly exceeding 20 working days. Therefore the Commissioner finds that the Council failed to comply with regulation 5(2).

³ https://ico.org.uk/media/action-weve-taken/decision-notices/2010/564116/fs_50276863.pdf, issued 8 November 2010

Regulation 14 – refusal notice

36. Regulation 14 of the EIR states that, if a public authority wishes to refuse to disclose environmental information, it must issue a refusal notice. Regulation 14(2) states that the notice must be issued no later than 20 working days after the date of receipt. Regulation 14(3) states that the refusal notice must include details of any exceptions relied on.
37. Given that the Council's response took nearly four months to respond, the Commissioner finds that the Council failed to comply with regulation 14(2). She further records that the Council failed to comply with regulation 14(3) on the basis that the refusal notice failed to cite the exception at regulation 13.

Regulation 11 – reconsideration (internal review)

38. Regulation 11(3) of the EIR states that a public authority must consider an applicant's request for internal review and notify the complainant of the outcome no later than 40 working days after the date of receipt.
39. Having taken four months to issue its initial response, the Council took a further four months to complete the internal review. The Commissioner also finds that the Council failed to consider the complainant's representations, therefore she records that the Council failed to comply with regulation 11(3).

Right of appeal

40. 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: now grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. 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.
42. 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

Sarah O’Cathain
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