

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 September 2022

Public Authority: Royal Borough of Windsor and Maidenhead
Address: Town Hall
St. Ives Road
Maidenhead
SL6 1RF

Decision (including any steps ordered)

1. The complainant has requested information from the Royal Borough of Windsor and Maidenhead ("the Council") in relation to a planning application. The Council disclosed some information but withheld the remainder under regulation 12(4)(e) – internal communications. It also advised that it does not hold any further information relevant to the request.
2. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of regulation 12(4)(e) and that, whilst the Council did not refer to regulation 12(4)(a) – information not held, on the balance of probabilities, the Council has provided all the information it holds in relation to the request. The Commissioner has also considered that the Council was correct to withhold the complainant's own personal data, under regulation 5(3) of the EIR and the personal data of third parties under regulation 13 of the EIR. However, the Council should have cited the exceptions it was relying on.
3. The Commissioner does not require the Council to take any steps as a result of this decision notice.

Request and response

4. On 18 June 2021, the complainant wrote to the Council and requested information in the following terms:

“Under the Freedom of Information Act or the Environmental Information Regulations, whichever you feel is most appropriate, could you please provide me with all correspondence and documentation between the planning department staff, other council staff, ecology staff, admin staff, Councillors, outside organisations or any other bodies supplying comment on the refused planning application [redacted].

Please can the FOI request include all public comments received, and responses to those commenting.

This information, including information we know to have been submitted, is not available on the planning website. Added to this, there is the statement “The Local Planning Authority has sought all reasonable measures to resolve issues and found solutions when coming to its decision” in the refusal letter, please can the FOI include all information relating to this statement.

Please can I have a copy of all data, correspondence, attachments and documents held on this planning application. It would be good to know that all evidence and any referred to within is being disclosed.”

5. The Council responded on 30 June 2021. It advised that some of the information was publicly available (providing the link to it) and also provided some information that the Council advised had not been uploaded to the application on the website.
6. Following an internal review the Council wrote to the complainant on 2 September 2021. It clarified that the request was being handled under the EIR and then provided the complainant with further information. It also explained that some of the information had been redacted due to personal data but did not specify that this was in accordance with Regulation 13.
7. During the Commissioner’s investigation, and following on from correspondence with the complainant, the Council wrote to the complainant again, providing a more detailed response and further documents that had not previously been provided. It explained that some of the information was being withheld under regulation 12(4)(e) – internal communications.

Scope of the case

8. The complainant contacted the Commissioner on 2 September 2021, to complain about the way their request for information had been handled.
9. The Commissioner considers that the scope of the investigation is to determine whether, on the balance of probabilities, the Council does not hold any further information in relation to the request under regulation 12(4)(a) and to determine if the withheld information is exempt from disclosure under regulation 12(4)(e) of the EIR. The Commissioner will also determine if the Council was correct to withhold information under regulation 5(3) of the EIR – complainant's own personal data and regulation 13 of the EIR – third party personal data.

Reasons for decision

Regulation 5 – duty to make environmental information available on request and regulation 12(4)(a) of the EIR.

10. Under regulation 5(1) of the EIR and subject to a number of EIR provisions, a public authority that holds environmental information shall make it available on request.
11. Under regulation 5(2), information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
12. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information "to the extent that it does not hold that information when an applicant's request is received".
13. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to check that the information is not held and he will consider any other reasons offered by the public authority to explain why the information is not held. The Commissioner will also consider any reason why it is inherently likely or unlikely that information is not held.
14. The Council confirmed that all information held relevant to the request would be held electronically, primarily in the form of emails and documents on the "planning portal", along with messages on Microsoft Teams.
15. The Council confirmed that searches were carried out by the planning staff members who were assigned to the case and the searches covered email accounts, the 'planning portal' and Microsoft Teams. It explained

that the search terms used consisted of the address of the location concerned, names, email addresses and the planning reference number.

16. The Council also confirmed to the Commissioner that it does not believe that any information in relation to the request has been deleted/destroyed.
17. The complainant has explained that they consider the Council holds further information in relation to the request as when they originally made their request for information, they were advised that it was all publicly available on the website. Then, when an internal review was completed, the Council provided them with a small amount of information, which indicated that there was more information that had not been shared. They added that when they requested this information, the Council then advised that it did not have the information.
18. The complainant has gone on to explain that when the Commissioner contacted the Council, it has advised that further information is held but that it cannot be given out, as it is for training purposes only.
19. The Council has explained to the Commissioner that all the information has been provided to the complainant, or that it does not exist and therefore cannot be provided.
20. The complainant also explained to the Commissioner that some information that they had provided to support their application had not been put online.
21. The Commissioner asked the Council to explain why information would not be put online. It explained that there are numerous reasons why a document may not have been uploaded, such as there being sensitive information which cannot be redacted, or it could contain information that could cause harm to others if it were released, amongst other reasons. It also explained that documents submitted through the portal are automatically uploaded, however, it is possible that the particular document the complainant is referring to, was not uploaded due to human error.
22. The Commissioner asked the complainant to provide a copy of the document that has not been uploaded and he asked the Council to explain why it hadn't been uploaded.
23. The Council explained to the Commissioner that it has not deliberately withheld any information from the planning portal and if it had been missed, the complainant could have contacted the planning department and ask for it to be uploaded. It also explained that the document in question was provided to the complainant when they first made the

request for information and regardless of if the document was on the portal, it would not make an impact on the outcome of the decision.

24. The Council has also explained that telephone calls between staff are not recorded, including calls conducted through Microsoft Teams. It has also explained why some information was not provided to the complainant; this was due to it already being available online and the Council did provide the relevant links to the information.
25. Whilst the Commissioner recognises that the complainant does not consider that the Council has fulfilled the request, the Council has provided a clear explanation of the searches that it undertook to identify information falling within the scope of the request. No evidence is available to the Commissioner which would indicate that the Council's searches were insufficient, or that it holds further recorded information falling within the scope of the requests. The Commissioner also notes the explanations provided by the Council as to how the matter was discussed both internally and with other interested parties, which explains why additional information is not held.
26. It is clear that there has been a breakdown of trust between the Council and the complainant and the Commissioner understands the complainant's reasons for considering that the Council holds further information.
27. However, on the balance of probabilities, the Commissioner is satisfied that the Council has identified all information it holds within the scope of the complainant's request. The Commissioner is therefore satisfied that the Council has complied with regulation 12(4)(a) of the EIR. However, the Commissioner reminds the Council that it should have issued a refusal notice in line with the requirements of the EIR. Whilst the Council has failed to issue a refusal notice which cited regulation 12(4)(a) correctly, this does not change the outcome of the Commissioner's findings.
28. The Commissioner does note that the Council provided some information later than the required 20 working days and, as such, it has breached regulation 5(2) of the EIR.

Regulation 12(4)(e) – internal communications

29. Regulation 12(4)(e) states 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 be exempt from disclosure.

30. The Commissioner has considered the information withheld by the Council (conversations on Microsoft Teams) on the basis of this exception and he is satisfied that all of it constitutes internal communications and therefore regulation 12(4)(e) applies to this information.

The public interest test

31. Regulation 12(1)(b) requires that where the exception under Regulation 12(4)(e) 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. The Commissioner is mindful of the provisions of Regulation 12(2) which state that a public authority shall apply a presumption in favour of disclosure.

Public interest in disclosing the information

32. The Council acknowledges that there is a public interest in how officers reach decisions internally and what training and guidance is provided by managers.
33. The Council also acknowledges that releasing the information may increase openness and transparency.
34. The complainant has explained that they believe it is in the public interest for the information to be provided as it will show that the Council did not follow the national planning policy.
35. They have also advised that they consider it likely to show that there has been direct interference, or misuse of authority, by someone in regards to a legitimate planning application.

Public interest in maintaining the exception

36. The Commissioner's guidance¹ on this exception explains that although a wide range of internal information will be caught by the exception, public interest arguments should be focussed on the protection of internal deliberation and decision-making processes. This reflects the underlying rationale for the exception being that it protects a public authority's need for a 'private thinking space'

¹ [Internal communications \(regulation 12\(4\)\(e\)\) \(ico.org.uk\)](https://ico.org.uk/our-work/information-rights-guidance/internal-communications-regulation-12(4)(e))

37. The Commissioner has carefully considered the arguments put forward by the complainant and by the Council. He recognises the legitimate public interest in disclosing information that would inform the public about decisions concerning activities that may have an impact (whether positive or negative) on the environment. Accordingly he is mindful that access rights under the EIR are designed to support public access to environmental information, public participation in decision making and access to justice.
38. The complainant has argued that they feel the messages within Microsoft Teams are not in a private training space; they consider it to be a communication method between Council employees.
39. They have also advised that this was a live planning application and not a training scenario, or a theoretical scenario for learning purposes.
40. The complainant has also argued that Microsoft Teams is not a confidential space, as it was used as open access, as other staff members were commenting in it and therefore it was not an individual's "safe space" or appraisal document.
41. The Council has argued that the final version of the advice has been provided in the published report and is available for members of the public to view and scrutinise as part of the statutory planning process.
42. The Council has also explained that staff should have a 'safe space' to be able to receive training and discuss applications with colleagues. It says that should the information be disclosed, then it would have to consider advising staff against speaking with colleagues about planning cases. The impact on this would mean that staff may not develop their skills and knowledge.
43. The Council has stated that public disclosure of such information would not only inhibit the Council's ability to effectively conduct an investigation, but would also damage public confidence in such inquiries being undertaken appropriately and with due regard to the rights and expectations of involved parties.
44. The Council has also argued that there is an expectation from staff of confidentiality when receiving guidance from managers. It says it would be an unfair and unexpected use of data to publish to the world at large.

Balance of the public interest test

45. With regard to attributing weight to the public interest arguments in favour of maintaining the exception, the Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. The

safe space arguments may carry significant weight in some cases. In particular, the Commissioner considers that the need for a safe space will be strongest when the issue is still live.

46. In the circumstances of this case the Commissioner accepts that at the time of the request and at the time of the internal review, matters concerning the planning application were still ongoing. Furthermore, the Commissioner is satisfied that the issues covered in the withheld information are ones that are related to the outstanding matters concerning the planning application. The Commissioner is also conscious that the withheld information contains detailed and frank internal discussions about a complex and contentious planning matter. However, he considers that the Council may be excessive in advising they would have to advise employees to not discuss planning cases if the information were to be released. Nevertheless, in light of the above compelling arguments, in the Commissioner's view, significant weight should be attributed to the safe space arguments in this particular case.
47. Whilst he accepts that the arguments in favour of disclosure in this case carry some weight, the Commissioner does not consider that they match the weight of the arguments in favour of withholding the information. The Commissioner's conclusion is, therefore, that the public interest in the maintenance of the exception outweighs the public interest in favour of disclosure of the requested information.
48. 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).
49. As covered above, the Commissioner has concluded that the public interest in maintaining the exception at regulation 12(4)(e) outweighs the public interest in disclosure of the information. 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(4)(e) was applied correctly.

Regulation 5(3) – the exemption for personal data - the complainant's own personal data

50. The duty to make environmental information available on request is imposed by regulation 5(1) of the EIR. Regulation 5(3) provides that regulation 5(1) does not apply to information that is the personal data of the requester. The Commissioner has first considered whether any of the requested information is the personal data of the complainant. If it is, the EIR did not require the Council to disclose this information.
51. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual"
52. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
53. The withheld information in this case contains some emails between the complainant and the Council. This contains personal data about the complainant, such as their name, home address, email address and contact number.
54. The Council has not cited regulation 5(3)(2), or considered the complainant's request as a Subject Access Request.
55. In his published guidance² on personal data of both the requester and others the Commissioner makes it clear that in circumstances where the personal data of the applicant is very closely linked to the personal data of other data subjects, ie it would be 'mixed' personal data, there is no requirement to assess the relative extent and/or significance of the different sets of personal data in order to establish the 'dominant' data subject. This is because there is no basis for regarding the individual whose data is more extensive or significant than the others as being the only data subject.
56. Where a request is made for information which, if held, would be the personal data of the applicant, the public authority should consider the information in its entirety under section 40(1) of the FOIA or regulation 5(3) of the EIR.
57. Taking the above into account, the Commissioner is satisfied that the information is the complainant's own personal data. This is because the requested information relates to correspondence in relation to the complainant and their property. The Commissioner therefore finds that

² <https://ico.org.uk/media/1209/personal-data-of-both-the-requester-and-others-foi-eir.pdf>

regulation 5(3) applies to some of the withheld information, other than that which he has considered under regulation 13, which is described at paragraph 59 below. As regulation 5(3) is an absolute exception there is no public interest test to apply.

58. Having viewed the withheld information, the Commissioner is satisfied that some of the information belongs to the complainant, of which they already have this information, as it is emails between both the complainant and the Council. However, the Council is correct to withhold this information under the EIR request, as to release it, would be releasing personal data to the world at large.

Regulation 13 – third party personal data

59. 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.
60. 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.
61. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.
62. The Commissioner is satisfied that the names, email addresses and contact numbers of the staff members who discussed the planning application, relates to living individuals who may be identified from that data. In addition the withheld information contains the personal information that belongs to the complainant (some of the redactions made are on email chains between the complainant and the Council) which could lead to their identification. The Commissioner is satisfied that this information falls within the definition of personal data as set out in the DPA.
63. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
64. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
65. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

66. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

67. In the case of request under the EIR, 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.

68. 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

69. 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 child³”.

70. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the FOIA, 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;

³ 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, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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”

- 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.

71. 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

72. In considering any legitimate interest in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

73. 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.

74. In this case, the Commissioner accepts that the complainant has a legitimate interest in knowing who was discussing their planning application within the Council and who made what decision.

75. The Commissioner considers that there may be a wider legitimate interest, such as transparency about how the Council's processes are conducted and that they are adhering to specific regulations. There is also a legitimate interest in the Council being accountable for its functions.

Is disclosure necessary?

76. '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.

77. The Commissioner notes that it is also important to acknowledge that Regulation 13 of the EIR is different from other exceptions in that its consideration does not begin with an expectation of disclosure. As Regulation 13 is the point at which the EIR and DPA interact, the expectation is that personal data will not be disclosed unless it can be demonstrated that disclosure is in accordance with the DPA.

78. As disclosure under the EIR is disclosure to the world at large, it is rare that such processing will be necessary to achieve a legitimate interest.
79. In this case, the Commissioner understands that, whilst certain planning information is required to be made available to the public, this does not extend to the names of members of staff or any personal contact details for them. The Commissioner notes that some of the information that has been redacted in the emails, belongs to the complainant.
80. The Commissioner is therefore not aware that the information would be accessible other than by making a request for information under the EIR, and he accepts that disclosure under the legislation would be necessary to meet the legitimate interest in disclosure. The Commissioner is also satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

81. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the EIR in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
82. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
83. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as private individuals, and the purpose for which they provided their personal data.

84. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
85. The Commissioner is of the view that staff members at the Council, along with the complainant themselves, would not expect their personal information to be released to the world at large.
86. The Commissioner is of the view that planning matters can be quite controversial and, as such, he considers that disclosure of the identity of the staff members could cause harm and distress to those individuals.
87. Whilst the Commissioner accepts that the complainant has a legitimate interest in disclosure of the information in question, he has been unable to identify any wider legitimate interest that would outweigh the fundamental rights and freedoms of the individuals in this case. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
88. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
89. The Commissioner has therefore decided that the Council should have withheld the information under regulation 12(1) by way of regulation 13(2A)(a) of the EIR.

Right of appeal

90. 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

91. 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.
92. 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

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