

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 30 July 2024

Public Authority: Bristol City Council
Address: The Council House
College Green
Bristol
BS1 5TR

Decision (including any steps ordered)

1. The complainant has requested information relating to a planning application concerning Bristol Zoo. Bristol City Council ("the council") disclosed further information (following new searches being required by the Commissioner in decision notice IC-256678-V0V6) subject to some redactions under Regulation 12(4)(d) (material still in the course of completion, etc.) and Regulation 12(5)(b) (course of justice). During the Commissioner's investigation, the council withdrew its reliance on Regulation 12(4)(d), and disclosed the information withheld under that exception.
2. The Commissioner's decision is that the council was correct to apply Regulation 12(5)(b) to withhold the remaining information that has been identified. He has also decided the council has complied with the requirements of Regulation 5(1) of the EIR as it has demonstrated, on the balance of probabilities, that no further information is held by it falling within the scope of the request for information.
3. The Commissioner does not require the council to take any steps.

Request and response

4. Following earlier correspondence, on 31 May 2023, the complainant wrote to the council and requested the information in Annex 1 to this decision notice.
5. The council subsequently disclosed information and withheld some under Regulation 12(5)(b).
6. This response, and subsequent internal review, is outlined in decision notice IC-256678-V0V6¹, in which the Commissioner accepted the application of Regulation 12(5)(b), but required the Council to undertake new searches for held information and issue a further response.
7. The Council responded on 12 February 2024. It advised that further information had been identified. It disclosed some of this information and withheld the remainder under Regulation 12(4)(d) and Regulation 12(5)(b).

Scope of the case

8. The complainant contacted the Commissioner on 22 February 2024 to complain about the way their request for information had been handled.
9. He argues that further information should be held by the council, and that the council was not correct to apply Regulation 12(4)(d) and Regulation 12(5)(b) to withhold the information from disclosure.
10. During the Commissioner's investigation, the council revised its position. It disclosed the information previously withheld under Regulation 12(4)(d) but maintained that the remaining information was exempt under Regulation 12(5)(b).
11. The following analysis therefore considers whether the council is correct to apply Regulation 12(5)(b) to withhold the remaining information, and whether any further information is held by the council falling within the scope of the complainant's request for information.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4027984/ic-256678-v0v6.pdf>

Reasons for decision

Regulation 12(5)(b) – Course of Justice

12. This reasoning covers whether the council is entitled to rely on Regulation 12(5)(b) to refuse to disclose some of the requested information.
13. Regulation 12(5)(b) allows a public authority to 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.
14. The exception is wider than simply applying to information which is subject to legal professional privilege ('LPP'). Even if the information is not subject to LPP it may still fall within the scope of the exception if its disclosure would have an adverse effect upon the course of justice or the other issues highlighted.
15. The council provided the Commissioner with a copy of the withheld information. It said that the relevant documents were withheld on the same basis as that considered by the Commissioner in decision notice IC-256678-V0V6, namely that that they contain information subject to legal advice privilege, which is one of the forms of LPP.
16. The Commissioner has viewed the withheld information. The Commissioner understands that the information is legal advice provided by the council's in-house legal adviser to its officers, and advice received from independent professional legal counsel. Having viewed the information, the Commissioner is satisfied that it constitutes confidential communications between a client and a professional legal adviser made for the dominant purpose of seeking and/or providing legal advice. As such, the Commissioner is satisfied that the information is subject to legal advice privilege.
17. Having considered the subject matter that the advice relates to, and the context that it has taken place in, the Commissioner considers that it is comparable to the legal advice that he considered in decision notice IC-256678-V0V6.
18. In that decision notice, the Commissioner found that the disclosure of the information would have an adverse effect on the course of justice, and that, having considered that the legal advice related to a live and ongoing matter, the public interest test was clearly weighted in favour of Regulation 12(5)(b) being maintained.

19. Having considered that the information in this case is comparable to that previously considered, the Commissioner considers it appropriate to transpose his earlier findings to this case.
20. Therefore, the Commissioner's decision is that Regulation 12(5)(b) was applied correctly.

Regulation 5(1) – Duty to make available information upon request

21. Broadly, Regulation 5(1) provides that, subject to an exception applying, a public authority that holds environmental information shall make it available on request. This duty is subject to the application of any exceptions or other qualifications to the duty to disclose outlined within the EIR. Regulation 12(4)(a) applies where the requested information is not held by the authority at the time that the request was received.
22. 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 First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
23. In other words, in order to determine such complaints, the ICO must decide whether on the balance of probabilities a public authority holds any - or additional - information which falls within the scope of the request and which was held at the time of the request.

The complainant's position

24. The complainant argues that the council will hold further information falling within the scope of the request. This includes any information recorded in hardcopy paper records, or electronic case notes made by involved officers.

The council's position

25. The council has informed the Commissioner that new searches were undertaken following decision notice IC-256678-V0V6.
26. These searches were conducted in the following electronic systems:
 - The Microsoft Outlook account of the relevant case officer for the planning application.
 - Idox DMS, which is the planning team's electronic document and records management system.
 - Uniform, which is the planning teams 'case notes' facility.

- OneDrive, for any OneNote pages of key officers involved in the application.
27. The search criteria and parameters used for these searches were:
- The keyword of "zoo".
 - The names and email accounts of the key stakeholders in the planning decision of 21/01999/F (the application) including deleted folders.
 - The date range of 1 February 2022 to 30 November 2022.
28. In addition to these electronic searches, the council has confirmed that it has also consulted with the officers in the council's legal team who were involved in providing legal advice.
29. The council explained that its reference to 'paper' records in its response of 12 February 2024 was incorrect and misleading as to the practices of the team during the relevant time period. The council explained that paper notes have not been kept for many years, as all work is undertaken digitally and entered into Uniform and Idox DMS. As such, no paper records, such as meeting notes, are known or expected to be held in relation to the requests.
30. The council also explained its specific position in respect of some parts of the request (specifically, that numbered as 8, 18, 20/21 and 47) to establish that no information was held:
- "Item 8 the email does not hold any attachments referred to by the applicant and none can be found which could reasonably be identified as such and therefore it is not held.
- Item 18 BCC do not hold emails between the applicant and their lawyers.
- Item 20/21 after further searches there is no return email from Fiona with the 'recommended amendments' therefore following reasonable searches we have concluded that this is not held.
- Item 47 is between parties not involving BCC and therefore not held."

The Commissioner's analysis

31. The Commissioner has considered the arguments of both parties and the evidence which has been provided to him.
32. The Commissioner notes that, following decision notice IC-256678-V0V6, further information was identified, and that some of this was disclosed, with the remainder withheld.

33. During this investigation, some of this withheld information was disclosed. The remaining information is that which the council considers to fall under the exception provided by regulation 12(5)(b).
34. The Commissioner must therefore consider whether, on the balance of probabilities, there remains any further information which has not been disclosed, or else withheld under regulation 12(5)(b).
35. The Commissioner has considered the searches undertaken by the council, including where they have been undertaken and the search terms used. The Commissioner has also noted that the council does not expect any paper records to be held, as all work undertaken is now digital.
36. There is no evidence available to the Commissioner that suggests the council's searches have been deficient, and that Commissioner would not reasonably expect paper records to be held if this is no longer how the council undertakes its work.
37. In conclusion, the Commissioner is persuaded by the council's arguments in respect of the searches it has carried out, and considers that it has proven, on the balance of probabilities, that no further information is held by it falling within the scope of the complainant's request for information.
38. As such, the Commissioner has decided that the council has complied with regulation 5(1) and does not require it to carry out further searches.

Right of appeal

39. 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

40. 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.
41. 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

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

Annex 1

Please disclose the following documents (note that the numbers in bold and in brackets correspond with the page number in the paginated bundle of your disclosure given to me by emails at 16:23:11 on 14 March 2023):

(4). Note made of the 'scheduled Zoom meeting' referred to in the email from (name of individual redacted by ICO) dated 15 November 2022.

(6). The 'Final version' sent to the Applicant or on its behalf referred to in the email from (name of individual redacted by ICO) dated 7 November 2022 and the email or other communication by which it was sent to the Applicant or on its behalf.

(8). The 'draft report and timetable' that was 'shared... for finalisation [and] review' by the Applicant to enable it to 'respond' – referred to in the email from (name of individual redacted by ICO) dated 21 October 2022 and the email or other communication by which it was sent to the Applicant or to others on its behalf. Also any email and attachment by which it did 'respond.'

(9). Note made of the discussion on 4 August 2022 referred to in the email from (name of individual redacted by ICO) of the same date.

(11). Note made of the proposed Zoom conversation of 2 August 2022 referred to in the email from (name of individual redacted by ICO) of the same date.

(12). The 'confidential advice on my report' and the report itself referred to in the email from (name of individual redacted by ICO) dated 2 August 2022. Please note that, contrary to the assertion made on page 13 of BCC's disclosure, legal professional privilege cannot now attach. It was disclosed to the Zoo and privilege has accordingly been waived.

(14). The 'flurry of comments' to which (name of individual redacted by ICO) referred in his email to (name of individual redacted by ICO) of 1 August 2022 and the comments which he was to 'collate' and send to him the following day.

(15). '[the] suggested changes' and 'the attached' sent to 'our barrister' and referred to in the email from (name of individual redacted by ICO) to the Applicant dated 1 August 2022. Please also identify and disclose the document to which '[the] suggested changes' were to be made.

(17). Note made of the proposed call on 27 July 2022 referred to in the email from (name of individual redacted by ICO) dated 26 July 2022.

(18). The 'draft report' that was 'shared' with the Applicant and referred to in the email from (name of individual redacted by ICO) dated 14 July 2022' the

'comments' that were sent to (name of individual redacted by ICO) (as promised in her email); the email by which they were sent and 'the updated version' that she mentioned.

(20/21). 'the latest draft of the Report for Committee' (a) on which (name of individual redacted by ICO) gave the 'heads up' to (name of individual redacted by ICO) by email dated 7 July 2022 and (b) in respect of which he solicited the Applicant's 'comments and recommended amendments' [my emphasis]; and the response following the Applicant's 'review' which (name of individual redacted by ICO) promised (name of individual redacted by ICO) by email the same day.

(25). Note of the conversation proposed for 4pm on 21 June 2022 referred to in the email from (name of individual redacted by ICO) of the same date.

(45). The 'attached... comments' referred to in the email from (name of individual redacted by ICO) dated 1 August 2022 and sent at 12:24.

(46). The 'attached comments from (name of individual redacted by ICO)' referred to in the email from (name of individual redacted by ICO) dated 1 August and sent at 10:44.

(47). '(name of individual redacted by ICO)'s review of (name of individual redacted by ICO)'s report and the 'comments (name of individual redacted by ICO) has already seen from (name of individuals redacted by ICO) referred to in the email from (name of individual redacted by ICO) dated 27 July 2022.

(47). The 'note [of (name of individual redacted by ICO)] yesterday' referred to in her email of 27 July 2022.

(51/52). Note of the proposed call referred to in the emails of (name of individual redacted by ICO) and (name of individual redacted by ICO) dated 2 February 2022.