

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 9 April 2024

Public Authority: Rochdale Borough Council
Address: Number One Riverside
Smith Street
Rochdale, OL16 1XU

Decision (including any steps ordered)

1. The complainant requested information relating to specific planning applications. Rochdale Borough Council (the "council") refused the request, citing the exceptions for internal communications (regulation 12(4)(e) and interests of the information provider (regulation 12(5)(f)).
2. The Commissioner's decision is that the council has failed to demonstrate that the exception in regulation 12(5)(f) is engaged and that, in relation to its application of regulation 12(4)(e), the public interest favours disclosure.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The complainant acts on behalf of Trammell Crow Company Logistics (Heywood) Limited ("Trammell"). They have explained that, on 1 November 2022 Trammell submitted a planning application with reference 22/01410/FUL (the "Planning Application") to the council.
6. The complainant has explained that, since that date, several representations have been received from a neighbouring land owner, Russell Homes (UK) Limited and/or other entities within the Russell Homes group ("Russell Homes"). The complainant has stated that some of those representations have been shared with Trammell, but some have not. The complainant has also stated that they understand that formal and informal meetings have been held with Russell Homes to discuss the Planning Application.
7. The complainant has confirmed that Trammell became concerned that the communication between the council and Russell Homes, and the influence that Russell Homes appeared to have in relation to the determination of the Planning Application, risked undermining the council's commitment to probity in planning.
8. It was within this context that the request for information was made.

Request and response

9. On 12 July 2023, the complainant wrote to Rochdale Borough Council (the "council") and requested the following information:

"We write to request the following information, limited to the period between 1 March 2022 and the date that the information is provided. Where we refer to Russell Homes this includes any parties acting for any Russell Homes group entity.

(a) All the written correspondence and associated attachments or enclosures (including but not limited to letters, reports and email correspondence) between the Council and Russell Homes relating to the Applications. This includes but is not limited to, any such correspondence between Russell Homes and the following individuals at the Council:

[names redacted]

(b) Details of any meetings held between officers or members of the Council and Russell Homes where any of the Applications were discussed, including any transcripts, contemporaneous notes and/or minutes of those meetings.

(c) All internal correspondence (email or otherwise), meetings and minutes between the Council's officers relating to:

(i) the perceived impact of the Planning Application on the Russell Homes Permission; and / or

(ii) any representations (written or otherwise) made by Russell Homes in relation to the Application.

(d) All correspondence (email or otherwise), meetings, minutes and documentation (including, for example, reports) between the Council and any third-party advisor relating to:

(i) the perceived impact of the Planning Application on the Russell Homes Permission; and / or

(ii) any representations (written or otherwise) made by Russell Homes in relation to the Application."

10. The council responded on 14 August 2023 and confirmed that it was withholding the requested information under the exceptions for internal communications (regulation 12(4)(e)) and interests of the information provider (regulation 12(5)(f)).
11. On 6 October 2023 the complainant asked the council to carry out an internal review. The council provided its review response on 1 December 2023. This confirmed that it was maintaining its position.

Scope of the case

12. On 22 December 2023 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
13. The Commissioner has considered whether the council was entitled to withhold the requested information.

Reasons for decision

Regulation 12(4)(e) – internal communications

14. 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 be exempt from disclosure.

15. The Commissioner has reviewed the withheld information and is satisfied that it consists of communications between officers at the council. The information clearly comprises internal communications. The Commissioner therefore considers that the exception at regulation 12(4)(e) is engaged.

Public interest test

16. As with the other exceptions under the EIR, when regulation 12(4)(e) is engaged, the public authority must still carry out the public interest test in order to decide whether the information should be withheld. 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), a presumption in favour of disclosure must be applied.

Public interest in disclosure of the information

17. The complainant has argued that disclosure is likely to help people understand and participate in public debate about current planning matters. The complainant has suggested that Russell Homes itself has raised concerns with the Council's approach to publishing documents associated with the Planning Application.
18. The complainant has further argued that disclosure would help the public to understand why the council has made certain decisions.
19. The complainant has also suggested that disclosure may reveal incompetent, illegal or unethical decision-making or examples of malpractice.
20. The complainant has argued that, if disclosure does not reveal such practices, it will serve to dispel concerns that such practices may have arisen, which have been heightened through the council's refusal to be

open about its discussions with Russell Homes, a major investor in Rochdale with which, the complainant has suggested, the council has particular business interests¹.

¹ See, for example: <https://russellhomes.co.uk/corporate/land/land-development-2#:~:text=Russell%20Homes%20has%20received%20approval,southern%20part%20of%2>

Public interest in maintaining the exception

21. The council has argued that it does not consider that disclosing the documentation relating to internal communications would service the public interest. It has argued that disclosure would not enhance any insight into the planning applications and decision making process.
22. It has further argued that it has a duty to ensure colleagues and employees are able to have free and frank discussions in relation to current work projects. The council considers that disclosure of internal communications into the public domain could affect the internal workings of the council where employees do not feel able to have confidential or frank discussions, this could overall harm how projects and work is undertaken.
23. In relation to the requirement to apply a presumption in favour of disclosure as per regulation 12(2), the council has argued that the communications may be of interest to Trammell but does not serve the public interest nor give the public an insight into the decisions and communications by the council, therefore would not be of benefit to the public.
24. The council has argued that the EIR should not be used as an opportunity for individual benefit but more for the public at large. Where planning applicants and/or objectors are not happy with the result of the applications process, the council has pointed to the availability of a transparent and formal process for challenging decisions with the planning inspectorate.

Balance of the public interest

25. The Commissioner considers that the underlying rationale for the exception at regulation 12(4)(e) is to protect a public authority's need for a private thinking space. He considers that the extent to which disclosure would have a detrimental impact on internal processes will be influenced by the particular information in question and the specific circumstances of the request.

26. Arguments about protecting internal deliberation and decision-making often relate to preserving a safe space in which to debate issues away from external scrutiny, and preventing a 'chilling effect' on the exchange of free and frank views in future. Their weight will vary from case to case, depending on the timing of the request and the content and context of the particular information in question.
27. The Commissioner considers that the need for a safe space is strongest when the issue is still live. Once a decision has been made the argument will carry little weight. The timing of the request is therefore an important factor.
28. Having considered the content of the withheld information, the Commissioner is not persuaded that disclosure of the material would result in necessary communication between officers being deterred or compromised. He considers that disclosure of the internal communications would further support the council's transparency and openness in its handling of planning applications without any likely effect on council processes.
29. In his decision notices the Commissioner has often provided his view that public officials are expected to be impartial and robust in meeting their responsibilities, and not easily deterred from expressing their views by the possibility of future disclosure.
30. In this case the Commissioner considers that the grounds for not disclosing the information are focused on the identity of the complainant and are entirely dismissive of the potential for broader public interest in the information. It is not the Commissioner's role to determine whether the information reveals malpractice or other negative aspects of the council's decision-making in this planning matter. However, where legitimate concerns are raised and there is a public perception that transparency will assist the public interest in accountability and scrutiny of decisions, the Commissioner considers that these provide a valid weighting in favour of disclosure.
31. 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.
32. In the circumstances of this case, the Commissioner considers that the presumption in favour of disclosure should prevail and therefore the information must be disclosed.

Regulation 12(5)(f) – interests of the information provider

33. Regulation 12(5)(f) provides an exception from the duty to make information available if this would adversely affect the interests of someone who supplied the information, and that person:
- was not under, and could not be put under, any obligation to supply it;
 - supplied it expecting that it would not be disclosed to a third party; and
 - has not agreed to the information being supplied.

How the exception works

34. As with all the exceptions in regulation 12(5), the threshold necessary to justify non-disclosure because of adverse effect is a high one. The effect must be on the interests of the person who voluntarily provided the information and it must be adverse.
35. In considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (i.e. more than trivial), and to explain why disclosure would, on the balance of probabilities, directly cause the harm.
36. The need to point to specific harm and to explain why it is more probable than not that it would occur reflects the fact that this is a higher test than 'might adversely affect', which is why it requires a greater degree of certainty. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party's interests.
37. Public authorities should be able to evidence the harm that would arise as a result of disclosure. In many cases this will stem from direct consultation with the person who supplied the information. This is most likely to have been at the time the information was provided. However, there may be instances in which it is necessary to consult the information provider at the time of the request.
38. In situations where a person states that disclosure would harm their interests, but does not articulate the nature of this harm, a public authority will need to enter into discussions with the provider in order to

establish whether there is any substance to the concerns expressed. This will allow the authority to decide whether disclosure, at the time of the request, would lead to an adverse effect or not and so whether further consideration of the exception is necessary. It is important to

acknowledge the importance that the person providing the information attaches to it and the harm that would be suffered if it was disclosed.

39. Whilst consultation with the person who provided the information is encouraged in the majority of cases, the Commissioner recognises that there will be instances where, due to its knowledge of the particular circumstances of a case and its overall experience of the context in which the information was provided, the public authority will be able to explain the harm to the provider without such consultation.
40. In all cases, the onus is on the public authority to demonstrate how disclosure of the requested information would lead to the adverse effect based on the circumstances at the time of the request².

The council's position

41. In applying the exception the council stated the following:

"The information provider were not contacted in relation to seeking their approval for disclosure, however, the emails received note that there is an expectation that communications will be confidential. The council must promote an opportunity for individuals and companies to approach the Council and discuss matters in a free and frank manner without communications being put into the public domain. Although any and all communications within the Council are subject to FOI & EIR regulations for openness and transparency, there has to be a balance on what information is in the public interest to be disclosed into a public arena. Disclosure of external communications could have an adverse effect on external customers and organisations to the Council if they feel that they cannot communicate with the council on matters of concern to them. Disclosure could also undermine the commercial confidentiality expected when communications are received from external companies. If our customers do not feel confident to express concerns or communicate with us without the information being published this could affect how Council services are ultimately provided."

The Commissioner's conclusions

42. In this case the Commissioner considers that the arguments provided by the council are entirely generic. While he acknowledges the general

² This is confirmed in the code of practice issued under regulation 16 of the EIR:
https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf

points presented, there is no explanation of the causal relationship between disclosure and the adverse effects to be incurred by the information provider. The conclusions reached by the council do not appear to be predicated on any specific argument or linked to a particular context.

43. The council has confirmed that it did not consult with the information provider regarding the application of the exception and it is clear from the generic nature of the council's arguments that it does not have direct knowledge of any specific harm that disclosure would cause. In view of this the Commissioner considers that the council has sought to apply the exception on a general basis and has failed to demonstrate that disclosure of the information would result in any specific harm.
44. It is self-evident from the council's arguments alone that it has not been shown how disclosure would result in adverse effects to the information provider. It is also not the Commissioner's duty to generate arguments on the council's behalf. He also does not consider that it is appropriate to provide the council with further opportunities to generate arguments when it has been given ample time to set out its position.
45. In view of the above the Commissioner has concluded that the council has failed to demonstrate that regulation 12(5)(f) is engaged. He has not, therefore, gone on to consider the public interest test.

Right of appeal

46. 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

47. 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.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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