

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

**Date:** 16 October 2013

**Public Authority:** Cheshire East Borough Council  
**Address:** Westfields  
Middlewich Road  
Sandbach  
Cheshire  
CW11 1HZ

**Decision (including any steps ordered)**

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1. The complainant has requested information relating to a proposal to build a waste transfer station at Lyme Green near Macclesfield. The request included the notes of any meetings or reports held in relation with this development, together with any communications on the subject. The Council initially withheld the majority of the information but during the course of the investigation it undertook to provide the requested information.
2. The Commissioner's decision is that the Council has now provided all the requested information, apart from a limited amount which has been withheld under regulation 12(5)(b) on the basis that it is covered by legal professional privilege. The complainant has not contested the application of this exception. The complainant does however believe the Council holds further information. The Commissioner is satisfied that it has now located all the information that falls within the scope of the request.
3. The Commissioner does not require the public authority to take any further action in this matter.

## Request and response

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4. On 28 November 2011, the complainant wrote to Cheshire East Borough Council requesting a range of information relating to work that had commenced to build a waste transfer station at a site in Lyme Green. The Council provided a limited amount of information in its response of 3 January 2012.

5. On 25 July 2012 the complainant emailed the Council. He referred to his previous request and advised the Council that there appeared to be several omissions from the information it had provided in response. He requested copies of the following information which he believed the Council should hold. The request was made in the following terms;

"You will remember the above request for information, and the letter you sent on the 3<sup>rd</sup> January 2012.

In relation to the information requested I have carefully examined the information, and there appears to be several omissions.

These include:

Notes/minutes of any officer working group meetings which took place up to and post the decision making process.

Details of any correspondence, emails reports etc involving any councillor in relation to the decision making process.

I would therefore like to receive copies of these"

6. The decision making process referred to is the series of decisions that lead to work being started on the construction of the waste transfer station at the Lyme Green site.

7. The Council responded on 3 August 2013. It withheld the requested information under regulations 12(5)(b) and 12(4)(e). Regulation 12(5)(b) allows a public authority to withhold information that would adversely affect the course of justice or an inquiry of a disciplinary nature. The Council also withheld some information under regulation 12(4)(e) on the basis that the requested information constitutes internal communications.

8. The complainant requested an internal review on the 12 December 2012 and despite this being well outside the deadline of 40 working days for requesting such reviews (as set out at regulation 11(2)) the Council did conduct one.

9. Following the internal review the Council wrote to the complainant on 21 December 2012. It stated that the information was still exempt under regulations 12(5)(b) and 12(4)(e).

### **Scope of the case**

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10. The complainant contacted the Commissioner in January 2013 to complain about the way his request for information had been handled. In particular he was concerned over the lack of any information relating to officer working groups and any communications with councillors, or between councillors about the Lyme Green project.
11. When the Commissioner contacted the Council it informed him that it was now happy to disclose the requested information and no longer wished to rely on the exceptions provided by regulations 12(5)(b) and 12(4)(e). On the 15 July 2013 the Council provided the complainant with a large bundle of documents. The Council did withhold one document under regulation 12(5)(b) on the basis that, as it contained legal advice, it attracted legal professional privilege and so could not be disclosed without having an adverse effect on the course of justice. The complainant has not contested the Council's refusal to provide that document.
12. The Commissioner considers that the request of the 25 July 2012 captures all reports, minutes of meetings, notes of meetings (including any handwritten notes taken by officers attending those meetings) together with any emails between officers, between officers and councillors, and between councillors, on the decision to build the waste transfer plant and to commence works on site. However as the July 2012 request is made by reference to his earlier request of 28 November 2011, it is limited to the information that had been created by the 28 November 2011, but which was still held by the Council at the time of the request ie 25 July 2012.
13. The complainant believes that he has not received all the information that was held at that time. The issue for the Commissioner to decide therefore is whether the Council holds any information falling within the scope of the request other than that which has already been provided and the one piece of legal advice withheld under regulation 12(5)(b).

## **Background**

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14. The attempt to build a waste transfer plant at the Lyme Green site was very controversial. When works commenced on this site local residents raised concerns that the development did not have planning permission. Work ceased on the site at the end of November 2011 and the project was finally abandoned in February 2012.
15. Ultimately it became apparent that there were a number of irregularities with the project. This resulted in the Council's Internal Audit investigating the matter and producing a report in June 2012. The complainant had been in correspondence with the council over this matter since his original request and had hoped the Internal Audit report would provide him with the information which he believed was missing from his November 2011 request. When it did not, he made his July 2012 request. At that time the Council were aware of serious disciplinary issues that it needed to investigate and so the Council applied regulations 12(5)(b) and 12(4)(e) to withhold the information.
16. In order to investigate the disciplinary issues arising from the Lyme Green project the Council was required to appoint a Designated Independent Person (DIP). The DIP produced a confidential report detailing whether in his opinion allegations of misconduct against several senior members of staff were well founded. That report was provided to the Council on 10 December 2012. The complainant had hoped that the completion of the DIPs investigation would remove any obstacle to the disclosure of the information he wanted. However the Council were still considering the implications of the DIP's report at that time and what action, if any, was required. The Council published an official summary of the DIP's report in June 2013.

## **Reasons for decision**

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17. Regulation 5(1) of the EIR provides that a public authority that holds environmental information shall make it available on request.
18. In cases where there is a dispute over the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Tribunal decisions applies the civil standard of proof. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities the Council holds any additional information which falls within the scope of his request.

19. The Council has provided a considerable amount of information to the complainant, around 500 double sided pages of A4. This includes emails between officers and between officers and external contractors. The number of emails to, or from, councillors is limited though to five. There is also only one formal set of minutes from the project's working group. The information does include two delegated decisions relating to the award of contracts including the decision to appoint a construction company to carry out the work at Lyme Green. It also includes programmes of works, updated as the project progressed.
20. In determining whether any additional information is held the Commissioner has considered the two investigations into the Lyme Green project, ie the Internal Audit report and the DIP's investigations and the information obtained for those purposes. He has taken account of the findings of those inquiries in terms of what they reveal about the procedures followed and therefore what records one could expect to exist. He has also considered particular queries from the complainant regarding the types of information he believes is missing and the additional searches and checks conducted by the public authority in response to the Commissioner's investigation.
21. When the complainant's request of July 2012 was received, the Council's Internal Audit had already conducted its investigation in the Lyme Green project. As a consequence it had already collected together a large amount of information. The Council considers this represents all the information held by the Council on the project, apart from two emails and one handwritten note which were discovered later.
22. At the time of the request the Internal Audit report had been considered by the Council and a decision taken to appoint a DIP to investigate serious allegations of misconduct. In light of this it is understood that the Council took the view that any information falling within the scope of the request was likely to be relevant to the DIP's investigation and that therefore it would not be appropriate to disclose it at that time. This is the reason why the Council applied the exceptions provided by regulation 12(5)(b) and 12(4)(e). The other consequence of this approach was that the Council did not carry out any additional searches for information over and above that already collected through the internal audit process. It is not clear whether this was also in part because it was presumed that the audit process would have captured all the information that fell within the scope of the request.
23. The Commissioner has considered the extent to which this body of information is likely to capture all the requested information. This involves considering both the scope of the Internal Audit investigation and the thoroughness of the searches conducted by Internal Audit.

24. The leader of the council and its chief executive initiated the Internal Audit report in February 2012. The investigation's objective and scope are set out in the investigation's terms of reference which have been published together with a full audit report on the Council's website. In respect of the Lyme Green project the objective was:

"To provide an independent and objective opinion to the organisation of management's compliance with established policies, procedures, laws and regulations particularly with regard to the use of assets and resources entrusted it".

25. The scope of the review was:

"Review, appraisal and reporting of the adequacy of the systems of managerial, financial and operational control and their effectiveness in practice,"

26. What became apparent through the Internal Audit's investigation and later confirmed by the DIP's investigation, is that the project management of Lyme Green was confused and chaotic and that in an attempt to deliver the project within very tight timescales, the Council's formal procedures were not followed. In terms of the information held this has two consequences. Firstly the audit trail that one would normally expect to exist for a project of this type may not exist. Secondly, in the absence of a formal audit trail, it becomes necessary to piece together the history of the project by examining the emails and less formal notes that the project generated.

27. The Council has explained that individual auditors are responsible for applying due professional care to their own work. Under a national code of practice they are obliged to use all reasonable care in obtaining relevant and reliable evidence on which to base their findings. The methodology followed by the auditors was to interview council staff, identifying the procedures and controls that should have been in place and requesting and reviewing the relevant documentation.

28. The Commissioner accepts that the Internal Audit investigation was thorough. It is also clear that there is, at least, a very large overlap between the information that the auditors would have examined and relied on in their investigation and that requested by the complainant.

29. However the Commissioner accepts that it is not possible to say with absolute certainty that the auditors would have required access to as full a range of documents as, potentially, falls within the request. Therefore it is possible that the body of evidence collected by internal audit and which, to a large extent, the Council later relied on as being the entirety

of the information it holds on this subject, does not represent all the information that existed at the time of the request in July 2012.

30. However the Commissioner is satisfied that in order to meet its objective the auditors would have had to unravel the history of the project and the decision making process that was followed in order to trace what happened and who followed what procedures. He is also satisfied that in the absence of formal minutes of meetings the Internal Audit investigation would have needed to rely on chains of emails and whatever other records did exist to meet that objective.
31. The Internal Audit methodology involved interviewing staff and its findings were discussed with those involved in advance of the report being issued to councillors. This provided an opportunity for them to comment on its accuracy and, if they disputed those findings, to present any new evidence. There was therefore ample opportunity for the internal audit investigation to identify a great deal of information which existed at that time and which was relevant to the history of the Lyme Green project.
32. Therefore although the Commissioner cannot be completely certain that the evidence collected by Internal Audit mirrors that captured by the request, he considers that there is a reasonable prospect that it did. Apart that is from in respect of handwritten notes. This is discussed in more detail later.
33. Following the Internal Audit report the Council appointed the DIP to investigate allegations of misconduct against senior members of staff. A summary of the DIP's report was published on the Council's website in June 2013 and the Commissioner has had access to the full report. One would expect disciplinary investigations of this nature to be very thorough and the Commissioner has no reason to believe that this was not the case in this instance. The DIP had access to all the information collected by Internal Audit and could compel officers and councillors to attend interviews. This gave staff the opportunity to produce any additional documents. The Council has explained that the only new information held as a result of the DIP's investigation was that generated by the interviews he conducted. From this the Commissioner understands that no new documents were unearthed by the DIP.
34. It therefore appears that the second investigation into this matter did not reveal any new reports, notes, minutes or emails etc that fell within the scope of the request. The Commissioner considers that if a second investigation failed to unearth new information relevant to the request this supports an argument that the original Internal Audit was successful in gathering most, if not all, information relevant to this request.



35. The complainant has had the opportunity to study the information that the Council provided to him. He has raised a number of concerns all of which are very understandable. These included the fact that there was little or no evidence of communications with councillors. He argued that with a project of this scale Councillors would normally have been closely involved. He also argued that as this project went over budget, officers would have had to have sought additional funds from the Council's cabinet. He was also surprised by the fact that there was only one set of formal minutes for the project working group and enquired whether in the absence of formal minutes there might be hand written notes held by the officers involved.
36. Regarding the lack of information on the involvement of councillors the Commissioner has considered both the findings of the Internal Audit report and the DIP's investigation as set out in the official summary. Both investigations, and in particular the DIP's, make it clear that the procedures and financial regulations that were in place were simply not followed. If they had been followed councillors would have been alerted to the problem of the project being over budget. For example officers relied on delegated decision making powers to award contracts when, because of the amounts involved, the matter should have been referred to the cabinet. One of those decisions, to appoint the developers to start work on the site met the criteria of a 'Key Decision'. As such the proposal should have been published in advance. This would have provided councillors with another opportunity to have some input to the proposal. However the key decision was not published. Furthermore the DIP's report finds that at no time was the fact that project costs were exceeding budget communicated to officers from the Finance and Services department. If finance officers had been made aware of the problem they would have had a responsibility to report the matter to cabinet. The Commissioner has no reason not to accept the DIP's findings on these matters.
37. In light of this the Commissioner considers it plausible that at the time of the request, July 2012, the Council did not hold any further information relating to the involvement of Councillors in the Lyme Green other than that which had been collated by Internal Audit. However the Commissioner did ask the Council to carry out further searches. He provided the Council with a copy of his guidance on 'Official information held in private email accounts' and asked it to clarify whether any additional information may be held in personal or private email accounts (this was not just in respect to communications with councillors but in respect of any information captured by the request. The Council passed this guidance on to staff. It asked all officers involved in the project (and who are still employed with the Council) together with and the councillors who were cabinet members with responsibilities for the environment and finance at the time of the project, whether they had



retained any emails on their private email accounts at home. All confirmed that no additional information was held. However one Councillor did identify two further emails that were held on the Council's system and one hand written note that fell within the scope of the request. The Council forwarded these to the complainant.

38. The complainant was also interested in any involvement that the Capital Assets Group (CAG) had with the project. Where it becomes apparent to a project manager that their project is over budget, the manager must submit a new business case based on the revised costs to CAG. CAG is composed of officers from the finance department. The Commissioner asked the Council to specifically check whether any information was held relating to CAG's involvement. In response the Council confirmed that it reviewed minutes of any meetings of CAG and had not found any information relating to the waste transfer station at Lyme Green. It pointed out that this concurs with the Internal Audit report which found that no revised business case was submitted to CAG and that arrangements were not made to seek approval for the full value of the scheme. In addition in response to a more general question about the searches that the Council had conducted, the Council advised the Commissioner that these included searching electronic data using 'Capital Asset Group' as a search term.
39. In light of the above the Commissioner is satisfied that it is unlikely that at the time of the request the Council held any further information in addition to that now provided relating to the involvement of councillors or the reporting of the projects budget problems through the established channels. Certainly the Commissioner is satisfied that there is no additional information at this point in time.
40. The complainant has also questioned whether it is plausible that there is only one set of minutes from the project working group. The Commissioner can fully understand the complainant's concerns. The Commissioner has looked at the minutes which do exist. These are of a meeting on the 7 September 2011. They are relatively detailed minutes which would suggest that the established practice of the group would be to keep some formal record of their meetings. The minutes include 'matters arising' as an agenda item which suggest that there was at least one earlier meeting of the group. Although from the actual contents of that minute it is not clear that it does relate to an agenda item raised at a previous meeting.
41. The Commissioner specifically asked whether there were any further meetings of this group. The Council has explained that from the email chains gathered by Internal Audit it was clear that there had been other meetings but confirmed that no additional minutes were discovered either as a result of the two investigations that were conducted into

Lyme Green or as a result of subsequent searches. The Council believes that the informal emails that flowed from members of the project team are the only means by which the deliberations of this group are recorded.

42. The Commissioner recognises that this is unusual, particularly given the high standard of minute taking represented by the 7 September minutes. However he has also taken account of the pressure placed on officers because of the timescales involved and how this may have undermined good record keeping. He is also aware that there were changes to the project manager which might explain a different approach being adopted to the taking of minutes in later meetings. The Commissioner has also taken account of the findings of the DIP's report as set out in the official summary. The DIP describes the management of the project as confused and says that no one in September and October 2011 was completely clear who the project manager was. Considering all the above the Commissioner accepts that it is plausible that no additional minutes exist.
43. The complainant asked whether there were any handwritten notes taken by the officers involved and this was put to the Council. The Council advised the Commissioner that it had asked the officers involved to search for any information relating to Lyme Green, including notes of the project team, held in any format. No additional information was found. The Commissioner recognises that these further searches would have taken place nearly two years after any meetings would have taken place. Informal, handwritten notes are often only kept for a short period. This may be the entire length of a project but is often only until a particular job or action point is completed. Therefore he appreciates that although there may have been more notes in existence when the complainant made his very first request back in November 2011, by the time he made his request in July 2012 it is quite possible that any handwritten notes would have been discarded.
44. It is important to remember that although the request was phrased in such a way that it relates to information that had been created by November 2011, it only captures such information if it still existed at the time of request in July 2012. Therefore even if more information had existed once, it does not follow that such information was still held at the time of his July 2012 request.
45. The Commissioner is satisfied that the Council no longer holds any more information in respect of the meetings of the project group. Even though the Commissioner cannot rule out the possibility that additional information was held while the Lyme Green project was still in progress, the Commissioner is satisfied on the balance of probabilities that this

information was not held at the time of the request and he is even more confident that no such information is held now.

46. The Commissioner is satisfied that in relation to the particular issues raised by the complainant, ie communications with councillors, the involvement of CAG, minutes of the meetings of the project team, the Council does not hold any additional information and that on the balance of probabilities this was also the case at the time of the request in July 2012. In respect of any other information that the Council might hold which falls within the scope of the request the Commissioner is satisfied that the further searches conducted by the Council during his investigation were capable of discovering any additional information if it existed. These searches have been referred to above, but for clarity the Council asked all the officers involved to supply all documentation they held in whatever format. Electronic searches were made using the the following search terms:

- Lyme Green
- Waste Transfer Station
- project group
- Working group
- strategic planning board
- Capital Asset Group

47. The searches carried out during the Commissioner's investigation included searches for handwritten notes. The Commissioner notes that only one handwritten document was discovered as a result of those searches and he is aware that all the other documents that have been provided to the applicant were sourced from electronic documents. Even if this suggests that the original Internal Audit investigation did not search for handwritten documents, the Commissioner considers it likely that even if such documents once existed it does not follow that they would have existed at the time of the request in July 2012. Nevertheless it is unfortunate that the Council did not search for handwritten documents at the time that request was received. Instead the Council relied on the hard copies of electronic records held by Internal Audit as representing all the information held on the Lyme Green project. The Commissioner recognises that the failure to conduct fresh searches at that time was because the Council believed that any information found would have to be withheld to prevent the DIP's investigation being undermined.

48. Notwithstanding this criticism the Commissioner considers that the fact that the Internal Audit investigation had, from February 2012 ie immediately after the Lyme Green project was abandoned, gathered together a large body of evidence has meant that that information has

been preserved. As a result it is possible that a fuller record of events existed at the time of the complainant's request in July 2012 than would otherwise have been the case.

49. The Commissioner is satisfied that on the balance of probabilities the Council has now provided the complainant with all the recorded information that was held at the time of his July 2012 request and that the Council does not hold any further information.

## Right of appeal

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50. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

51. 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.
52. 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 .....**

**Lisa Adshead**  
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