

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 7 November 2013

**Public Authority:** Royal Borough of Windsor & Maidenhead

**Address:** Town Hall  
St Ives Road  
Maidenhead  
SL6 1RF

#### **Decision (including any steps ordered)**

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1. The complainant has requested a copy of a report relating to a complaint about planning decisions made by the Royal Borough of Windsor & Maidenhead (the "council"). The council refused the request under the FOIA exemptions for information provided in confidence (section 41) and legal professional privilege (section 42).
2. The Commissioner's decision is that the Royal Borough of Windsor & Maidenhead:
  - wrongly handling the request under the FOIA and breached regulation 5(1) and regulation 14(1) of the EIR;
  - correctly withheld the requested information under the exception for adverse affect to the course of justice (regulation 12(5)(b)).
3. The Commissioner does not require the public authority to take any steps.

#### **Request and response**

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4. On 18 March 2013, the complainant wrote to the council and requested information in the following terms:

*"I would like to request a copy of Mr Flather's Report into the processing of planning applications at 41-47 Eton Wick Road and 31-33 Victoria Road, Eton Wick."*

5. The council responded on 18 April 2013. It stated that it was refusing the request under the exemptions for information provided in confidence and legal professional privilege.
6. Following an internal review the council wrote to the complainant on 24 April 2013. It stated that it was upholding its original decision to refuse the request.

### **Scope of the case**

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7. On 24 April 2013 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly applied exemptions to refuse the request.
9. During the course of the investigation, the Commissioner provided the council with his initial view that the withheld information constituted environmental information as defined by the EIR. He invited the council to reconsider the request under the EIR. The council agreed to do this and confirmed that the withheld information (in its entirety) was subject to the exception for adverse affect to the course of justice (regulation 12(5)(b)). The Commissioner has considered whether the exception has been correctly applied.

### **Reasons for decision**

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#### **Is it Environmental Information?**

10. The Commissioner has considered whether the council correctly handled the request under the FOIA or whether the requested information constitutes environmental information as defined by the EIR.
11. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is as any information in any material form on:
  - '(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

*(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

*(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements...'*

12. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
13. The Commissioner notes that the withheld information relates to decisions regarding proposals for planning permission for residential developments. He has considered whether this information can be classed as environmental information, as defined in Regulation 2(1)(a)-(f), and he has concluded that it can for the reasons given below.
14. In this case the subject matter of the withheld information relates to land/landscape and advice which could determine or affect, directly or indirectly, policies or administrative decisions taken by the council.
15. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of Kirkaldie v IC and Thanet District Council (EA/2006/001) ("Kirkaldie").
16. In view of this, the Commissioner has concluded that the council wrongly handled the request under the FOIA.
17. During the course of his investigation the Commissioner invited the council to reconsider the request under the EIR. The council agreed to do this and confirmed that it considered that the requested information should be withheld because disclosure would adversely affect the course of justice. The Commissioner has gone onto consider whether the council has correctly applied the relevant exception.

### **Regulation 14 – refusal to disclose information**

18. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore where the procedural requirements of the two pieces of legislation differ it is inevitable that the council will have failed to comply with the provisions of the EIR.
19. In these circumstances the Commissioner believes that it is appropriate for him to find that the council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and indeed its internal review) failed to cite any exception contained within the EIR because the Council actually dealt with the request under FOIA.

### **Regulation 12(5)(b) – The course of justice**

20. Regulation 12(5)(b) provides that the disclosure of information can be refused if 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."
21. In the Information Tribunal hearing of Kirkaldie, the Tribunal stated that the purpose of this exception was reasonably clear and that:

*"...it exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation".*

In this hearing the Tribunal decided that legal professional privilege (LPP) is a key element in the administration of justice and that advice on the rights and liabilities of a public authority is a key part of the activities that will be encompassed by the phrase "course of justice".

22. The Tribunal in *Woodford v IC* (EA/2009/0098) confirmed that the test of "would adversely affect" for this exception would be met by the general harm which would be caused to the principle of LPP, without needing to demonstrate that specific harm would be caused in relation to the matter covered by the information.
23. Having viewed the information, the Commissioner is satisfied that some of it covers confidential communications between a client and a lawyer made for the dominant purpose of seeking or giving legal advice in relation to litigation, namely judicial review proceedings. He is,

therefore, satisfied that it records the seeking and giving of legal advice and is therefore subject to LPP.

24. The council has stated to the Commissioner that it does not consider that the privilege attached to the information has been lost.
25. The remainder of the withheld information consists of various supporting documents and correspondence which informs the legal considerations and provides the basis for the subsequent legal advice provided to the council.
26. The Commissioner considers that regulation 12(5)(b) is not limited to excepting only information that is subject to LPP. The wording of the exception has a broad remit encompassing any adverse affect on the course of justice generally; this allows for documents that are not subject to LPP to still be covered by the exception, as long as disclosure would adversely affect on 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. The Tribunal affirmed this view in the case of *Surrey Heath Borough Council v Kevin McCullen and the ICO (EA/2010/0034)* when they acknowledged that the regulation covered more than just LPP.
27. In *Rudd v IC & Verderers of the New Forest (EA/2008/0020)* the Tribunal clarified that 'the course of justice' does not refer to a specific course of action but "a more generic concept somewhat akin to 'the smooth running of the wheels of justice'" (paragraph 29).
28. In view of the above, the Commissioner is satisfied that all the withheld information falls within the scope of the exception. He has gone on to consider whether disclosure of the information would result in adverse effect to the course of justice.
29. The council has explained that the dispute to which the information relates is current and the threat of litigation remains a possibility. Disclosure of the information would provide third parties with access to the council's position in this matter, putting the council at a disadvantage. As a result, the council's ability to prepare for any proceedings would be prejudiced.
30. The Commissioner is satisfied that there is real potential for disclosure to result in adverse effect to the council's ability to defend its decision in a litigation context. It follows that, in future, the council would be discouraged from seeking legal advice, particularly in the context of complex, contentious matters which are potentially damaging to its interests and which would inhibit the effectiveness of its public function. The Commissioner has concluded that it is more likely than not that

disclosure of the withheld information would result in adverse effect to the course of justice.

31. As the Commissioner has concluded that regulation 12(5)(b) applies in this case, he has gone on to consider the relevant public interest arguments.

*Public interest in disclosure*

32. The EIR state clearly under regulation 12(2) that when considering exceptions to the duty to disclose environmental information, a public authority must apply a presumption in favour of disclosure and only where there is an overriding public interest in maintaining the exception should information not be released in response to a request.
33. In considering the benefit of disclosure of the report, the council has acknowledged that there is a natural interest in the content of the information, given the allegations of malpractice which are alleged.
34. The complainant has submitted that there is an overwhelming public interest in showing that planning applications are handled fairly. Disclosure of the information would, in this instance, either provide public reassurance that the council handled the planning matters in question properly or, where wrongdoing is identified provide a mechanism for accountability.

*Public interest in maintaining the exception*

35. The Commissioner considers that there is a strong public interest in the council not being discouraged from obtaining full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions for fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have an impact upon the extent to which legal advice is sought. This in turn may have a negative impact upon the quality of decisions made by the council which would not be in the public interest.
36. The Commissioner notes that disclosure of the information would be unfair since parties seeking to challenge the council's legal position would not be obliged to disclose any equivalent advice they had received in relation to this issue. Disclosure would, therefore, adversely affect the council's ability to defend its legal position. There is a public interest in maintaining the integrity and fairness of the course of justice and there are legal mechanisms, such as the right to appeal planning applications, in place for those wishing to challenge the council's decision in this matter.

37. The Commissioner is mindful that, at the time of the request, a claim for compensation had been submitted to the council and the withheld information was created for the purpose of establishing the council's legal position in relation to this claim. The threat of litigation was real and live. The Commissioner considers that this provides a significant weighting in favour of maintaining the exception because of the likely damage which disclosure would cause to the course of justice.

*Balance of the public interest*

38. In considering where the balance of the public interest lies, the Commissioner has given due weighting to the fact that the general public interest inherent in this exception will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the course of justice.

39. The Commissioner notes that the issues to which the legal advice relate were still live at the time of the request. He accepts that this factor carries considerable weight in favour of maintaining the exception as disclosure would result in adverse effect to the course of justice by revealing the council's legal strategy to potential opponents and undermining the principle that legal advice remains confidential. In the Commissioner's view, this weighs heavily in the balance of the public interest test in this case.

40. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the council and its legal advisers and that this would lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of thorough legal advice.

41. Whilst the legislation is applicant and purpose-blind, where the purpose behind a request identifies a broader public interest, such factors may, at times be relevant. In this case, the Commissioner has not presumed to ascribe any motivation to the requester but assessed the public interest on the available facts, including the arguments provided by the complainant.

42. The Commissioner has considered the decision notices and tribunal decisions referred to in the complainant's submissions and provided in support of their argument in favour of disclosure.



43. In relation to a decision notice issued to Wirral Council<sup>1</sup> in August 2013, the Commissioner notes that this upheld the public authority's use of the exception for adverse affect to commercial confidentiality to withhold the majority of a requested viability assessment. The Commissioner does not consider that either the facts of this specific decision notice or the conclusion reached contribute to the argument in favour of disclosure in this case.
44. In relation to another decision noticed cited by the complainant, namely a notice issued to Nottingham City Council<sup>2</sup> in June 2009, the Commissioner notes that, whilst this overturned the authority's application of regulation 12(5)(b), he does not consider that the facts of that case (which relate to a Nottingham City Council's designation of land under the Nottingham Inclosures Act 1845) are transposable here.
45. The Commissioner notes that the planning matters identified in the request relate to private developments and do not involve the use of public land or money. He does not see that there is an obvious broader public interest in the information being disclosed. He considers that the planning appeal process provides mechanisms for individual concerns to be raised and decisions to be challenged. Similarly, a remedy for complaints about maladministration is available via the Local Government Ombudsman.
46. The Commissioner further notes that there are other legal remedies available to parties with grievances against public authorities. In this instance, the withheld report was prompted by a party's complaint about the council's handling of their planning matters, which also gave notice of their intention to seek financial compensation from the council. The Commissioner does not consider that the purpose of the EIR is to provide a remedy for disputes between individuals and public authorities or, where they are available, to bypass other channels, such as courts disclosure rules, which might be more appropriate.

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<sup>1</sup> ICO reference: FER0488228, online here:  
[http://www.ico.org.uk/~media/documents/decisionnotices/2013/fer\\_0488228.ashx](http://www.ico.org.uk/~media/documents/decisionnotices/2013/fer_0488228.ashx)

<sup>2</sup> ICO reference: FS50194691, online here:  
[http://www.ico.org.uk/~media/documents/decisionnotices/2009/FS\\_50194691.ashx](http://www.ico.org.uk/~media/documents/decisionnotices/2009/FS_50194691.ashx)



47. In *Wears v The Information Commissioner (EA/2013/0057)* the Tribunal set out its view about the purpose behind the FOIA and clarified the distinction between the public interest and private interests. The Commissioner considers that this assessment is transferable to the EIR:

*"FOIA is in some cases used by requesters in order to obtain information which is of little or no public interest but is sought in order to further their private interests. That does not, of itself, make the request vexatious nor provide to the public authority an exemption from the duty to disclose. This Tribunal regularly declares that FOIA is blind to the requester's motive. Nevertheless, looking at this jurisdiction generally, securing private advantage, certainly private financial advantage, was not the purpose of the enactment of this ground – breaking statute."<sup>3</sup>*

48. Having inspected the information, the Commissioner can see no obvious sign of unlawful activity, evidence that the council has misrepresented any legal advice it had received or evidence of a significant lack of transparency where it would have been appropriate. Whilst he accepts there is a public interest in authorities being held accountable for decisions, in this instance, these do not outweigh the public interest in maintaining the exception and other remedies are available for testing the council's actions in this case.
49. The Commissioner has concluded that, in this case, the balance of the public interest favours maintaining the exception. He has, therefore, concluded that the council has correctly applied the exception to the withheld 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 .....**

**Andrew White**  
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