

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

**Date:** 27 August 2014

**Public Authority:** Spelthorne Borough Council  
**Address:** Knowle Green  
Staines-upon-Thames  
TW18 1XB

**Decision (including any steps ordered)**

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1. The complainant has requested information from Spelthorne Borough Council (the Council) about the proposed development of Kempton Park. The Council disclosed information to the complainant but redacted three documents citing the exceptions contained at regulation 12(4)(e), 12(5)(d) and 12(5)(f) of the EIR. The Commissioner is satisfied that the redacted information is exempt from disclosure on the basis of either regulation 12(4)(e) or 12(5)(d) and that in all the circumstances of the case the public interest favours maintaining each exception. However, the Commissioner has concluded that the Council breached regulation 5(2) by failing to respond to the requests within the time permitted by the EIR.

**Request and response**

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2. The complainant submitted the following request to the Council on 4 January 2014:

*'I would like to make a request to yourselves for information under the Environmental Information Regulations of 2004. I would be most grateful if you could acknowledge my request by return email. I would like you to send me the following information.*

1. Any documents/records relating to the Spelthorne Borough Council

*Cabinet and Planning Committee Tour of Kempton Park held on 21st March 2012, starting at 3pm.*

*2. Any documents/records relating to the meeting held at Kempton Park on 23 January 2013 starting at 3pm, attended by various representatives of Spelthorne Borough Council and various representatives of, and consultants to, The Jockey Club and Kempton Park.*

*3. Any documents/records relating to the meeting held at Knowle Green Council Offices on 9 December 2013 attended by Mark Boyes (consultant to The Jockey Club) and representatives of Spelthorne Borough Council.'*

3. The complainant contacted the Council again on 5 January 2014 in order to ask for the following additional information:

*'Please oblige by sending a copy of the agreement between the Council and the Racecourse relating to the land which was mentioned in the letter which Kempton Park handed out all over the place.'*

4. The Council responded on 4 February 2014 and provided the complainant with a copy of the agreement sought by her request of 5 January 2014. It also provided her with the attendance list of the tour held on 21 March 2012. With regard to the remaining aspects of her request the Council explained that it had received a number of requests about this subject matter. In order to ensure that all of the information relevant to such requests, including hers, had been located the Council had conducted a search of its email archive which had returned over 4,500 emails. The Council explained that it was in the process of assessing the public interest in relation to such emails but explained that given the amount of information it was not possible to respond to the requests in full within 20 working days.
5. The Council provided the complainant with a substantive response on 3 April 2014 in which it disclosed the information requested albeit with redactions applied on the basis of the exceptions contained at the following regulations of the EIR: 12(4)(e), 12(5)(f), 12(4)(d), 12(5)(d), 12(5)(e), 12(5)(b) and 13(1).
6. The complainant contacted the Council on 6 May 2013 in order to ask it to review the redactions applied to three particular documents.
7. The Council informed the complainant of the outcome of the internal review on 2 June 2014; the review upheld the application of the exceptions to the three documents in question.

## Scope of the case

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8. The complainant originally contacted the Commissioner on 12 March 2014 in order to complain about the Council's delays in providing her with a substantive response to her request. Following the outcome of the internal review, the complainant confirmed that she also wished to dispute the Council's decision to redact information from the three documents she identified in her request for an internal review.
9. The three documents in question are:
  - (a) An email dated 23 February 2012 which was redacted on the basis of 12(4)(e);
  - (b) A typed note of the meeting of 26 June 2013 which was redacted on the basis of 12(5)(d); and
  - (c) Handwritten notes of the meeting of 9 December 2013 which were redacted on the basis of 12(5)(d) and 13(1).
10. During the course of the Commissioner's investigation, he established that the document (c) did not in fact fall within the scope of any of the complainant's requests. This was because although it related to a meeting held on 9 December 2013 it was a different meeting to the one described in request 3 which the complaint submitted on 4 January 2014. (Document (c) had in fact been provided to the complainant as a discretionary disclosure by the Council.)
11. The Commissioner subsequently established that when it originally dealt with these requests the Council was of the view that it did not hold any recorded material falling within the scope of request 3. The complainant queried this position once it was established that document (c) did not fall within the scope of request 3. As a result, the Council undertook further searches in relation to request 3 and during the course of the Commissioner's investigation located handwritten notes taken by a council officer which did fall within the scope of the request 3, ie such notes did relate to the meeting described in that request. The Commissioner has referred to these notes as document (d). The Council provided the complainant with a redacted version of these meeting notes on 13 August 2014. The redactions were applied on the basis of regulations 12(5)(d) and 12(5)(f).
12. The scope of the Commissioner's investigation has therefore been to consider the redactions applied to documents (a), (b) and (d). He has also considered the time it took the Council to initially respond to the requests.

## Reasons for decision

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### Document (a)

13. The Council redacted this email on the basis of regulation 12(4)(e). This states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. The exception is a class based one; that is to say if information falls within the scope of the exception then it is engaged – there is no need for a public authority to demonstrate some level of prejudice.
14. The Commissioner is satisfied that the withheld information clearly falls within the scope of this exception given that it constitutes emails exchanged between Council employees.
15. Regulation 12(4)(e), like all of the exceptions contained within the EIR, is a qualified exception and therefore for the information that he accepts constitutes an internal communication, the Commissioner must consider whether the public interest in maintaining the exception outweighs the public interest in disclosing the information.

#### *Public interest arguments in favour of maintaining the exception*

16. The Council argued that its officers must be free to have open discussions with their managers, colleagues and advisers about the conduct of a matter without consideration that such discussions will be put into the public domain. The Council argued that disclosure of internal discussions would have the effect of removing private thinking space and encroach and impact on free, open and frank discussions. Moreover, the Council suggested that if it routinely disclosed such information, officers' discussions would be more guarded and may in turn impact on the effectiveness of the Council's decision making process.
17. In relation to the specific information that had been withheld the Council noted that the email was exchanged between the most senior officers in the Council (from Council's Head of Planning and Housing Strategy to the Chief Executive, copied to two Assistant Chief Executives). The Council emphasised that officers at this senior level definitely required a safe space for discussion. The Council also explained that this was still a live issue; pre-planning discussions were continuing and the Jockey Club Park intended to submit their planning application in respect of the development in due course.

#### *Public interest in arguments in favour of disclosing the information*

18. The Council acknowledged that there is a public interest in public authorities being open and transparent about how decisions and conclusions are reached. In the particular circumstances of this case the Council recognised that the potential development of the site was an issue of concern for local residents.
19. The complainant argued that the local residents were entitled to know about the content of the Council's discussions with the Jockey Club given that they would be directly affected by any development.

*Balance of the public interest arguments*

20. With regards to the arguments in favour of maintaining regulation 12(4)(e), although a wide range of information will be caught by the exception, in the Commissioner's view the public interest should be focused on the protection of the internal deliberation and decision making processes. As the Council itself has noted, arguments about protecting such deliberations and processes often relate to preserving a 'safe space' to allow a public authority to debate issues away from external scrutiny. Furthermore, they also relate to preventing a 'chilling effect' on free and frank views in the future. The weight that applies to these factors will vary from case to case, depending on the timing of the request and the content and context of the particular information in question.
21. As a general principle, the Commissioner agrees with the position advanced by the Council that there is a clear public interest in decision makers being in a position to make sound decisions and this necessitates the Council being able to discuss matters freely and frankly.
22. Turning to the circumstances of this case, in the Commissioner's opinion the Council's arguments regarding safe space deserve to be given notable weight; this is because it was clear that pre-planning discussions with the Jockey Club were ongoing at the time of the request and moreover it was clear that the Jockey Club intended to submit a planning application regarding the potential development in due course. Consequently, even following the completion of pre-planning discussions it was reasonable to argue that senior council officers would require a safe space to discuss any planning application that would be submitted in due course. Furthermore, the Jockey Club's proposed development of land for residential use clearly – and understandably – attracted a lot of interest from local residents. Therefore, the Commissioner accepts that disclosure of the withheld information at the time of the request would have been likely to result in an infringement into the Council's safe space to discuss matters relating to the proposed development at Kempton Park.

23. With regards to the possibility of the disclosure of the withheld information having some sort of 'chilling effect' on future internal discussions, the Commissioner recognises that there is a strong counter argument to this position. Namely that, public officials are charged with giving advice; they 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. Nonetheless, the possibility of a chilling effect cannot be dismissed out of hand. The Commissioner accepts that the chilling effect can attract weight in some circumstances.
24. In the circumstances of this case, in the Commissioner's opinion given that the matter in question remained live at the time of the request, he accepts that disclosure of the information could lead to a loss of frankness and candour in future internal discussions about this development. Moreover, the Commissioner accepts that disclosure of the withheld information could plausibly risk undermining the candour of similar internal discussions regarding other proposed developments in the future. The Commissioner has reached this finding given the frank and candid nature of the withheld information.
25. With regard to the public interest arguments in favour of disclosure, the Commissioner recognises that the proposed development is clearly one of great interest and concern to local residents. Consequently, he accepts that there is a public interest in disclosure of the information as it would provide the local community with a greater insight into the Council's views in relation to the nature of the proposed developments at Kempton Park. However, in the Commissioner's opinion the weight that should be attributed to such arguments is limited for two reasons.
26. Firstly, because at the time of the request no formal planning application had been submitted; rather only pre-planning discussions had taken place and the withheld information relates simply to these discussions. As the Council explained in its refusal notice, pre-planning discussions are an established route by which developers can discuss potential plans with planning authorities. This is so that they can receive advice on what issues are likely to arise prior to drawing up formal plans for approval, thereby saving time and money themselves, but also time and costs to planning authorities by reducing the issues that may arise during a formal planning application. It is important to note that any plans that developers discuss at pre-planning stage may be very different from any subsequent formal planning application. Consequently, if the withheld information was disclosed it would only provide the public with an insight into aspects of the pre-planning discussions in February 2012 (the date of the redacted email). Such discussions may bear little, if any, resemblance to the content of the formal planning application to be submitted in due course. In other words, to some extent there is a limited value in the disclosure of the withheld information with regard to

informing the public as to the nature of any actual development at Kempton Park. Furthermore, in the Commissioner's opinion it is important to remember that once a formal planning application is submitted, the public will have the opportunity to view the proposals and raise any objections which will be considered by the Council as part of the decision making process.

27. Secondly, the Commissioner notes that as part of the pre-planning process the Council has engaged with local residents' groups (albeit the Commissioner recognises that such groups may not necessarily have been satisfied with the nature of discussions) and further has disclosed notable amounts of information (albeit with redactions) in response to various information requests on this subject matter. As result, in the Commissioner's opinion it would not be valid to accuse the Council of a complete lack of transparency with regard to the nature of these pre-planning discussions.
28. In conclusion, the Commissioner does not dispute that there is a public interest in the disclosure of the information withheld under the basis of regulation 12(4)(e). However, for the reasons discussed above he is of the view that the weight which should be attributed to such arguments is limited. In contrast, the Commissioner believes that the weight that should be attributed to the safe space and chilling effect arguments are significant not least because of the ongoing nature of this matter and the candour of the withheld information. The Commissioner has therefore concluded that the public interest favours maintaining the exception contained at regulation 12(4)(e).

### **Documents (b) and (d)**

29. The meeting note of 26 June 2013 records a meeting between the Council and Kempton Park's management and their advisers. The meeting note of 9 December 2013 details the discussions between senior officers of the Council and an adviser to the Jockey Club. The Council redacted information from these documents on the basis of regulation 12(5)(d). This exception allows a public authority to withhold information if disclosing it would adversely affect the confidentiality of a public authority's proceedings where the confidentiality arises from statute or common law.
30. In the Commissioner's opinion the following issues need to be considered in order for this exception to be engaged:
  - What are the proceedings in question?
  - Is the confidentiality of those proceedings provided by law?
  - Would disclosing the information adversely affect that confidentiality?

31. With regard to the first point, in the Commissioner's view although the definition of 'proceedings' can cover a range of activities, the word implies some formality, i.e. it does not cover an authority's every action, decision or meeting. It will include, but is not limited to:
  - Formal meetings to consider matters that are within the authority's jurisdiction;
  - Situations where an authority is exercising its statutory decision making powers; and
  - Legal proceedings.
32. In each of these cases the proceedings are a means to formally consider an issue and reach a decision.
33. In the context of this case the Commissioner accepts that pre-planning discussions between the Council and the Jockey Club and their advisers about proposals to develop Kempton Park have a sufficient degree of formality to constitute proceedings for the purposes of this exception.
34. With regard to the confidentiality of proceedings, an authority cannot simply decide for itself that the proceedings of a particular meeting are confidential; there must be a legal basis for this. However, the confidentiality may be provided in statute or derived from common law. For the latter situation to apply, the information must have the quality of confidence; this means it must not be in the public domain already and it must be of importance to the confider and not trivial. There must also be an expectation that it would not be disclosed.
35. In its submissions to the Commissioner, the Council argued that there was every expectation on the part of the Jockey Club and its advisers that the contents of the meeting of 26 June and that of 9 December would be confidential. In relation to the redacted information the Council explained that this was clearly information that was of importance and was not in the public domain. Having considered the content of the redacted information and taking into account the context of the meetings, the Commissioner is satisfied that such information has the quality of confidence. Furthermore, the Commissioner is satisfied that the disclosure of some of the information from each of the meeting notes does not undermine the confidentiality of either meeting in respect of the withheld information. This is because of the different nature of the information that has been withheld compared to the information that has been disclosed.
36. With regard to the adverse effect, the Council argued that it needed to have the ability to have free and open conversations with developers to ensure pre-planning applications are effective for all concerned. If such



information was routinely disclosed then developers are less likely to come forward for discussions, or be likely to alter the frankness of such discussions. If such discussions did not take place - or were less candid and thus less effective - then developers may waste time and money putting in an application that is wholly unacceptable.

37. Having considered the content of information redacted from the meeting note of 26 June and the note of 9 December meeting, the Commissioner accepts that it is plausible for the Council to argue that its disclosure would adversely affect the candour with which other developers are likely to approach pre-planning discussions. The Commissioner therefore accepts that its disclosure would adversely affect the confidentiality of such discussions in the future.
38. Having concluded that the exception is engaged, the Commissioner must consider whether the public interest in maintaining the exception outweighs the public interest in disclosing the information.

*Public interest arguments in favour of maintaining the exception*

39. The Council argued that there was a public interest in individuals and organisations being able to seek advice from planning authorities on a confidential basis for ideas that they have for potential future development free from the public eye initially. As discussed above, such pre-planning discussions can save both developers - and the planning authorities - time and money. In particular the Council noted that as the planning applications that are submitted may be significantly different from ideas discussed at a pre-planning stage, disclosure of pre-planning discussions may result in the Council having to address objections to plans which will never actually be formally submitted. The Council also emphasised that the public has the right to object to planning issues once formal planning applications are submitted for approval.

*Public interest arguments in favour of disclosure*

40. These are same as those outlined above in relation to regulation 12(4)(e).

*Balance of the public interest arguments*

41. The Commissioner acknowledges that disclosure of the withheld information would provide local residents with an insight into the issues the Jockey Club was considering during the pre-planning stage. Therefore, he accepts that disclosure of the information is clearly in the public interest as it could be used, to some extent, to inform the public debate about this development. However, for the reasons discussed above in relation to regulation 12(4)(e), the Commissioner believes that

the weight that should be attributed to these arguments is limited. Furthermore, the Commissioner notes that the Council has disclosed some parts of these meeting notes and thus the public already has, to some degree, an understanding of what was discussed at each meeting.

42. With regard to the public interest in favour of maintaining the exception, the Commissioner believes that there is always a general public interest in protecting confidential information. Furthermore, in the particular circumstances of this case the Commissioner agrees with the Council that there is a considerable public interest in protecting the confidentiality of pre-planning discussions primarily with the Jockey Club. This is in order to protect Council resources, be it from having to dealing with objections from the public to pre-planning discussions or from processing planning applications that, because they have not been subject to rigorous pre-planning discussions, require considerable Council resources.
43. For these reasons, the Commissioner has concluded that the public interest favours maintaining the exception in respect of the information redacted from both document (b) and document (d).

### **Procedural matters**

44. Under regulation 5(2) of the EIR a public authority has to respond to a request within 20 working days. However, regulation 7(1) allows a public authority to take up to 40 working days if the complexity and volume of the information means that it is impracticable to comply within 20 working days.
45. In the circumstances of this case, although the Council informed the complainant that it needed an additional 20 working days to consider her request, it failed to complete these considerations within this extended timescale because it did not issue its substantive response until 3 April 2014, some 64 working days after the date of the request.
46. The Council explained to the Commissioner that in order to ensure that the complainant's requests were answered fully it took the view that it was logical to deal with the broader request it had already received concerning this proposed development. Due to the amount of information that had to be searched in order to deal with this earlier request, as summarised in paragraph 4, this resulted in a delay before the complainant's requests could be responded to.
47. The Commissioner can understand the approach taken by the Council in the particular circumstances of this case. Nevertheless, any failure to provide a response to request with 40 working days constitutes a breach of regulation 5(2).

## Right of appeal

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48. 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 123 4504

Fax: 0870 739 5836

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

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

49. 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.
50. 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 .....**

**Alexander Ganotis**  
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