

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

### **Decision notice**

**Date:** 13 April 2015

**Public Authority:** Kent County Council  
**Address:** County Hall  
Maidstone  
Kent  
ME14 1XQ

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

---

1. The complainant has requested information in relation to meetings the Leader of Kent County Council (the council) had with regards to East Kent Opportunities LPP (EKO) over a two year period.
2. The council provided some information but refused the remaining as it considered the information to be commercially sensitive. Following an internal review, the council amended its refusal to instead rely on section 36(2)(b) and (c) of the FOIA. During the Commissioner's initial investigations, he asked the council to consider whether the response should have been made under the EIR. With this, the council sought to rely on 12(4)(e) of the EIR – Internal Communications – and considered 12(5)(d) of the EIR – Proceedings protected by law, in this case litigation privilege and legal advice privilege – would also apply to two of the three briefing notes being withheld. The complainant has advised the Commissioner he does not consider the information should be withheld.
3. The Commissioner's decision is that the council has correctly relied on regulation 12(4)(e) of the EIR to withhold the two briefing notes that the council also considered were exempt under 12(5)(d). So he has not gone on to consider the application of 12(5)(d). The Commissioner has also determined that the briefing note, which is a minute meeting attended by the then Chief Executive of the TDC dated 23 October 2013, is not covered by regulation 12(4)(e) of the EIR. The council did not apply any other exception to this information.

4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Provide the complainant with a copy of the minute meeting attended by the then Chief Executive of the TDC dated 23 October 2013.
5. 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.

### **Request and response**

---

6. On 9 July 2014, the complainant wrote to the council and requested information in the following terms:

*"Please tell me if the Leader of Kent County Council has had any meetings with the staff or management committee members of East Kent Opportunities LLP or its agents or consultants during the past 2 years to discuss EKO's planning application to build houses on land which it owns at New Haine Road Ramsgate.*

*Please let me know the dates of these meetings and the attendees.*

*Please provide me with copies of any minutes or notes of these meetings and please provide me with copies of any documents or e-mails related to the EKO planning application at New Haine Road Ramsgate which have been produced by, or sent to the Leader of the Council"*

7. The complainant contacted the council again on the 8 July 2014 as he had not received a response from the council.
8. The council responded on the 9 July 2014. It confirmed that the leader of the council did attend part of one meeting of the EKO management committee on 14 November 2013 and provided an email and agenda for it. The council stated that a copy of the minutes for that meeting had already been provided to the complainant by the EKO following the request he had made to them.
9. The council also provided a copy of the 3 August 2013 briefing notes on the progress of the planning application which was distributed to the

leader of the council and other interested parties in regards to the council's investment and partnership in the EKO.

10. The council also advised that other briefing notes were prepared on the 18 October, 22 October and 4 November 2013 which related to the strategy to be followed by council and EKO members following the determination to refuse the application. The council refused to provide these briefing notes as it determined that the information contained in them is commercially sensitive in terms of EKO's core business. Especially now, because the planning application has been recovered for decision by the Secretary of State.
11. The council appeared to be relying on section 43 of the FOIA to refuse this information.
12. The complainant requested an internal review on the 16 July 2014 as he considered that the council were wrong to withhold the information on the grounds of it being commercially sensitive.
13. The council provided its internal review on the 13 August 2014. It no longer sought to rely on section 43 of the FOIA, but instead considered that section 36(2)(b) and (c) of the FOIA was engaged – prejudice to effective conduct of public affairs applied because the release of the information requested would (or would be likely to) inhibit the free and frank provision of advice, or free and frank exchange of views for the purposes of deliberation; or would (or would be likely to) otherwise prejudice the effective conduct of public affairs.

### **Scope of the case**

---

14. The complainant contacted the Commissioner on 4 September 2014 to complain about the way his request for information had been handled.
15. During the Commissioner's investigations and on receipt of a copy of the withheld information, he invited the council to reconsider whether the response should in fact have been under the EIR rather than the FOIA. It seemed to the Commissioner that the withheld information was environmental information.
16. On this, the council advised that it did wish to submit its reasons for withholding the information under the EIR. It confirmed that the withheld information was exempt under regulation 12(4)(e) of the EIR – Internal Communications – and 12(5)(d) of the EIR – Proceedings protected by law, in this case litigation privilege and legal advice privilege – would also apply to the subject matter of one entire briefing

note and all of the content of a second briefing note, except for the first and final two paragraphs of the second briefing note.

17. The council wrote to the complainant on 22 January 2015, informing him of its refusal now under the EIR.
18. The complainant has advised the Commissioner that he is not satisfied that the exceptions apply in this case.

The Commissioner considers that the scope of the case is to firstly determine whether the withheld information is environmental information and if so go on to consider whether the council is correct to withhold the information it has under regulation 12(4)(e). The withheld information being three separate documents that the council refer to as "briefing notes" dated 18 October 2013, 23 October 2013 and 4 November 2013.

19. If the Commissioner finds that the council was incorrect to withhold the information under regulation 12(4)(e), he will then go on to consider whether the council was correct to also apply regulation 12(5)(d) of the EIR to the two briefing notes dated 18 October 2013 and 4 November 2013 only. As those are the two that it considers regulation 12(5)(d) also applies.

## **Background**

---

20. The council has explained to the Commissioner that East Kent Opportunities LLP (EKO) is a joint venture company which is jointly owned by the council and Thanet District Council (TDC). EKO applied to TDC, the local planning authority, for outline permission to develop land for mixed use which it owns at New Haine Road Ramsgate.
21. This is part of EKO's plan to redevelop parts of East Kent, but has proved controversial for some local residents.
22. The withheld information is made up of briefing and meeting notes provided to the leader of the council, cabinet member for economic development, and senior council officers between October and November 2013 following the refusal of the planning application by TDC. This information presented position statement, legal advice, options and likely impacts of a range of issues to be considered in determining next steps.
23. In light of the advice and guidance, it was agreed to pursue an appeal and the application was subsequently recovered by the Secretary of State and a public inquiry was undertaken on 17 and 18 August 2014.

24. The Secretary of State's decision for the appeal of the Eurokent site was notified to the EKO on 29 October 2014. EKO's appeal was upheld and it is now moving forward with outline planning approval for mixed use development at its Eurokent site.

## Reasons for decision

---

### Is the Information Environmental?

25. The Commissioner has first considered whether the requested information is environmental information as defined by regulation 2(1) of the EIR. The withheld information – briefing and meeting notes – appears to the Commissioner to be "*measures... and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...*" as set out in regulation 2(1)(c). It is discussions around next steps, following a planning permission being declined. Subsequently an appeal was made, which was successful.
26. With this the Commissioner is satisfied that the EIR is the correct regime to consider this withheld information.

### Regulation 12(4)(e) of the EIR

27. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
28. The Commissioner has published guidance on regulation 12(4)(e)<sup>1</sup> which includes a description of the types of information that may be classified as 'internal communications'.
29. The Commissioner sees the first factor that must be considered is whether the information in question can reasonably be described as a 'communication'. In his guidance, the Commissioner acknowledges that the concept of 'communication' is broad and will encompass any information someone intends to communicate to others, or places on file so that others may read it.

---

1

[http://ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Environmental\\_info\\_reg/Detailed\\_specialist\\_guides/eir\\_internal\\_communications.ashx](http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_internal_communications.ashx)

30. The Commissioner is satisfied in this case that the withheld information is a 'communication' for the purposes of the regulation. The Commissioner must now consider whether the withheld information would fall into the category of 'internal' communications.
31. The EIR does not give a definition of what is meant by 'internal' and so, in absence of one, a judgement must be made by considering the relationship between the sender and the recipient, the circumstances of the particular case and the nature of the information in question. Usually though, an internal communication is one that stays within the public authority.
32. The council has told the Commissioner that the writer of the withheld information and all the parties that the documents are addressed to, or copied to, are its council officers or members and in one case the former Chief Executive of the TDC. It has confirmed that the information in these documents is not in the public domain.
33. The Commissioner is satisfied that the majority of this withheld information is internal communications as the council has confirmed it has only been internally within the council. The only issue is the 23 October 2013 briefing note which is a minuted meeting that was also attended by the then Chief Executive of TDC. TDC being a separate public authority to the council.
34. The council has told the Commissioner that its view is that an exception should be made to the general rule that communications between public authorities or public authorities and external advisers will normally not amount to internal communications. The council refers to the exception made in the case of *DFT v Information Commissioner EA/2008/0052* where Sir Rod Eddington had become embedded within the Civil Service and was entitled to benefit from the free thinking space available to Ministers and their civil servants.
35. The Commissioner notes in the case of *South Gloucestershire Council v Information Commissioner and Bovis Homes Ltd EA/2009/0032* the Information Tribunal found that the reports were not internal communications, rejecting an argument that the consultants were "embedded" in the council in a similar way to Sir Rod Eddington in the DfT, and noting that the facts of the Eddington case were "exceptional".
36. The council acknowledges that the circumstances around this case are factually different; however it considers that the EKO – which both the council and TDC are joint owners of – creates a necessity for them to have the ability of a free thinking space for the members and senior officers of the two authorities, as joint owners.

37. The council's view is that to deny this free thinking space, around a joint venture, in that anything recorded and distributed between the two authorities will immediately be disclosable to the general public, following a request, makes the operation of such a venture virtually impossible.
38. It considers the knock on effect to this would be local authorities being unwilling to enter into joint venture arrangements because they will be impossible to manage effectively and/or the parties to joint ventures would not minute the content of sensitive meetings to prevent the prospect of immediate public disclosure.
39. It therefore sees that communications between the council and TDC in relation to the EKO should be seen as the internal communications of both public authorities for the purposes of regulation 12(4)(e) of the EIR.
40. The Commissioner's guidance on regulation 12(4)(e) at paragraph 30 discusses communications recording third party information which states:

*"Communications can still be internal even if they record discussions with third parties or contain information received from third parties. For example, a note of a meeting with a third party, created and circulated within a public authority for its own use, is still an internal communication. It is the form of the communication that is important, rather than its content."*

41. But if the public authority forwards this internal communication to someone outside the authority, that communication, in the Commissioner's view, will generally cease to be internal.

42. Paragraph 25 of the Commissioner's guidance states:

*"Communications between other public authorities (eg between central government and a local authority, or between two local authorities) will not constitute internal communications."*

43. The minute meeting dated 23 October 2013 attended by the then Chief Executive of TDC was created internally, but as confirmed by the council, a copy of that meeting was forwarded outside of the council to the then Chief Executive of TDC. In the Commissioner's view, because it was sent outside of the council, the minute meeting no longer constitutes an internal communication for the purposes of regulation 12(4)(e).
44. The Commissioner has given consideration to the council's reasoning's and arguments in this case, but it is a communication shared by one

council to another, albeit with regards to a joint venture they have undertaken. So in the Commissioner's view, this does not constitute an internal communication under regulation 12(4)(e) of the EIR.

45. The Commissioner has to consider whether the information fits as an internal communication under the exception not whether or not it should be because of what the possible effects could occur if the information were to be released. He also, does not consider that this case to be "exceptional" as noted in paragraph 35 above.
46. Therefore the Commissioner's decision is that the council is not able to rely on regulation 12(4)(e) of the EIR to withhold the minute meeting attended by the then Chief Executive of the TDC dated 23 October 2013 and should provide a copy of this to the complainant.
47. The Commissioner has found that the remaining withheld information, the briefing notes dated 18 October 2013 and 4 November 2013, falls within the parameters of regulation 12(4)(e) of the EIR as the council has confirmed these were not shared outside of the council.

### **Public Interest Test**

48. With regards to the briefing notes dated 18 October 2013 and 4 November 2013 that the Commissioner has found to be engaged by regulation 12(4)(e) of the EIR, this information is subject to the public interest test as required by regulation 12(1) of the EIR.
49. The public interest test is to determine whether in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
50. What the Commissioner must take into account, when carrying out the public interest test, is a presumption towards disclosure of the information as required by regulation 12(2) of the EIR.

### **Public interest in favour of disclosure**

51. The council has stated that it accepts the need to be transparent in its delivery of its services and in this case regeneration for the benefit of local communities.
52. This in turn would assist the public in understanding the internal workings of the council.
53. The complainant has stated that this matter has led to widespread comment in the local and regional media as well as social media. He has told the Commissioner that people want to know how the council and TDC have got themselves in this position. The disclosure of the



information would, in his view, reveal how the situation came about, serve to promote transparency and accountability of two public authorities and how they spend public money. It would also add to the public understanding of this issue and may possibly reveal wrong doing or inappropriate behaviour by officers or elected politicians involved.

54. The complainant considers the council's considerations to loss of thinking space and chilling effects were this information to be released within a short time of the decision making is not sufficient to withhold the information requested.
55. He states that this is because his request for the information came some 18 months after the documents were produced and the initial decision to refuse planning permission. It was also made six months after the reversal of this decision, granting the planning permission.
56. The complainant refers to paragraph 50 of the Commissioner's guidance on regulation 12(4)(e) of the EIR, "*The need for a safe space will be strongest when the issue is still live. Once a public authority has made a decision, a safe space for deliberation will no longer be required and the argument will carry little weight*".
57. With regards to any chilling effect arguments, the complainant states that any argument claiming that the disclosure of the information would inhibit the open and frank briefing of councillors and may damage relations with TDC should not be accepted. This is because the code of Conduct for Local government Officers requires that they provide politicians with factual, impartial advice. He also considers that the officers should take in to account that this advice may be disclosed and not deter them from carrying out their duties as set out in the Code of Conduct.
58. The complainant argues that the possibility of disclosure may actually encourage officers to ensure that their advice is of the highest standard.
59. The Commissioner also considers that safe and chilling effect arguments do not automatically carry much weight in principle. The weight has to be considered on the specific circumstances of the individual case, including the timing of the request, whether the issue is still live at the time of the request, and the content and sensitivity of the information in question.

### **Public interest in maintaining the exception**

60. The public interest consideration with regulation 12(4)(e) mainly relate to the protection of thinking space and the ability to have full and frank discussions without fear that the information will be disclosed.

61. The council has told the Commissioner that it aims to be innovative and commercially effective to achieve best outcomes and this has resulted in different delivery models to achieve regeneration outcomes. It therefore considers that disclosure of free and frank exchanges that inform the establishment and operation of such innovative models would essentially reduce or eliminate thinking space for members and officers in the future and thus reduce or eradicate the ability to explore best outcomes for regeneration in the future.
62. The council has also stated that, whilst it may be in the public interest to release these documents in order to assist the public in understanding the internal workings of the council, it is not in the public interest for internal minutes and briefing notes containing free and frank discussions to be published, especially in relation to an issue which is self-contained and is ongoing.
63. The council has said that it notes that the planning decision and appeal outcome are now publically available documents and that the appeal has been determined following full consideration of all relevant matters in accordance with planning law. So it considers that there has been full scrutiny of all the relevant issues.
64. The Commissioner does consider that having these planning processes in place, does go some way to informing the public on the planning process and decisions made.
65. The council has also raised that this is not the end of the story for the project relating to the land in question. There is going to be a need for future thinking space in relation to the policy for the development of this land.
66. The council maintains the view that publication of the withheld information would deny the council officers and its Members a meaningful thinking space in relation to both this ongoing matter and in relation to similar issues in the future, which would stifle meaningful debate.
67. It considers this is because it would make its Members and officers very cautious about giving open and honest opinions or entering into frank and meaningful discussions regarding any issue which was at all controversial.
68. Alternatively, the council says that any such meetings would not be minuted in order to avoid risk that the minutes would be made public. This scenario would not be in the long term public interest as it would reduce the transparency of the conduct of public affairs rather than add to it.

69. The council conclude that publication of its internal discussions and debate would be detrimental to the council, its business, its relationship with TDC and the future successful operation of the company having a knock on effect to its members and officers crucial future thinking space and full co-operation from other, potential future, third party companies that the council may look to work with.
70. The Commissioner accepts that, although there has been an initial decision and an appeal, this case, as a whole, is still ongoing. And therefore disclosure of the information could reduce the council's thinking space and the ability to have full and frank discussions without fear that the information will be disclosed. This could detrimentally affect the decision making process in the future/ or potentially lead to less full and frank advice being provided in the future.
71. The planning process does have avenues of appeal for those opposed to planning decisions made, which adds weight to maintaining the exception for the withheld information as the appeal process is a legitimate route for disputing decisions made.
72. The complainant also stated that disclosure of the withheld information may reveal possible wrong doing in the council. Again, there are bodies such as the Local Government Ombudsman, available to be able to consider such issues. The Commissioner does not consider much weight can be given to suspicions that the information may show wrongdoing.
73. Lastly, the Commissioner is of the opinion that ultimately, regardless of the advice and free and frank discussions, it is the decisions and appeal decisions made as to whether the planning permissions be granted that determine the outcome of cases. And so greater weight falls on the public having access to these decisions rather than the internal communications in this case.
74. In consideration of this and the specific circumstances of the case, the Commissioner considers that there is sufficient weight in the argument of safe space and that there is still a credible argument to the chilling affect to find that the public interest in maintain the exception outweighs that for disclosure.
75. Therefore the Commissioner's decision is that the council was correct to withhold the remaining two the briefing notes dated 18 October 2013 and 4 November 2013 in this case.

## Right of appeal

---

76. 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: 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)

77. 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.
78. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**