

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

Decision notice

Date: 17 June 2019

Public Authority: Tonbridge and Malling Borough Council
Address: Gibson Building
Gibson Drive
Kings Hill
West Malling
ME19 4LZ

Decision (including any steps ordered)

1. The complainant requested information relating to a planning consultation. Tonbridge and Malling Borough Council ('the Council') refused to provide the requested information citing regulation 12(4)(b) of the EIR on the basis the request was manifestly unreasonable.
2. The Commissioner's decision is that the Council was correct to handle the request under the EIR. She finds that the Council correctly applied regulation 12(4)(b) to the request and that the public interest in maintaining the exception outweighs the public interest in disclosure.
3. The Council has complied with the requirement of regulation 9 of the EIR to provide advice and assistance. However, the Commissioner also finds that the Council breached regulation 11(4) of the EIR by failing to respond to the review request within 40 working days. As the Council has now provided a review response, it is not required to take any steps to comply with the legislation. In addition, the Council breached regulation 14(3)(b) by failing to include its public interest considerations in its refusal notice.

Background

4. The Commissioner understands that the original request sought copies of all correspondence, minutes and any documents exchanged, between the Council and a consortium of six land owners and their consultants, in respect of one of the sites forming the development strategy for the

emerging Local Plan. This was over a period which potentially spanned five years.

5. The Council has explained that the Borough Green Gardens site in question has been discussed at length by Members of the Council, including the complainant (who is also a Borough Councillor). These have been documented through public meetings and decisions up to Full Council, which approved the Local Plan for the purposes of further public consultations, and submission to the Secretary of State, by a significant majority on 12 September 2018.
6. The Council said there have been *"two extensive rounds of public consultation on the Local Plan"* and that the 20,000 representations received during the consultation last autumn had been redacted and published on the Council's website. These matters are now being considered by the appointed Local Plan Inspectors and will form part of an examination later this year.

Request and response

7. On 10 September 2018 the complainant wrote to the Council and requested information in the following terms:

"1. Details of all meetings between Officers, Members and the Consortium and its representatives, between the end of the Reg 18 consultation and the Cabinet meeting on 3rd September.

2. Any emails, minutes and contemporaneous notes from those meetings or generated as a result of those meetings.

3. Any emails, minutes or contemporaneous notes of any internal meetings between Officers, or between Officers and Members, referring to Borough Green Gardens and offers from the Consortium.

4. Any emails, letters or telephone conversations between Officers and the Consortium or its representatives and contemporaneous notes.

5. Details of any advice or consultation provided to TMBC [ie the Council] by the Consortium or its representatives."

8. The Council responded on 8 October 2018 as follows:

"Having reviewed the information you have requested, as required by the Act, I am able to advise that we do hold some of the specific information that you have asked for. The email account of the Director [position redacted] has been deleted [as

a retired employee], so I do not have access to any correspondence directly between that account and the people you have requested, but I do have some correspondence where copied in.

I have reviewed the total number of emails, meetings, notes and telephone conversations over this period and I can advise that this would necessitate officers reviewing every single correspondence to redact any personal data/information as required by the GDPR (2018) and any commercially confidential information. This would fall within the scope of the Environmental Information Regulations and in particular the exception set out at Regulation 12(4)(b) as it would be 'manifestly unreasonable' insofar that it would create unreasonable costs or an unreasonable diversion of resources. I would consider that provision of this information would take an officer in the region of 37 hours to complete conclusively and in full."

9. The complainant requested an internal review on 9 October 2018. This was not provided until the Commissioner intervened (see 'Scope' section below).

Scope of the case

10. The complainant initially contacted the Commissioner on 29 November 2018 to complain about the way his request for information had been handled. Following an exchange with the complainant it became apparent that the internal review had still not been completed by the Council.
11. As a result, the Commissioner wrote to the Council on 3 January 2019 asking it to complete the requested review.
12. Subsequently, the Council provided its internal review on 28 January 2019, partly revising its position. It advised the complainant that it had been able to retrieve the former Director's emails from its back-up system, Netmail. It explained that emails and meetings relating to the Borough Green Gardens could span a five year period and provided the number of emails potentially in scope of the request, together with those for other officers who may have received communications about the Borough Green Gardens, either on the 'live' or back-up systems. It also identified the dates of known meetings in scope held during the five year period.
13. It advised the complainant as follows:

"To conclude, my investigation identified that some emails relating to the Borough Green Gardens site have been retained, but the time it would take to prepare them for release would be manifestly unreasonable. The majority of records relating to the site appear to be on individual Netmail accounts, which would also require an extensive amount of time to review each of the Netmail accounts and then prepare any relevant emails for release. I consider that the EIR request is overly wide in its remit and would advise that should it be framed in a more concise way, taking account of my investigation above."

14. On 18 February 2019 the complainant contacted the Commissioner further to complain about the Council's handling of his request, raising concerns about whether the Council's processes had been unduly influenced. The Commissioner cannot consider any allegations of potential wrongdoing as this does not fall within her remit.
15. The complainant contended that the 175,000 plus emails potentially in scope could readily be reduced by filtering them by sender/receiver, date and subject. He also said that no information would need redacting because as a Councillor, he is "*inside the circle*" and that no information could be commercially sensitive because the Plan had not been approved. The Commissioner would highlight that providing a response to a request under the FOIA or EIR is effectively responding to the world at large and therefore the Council was entitled to consider the potential wider audience and the requester's role as a Councillor is not relevant to the consideration of either piece of legislation.
16. In this case, the Commissioner has considered whether the correct legislative regime was applied to the request and whether the request was 'manifestly unreasonable' under regulation 12(4)(b) of the EIR. She has also considered whether the Council complied with the requirement to provide advice and assistance (regulation 9(1) of the EIR) and whether it completed a timely internal review (regulation 11(4)).

Reasons for decision

17. The Commissioner has first considered whether the requested information constitutes environmental information.

Regulation 2 - Is any of the information environmental?

18. The Council told the Commissioner that it had considered the request under the EIR because:

"The matters relating to the original request are associated with the preparation of the emerging Tonbridge and Malling Local

Plan, specifically regarding one strategic site allocation at Borough Green. The Local Plan as a whole, and the strategic allocation in question specifically, are policies affecting or likely to affect elements of the environment and the request therefore clearly falls within Regulation 2(1)(c) of the EIR Regulations. Therefore it is entirely appropriate in the Council's opinion to deal with the request under the EIR regime."

19. Information is environmental if it meets the definition set out in regulation 2 of the EIR. Briefly, subparagraph 2(1)(a) of the EIR defines environmental information as material on the state of the elements of the environment including, for example the atmosphere, air, water, land and landscape.
20. Regulation 2(1) states environmental information is 'any information ... on' the matters listed later in regulation 2(1). This means regulation 2(1)(c) covers:
 - documents setting out the measures themselves;
 - any information on the way they have been developed and are applied; and,
 - any information about the results of that application.
21. The Commissioner considers that information relating to the Council's Local Plan would constitute a 'measure' as per 2(1)(c) of the EIR and that the Plan would affect, or be likely to affect, elements of the environment, such as land. In the Commissioner's opinion, the information requested by the complainant constitutes environmental information and that the Council was correct to handle the request under the EIR.

Regulation 12(4)(b) – Requests that are manifestly unreasonable

22. Regulation 12(4)(b) of the EIR provides:

*"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that-
(b) the request for information is manifestly unreasonable ..."*

23. The Commissioner has issued published guidance¹ on the application of regulation 12(4)(b). This guidance contains the Commissioner's definition of the regulation, which is taken to apply in circumstances

¹ <https://ico.org.uk/media/for-organisations/documents/1615/manifestlyunreasonablerequests.pdf>

where either the request is vexatious, or where the cost of compliance with the request would be too great. In this case the Council considers that the cost of compliance is applicable.

24. The EIR do not contain a limit at which the cost of compliance with a request is considered to be too great. However, the Commissioner's guidance suggests that public authorities may use *The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004*² ("the Regulations") as an indication of what Parliament considers to be a reasonable charge for staff time. The Regulations specify that £450 is the appropriate limit for local government authorities, and that the cost of complying with a request should be calculated at £25 per hour; this applies a time limit of 18 hours.
25. For the purposes of the EIR, a public authority may use this hourly charge in determining the cost of compliance. However, the public authority is then expected to consider the proportionality of the cost against the public value of the request before concluding whether the request is manifestly unreasonable.

Is the exception engaged?

26. The Council has informed the Commissioner that, having liaised with its IT Service, it had been able to identify deleted emails from the relevant former employee via its back-up system, Netmail.
27. The Council had, therefore, requested information from the IT Service regarding the number of emails for this individual on his Netmail account for the last five years; this is based upon the period that may contain emails relating to the Borough Green Gardens site. The results are provided below:

1/1/18 - 22/11/18 total 53,101
1/1/17 - 31/12/17 total 55,310
1/1/16 - 31/12/16 total 37,894
1/1/15 - 31/12/15 total 16,092
1/1/14 - 31/12/14 total 12,779

28. The Council advised that in order to find emails relating to the Borough Green Gardens site in the relevant individual's Netmail account, it would be necessary to open every email. Based upon a total of 175,176 emails

² <http://www.legislation.gov.uk/uksi/2004/3244/contents/made>

and making an assumption that it would take 30 seconds to read each email, the Council said it would take one person 197 working days to view all the emails - around 39-40 weeks working 7.4 hours a day. In addition, any relevant emails would need to be redacted in order to meet GDPR requirements. It explained:

"... as the quantum of emails relating to the Borough Green Gardens site is unknown it is not possible to provide a calculation on how long this might take. Notwithstanding the latter point, I consider the amount of time it would take to go through [the relevant individual's] Netmail would comprise a manifestly unreasonable amount of time to commit a full time resource in order to find those emails that relate to the Borough Green Gardens site."

29. Turning to other officers who may have received communications on the Borough Green Gardens site, the Council said it had contacted everyone in the Planning Policy Team, together with the relevant manager. Three officers confirmed having received communications on the Borough Green Gardens site, however, how these items have been retained differ from officer to officer. In one case, the officer has only retained emails for the last two months, in another case only for the last month. All other emails have been deleted, however, copies will have been kept on their Netmail accounts. One officer has retained a selection of emails for the last three years, but this is not comprehensive as they have confirmed that other emails relating to the Borough Green Gardens site were deleted and are therefore on their Netmail account back-ups. The retained information relates only to emails and does not comprise separate notes on telephone conversations, letters, meeting notes or any other notes.
30. The Council advised that the details as to what has been saved are as follows:
- 204 stored emails
 - An unknown number of deleted emails contained within the officers' respective Netmail accounts
31. In order to provide the 204 stored emails, the Council said it would be necessary to open and read each email and redact where necessary. It also added the following:

"Please note that redaction does take time to complete and the email would then need to be scanned and uploaded. In addition, some information may be commercially sensitive and, as such, would require extensive redaction. Based upon an average time per email of 15 minutes this would take 51 hours to complete. I

consider this to be a manifestly unreasonable amount of time to commit a full time resource."

32. Public authorities handling cost requests under the FOIA are not permitted to include time spent (or likely to be spent) on considering whether any exemptions apply or time spent (or likely to be spent) in removing any exempt information, also known as "redaction" in their cost estimates³. This is because these activities do not fall within the list of four permitted activities which can be included. The Commissioner's guidance on charging for environmental information⁴ includes the following:

"The Commissioner strongly discourages public authorities from charging for staff time spent considering the application of any exceptions and redacting excepted information. The subjective nature of this task, especially where reliance on an exception is particularly contentious or the public interest is a borderline decision, could result in charges which are objectively unreasonable to pass on to the requestor."

33. The Commissioner's view is that the Council should exclude all redaction related activity from its cost estimate as this request has been handled under the EIR.
34. In relation to meetings, the Council confirmed it had identified the dates on which *"some meetings took place"* as follows:

06.12.17

20.12.17

24.01.18

25.01.18

01.05.18

06.08.18

³ https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

⁴ <https://ico.org.uk/media/for-organisations/documents/1627/charging-for-environmental-information-reg8.pdf>

35. However, the Council understands that this may not be a comprehensive list of meetings as it comprises the records of only one officer. Other officers have attended meetings but do not currently hold records of the dates.
36. In response to the Commissioner's questions about the potential for reducing the numbers of emails in scope, the Council has explained that the search functions for Netmail are not as efficient as those used for searching in, for example, Outlook. It said:

"Advanced search features allow for searching on key words and names, but unless the right search criteria are used there is a risk that some emails would be lost.

Due to the wide ranging scope of the original request, all recipients copied into an email may also appear on a given search. Each 'hit' would have to be reviewed to see if it was just a copy and of course the final collection of emails would then need to be redacted to remove personal data (email addresses etc.) and commercially confidential information. It may be necessary to check with the relevant parties whether the latter could be shared or not, which would also take time."

37. The Commissioner had asked the Council to provide her with a sample of ten emails from the Netmail archive using a search on applicable search terms. She suggested that a common sense approach might be to search for emails sent in the periods around the known meeting dates.
38. In response, the Council provided a screenshot and explained that it had conducted the requested sample search using the key words 'Borough 'Green', 'Borough Green Gardens' and 'BGG' for the requested date range. It explained that :

"The total number of hits on one staff member's inbox on this search term was 511. This would have to be repeated for 10 members of staff inboxes, including that of the former Director [position redacted], which we do now have access to.

Reviewing the number of emails is the most time consuming part of the request and justifies the manifestly unreasonable conclusion on its own. As noted a scaled down request relating to meetings has since been received and responded to. It would also be common practice that any meeting notes would have been circulated by email, and therefore captured by this search methodology."

39. The Commissioner acknowledges that the IT search of the deleted emails, together with the additional email searches by the three officers, have already identified a total of 175,380 separate emails across four accounts.
40. The Commissioner has considered the Council's submissions and recognises that a significant amount of recorded information is held that would potentially fall within the parameters of the complainant's request. Whilst the Commissioner notes that the Council has provided evidence in support of its position (namely the numbers of emails potentially in scope, together with the dates of the known meetings) it is evident that the Council would not be able to process each of the 175,176 (for the relevant individual) plus 204 emails (for the three officers) in order to fully action the request within the time limit of 18 hours.
41. Given the limitations of the Netmail search function, and the sample exercise undertaken at the Commissioner's request, with the additional requirement to review and prepare any relevant emails for disclosure, it is clear to the Commissioner that the burden on the Council would be manifestly unreasonable. On this basis the Commissioner accepts that the request is manifestly unreasonable within the meaning of regulation 12(4)(b).

The public interest test

42. Regulation 12(4)(b) is subject to the public interest test set out in regulation 12(1)(b). This specifies that a public authority may only rely on an exception if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.
43. The Council's failure to provide details of its public interest test considerations and conclusion to the complainant are considered later in this notice.

Public interest arguments for disclosure

44. The Council did not provide any public interest arguments for disclosure; however, the Commissioner acknowledges that there is a strong public interest in ensuring transparency and accountability in respect of environmental matters. She further recognises that the disclosure of such information can enable individuals to access information which may help them decide whether to challenge a decision made, or action taken, by the Council. This in turn promotes democracy and public participation.

Public interest arguments for maintaining the exception

45. The Council submitted the following arguments in favour of maintaining the exception:

"At the time the request and the subsequent complaint were made the Council was focusing all of its Planning Policy resources on preparing the Local Plan for submission by the deadline of 24th January introduced by transitional arrangements established by the revised National Planning Policy Framework (published July 2018).

The additional burden of this request, which the Council maintains is manifestly unreasonable, would have had the effect of delaying the submission of the Local Plan with the significant adverse implications and costs associated with such a delay. The Government has made it very clear to Local Planning Authorities that it wishes Local Plans to be robust and up to date. Failure to submit the Local Plan by the 24th January would have resulted in a delay of between one to two years during which time the adopted Local Plan would become increasingly out of date and the Council would not be able to demonstrate a five year housing land supply, another key priority for the Government in addressing the national housing crisis.

I am in no doubt that redirecting the resources necessary to respond to the request in full would have represented a significant risk of the Local Authority not being able to submit the Local Plan by the 24th January and therefore would not have been in the public interest."

46. The Council therefore considers that compliance with the request would divert it from its core public functions and duties, as the review and preparation of the retrieved emails would need to be undertaken by one or more of a number of officers based within the Planning Policy team who have the background knowledge to do this. Given the pressing commitment of the need for the Council to provide its Local Plan submission by 24 January 2019, the Council has explained it was not in a position to redirect its resources to respond to the request in full. Further, the Council has argued:

"It is most certainly in the public interest that Tonbridge and Malling Borough Council adopt a Local Plan at the earliest opportunity. Currently the Local Authority cannot demonstrate a 5 year housing land supply and this will only be rectified when the Local Plan is adopted."

47. As set out in the 'Background' section of this notice, the Council has explained that the request relates to the Borough Green Gardens site

which has been subject to two extensive rounds of public consultation. The Commissioner also notes that these matters are now being considered by the appointed Local Plan Inspectors and will form part of an examination later this year.

The Balance of the public interest test

48. The Commissioner recognises the inherent importance of accountability and transparency in decision-making within public authorities, and the necessity of a public authority bearing some costs when complying with a request for information. However, in considering the public interest test for this matter, the Commissioner must assess whether the cost of compliance is disproportionate to the value of the request.
49. The Commissioner notes that the request relates to a subject matter (ie the development of the Borough Green Gardens in the context of the Local Plan) that is likely to have significant environmental implications. The disclosure of information about this matter will allow the public to understand that process that the Council has followed in addressing this, as well as information that it has based its decisions upon.
50. However, the Commissioner also recognises that the subject matter has been subject to extensive public consultation, and understands that the matter will be further considered by the appointed Local Plan Inspectors. In such a scenario, it is reasonable for the Commissioner to conclude that a formal and transparent decision making process has been followed by the Council.
51. The Commissioner additionally notes that, in his capacity as a Councillor, the complainant will have had direct access to the relevant Council officers. He is also likely to have had significant access to the proposals and is in a position to raise his concerns directly with the relevant Council individuals
52. It is further recognised that the volume of held emails, spanning a range of individuals and subjects, would require significant public resources to be applied in order to fully comply with the request under the EIR. Whilst the Commissioner has noted the comments submitted by the complainant about the Council's processes having been "*unduly influenced*", there is no immediate evidence available to the Commissioner which suggests that the actions taken by the Council have been incorrect, improper, or subject to a lack of transparency. However, it is not within the Commissioner's remit to consider any potential 'undue influence' which may have occurred.
53. The Commissioner notes that the timing of the request coincided with the Council's requirement to provide its Local Plan submission and that redirecting its resources to deal with the request will have impacted on

the Council's ability to meet the Local Plan deadline which would not have been in the public interest.

54. Having considered the relevant factors in this case, the Commissioner has concluded that the public interest favours the maintenance of the exception.

Regulation 9 – Advice and assistance

55. Regulation 9(1) provides that:

"A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants."

56. This regulation places a duty on a public authority to provide advice and assistance to someone making a request. The Commissioner considers that this includes assisting an applicant to refine a request if it is deemed that answering a request would otherwise incur an unreasonable cost.
57. In this case the Council refused the original request on the basis that it would be likely to engage regulation 12(4)(b), and invited the complainant to refine his request taking into account the findings of the investigation.
58. The Commissioner notes that, on 6 March 2019, the complainant has since submitted a reduced request, which focussed only on the meetings related information, to which the Council has responded in full and not cited any exception.
59. The Commissioner recognises that the information sought in the original request is essentially information relating to the Borough Green Gardens site. However, this matter has seemingly been 'live' and under consideration for an extended period as part of the Council's implementation of the Local Plan, and consequently, a significant volume of information is held. As such, the Commissioner considers that the Council's invitation to refine the parameters of the request to be a proportionate attempt to provide advice and assistance. On this basis the Commissioner considers that the Council has complied with regulation 9(1).

Regulation 11 – Representation and reconsideration

60. Regulation 11(4) of the EIR sets out that, where a requester has made written representations to a public authority within 40 working days of the date on which he or she believed that the authority has failed to comply with a requirement of the EIR (that is, normally, the date of receipt of the public authority's response), the public authority should

reconsider its response and provide its decision "*as soon as possible and no later than 40 working days after the date of receipt of the representations*". This reconsideration is normally referred to as an internal review.

61. In this case the complainant requested an internal review on 9 October 2018. The Council did not provide its actual internal review until 28 January 2019, following the Commissioner's intervention, which exceeds the 40 working days' statutory limit; therefore the Council has breached regulation 11(4) of the EIR.
62. The Commissioner notes the Council's explanation that the delayed internal review was as a result of an officer's unavailability.
63. No remedial steps are required in respect of the time for compliance, but the Council should ensure that it meets the requirement to issue internal review responses in a timely manner going forward (see also 'Other matters' section below).

Regulation 14 – Refusal to disclose information

64. Regulation 14(3) of the EIR requires public authorities to issue a refusal notice which specifies the reasons not to disclose the information requested, which must include the following:

"(a) any exception relied on under regulations 12(4), 12(5) or 13; and

(b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3)."

65. In other words if a public authority is relying on an EIR exception, it should set out the considerations and conclusion of its public interest test. In this case, based on the correspondence available to her, the Commissioner notes the Council did not provide the complainant with its public interest considerations. It has therefore breached regulation 14(3)(b) of the EIR.

Other matters

66. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft "Openness by design"⁵ strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA and EIR enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"⁶.

⁵ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁶ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

67. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

68. 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.

69. 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

Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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