

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

### **Decision notice**

**Date:** 1 October 2019

**Public Authority:** Nuneaton & Bedworth Borough Council

**Address:** Town Hall  
Coton Road  
Nuneaton  
CV11 5AA

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

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1. The complainant requested correspondence from Nuneaton and Bedworth Borough Council ("the Council") relating to a specific planning application. The Council withheld the information under regulation 12(4)(d) of the EIR – material in the course of completion – and/or regulation 12(4)(e) of the EIR – internal communications.
2. The Commissioner's decision is that the two exceptions are engaged; however, the balance of the public interest favours disclosure of the information.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld information, subject to the redaction of third party personal data as per paragraph 55 of this notice.
4. The Council 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**

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5. On 28 November 2019, the complainant wrote to the Council and requested information in the following terms:

*"Correspondence to or from Katherine Moreton, [other named planning officer] and Arbury Estates in relation to planning application 035973."*

6. The Council explained on the same day that some information was publicly available. In an email later on the same day the complainant reiterated her request, explaining that:

*"What I seek specifically is email correspondence to / from the named individuals regarding application 035973 that has not formed part of the 'public' application file."*

7. On 29 November 2018, the Council responded and stated that the information was exempt from disclosure under regulation 12(4)(e) of the EIR – internal communications.
8. The complainant requested an internal review on 29 November 2018. She disputed that all of the information would be exempt from disclosure or would all be "internal communications", since Arbury Estates was a third party.
9. The Council sent her the outcome of its internal review on 16 January 2019. It stated that some of the information falling within the scope of the request was the complainant's own personal data, and she would have a copy of this already. Some other relevant information was disclosed.

The Council withheld the remainder of the information under regulation 12(4)(d) of the EIR – material which is still in the course of completion – and/or regulation 12(4)(e) of the EIR – internal communications.

## **Scope of the case**

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10. The complainant contacted the Commissioner on 8 February 2019 to complain about the way her request for information had been handled.
11. During the course of the investigation, the complainant made clear that she was not asking for the names and/or contact details of individual parties to the correspondence to be disclosed under the EIR.
12. The following analysis covers whether the Council correctly withheld information under regulations 12(4)(d) and/or 12(4)(e) of the EIR.

## Reasons for decision

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### Regulation 2(1) - is the information environmental?

13. Regulation 2(1) of the EIR provides the following definition of environmental information:

*"...any information in written, visual, aural, electronic or any other 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..."*

14. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
15. The Commissioner has produced guidance<sup>1</sup> to assist public authorities and applicants in identifying environmental information. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with

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[https://ico.org.uk/media/fororganisations/documents/1146/eir\\_what\\_is\\_environmental\\_information.pdf](https://ico.org.uk/media/fororganisations/documents/1146/eir_what_is_environmental_information.pdf)

the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.

16. The Commissioner notes that the withheld information comprises correspondence about a proposed cycle path, and relates in part to the potential environmental impact of the path.
17. The Commissioner has considered the information in light of the definition at regulation 2(1). She is satisfied that the information relates to measures affecting, or likely to affect, the elements and factors of the environment. She agrees that the correspondence is information "on" these measures. The information therefore falls within the definition of environmental information at regulation 2(1)(c) of the EIR, and the Commissioner is satisfied that the Council considered the request under the correct access regime.

### **The withheld information**

18. Five email chains have been withheld by the Council, labelled as 1 – 5. The Council has explained that it withheld email chains 1, 3, 4 and 5 under regulation 12(4)(d), and emails chains 2, 3, 4 and 5 under regulation 12(4)(e). That is, it considers that both exceptions applied to email chains 3, 4 and 5.
19. The Commissioner has first considered the exception at regulation 12(4)(e), which has been applied to chains 2, 3, 4 and 5.

### **Regulation 12(4)(e) – internal communications**

20. 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.
21. This is a class-based exception covering a relatively broad range of communications, including email correspondence, and there is no need for the public authority to consider the sensitivity of the information in order for the exception to be engaged. However, it is a qualified exception and, if it is engaged, the public authority is required to carry out a public interest test regarding whether or not the exception should be maintained.
22. In this case, the Commissioner is satisfied that the withheld information comprises email correspondence between council officers (and in one case, between a councillor and a council officer). This falls within the definition of internal communications and so the exception is engaged.
23. The Commissioner will therefore go on to consider the balance of the public interest in the disclosure of the four email chains.

## **The balance of the public interest**

24. As stated above, regulation 12(4)(e) is a qualified exception and is, therefore, subject to the public interest test at regulation 12(1)(b), which states that information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.
25. There is always a public interest in a public authority being transparent regarding how it conducts its business. In addition, regulation 12(2) of the EIR states that "*a public authority shall apply a presumption in favour of disclosure*". These factors already lend weight in favour of environmental information being disclosed by the Council.
26. The complainant also considers that there is a public interest in the public being informed as to the way in which the Council was considering the cycle path. She considers that the planning information which was in the public domain at the date of the request was not sufficient, and/or had not been placed into the public domain early enough, to assist members of the public during the consultation process, and she has explained that a number of residents had concerns over the proposed route and the type of path being constructed.
27. The Council, however, argued that there is limited public interest in the withheld information, since the correspondence relates to its approach which, at that date, had not yet been finalised. It explained that its position, once finalised, would subsequently be reflected in the report to the planning committee, which would enable the relevant arguments to be considered in public.
28. The Council also considered that the issue of a "safe space" was relevant. It argued that the Council needed to be able to discuss potential "*merits and demerits*" of various arguments away from public scrutiny, as well as playing "*devil's advocate*" in anticipating the positions which varied interested parties may adopt, to ensure the robustness of the Council's final position.
29. The Council explained that at the date of the request the issue of the planning application was still "live" in that the Council's position had not been finalised. Its position, in summary, is that the balance of the public interest favours maintaining the exception, due to the need for free thinking and open discussion at the time.
30. The Commissioner will take into account the need for a public authority to communicate, away from scrutiny, in a "safe space". However, the weight of this argument will depend on the circumstances of each case, and on the nature of the withheld information.

31. In this case, the Commissioner has considered the withheld information and does not find it to be especially sensitive. While the emails contain an exchange of views, she considers that the public would have been aware of the matters being discussed. The need for the provision of a cycle path arose in connection with a nearby housing development, meaning that the matter itself was already in the public domain. The selection and construction of the route, and its environmental implications, were already matters of public debate.
32. The Commissioner does not consider that releasing the internal communications that were generated prior to the Council settling on its final position would be confusing for the public; it is evident from the timing of the correspondence that matters were not yet finalised. In any event, the Commissioner takes the approach that it is possible for a public authority to issue explanations alongside information being disclosed.
33. While discussions around unfinished policy are not always of wider public interest, the Commissioner considers that the internal communications in this case are of some interest, due to the proximity of the path to a protected species.
34. In the circumstances of this case, the Commissioner does not consider that the Council's arguments around needing a safe space for debate carry sufficient weight to outweigh the presumption in favour of disclosing environmental information. Taking into account all of the balancing factors above, therefore, she considers that the balance of the public interest favours disclosure.

### **The Commissioner's decision**

35. The Commissioner has determined that the balance of the public interest favours disclosure of the email chains; however, she notes that the Council considers that chains 3 – 5 are also excepted from disclosure under regulation 12(4)(d), and so will go on to consider this below.
36. The Commissioner orders the disclosure of email chain 2, subject to the information being redacted for third party personal data in accordance with paragraph 55 below.

### **Regulation 12(4)(d) - material which is still in the course of completion, unfinished documents or incomplete data**

37. Email chain 1 was withheld under this exception. In addition, since she has determined that email chains 3 – 5 should not have been withheld under regulation 12(4)(e), the Commissioner will consider whether these were correctly withheld under regulation 12(4)(d).

38. Regulation 12(4)(d) states that a public authority may refuse to disclose information to the extent that the request relates to:
- material which is still in the course of completion;
  - unfinished documents; or
  - incomplete data.
39. The exception is class-based, which means that it is engaged if the information in question falls within its scope. If the information falls into one of the three categories, then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception. However, regulation 12(4)(d) is a qualified exception, so the public authority must consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
40. The fact that the exception refers both to material in the course of completion and to unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion. The Council has argued that this is so in this case.
41. The nature of email chains 2, 3 and 4 has been described previously in this decision notice. Email chain 1 comprises correspondence between an officer at the Warwickshire Wildlife Trust (WWT) and an officer at the Council, which is then forwarded to a further Council officer.
42. Regarding whether or not the correspondence is incomplete, the Council advised the Commissioner that the emails relate to potential conditions which could be attached to the planning application for the path if approved, and discuss potential impacts of the application on matters affecting the environment. The Council argues that the information is incomplete in the sense that the correspondence discusses various options which would go on to inform the Council's final position.
43. The Council has provided further detail as to why it considers the correspondence to be material in the course of completion. Email chain 1 relates to matters highlighted by the WWT, including the habitat of a nearby colony of great crested newts, and the potential issue of environmental management plans. The Council has explained that there was an intention to collate and present these thoughts for the WWT to comment on, and they are therefore incomplete material. The other email chains withheld under this exception relate to the Council's approach to the location of the proposed cycle path, and the Council has explained that, at the date of the request, no decision had been made on this issue.

44. The Commissioner has considered whether (as argued by the Council) the correspondence comprises material in the course of completion. The ICO's published guidance on this exception<sup>2</sup> provides the example of a public authority formulating and developing policy, which is relevant to the Council's position in this case.
45. In this case, it is evident that the contents of the withheld emails relates to matters which, at the time, had not been settled. They relate to the Council's consideration of the proposal for the cycle path, prior to a decision being made about whether to attach conditions to the proposal.
46. The Commissioner accepts that the information is material in the course of completion and that the exception at regulation 12(4)(d) is engaged. She has therefore gone on to consider the public interest in the disclosure of the information.

### **The balance of the public interest**

47. It has already been covered in this notice that there is an inherent public interest in public authorities conducting business in a transparent manner, and that, in the case of environmental information, there is a presumption of disclosure. The notice has also covered the complainant's views in favour of disclosure.
48. Furthermore this notice has also already considered the Council's views on the need for a safe space for debate, insofar as they relate to the information that comprises internal communications. These arguments are also relevant here.
49. The Commissioner has, therefore, already considered the need for officers to discuss potential advantages and disadvantages of various options, away from scrutiny, while formulating the Council's final position, and she did not consider that this carried much weight with regard to email chains 3 – 5. Notably, she did not consider that it was confusing or misleading for the public for this information to be published, despite the fact that the Council's position was not finalised. She also considers that there is some public interest in the way in which the Council took environmental matters into account when formulating its approach to the planning application.

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1637/eir\\_material\\_in\\_the\\_course\\_of\\_completion.pdf](https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf)



50. With regard to email chain 1, the Commissioner is mindful that this is correspondence with a third party: an officer at Warwickshire Wildlife Trust (WWT). The views of the WWT are relevant to the Council's policy formation.
51. The Council has explained that it is concerned that debates with third parties in future may become less free and frank if it publishes correspondence from a stage of the decision-making process before matters had been finalised. It argued: "*consultees [may] lose confidence in their ability to question council officers on various aspects of current and future planning applications, leading to less informed consultation responses*". The Council evidently considers that this may adversely affect the decision-making process, and indeed expressed the view that it could even cause unintended harm to the environment as a consequence.
52. The Commissioner will take this "chilling effect" into account; however, in this case, in view of the nature of the information which has been withheld, she does not consider that disclosure would be likely, significantly, to affect the way in which either Council officers or relevant third parties contribute to planning discussions in future.
53. Taking all of the above factors into account, the Commissioner does not consider that the factors in favour of maintaining the exception, which the Council applied due to the information comprising material in the course of completion, outweigh the presumption of disclosure of environmental information.

### **The Commissioner's decision**

54. The Commissioner has determined that the contents of email chains 1, 3, 4 and 5 should be disclosed, subject to paragraph 55 below, in addition to the contents of email chain 2, as explained at paragraph 35 – 36, above.
55. As previously explained, the complainant has not sought the disclosure under the EIR of the names and/or contact details of the individual parties to the correspondence. The Commissioner therefore notes that this information should be redacted by the Council prior to disclosure.

## Right of appeal

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56. 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](mailto:grc@justice.gov.uk)

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

57. 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.
58. 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**