

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

### **Decision notice**

**Date:** 22 May 2019

**Public Authority:** Maidstone Borough Council  
**Address:** Maidstone House  
King Street  
Maidstone  
ME15 6JQ

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

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1. The complainant has requested information held by Maidstone Borough Council (the council) that relates to a potential breach of planning at a particular site in the Maidstone area. Whilst the council disclosed some information in response to the request, certain information was withheld under regulation 12(5)(b) of the EIR. In addition, the council advised the complainant that certain information that had been requested was not held.
2. The Commissioner's decision is that the council was correct to apply regulation 12(5)(b) of the EIR to the information that has been withheld. In addition, she is satisfied that, on the balance of probabilities, the council does not hold any additional information that would fall within the scope of the request and has therefore discharged its duty under regulation 5(1).
3. The Commissioner requires no further steps to be taken as a result of this decision notice.

#### **Request and response**

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4. On 24 May 2018, the complainant wrote to the council for information held relating to an investigation it was conducting into an alleged breach of planning at a park homes development in the local area. He set out

his request in the following terms:

1. *It is known you conducted a recent count and [I] require you to provide an accurate account of the units on site.*
2. *The 14-day notice is for you to **officially provide in writing, a list of all the breaches on site including those that both fail MA/13/1435 and its associated conditions.***
3. *You have been informed that the owner continues to develop the site and on 23/05/2018 08:40 units were still arriving and being installed without formal planning consent.*
4. *Please forward the delegated report applicable to 17/506484/Full. If not give the exact reasons why this is not available after the statutory consideration period.*
5. The council provided a response to the request on 13 June 2018. With regard to item 1, the council stated that whilst there had been no exact count of units during visits made to the site, new information had been received that included a plan showing 245 units. However, it advised that this figure had not been confirmed.
6. With regard to item 2 of the request, the council advised that certain information was to be withheld under regulation 12(5)(b) of the EIR. It advised various planning permissions and conditions were currently under investigation and the release of potential, or identified, breaches of a development would be likely to affect the course of justice. In addition, the council advised that the public disclosure of the information requested may adversely affect and undermine the inquiry process and would directly impact the right and expectation to fair treatment and justice for the parties involved.
7. The council also referred the complainant to three decision notices<sup>1</sup> that had previously been published by the Commissioner that it had regarded to be relevant when considering the request and the application of regulation 12(5)(b).

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2013759/fer0659765.pdf>

[https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432853/fs\\_50575752.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432853/fs_50575752.pdf)

<https://icosearch.ico.org.uk/s/search.html?collection=ico-meta&query=FS50622657&profile= default>

8. With regard to item 3 of the request, the council advised that it was fully aware of the current works which were being carried out and would deal with any breaches as part of the investigation.
9. With regards to item 4 of the request, the council advised that the delegated report for 17/506484/ FULL was not available. This was because the matter at the heart of the file had yet to be decided, and therefore the 'report' requested had not yet been compiled. The council went on to say that once there had been some advancement in relation to this planning matter it would inform the complainant. The council also confirmed that it would be happy to meet to discuss the issues that the complainant was raising about the development.
10. On 20 June 2018 the complainant advised the council that he was not happy with the response that he had received. He questioned the discrepancy between the council's response to item 1 of his request, which had referred to 245 units, and the 248 units which he states had been listed on the council's website. In addition, the complainant stated that the council had been 'deregistering' some of the units from the Valuation Office Agency (the VOA).
11. The complainant went on to say that he still required details of all the breaches at the site together with details of the council's enforcement action.
12. On 27 June 2018 the council responded to the complainant advising that its position had not changed with regard to the disclosure of details of the breaches on site '*as this is part of an ongoing enforcement investigation.*' It went on to say that it maintained its view that the exception under regulation 12(5)(b) was engaged and that disclosure would prejudice the investigation process and the right to a fair trial.
13. The council also advised that it was still willing to discuss issues about the site directly with the complainant and that he also had a right to request an internal review of its decision.

### **Scope of the case**

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14. The complainant initially contacted the Commissioner on 10 July 2018 to complain about the way his request for information had been handled.
15. The Commissioner then contacted the council to confirm that the concerns raised by the complainant had been accepted for further investigation. In response, the council requested that it be given the

opportunity to carry out a full internal review prior to the Commissioner's investigation.

16. However, whilst it was not explicitly stated, the Commissioner views the council's correspondence to the complainant of 27 June 2019 to have been confirmation that it had already reconsidered the request, and that its position remained unchanged.
17. In addition, the Commissioner took into account the fact that during the investigation process, the council would be provided with the opportunity to both review how it had handled the request, and change its stance, should it wish to do so.
18. As a result, the Commissioner confirmed to the council that she intended to proceed with her investigation in this particular instance.
19. The Commissioner considers the scope of her investigation to include the following:
  - whether the council has complied with its obligations under regulation 5 to make information available upon request; in other words, whether it has now provided the complainant with all the information captured by the request that it is obliged to.
  - to consider the information that has been withheld and determine whether the council is entitled to rely on the exception provided by regulation 12(5)(b).

## **Reasons for decision**

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### **Regulation 5-duty to make information available on request**

20. Regulation 5(1) of the EIR states that a public authority that holds environmental information will make it available on request. This obligation is subject to a number of exceptions contained in regulation 12.
21. Regulation 5(2) provides that a public authority should provide the information to which the applicant is entitled to within 20 working days.
22. The council has advised that it identified information that it believed fell within the scope of the request and, with the exception of that which it considered to be exempt under regulation 12(5)(b), provided this to the complainant.
23. With regards to item 1 of the request, the complainant has argued that the information that has been provided is contradictory to other

information that is in the public domain and has indicated that additional information may be held which is more accurate and up to date.

24. The council has confirmed that it had not published the number of units at the site on the planning pages of its website at the time of the request. It has also advised that, *'in the event that it was relevant'*, there may be a discrepancy between the pitches that were indicated by the plan that it held and the number which had been recorded and published for the purpose of paying council tax.
25. In addition, the council had informed the complainant that, in contrast to what he had stipulated in his request, the units had not been counted at the site visit, and that the figure it had provided to him was based on a recent plan that it had received. Given this, the council makes it clear that it could not account for the reliability of the figures that it had provided at that time.
26. The Commissioner appreciates that the information which was provided to the complainant regarding the number of units that were on the site may not necessarily concur with other information he has obtained from other sources, including the council's website. However, she is satisfied that, based on the information that has been made available, the council provided the complainant with the information that it held which would give the most relevant and up to date answer to his request for the number of units recorded on the site. When doing so, it confirmed the figure was yet to be substantiated.
27. With regard to item 3 of the complainant's request, the council has advised the Commissioner that it viewed this to be notification by the complainant that further units were still arriving at the site, and it was not a request for recorded information. The Commissioner does not regard it to have been unreasonable for the council to have reached such a conclusion in this instance.
28. With regard to item 4 of the request, the council maintains that the report for 17/506484/FULL was not held and has provided evidence which confirms that this was a matter that was yet to be determined at the time that the request was received. It may, or may not, be the case that such a report now exists in relation to this planning reference. However, the Commissioner is satisfied from the information that has been made available to her that the information was not held at the time that the council received the complainant's request. Therefore, its response to item 4 of the request was appropriate.
29. Given the above, the Commissioner is satisfied that, on the balance of probabilities, the council identified and has provided, all relevant information held relevant to items 1,3 and 4 of the request.

### **Regulation 12(5)(b) – Adverse effect on the course of justice**

30. Regulation 12(5)(b) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect, amongst other things, the course of justice.
31. The council informed the complainant that the information held relevant to item 2 of his request related to an investigation that was ongoing and that the disclosure of such information may adversely affect and undermine the inquiry process. It also advised that this would directly impact the rights and expectations to fair treatment and justice for the parties involved.
32. It is not unusual for a planning authority to obtain legal advice as part of an investigation into a potential breach of planning. The Commissioner has had sight of that information which the council has advised that it withheld (together with supporting evidence which it supplied which she regards to fall outside the scope of the request).
33. The Commissioner accepts that the information that the council states has been withheld is relevant to the investigation into the potential breach of planning at the park homes site. She also regards it to form material which would be covered by the definition of legal professional privilege.
34. Legal professional privilege is an important concept in the English legal system. It protects confidential communications between a client and a legal adviser and preserves the ability of the client to present all the relevant facts of the issue they require advice on, and the ability of the adviser to then provide full and candid advice on their client's position. Such advice may discuss both the strengths and weaknesses of the client's position, hence the need for confidentiality. Without the ability to discuss legal concerns in such a candid manner an individual would not be able to access the best legal advice available in order to protect their legal interests. It has therefore been accepted by the Tribunal<sup>2</sup> that the disclosure of information that is protected by legal professional privilege is very likely to have an adverse effect on the course of justice.
35. Given the above, the Commissioner is satisfied that the exception provided by regulation 12(5)(b) is engaged. It is, however, subject to

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<sup>2</sup> <http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i94/Kirkaldie.pdf>

the public interest test which means that although the exception is engaged the information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exception (and withholding the information) is greater than the public interest in disclosing the information.

36. The council has advised the Commissioner that it recognises that there is a presumption for disclosure under EIR, along with a general public interest in promoting accountability and public understanding of the council's activities. It states that further to this is the public interest in the development of a site in the countryside, and in the Kent Downs AONB, and that disclosure would reassure the public more generally around the process of enforcing planning breaches, and the council's adequate considerations of these matters.
37. However, the council goes on to say that whilst it recognises that there is a public interest in disclosing the information, this is outweighed by the significant public interest in the ability of the authority to function and make decisions and/or debate key issues of investigations. Given this, the council has advised that, in this instance, the public interest in maintaining the exception weighs in favour of preserving the principle of legal professional privilege.
38. The Commissioner accepts that the public interest argument in transparency carries some weight in her consideration of this case. The council performs functions of a public nature, i.e. it makes decisions in relation to planning matters that can have an effect on part, or all, of its community and there is a public interest in holding the council to account for the decisions that it makes.
39. The Commissioner also accepts that the matters relating to potential breaches of planning can be controversial, and may generate significant public interest. Given the alleged breaches that were being investigated by the council this is likely to have been the case in this instance. As a result, there appear to be some strong arguments in favour of disclosing the requested information.
40. However, careful consideration needs to be given to the public interest in preserving the rights of individuals, and authorities, to seek and obtain full and candid legal advice in order to pursue or defend their legal interests.
41. The principle that a client should be able to communicate with their legal adviser in confidence is considered a cornerstone of the English legal system. The Tribunal has previously found that there is a strong element of public interest inbuilt into the privilege itself. Added to this is the fact that at the time of the request, the issue was very much live and



ongoing and the information requested formed part of a current investigation.

42. In addition, the Commissioner understands that, in order to aid transparency, openness, and accountability in the planning process, there is a statutory obligation for planning authorities to publish certain details relating to planning. However, this does not extend to any potential breaches of planning (although information may be published in certain circumstances once an investigation is complete). This is, in part, due to the sensitivities surrounding potential breaches that are not proven.
43. Given the inherent public interest in preserving the principle of legal professional privilege, the fact that the investigation was very much a live issue at the time of the request, the Commissioner finds that the public interest favours maintaining the exception. Given this, the council is entitled to withhold that information which the Commissioner has accepted is subject to legal professional privilege under regulation 12(5)(b).
44. In addition, the Commissioner is satisfied that, on the balance of probabilities, the council has provided all the information held relevant to the request and, as it did so within 20 working days, has met its obligations under both regulation 5(1) and 5(2) of the EIR.
45. Therefore, the Commissioner does not require the council to take any further steps as a result of this decision notice.



## Right of appeal

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46. 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)

47. 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.
48. 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**  
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