

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

Date: 15 October 2021

Public Authority: Shrewsbury Town Council
Address: Riggs Hall
Castle Gates
Shrewsbury
SY1 2AS

Decision (including any steps ordered)

1. The complainant requested from Shrewsbury Town Council all emails and documents exchanged with Base Architects. Shrewsbury Town Council refused the request under Section 43 of the FOIA.
2. The Commissioner's decision is that the requested information is environmental as defined by the EIR and Shrewsbury Town Council has incorrectly applied Section 43 of the FOIA and has failed to engage regulation 12(5)(e) of the EIR.
3. The Commissioner also finds that the Council has breached Regulation 5(2) of the EIR by failing to respond to the complainant within 20 working days.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information
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 30 May 2020 the complainant wrote to Shrewsbury Town Council (the Council) and requested information in the following terms:

"Can I please have all emails and documents exchanged between the Town Council and Base Architects. I am specifically interested in their role in the Eco Homes planning application attached and the production of a Historical Survey by (name redacted) 2011 that clearly shows the land sold to be Parkland.

Can I see the correspondence between the Town Council and Base Architects and this document and circulated documents that state 'why it was not presented to the conveyancing process?'"

7. The Council responded on 6 July 2020. It stated that it was refusing the request under Section 43 of the FOIA on the grounds of 'Commercial Interests'.
8. The complainant replied on 7 July 2020 stating he was requesting the information under the EIR.
9. The Council responded on 10 July 2020 noting that the complainant had asked for a number of his FOIA requests, including the present one, to be reconsidered under the EIR. However, it rejected this request on the basis that the EIR did not apply to the information requested.
10. The complainant replied on 12 July 2020 stating that in addition to his other request, he would like the present one referred to the 'Public Interest Report' giving reasons why it was not in the public interest and also why the information was 'not released during the Full Disclosure Requirement for the Judicial Review'.
11. Following a review of a number of related requests submitted the complainant, the Council wrote to him on 28 September 2020 and stated that the requested information was refused under Section 43 of the FOIA as it was 'commercial in nature'.

Scope of the case

12. The complainant contacted the Commissioner on various occasions in 2020 and 2021 to complain about the way his request for information had been handled. In particular, he was unhappy with the Council's decision to apply a blanket refusal under Section 43 of the FOIA.
13. The Commissioner contacted the Council on a number of occasions in relation to the complaint and on 14 June 2021 requested a schedule

and copies of the withheld information. She also suggested the information might be environmental as defined by the EIR and invited the Council to consider this point when responding.

14. The Council responded on 18 August 2021 with a schedule and copies of the withheld information. It also attached a copy of its initial response to the complainant in which it cited Section 43 as the reason for withholding the information in its entirety.
15. The scope of the Commissioner's investigation will be to determine firstly, whether the requested information is environmental as defined by the EIR and if so, whether the original arguments advanced by the Council to withhold it have been engaged.

Reason for decision

16. In its responses to the complainant and the Commissioner, the Council indicated the information requested was covered by the FOIA by citing the exemption under Sections 43. However, both the complainant and the Commissioner have asked the Council to consider the request under the EIR. The Commissioner will therefore start by considering the appropriate legislative regime applicable to the request.

Is the requested information environmental as defined by the EIR?

17. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

18. The Commissioner has viewed the withheld information which consists of documents relating to the sale, inspection and development of Council owned land adjacent to Greenfields Recreation Ground, including correspondence with the developer, CSE limited and its agent, Base Architects. The Commissioner finds this information is a measure likely to affect the elements of the environment such as land and landscape as defined by Regulation 2(1)(a). She is therefore satisfied that the information falls within the definition of environmental information under Regulation 2(1)(c) of the EIR.

Regulation 5(1) – Duty to make environmental information available on request

19. Regulation 5(1) of the EIR states that "*a public authority that holds environmental information shall make it available on request.*" This is subject to any exceptions that may apply.

Regulation 5(2) of the EIR – Time to respond

20. As explained above, Regulation 5(1) requires a public authority to disclose requested information. Regulation 5(2) of the EIR requires this information to be provided to the requester within 20 working days following receipt of the request.
21. The complainant submitted his request on 30 May 2020 and the Council responded on 6 July 2020.
22. This was more than the required 20 working days. Therefore the Commissioner finds that the Council breached regulation 5(2) of the EIR.
23. In its initial response to complainant, the Council refused to disclose the requested information under Section 43 of the FOIA. However, it did not elaborate as to why it believed this exemption was applicable

nor did it carry out a public interest balancing test. The Commissioner will now deal with this exemption and the EIR equivalent exception.

Section 43 of the FOIA – Commercial Interests/Regulation 12(5)(e) of the EIR – adverse affect to the confidentiality of commercial or industrial information

24. Section 43(2) of the FOIA states that:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

25. The exemption can be engaged on the basis that disclosing the information either "would" prejudice commercial interests, or the lower threshold that disclosure only "would be likely" to prejudice those interests. For the Commissioner to be convinced that prejudice "would" occur, she must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of "would be likely to" occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.

26. In the Commissioner's view it is not sufficient for a public authority to merely assert that prejudice would be likely to occur to another party's commercial interests to engage the exemption. Nor is it sufficient for any third party to assert that such prejudice would be likely to occur. The public authority must draw a causal link between disclosure of the information and the claimed prejudice. It must specify how and why the prejudice would occur.

27. Although there is not a direct equivalent to Section 43 of the FOIA in the EIR, the closest is Regulation 12(5)(e) which relates to commercial or industrial information.

28. Regulation 12(5)(e) states a public authority may refuse to disclose information to the extent that its disclosure would adversely affect;

'(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest'

29. In this case the Council has not advanced any arguments as to why disclosure of the requested information would prejudice commercial interests or adversely affect the confidentiality of commercial or industrial information. All it has stated in its responses is; 'Section 43 – Commercial Interests'. The Commissioner is not persuaded that any or

sufficient evidence has been advanced by the Council to engage either Section 43 of the FOIA or Regulation 12(5)(e) of the EIR.

Other matters

30. The Commissioner would like to remind the Council of the importance of engaging with her when responding to requests for detailed arguments under the FOIA and EIR, including those relating to the public interest, in support of any information redacted or withheld. The Commissioner would also like to draw the Council's attention to her detailed guidance on the FOIA¹ and the EIR² on the ICO's website.
31. The Commissioner uses intelligence gathered from individual cases to inform our insight and compliance function. This aligns with the goal in our draft "Openness by design"³ strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our "Regulatory Action Policy"⁴.

¹ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/>

² <https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/>

³ https://ico.org.uk/media/about-the-ico/documents/2615190/openness_by_-_design_strategy_201906.pdf

⁴ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/>

Right of appeal

32. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

33. 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.
34. 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

**Laura Tomkinson
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**