

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

### **Decision notice**

**Date:** 19 December 2022

**Public Authority:** Wiltshire Council

**Address:** County Hall  
Bythesea Road  
Trowbridge  
Wiltshire  
BA14 8JN

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

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1. The complainant requested from Wiltshire Council (the Council'), information relating to a planning enforcement against a member of the public. The council withheld the information under Regulation 12(5)(d) and Regulation 12(5)(f).
2. The Commissioner's decision is that the council was correct to apply Regulation 12(5)(d) to withhold the information. He has also used his discretion to apply Regulation 13(1) and Regulation 5(3) to withhold personal data relating to a third party and to the applicant.
  - The Commissioner does not require the council to take any steps

## **Request and response**

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3. On 11 May 2022, the complainant wrote to the council and requested information in the following terms:

“I would like to make a request to the Development Services Enforcement Department under the Freedom of Information Act 2000 for the following information: All correspondence, including email correspondence and reports relating to Planning Enforcement Reference: [redacted by the ICO].”
4. The council responded on 17 May 2022. It withheld the information under Regulation 12(5)(d) and Regulation 12(5)(f).
5. Following an internal review, the council upheld its position that the information was exempt under the exceptions it had cited in its initial response.

## **Reasons for decision**

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6. The following decision notice considers whether the council was correct to withhold the requested under the exception in Regulation 12(5)(d). It also considers whether the information was exempt from disclosure under the EIR under Regulation 13 (personal data of third parties).
7. The Commissioner has not found it necessary to view the withheld information. He has made his decision based upon the type of information requested, together with his understanding of the circumstances surrounding the request.

### **Regulation 5(3) – personal data of the applicant.**

8. Broadly, Regulation 5(3) provides that, where information requested is personal data relating to the applicant, the information is exempt from disclosure.
9. Due to the circumstances of the case, it is clear that some information will be personal data relating to the applicant. The Commissioner is satisfied that this information is exempt from disclosure under Regulation 5(3).
10. The complainant has a right to request a copy of his own personal data under the Data Protection Act 2018. This right may be subject to exemptions under that Act.

## **Regulation 13(1) - personal data of third parties**

11. The following analysis explains why the Commissioner is satisfied that the public authority was entitled to apply Regulation 13(1) of the EIR to the withhold the redacted information.
12. Regulation 13(1) of the EIR allows a public authority to withhold information if it is personal data, (i.e., information falling within the scope of the definitions provided in sections 3(2) and (3) of the Data Protection Act 2018), and none of the conditions listed as a lawful basis for processing listed in Article 6(1) of the UK GDPR is satisfied.
13. Due to the circumstances of the case, it is clear that the majority of the information will be personal data relating to a third party.
14. The council is not able to take into account either who the complainant is, nor his reasons for making the request when making its decision. Information disclosed under the EIR is considered to be to the whole world.
15. However, the complainant knows who the individual is, and the council must take this point into account. The information cannot, therefore, be anonymised by redacting the identity and address of the individual; the complainant would still be aware of the property and the individual which the personal data relates to.
16. The Commissioner has decided that Regulation 13(1) is satisfied, as a disclosure of the redacted information would contravene data protection principle (a).
17. The Commissioner has ascertained this by assessing whether there is a lawful basis for processing the requested information under Article 6(1)(f) of the UK GDPR.
18. He has determined that, whilst there is a legitimate interest in disclosure, and disclosure would be necessary to satisfy that interest, there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms.
19. The Commissioner has determined this by balancing the legitimate interest of the complainant against the rights of the individual concerned, and whether they would have a reasonable expectation that their information would be disclosed to the public.
  - The primary legitimate interest relates to the complainant's own private interests. The public as a whole has very little legitimate interest in the disclosure of information relating to the issues with the individual property, other than those in being informed about

enforcement proceedings in general, and in the council being transparency about its actions. The disclosure of information relating to enforcement proceedings is subject to statutory provisions as to the type of information which should be disclosed, and the point at which information should be disclosed. The requested information goes beyond those requirements.

- The issue was still live at the time of the request for information. Members of the public would not expect that details about potential enforcement proceedings being taken against them would be disclosed to the whole world, particularly prior to those proceedings being completed, and where an appeal is still possible if enforcement is eventually taken.
  - The council highlighted that the information was submitted to it in confidence, and a disclosure of this would be a breach of trust. The Commissioner considers that this argument strengthens the view that the individual would not expect details about enforcement proceedings being taken against them would be disclosed to the whole world, particularly when the requested information goes beyond that required to be disclosed by statute.
  - A disclosure of information relating to enforcement proceedings being taken against the individual would be likely to cause distress to the individual involved.
20. As the Commissioner has concluded that disclosure would not be lawful under Article 6(1)(f) of the UK GDPR, he has not gone on to separately consider whether disclosure would be fair or transparent.
21. The Commissioner's decision is therefore that council was able to withhold the personal data from disclosure under Regulation 13(1).

### **Regulation 12(5)(d) – confidentiality of proceedings**

22. Regulation 12(5)(d) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that, or any other public authority, where such confidentiality is provided by law. The exception, where applicable, is intended to protect the proceedings; not the information concerned.
23. The council highlighted that, in this instance, the 'proceedings' relate to the council's statutory decision-making powers in relation to planning enforcement matters. The consideration of planning enforcement matters is a process where a public authority exercises its legal decision-making powers under the Town and Country Planning Act 1990.

24. The Commissioner accepts that this process would amount to "proceedings" for the purposes of this exception. The Commissioner also accepts that these proceedings are subject to a common law duty of confidence.
25. The Commissioner recognises that the withheld information is neither trivial nor otherwise in the public domain – it therefore has the necessary quality of confidence. He also accepts that if the information were to be disclosed this may cause a degree of distress to the property owner. A disclosure of the information would make it less likely that the individuals would respond to the council's questions and correspondence on an informal basis in order to resolve potential enforcement situations. Therefore, an adverse affect would occur on the council's ability to conduct its investigations and make decisions regarding taking formal enforcement action.
26. The Commissioner therefore accepts that there is a general expectation that details of an enforcement complaint will be kept confidential – at least until a decision has been taken on whether to take enforcement action: at such time the enforcement action would become a matter of public record. The Commissioner therefore accepts that such information is subject to the common law duty of confidence.
27. The Commissioner has therefore considered the public interest test required by Regulation 12(1). In doing so, he has taken into account the presumption towards disclosure required by Regulation 12(2).

The public interest test

The public interest in the information being disclosed

28. The central interests concerned in this case relate to the complainant's own private interests. This weakens the argument that the public interest should rest in the information being disclosed.
29. However, there is a general public interest in the actions of authorities being disclosed where they relate to planning matters and the enforcement of planning matters. Transparency ensures that matters are treated appropriately and fairly, and a disclosure of such information provides the public with greater insight into how such matters are addressed and decided.

The public interest in the exception being maintained

30. There is a public interest in enforcement matters being dealt with fairly, and appropriately.

31. A disclosure of information during the course of the proceedings could undermine the council's enforcement actions, and lead to unwarranted arguments with either the property owner or the person who made the initial complaint. It may undermine the council's ability to resolve the situation on an informal basis, and hinder the collection of evidence necessary to bring forward any formal enforcement action if this proves necessary.
32. It is for the council to initially decide whether enforcement is warranted and necessary, not the public or complainants themselves. The power to issue an enforcement notice is discretionary (section 172 of the Town and Country Planning Act 1990).
33. The Commissioner notes that enforcement decisions are required to be made public via an authority's planning enforcement register. Planning enforcement registers are available for the public to view and should contain details of:
  - planning enforcement orders,
  - enforcement notices,
  - enforcement warning notices,
  - stop notices, and
  - breach of condition notices<sup>1</sup>.
34. The details included within the register should include the address of the property concerned, and further requirements to be included are stipulated by statute.
35. Where enforcement action is taken, therefore, there is already a statutory requirement for an authority to allow the public to view some information, and the required contents of the register are stipulated in law. The complainant's request for information goes far beyond that stipulated as required to be made public within the register. However up until an enforcement decision of the types listed above is taken by the authority, there is no requirement to include this within the register.
36. Should a complainant be unhappy with a council's failure to resolve the issues which they have raised, they may be able to seek redress for this via the Local Government and Social Care Ombudsman, or via a judicial review of the council's decision.

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<sup>1</sup> S.188 Town and Country Planning Act 1990

37. The council also noted that:

- There is always a general public interest in protecting confidential information. Breaching an obligation of confidence undermines the relationship of trust between confider and confidant.
- There is an expectation of confidence in relation to information regarding planning enforcement matters. If information were disclosed, bodies and individuals would be less willing to provide information to the council for fear of disclosure. This would adversely affect the council's ability to investigate planning enforcement matters.

Conclusion of the public interest test

38. Having considered the arguments submitted by both parties, and balancing the interests considered above, the Commissioner's decision is that the public interest in maintaining the exception outweighs that in the information being disclosed in this case. The council was therefore able to apply Regulation 12(5)(d) in order to withhold the information from disclosure.
39. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*, "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).
40. As covered above, in this case, the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in Regulation 12(2), is that the exception provided by Regulation 12(5)(d) was applied correctly.
41. Given the above decision, the Commissioner has not found it necessary to consider the application of Regulation 12(5)(f) by the council.

## Right of appeal

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

43. 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.

44. 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 .....**

**Ian Walley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**