

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

**Date:** 1 April 2022

**Public Authority:** Kent County Council  
**Address:** County Hall  
Maidstone  
Kent ME14 1XQ

**Decision (including any steps ordered)**

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1. The complainant requested information relating to statutory transfers of land in respect of schools. Kent County Council (the "council") refused the request, initially withholding the information under exemptions in the FOIA. It subsequently reconsidered the request under the EIR, withholding the information under the exceptions for internal communications (regulation 12(4)(e)) and commercial confidentiality (regulation 12(5)(e)).
2. The Commissioner's decision is that the council wrongly handled the request under the FOIA and breached regulation 5(1) and 14(1) of the EIR but that it correctly withheld the requested information under regulation 12(4)(e).
3. The Commissioner does not require the council to take any steps.

## Background

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4. The council has explained that it has general statutory duties (under the Education Act 1996, sections 13 and 14) to ensure that there are sufficient school places within the local authority area.
5. The council has stated that it relies on the land it owns in order to fulfil those general statutory duties, including to expand existing schools and it must transfer new or additional land that it owns to the trustees of a Church school where that school relocates, is rebuilt on a new site or when extensions or additions to the existing school buildings increase the footprint of the school site (a 'Statutory Transfer').
6. The council has explained that, at any one time, it is involved in multiple negotiations regarding Statutory Transfers and in multiple ongoing disputes about the way in which it determines the extent of the new or additional land to be transferred to a school under a Statutory Transfer.
7. The council has stated that a specific dispute has arisen in respect of Lady Margaret Boswell's Church of England Charity (the "Charity") regarding the school's application for a Statutory Transfer of land made in 2016. The complainant is a trustee of the Charity.
8. The council confirmed that it assessed the site and opened negotiations with the complainant as to the areas of land that the council would be prepared to pass to the school under a Statutory Transfer. The council's position was that it would not include playing fields, a large woodland area and a nursery school leased out by the council to a nursery provider and located at the far end of the site. The council has stated that the complainant was not satisfied with and objected to the proposed Statutory Transfer, alleging that additional land should be transferred to the school.
9. The dispute between the council and the complainant has continued and the council has stated that the complainant disagrees with the council's position, particularly in relation to its definition of 'playing fields' in the context of Statutory Transfers.
10. It was within this context that the request was made, with the specified information relating to ongoing negotiations with multiple schools in respect of Statutory Transfers of land at various school sites.

## **Request and response**

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11. On 26 August 2020, the complainant wrote to the council and requested information in the following terms:

"Please may I have sight of the position paper referred to in the third paragraph of [redacted] letter to me of May 17, 2019 and the third paragraph of [redacted] letter to me of February 5, 2020."

12. The council responded on 13 October 2020. It stated that it was withholding the requested information under the exemption for commercial interests – section 43(2) of the FOIA.
13. Following an internal review the council wrote to the complainant on 3 November 2020. It stated that it was maintaining its position in relation to section 43(2) and also relying on an additional exemption to withhold the information – the exemption for prohibitions on disclosure (section 44).

## **Scope of the case**

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14. On 6 January 2021 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
15. During the Commissioner's investigation the council reconsidered the request and on 27 September 2021, issued a new response to the complainant. This response confirmed that the council was withdrawing its reliance on the exemption in section 44 of the FOIA but maintaining its position in relation to the exemption in section 43(2). It also confirmed that it was additionally relying on the exemptions for prejudice to the effective conduct of public affairs (section 36) and legal professional privilege (section 42) to withhold the information.
16. It occurred to the Commissioner that, as the information in question related to decisions around the disposal of land, it was likely that the request fell to be considered under the EIR rather than the FOIA. He directed to the council to reconsider the request under the EIR and issue a new response to the complainant.
17. The council issued a new response under the EIR on 2 November 2021. The response confirmed that the council was withholding the information under the exceptions for internal communications (regulation 12(4)(e)) and commercial confidentiality (regulation 12(5)(e)).
18. On 19 January 2022 the council carried out an internal review under the EIR and confirmed that it was maintaining its position.

19. The complainant confirmed that they were amenable to attempting to resolve the matter informally and the Commissioner facilitated engagement with the council to this end. However, attempts to resolve the matter informally failed so the Commissioner has considered whether the council correctly refused to provide the information in the original request.

## **Reasons for decision**

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### **Is it Environmental Information?**

20. During the course of his investigation the Commissioner advised the council that he considered the requested information fell to be considered under the EIR. The Commissioner has set down below his reasoning in this matter.
21. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is any information in any 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...”
22. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc in question.

23. In this case the requested information relates to decisions concerning the disposal of and use of land.
24. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be on a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of *Kirkaldie v IC and Thanet District Council* (EA/2006/001) ("Kirkaldie").
25. In view of this, the Commissioner has concluded that the council wrongly (initially) handled the request under the FOIA and breached regulation 5(1) of the EIR. As the council subsequently corrected this the Commissioner does not require the council to take any steps in this regard

#### **Regulation 14 – refusal to disclose information**

26. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore, where the procedural requirements of the two pieces of legislation differ, it is inevitable that the council will have failed to comply with the provisions of the EIR.
27. In these circumstances the Commissioner believes that it is appropriate to find that the council breached regulation 14(1) of EIR which requires a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and indeed its internal review) failed to cite any exception contained within the EIR as the council actually dealt with the request under FOIA.
28. Since the council has subsequently addressed this failing the Commissioner does not require it to take any steps in this regard.

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

29. Regulation 12(4)(e) provides an exception for information which constitutes an 'internal communication'. In order for the exception to be engaged it needs to be shown that the information in question constitutes a communication within one public authority, specifically, the authority to which the request is made.

30. The exception for internal communications is class-based, meaning that there is no need to consider the sensitivity of the information in order to engage the exception. However, such factors might be relevant when considering the balance of the public interest.

Is the exception engaged?

31. The council confirmed that the position paper referred to in the request is a Cabinet Members' Meeting report dated 20 May 2019, the "Report". It explained that the withheld information is an internal document and that it represents the entirety of the requested information.
32. Having viewed the Report the Commissioner is satisfied that it falls within the scope of the request and that it constitutes an internal communication. He has, therefore, concluded that the exception is engaged and has gone on to consider the public interest test.

*Public interest in disclosing the information*

33. The council has acknowledged that the principles of open government and good decision-making are important and that the public should have a right to know how public bodies function and how decisions are made. In particular, the council has confirmed that it recognises that there is public interest in disclosing information to present a full picture and promote the public interest in a sustainable environment.
34. The council has confirmed that there is a public interest in the details of how it conducts its business, including sensitive negotiations over the disposal of valuable land assets.
35. The complainant considers that the council is wrongly refusing Statutory Transfers and that there is a public interest in making the grounds for its position available for public scrutiny. The complainant considers that the council is not following guidance in respect of Statutory Transfers issued by the Department for Education. Disclosure of the information would, therefore ensure that council decision making is given due accountability.

*Public interest in maintaining the exception*

36. The council has explained that the Report was produced with the purpose of advising members on the nature and extent of the 'live' and ongoing disputes between itself and the Diocesan Boards and schools in relation to Statutory Transfers and the differing interpretations of the extent of land to be transferred. The Report, therefore, sets out advice to the members in form of recommendations and the detail of the Report includes an assessment of the council's bargaining position and

the financial constraints under which it currently finds itself as the dispute continues.

37. The council has argued that it considers that the free and frank provision of advice would be inhibited by disclosure of the Report because those individuals drafting the advice would be more mindful of adverse consequences for the council in similar 'live' disputes in the event that such advice was later disclosed (in particular, disclosed while the dispute was still 'live' and ongoing, as is the case here).
38. The council has argued that the Report sets out the very real pressures it faces as a result of this dispute and that the ongoing dispute has wider implications for the Educational estate and impacts on the council's strategic decision making.
39. The council further considers that disclosure of the Report would provide a tactical advantage to its counterparties in this dispute. It considers that disclosure would result in its bargaining position being exposed, potentially allowing its opponents to outmanoeuvre the council as the dispute continues.
40. The council considers that those who are tasked with drafting advice, such as that in the Report, would feel the 'chilling effect' of potential future disclosure of the advice. This would put those drafting such advice in a difficult position of either potentially weakening the council's bargaining position by including the weaknesses of its case (and the risks facing the council) in advice that may ultimately be revealed to the public and the council's opponents or also weakening the council's position by making those drafting the advice reticent to include all the weaknesses of the council's case, meaning that a decision could be made not on 'free and frank' advice but on 'limited and couched' advice. The risk of the chilling effect, the council maintains, is very real.
41. If the Council were to receive and act on advice that is neither fully frank nor fully free, it could increase the council's liabilities in a dispute. There is a risk that an ill-advised council would ultimately expend more resources, especially if it faces losing more challenges and having to cover its opponents' legal costs. This would be detrimental to the public interest and have a negative impact on the council and its residents because funds would have to be diverted away from services in order to fund a potentially costly dispute.
42. The council has further suggested that there is only minimal (if any) public interest in the matters discussed in the Report. The council considers that the Report is only of value to the complainant in their private dispute (as trustee) regarding the Statutory Transfer at Lady



Margaret Boswell's Church of England Charity and to other trustees and diocesan boards, rather than there being a wider public interest.

#### Balance of the public interest

43. The Commissioner considers that the underlying rationale for the exception is to protect a public authority's need for a private thinking space. The Commissioner considers that the extent to which disclosure would have an impact on such processes is contingent upon the particular information in question and the specific circumstances of the request.
44. The Commissioner recognises that the need to provide a safe space for public authority decision making will be strongest when the issue under consideration is still live. The Commissioner is sceptical about the council's arguments in relation to the "chilling effect" as, where it is the duty of officers in public authorities to provide advice, disclosure would be unlikely to halt this.
45. However, in this case, it is clear that the matter to which the information relates was live at the time of the request and that the dispute in question remains live. On the one hand, the council considers that disclosing the information would invade the safe space needed to protect the candour and effectiveness of its decision making. On the other hand, the complainant considers that disclosure would force the council to be accountable for its decisions in this matter.
46. In relation to the complainant's allegation that the council is acting wrongly in its handling of Statutory Transfers and contrary to the relevant guidance, it is not the Commissioner's role to reach a decision in relation to this. He accepts that even the perception of wrongdoing can be an argument for transparency and disclosure but this needs to be considered alongside the extent of public money involved and the degree of impact on the local community. It also needs to be set against the public interest in allowing the council to carry out its statutory obligations in respect of education provision and the use of land.
47. The Commissioner is sympathetic to the complainant's concerns in this case, however, his view is that, whilst decision-making processes are live, the weighting of the public interest in favour of protecting deliberations in internal communications is enhanced.
48. The Commissioner notes that the complainant believes that the issue of potential wrongdoing in this matter by the council is of interest to the wider public. The council has argued that the matter is only of interest to the complainant and Diocesan Boards and schools with interests in



Statutory Transfers. The Commissioner accepts that the complainant's interest is genuine but he considers that the matter is of limited interest to the wider public. In addition, as the information relates to a matter which is under dispute and it has not been shown that the council has committed any wrongdoing he considers that the public interest in not disclosing the information and in protecting the integrity of the council's position outweighs the public interest in disclosure. He accepts that the public interest might change once the matter is no longer live but, at this time, he does not consider that the EIR is the appropriate mechanism for addressing disputes about the council's decisions. Other legal remedies are available should the complainant wish to pursue this further.

49. Having considered the arguments and the withheld information the Commissioner considers that, in this case, it is clear that disclosing the information, which relates to live decision-making processes, would damage the council's ability to make and defend its decisions. Whilst he acknowledges the complainant's genuine interest in the matter, he does not consider that the public interest in disclosing the information in this case outweighs the interest served by the application of the exception. He has, therefore, concluded that the council has correctly applied the exception to the withheld information and that the public interest in this case favours maintaining the exception
50. As the Commissioner has found that the council has correctly applied regulation 12(4)(e) in withholding the information, he has not gone on to consider its application of regulation 12(5)(e).

## Right of appeal

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51. 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)

52. 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.
53. 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 .....**

**Ben Tomes**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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