

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

### **Decision notice**

**Date:** 17 January 2023

**Public Authority:** High Peak Borough Council  
**Address:** Buxton Town Hall  
Market Place  
Buxton  
SK17 6EL

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

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1. The complainant requested information about a complaint they submitted to the Council regarding a specific piece of land and copies of information referred to in the minutes of meetings concerning the land in question. High Peak Borough Council (the Council) provided some information and withheld other information under regulations 12(4)(e) (internal communications) and 12(5)(b) (course of justice). The Commissioner's decision is that some of the information constitutes the complainant's own personal data, and as such regulation 5(3) of the EIR applies. The Commissioner has also determined that the Council has correctly applied regulations 12(4)(e) and 12(5)(b) to the information it withheld. The Commissioner does not require any steps to be taken.

#### **Request and response**

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2. On 23 January 2022 the complainant wrote to the Council and requested information in the following terms:

"I would be grateful if you could let me have contact details for the person you have passed my concerns to, names of people on the planning policy team, how and when the issues will be considered by the planning policy team, and please forward full copies of the emails + attachments you sent to the planning team with my comments".

3. The complainant sent further emails to the Council on 24 February, 7 March, 16 March and 24 March 2022 repeating the request made in January 2022.
4. On 22 March 2022 the complainant submitted a further request for information relating to the Select Committee Meeting on 3 February 2021 in the following terms:

“As well as having my previous questions answered (requested email supplied) rather than avoided [sic] I would also like you to supply me with all the hidden material relating to Agenda 11 & 12 named by HPBC as George Street Wood, but actually my garden and the old Glove Works car park. Including correspondence to third parties such as the Land Registry”.
5. The Council responded on 8 April 2022 and sent screenshots of two emails in relation to the first request. In relation to the request for information concerning the meeting on 3 February 2021, the Council stated that the information was exempt under regulations 12(4)(e) and 12(5)(b).
6. On 12 April 2022 the complainant requested an internal review of the Council's handling of the request. They disputed that the screenshots of emails fulfilled the request and asked for complete copies of the emails in question. The complainant also disputed the Council's reasons for withholding information relating to the meeting on 3 February 2021.
7. The Council provided the outcome of its internal review on 20 April 2022 and merely stated that it had nothing further to add to its initial refusal.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 19 June 2022 to complain about the way their request for information had been handled.
9. In terms of the request dated 23 January 2022, which is for information about a complaint that the complainant submitted to the Council the Commissioner has exercised his discretion to consider whether this constitutes a request for the complainant's own personal data. In respect of the request dated 22 March 2022, the Commissioner has considered whether the Council correctly applied regulations 12(4)(e) and 12(5)(b) to the request.

## Reasons for decision

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### **Regulation 5(3) – the complainant’s own personal data Request 1 – 23 January 2022**

10. Regulation 5(3) of the EIR provides that any information to which a request for information relates, is exempt information if it constitutes personal data of which the requester is the data subject.
11. Section 3(2) of the Data Protection Act 2018 (“the DPA”) defines personal data as: “any information relating to an identified or identifiable living individual”.
12. The two main elements of personal data are therefore that the information must relate to a living person, and that the person must be identifiable.
13. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data or an online identifier; or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
14. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
15. The request dated 23 January 2022 refers to a letter which the complainant sent to the Council on 8 December 2021. The request asks for the contact details of the person who the letter/concerns had been passed to, the names of individuals working in the planning policy team and details as to how and when the issues raised by the complainant would be considered by the planning policy team. The complainant also asked for copies of any emails and attachments which a specific officer had forwarded to the planning policy team in respect of their letter.
16. It is clear to the Commissioner that in this case, the complainant has requested correspondence relating to a specific complaint which they submitted to the Council. As such, the Commissioner considers that, with the exception of the names of persons dealing with the complaint and officers working within the planning policy department, which the Council has already provided to the complainant, the remaining parts of the request in some way or other link back to the complainant. The Commissioner’s view is that such information will relate to the complainant and they will be identifiable in relation to that information. Therefore, any information falling within the scope of the request would be the personal data of the complainant.

17. As the Commissioner is satisfied that any information within the scope of the request would be the complainant's own personal data, he finds that the exception at regulation 5(3) of the EIR is engaged in relation to the request.
18. As the exception provided by regulation 5(3) is engaged the Council was not obliged by the FOIA to disclose the requested information.

**Regulation 12(4)(e) – internal communications**  
**Request 2 – 22 March 2022**

19. Regulation 12(4)(e) of the EIR provides an exception from disclosure to the extent that the requested information comprises internal communications. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. Rather, as long as the requested information constitutes an internal communication then it falls within the scope of the exception.
20. The information which has been withheld under regulation 12(4)(e) comprises two reports which were considered within the closed session of two Council meetings. The reports were considered exempt from publication pursuant to Schedule 12A of the Local Government Act 1972.
21. Having viewed the withheld information the Commissioner is satisfied that it constitutes internal communications and therefore regulation 12(4)(e) applies to the information.

**The public interest test**

22. Regulation 12(1)(b) requires that where the exception under Regulation 12(4)(e) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner is mindful of the provisions of Regulation 12(2) which state that a public authority shall apply a presumption in favour of disclosure.
23. The Council has not submitted any specific representation in favour of disclosure in this case, however, it acknowledges that issues relating to the land in question have been highly controversial in the local community, particularly regarding ownership of the land in question. The Council maintains that the land is unregistered and despite its efforts no owner of the land has been found.
24. The complainant alleges that their garden forms part of the land in question and some councillors have wanted them to "give it to the community". As such the complainant has a personal interest in any matters associated with plans for the land.

25. In relation to the public interest in maintaining the exception, the Council has argued that it needs a safe space to deliberate matters relating to the land in question. It considers that councillors should be "free to make decisions sober from the effects of community pressure in a private thinking space".
26. The Council stated that it does not want this matter to "become political and those intentions are best served if the matter is considered in private according to parliaments intentions under the Local Government Act". The Council pointed out that the matter is "live" in that discussions are still ongoing relating to the land in question, a valuation report was undertaken in November 2021, a further report has been prepared for consideration and a plan for use of the land is being developed. The Council also considers the matter is live in respect of ownership issues, land registry applications, and ongoing county court injunctions. The Council advised that it has recently received notification from the land registry that a third party has applied to have their interest in the land registered.
27. The Commissioner's guidance on this exception<sup>1</sup> explains that although a wide range of internal information will be caught by the exception, public interest arguments should be focussed on the protection of internal deliberation and decision-making processes. This reflects the underlying rationale for the exception being that it protects a public authority's need for a 'private thinking space'
28. The Commissioner has carefully considered the arguments put forward by the complainant and by the Council. He recognises the legitimate public interest in disclosing information that would inform the public about decisions concerning activities that may have an impact (whether positive or negative) on the environment. In this case, the Commissioner accepts that disclosure would provide the public with information relating to plans for the land in question and would increase public participation in decision making.
29. The Commissioner notes the complainant alleges that refusing to disclose the information suggests that the Council has something to hide. However, it cannot be assumed that a refusal to disclose information is based on a desire to cover up wrongdoing. In the Commissioner's experience there are many cases where the withheld information may be relatively innocuous, but the act of disclosure would have a detrimental effect on the public authority's ability to conduct its

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<sup>1</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-4-e-internal-communications/>

business effectively. In any event, the Commissioner has not seen any evidence of wrongdoing, therefore the complainant's argument does not carry significant weight in this case.

30. The Commissioner notes that there is a clear difference of opinion in terms of ownership of the land in question. The complainant alleges that their garden forms part of the land, and on the other hand the Council alleges that the land is unregistered. It is not within the Commissioner's remit to determine land ownership disputes, and as such the Commissioner has not taken this into account. However, he appreciates that the complainant has concerns about, and a possible direct interest in matters relating to the land in question. In view of the dispute concerning land ownership, the Commissioner acknowledges that the complainant in this case has a clear interest in accessing information relating to the land in question.
31. With regard to attributing weight to the public interest arguments in favour of maintaining the exception, the Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This may carry significant weight in some cases. In particular, the Commissioner considers that the need for a safe space will be strongest when the issue is still live.
32. In the circumstances of this case the Commissioner accepts that at the time of the request and at the time of the internal review, matters concerning the land in question were ongoing and are still ongoing at the time of this decision notice. Furthermore, the Commissioner is satisfied that the issues covered in the withheld information are ones that relate to the outstanding matters concerning the land. The Commissioner is also conscious that the withheld information contains detailed and frank internal discussions about a complex and contentious matter. In light of the above compelling arguments, in the Commissioner's view, significant weight should be attributed to the safe space arguments in this particular case.
33. Whilst he accepts that the arguments in favour of disclosure in this case carry some weight the Commissioner does not consider that they match the weight of the arguments in favour of withholding the information. The Commissioner's conclusion is, therefore, that the public interest in the maintenance of the exception outweighs the public interest in favour of disclosure of the requested information.
34. 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)

35. As covered above, the Commissioner has concluded that the public interest in maintaining the exception at regulation 12(4)(e) outweighs the public interest in disclosure of the information. 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(4)(e) was applied correctly.

**Regulation 12(5)(b) – course of justice  
Request 2 – 22 March 2022**

36. Regulation 12(5)(b) states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature
37. In this case, the Council has withheld two documents which comprise legal advice from Counsel regarding matters relating to the land in question. The Council considers the withheld information to be covered by legal professional privilege (LPP), specifically 'advice privilege'.
38. The Commissioner has viewed the withheld information and is satisfied that it constitutes confidential communications between a client and a professional legal advisor made for the dominant purpose of providing legal advice. He therefore considers the information to be covered by LPP on the basis of advice privilege. The Commissioner is aware of no evidence suggesting that this privilege has been waived
39. The Council has explained that the withheld information is considered to be live as matters relating to the land in question are still under consideration. As the withheld information is subject to LPP and relates to a live matter, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged. The Commissioner will now go on to consider the public interest test.

## **Public interest test**

40. The Commissioner has taken into account the public interest factors in the disclosure of the information which he has already considered under his analysis of regulation 12(4)(e).
41. In terms of the public interest in maintaining the exception at regulation 12(5)(b), the Council argued that disclosure would provide public access to privileged information at a time when the matters to which the legal advice relates is live. The Council pointed out that disclosure would reveal the arguments, strengths and weaknesses of its position, which would in turn unbalance "the playing field under which adversarial proceedings are meant to be carried out". The Council explained that a further report on the subject matter of the land in question is currently being considered. The Council believes that there is a public interest in it having a safe space to consider legal advice without any external interference, particularly in cases like this when the matter is still live and sensitive.
42. The Council also considers that, based on the history of communications with the complainant, disclosure would also lead to significant further correspondence from the complainant about the matter. This would in turn have a detrimental impact in its ability to consider the matter through the proper channels. It does not consider this to be in the public interest.
43. The Council also explained that the barrister who provided the legal advice is self employed. As such the Council considers that they would have had no reasonable expectation that their work would be put into the public domain, where it could be reproduced. The Council is also of the view that disclosure of the legal advice would have an adverse effect on its ability to retain Counsel in the future because of the fear that any legal advice they provide would be published.
44. In balancing the opposing public interest factors in this case, the Commissioner considers that it is necessary to take into account the in-built public interest in the importance of maintaining the principle behind LPP. LPP is a fundamental principle of justice, and it is the Commissioner's well-established view that the preservation of that principle carries a very strong public interest. The principle exists to protect the right of clients to seek and obtain advice from their legal advisers so that they can take fully informed decisions to protect their legal rights.
45. The Commissioner accepts that there will always be a public interest in transparency, accountability and in members of the public having access to information to enable them to understand more clearly why particular decisions have been made and certain processes followed. He also notes



that the complainant in this case has a personal interest in the subject matter as they are claiming ownership to part of the land in question.

46. However, the Commissioner does not consider that, in this case, there are sufficient or compelling enough arguments in favour of disclosure which would override the inbuilt public interest in information remaining protected by LPP.
47. The Commissioner's decision is, therefore, that the balance of the public interests favours the exception being maintained. This means that the Council was not obliged to disclose the requested information.
48. 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 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)(b) was applied correctly.

## **Other matters**

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### **Internal review**

49. The Commissioner wishes to comment more generally on the way the Council has handled this request for information. The Council's correspondence to the complainant on 20 April 2022 setting out the outcome of the internal review, was limited to two sentences:

"Thank you for your further correspondence. I have nothing further to add in response. I acknowledge your intention to refer the matter to the ICO and we await further correspondence from the Commissioner".
50. The FOIA section 45 Code of Practice provides guidance to public authorities on their responsibilities under the FOIA. Paragraphs 5.8 – 5.10 explain that the internal review procedure should provide a fair and thorough review of procedures and decisions taken in relation to the FOIA. It says that the public authority should "in all cases re-evaluate their handling of the request and pay particular attention to concerns raised by the applicant".
51. While the Council may have conducted a thorough internal review, the cursory nature of the response that was issued, does not demonstrate this.

52. The Commissioner has set out on his website the positive benefits for public authorities of conforming with the section 45 Code of Practice. These include improved public perception of an organisation, saving of staff time and potentially less resource being spent on dealing with complaints to the Commissioner.
53. The above issue will be logged and used by the Commissioner when considering the overall compliance of the Council.
54. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. This will align with the goal in his draft Openness by design strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA and EIR enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in his Regulatory Action Policy<sup>2</sup>.

### **Access regime**

55. In this case, the Council failed to recognise that part of the request of 23 January 2022 was for the complainant's own personal data and did not consider it under the GDPR. Whilst the Commissioner cannot require a public authority to take action under the GDPR via a EIR decision notice, in view of his decision above he recommends that the Council should reconsider the request dated 23 January 2022 as a subject access request for the complainant's own personal data.

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<sup>2</sup> <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

## 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: 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)

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 .....**

**Joanne Edwards**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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