

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

**Date:** 25 October 2023

**Public Authority:** Torridge District Council  
**Address:** Riverbank House  
Bideford  
Devon EX39 2QG

**Decision (including any steps ordered)**

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1. The complainant has requested information about an Article 4 Direction associated with Braddon Woods. Torridge District Council ('the Council') disclosed some information. It has applied the exceptions under regulations 12(5)(b), 12(4)(e) and 13 of the EIR to the remaining information, which concern the course of justice, internal correspondence and personal data respectively.
2. The Commissioner's decision is as follows:
  - On the balance of probabilities, the Council doesn't hold any further information within scope of the request of 21 February 2023 and has complied with regulation 5(1) of the EIR.
  - The information within scope of part 1 of the request is excepted from disclosure under regulation 12(5)(b). However, the Council's refusal of this part didn't comply with regulation 14(3) of the EIR.
3. It's not necessary for the Council to take any corrective steps.

## Request and response

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4. An Article 4 Direction is a legal device available to all local authorities enabling them to exert tighter controls on changes to the outside of houses facing a road or open space that could damage the character and appearance of the conservation area.

5. On 21 February 2023, the complainant wrote to the Council and requested information in the following terms:

"I am currently reviewing the Article 4 Direction with respect to Braddon Woods. I would be grateful if you could confirm the following and provide the following information as detailed below as I have been unable to find this information on the Council's website.

1. Dates of relevant local planning authority decisions and consideration of the Article 4 Direction – for example Committee and officer's reports – and where I may locate them;

2. Copies of correspondence with DHLUC with respect to the Article 4 Direction as required by Schedule 3 of the GPDO 2015;

3. Confirmation as to the type of Direction sought – immediate or non-immediate;

4. Copies of the consultation letters sent to the legal owners of the land subject to the Article 4;

5. A map confirming the land to which the Article 4 Direction specifically relates;

6. The date on which the notice with respect to the proposed Direction was served/published and a copy of the notice;

7. The date on which consultation on the Direction expired;

8. The date on which the Council confirmed the Direction and a copy of the notice of confirmation;

9. The justification for the Direction in relation to paragraph 53 of the NPPF (local amenity and well being) i.e what are the LPAs particular concerns."

6. The Council responded on 31 March 2023. It addressed parts 2 to 9 of the request, disclosing relevant, recorded information where this was held. The Council withheld information within scope of part 1 under regulation 12(4)(e) of the EIR.

7. The complainant requested an internal review on 10 May 2023 as they considered that the Council held further, relevant information.
8. The Council provided an internal review on 7 July 2023. It now relied on regulation 12(5)(b) of the EIR in respect of the information within scope of part 1 of the request. The Council confirmed that it didn't hold further information within scope of parts 2, 4, 5, 6 and 7. It addressed the complainant's query about its response to part 3 and confirmed that it had addressed parts 8 and 9 in its original response to the request.
9. In their complaint to the Commissioner, the complainant disputed the Council's application of regulation 12(5)(b) to the information it's withholding. They also considered that the Council would hold: a report on which the decision was based; a "robust evidence base" which they say is needed for an Article 4 Direction; and the name of the body or person who made the Article 4 decision.

## Reasons for decision

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10. The Commissioner will first consider whether the Council holds any further information within scope of the complainant's request.
11. The Commissioner will then consider the information the Council has withheld. The Council advised the complainant that it had applied regulation 12(5)(b) to what it has described as an 'Article 4 report' (a copy of which it has provided to the Commissioner). However, in its submission to the Commissioner the Council has indicated that some of the information in the report is personal data and excepted from disclosure under regulation 13, and that some of the information engages regulation 12(4)(e).
12. Finally, the Commissioner will consider whether there were any procedural breaches.
13. It's not absolutely clear whether the Council is also still relying on regulation 12(5)(b) in respect of the information to which it has applied regulations 12(4)(e) and 13. However, having reviewed the information being withheld, the Commissioner will focus on whether all the information in it engages regulation 12(5)(b) in the first instance. If necessary, he'll consider whether some of the information in that document engages regulations 12(4)(e) and 13.

**Regulation 5 – duty to make environmental information available on request**

14. Under regulation 5(1) of the EIR, a public authority that holds environmental information shall make it available on request if it's not subject to an exception.
15. In scenarios where there's some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner follows the lead of a number of Information Tribunal decisions. The Commissioner applies the civil standard of the balance of probabilities.
16. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any (or further) information which falls within the scope of the request (or was held at the time of the request).
17. As noted, in their complaint the complainant indicated the additional information that they consider the Council would hold. This included the name of the body or person who made the Article 4 decision; however the Commissioner has reviewed the request and can't identify where they specifically requested this information. However, in his correspondence to the Council, the Commissioner noted the other information that the complainant had expected the Council to hold, including the requested name.
18. In its submission the Council described how it generally approaches identifying information relevant to a request.
19. The Council says that its FOI Officer contacts the [relevant] designated team member and asks them to provide any information which is held, even if they believe it's exempt. This instruction is then forwarded on to "their individual teams" [the Commissioner understands the Council to mean other team members] to check what information they hold.
20. The Council goes on to say that all relevant staff are asked to check all electronic devices (including software such as Microsoft Teams, Outlook for example) and all notebooks and diaries.
21. In this instance, the Council says, it contacted the designated Planning team member and asked them to check with their team about the requested information. There were also discussions between Planning department and the Legal department about the withheld information discussed above.
22. In the course of formulating a response to the request, there were also talks with the Head of Legal and Governance about some of the

Council's readily available information. The Legal department was contacted about some attachments missing from an email to the Secretary of State. The Planning department was also contacted about Committee Reports/Minutes; no meetings had taken place about this [Article 4] case.

23. FOIA and the EIR concern information a public authority does or doesn't hold; they don't concern information an applicant considers an authority should hold. The complainant has indicated relevant information that they consider the Council would hold. However, the Commissioner considers that the searches for information that the Council has carried out, including the discussions it's had about the request, were appropriate and adequate in this case. On the basis of its submission to him the Commissioner accepts that, on the balance of probabilities, the Council doesn't hold any further information within scope of the request.
24. The Commissioner's decision is therefore that the Council has complied with regulation 5(1) of the EIR.

**Regulation 12(5)(b) – the course of justice etc**

25. Under regulation 12(5)(b) 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. The exception is subject to the public interest test.
26. In its submission to the Commissioner, the Council confirmed that it considered disclosing the information would adversely affect the third limb, ie its ability to conduct an inquiry of a criminal or disciplinary nature.
27. The Council went on to say that the inquiry is an Article 4 direction for the site mentioned within the request – Braddon Woods. The Council is the Local Planning Authority for the area in which this site is located.
28. The Council explained that if an Article 4 direction is breached this can lead to enforcement. It also said that disclosing some of the information in the report could potentially result in legal action against the Council.
29. As noted, the Commissioner has seen the information being withheld. He notes that the document is addressed to the Head of Legal Services (and the Development Manager) and was sent by the Council's Planning Team. This suggests that there's a legal dimension to the information. In its submission the Council said that it's possible that the Article 4 direction could be breached in the future, in which case the Council would need to take enforcement action.

30. The Commissioner asked the Council for further explanation on that point ie the matter of future inquiries. The Council confirmed that the information relates to legal advice sought from its Legal Team in a professional capacity and the information was created for the dominant purpose of securing legal advice. The Council says that disclosing the information would reveal the strengths and weaknesses of the different options available in respect of possible enforcement action. Disclosure will make it harder for the Council to take action in future if it proves necessary to revisit this matter [ie the matter of Braddon Woods].
31. The Council also advised that disclosure would prejudice its ability to seek and use legal advice because it would adversely affect its ability to undertake investigations into complaints, and then act upon their findings. This would make it harder to undertake formal enforcement action in respect of this matter, should it be necessary, and to take enforcement action in similar cases. The Council says it has planning enforcement functions and these interests would be adversely affected if the information were to be disclosed.
32. The Council's description of the information being withheld is correct. The Commissioner has noted the date of the withheld report but accepts that the planning matter associated with Braddon Woods remained live at the time of the request. This is because enforcement action may have been necessary. The Commissioner also accepts that it's possible that the options presented to the Council's Legal Team in this case may be relevant to future enforcement action in different but similar cases. This is because it would provide an indication of the arguments and actions the Council might have as options, and their strengths or weaknesses. As such the Commissioner is satisfied that disclosing the withheld information would adversely affect the Council's ability to carry out an inquiry and that the information being withheld engages regulation 12(5)(b) of the EIR. He has gone on to consider the public interest test.

### **Public interest test**

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33. The Council argues that public interest considerations should favour maintaining the exception due to the importance of the principle of legal professional privilege in the UK legal system. In addition to the inbuilt public interest in withholding information which is subject to legal professional privilege the Council says that the public interest also favours local residents and the environment benefitting from the Council being able to carry out its planning functions efficiently and robustly. The advice in this case is still likely to be used in a variety of decision-making processes and such processes would be likely to be affected by disclosure.

34. The Commissioner notes the very strong public interest in allowing clients to speak freely and frankly with their legal advisers on a confidential basis. This is a fundamental requirement of the UK legal system. He also notes that the matter of Braddon Woods was live at the time of the request. This adds further weight to the argument for non-disclosure as disclosure would risk undermining the Council's position in any future enforcement action. It's firmly in the public interest that the Council is able to carry out its planning functions as efficiently and effectively as possible.
35. The Commissioner is aware of the EIR's presumption in favour of disclosure and the general public interest in public authorities being transparent. However, he hasn't been presented with any specific or compelling public interest arguments for the information's disclosure that would justify undermining the client/lawyer relationship. The public interest in transparency has been met sufficiently, in the Commissioner's view, by the relevant information the Council publishes routinely and by the information it's disclosed in response to this request.
36. The Commissioner's decision is therefore that the balance of the public interest favours non-disclosure. He's satisfied that there's greater public interest in this case in withholding the information under regulation 12(5)(b) in order to protect the relationship between a client and their legal team.
37. Since the Commissioner has found that the withheld information in its entirety engages regulation 12(5)(b), it's not necessary to consider the Council's application of regulation 12(4)(e) and 13 to some of that information.

## **Procedural matters**

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38. In their complaint to the Commissioner the complainant said that the Council hadn't been specific about what element [of 12(5)(b)] it was engaging to justify its response.
39. Regulation 14(3) of the EIR says that a public authority's refusal notice must specify the reasons not to disclose and include the exception being relied on and the associated public interest considerations.
40. In its internal review, the Council confirmed that it was now relying on regulation 12(5)(b) in respect of part 1 of the request but provided no further explanation and no public interest considerations. The Commissioner therefore considers that the Council's refusal didn't comply with the requirements of regulation 14(3).

## Right of appeal

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41. 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)

42. 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.
43. 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

**Cressida Woodall**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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