

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

### **Decision notice**

**Date:** 4 November 2013

**Public Authority:** Environment Agency  
**Address:** Rivers House  
21 Park Square South  
Leeds  
LS1 2QG

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

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1. The complainant has requested information from the Environment Agency (EA) regarding any communications between and about the landowners in connection with a particular planning application.
2. The Commissioner's decision is that Environment Agency has successfully applied Regulation 13 of the EIR to the requested information it has either redacted or withheld.
3. The Commissioner does not require the public authority to take the following steps to ensure compliance with the legislation.

#### **Background**

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4. The 'application site' referred to by the complainant in his request dated 5 August 2012 is situated at Clay's lake, Parish lane, Pease Pottage, West Sussex.
5. Planning permission has been granted<sup>1</sup> for the removal and replacement of the existing dam at Clay's Lake with a larger dam to enable the storage of additional water during periods of flood as

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<sup>1</sup> 11/00336/FUL

part of the Upper Mole Flood Alleviation Scheme<sup>2</sup>. Work associated with this scheme includes the excavation of a borrow pit on the adjoining land to provide materials for the dam and mitigation measures to include the creation of a pond and tree pruning.

6. The EA has instructed a firm of external surveyors and valuers (Michael Murphy Associates) to undertake various tasks on its behalf relating to the Upper Mole Flood Alleviation Scheme including the conducting of negotiations with the landowners of the application site.

## **Request and response**

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7. On 5 August 2012 the complainant wrote to the EA and requested information in the following terms:
  - "Details of communications (e.g. file notes/letters/emails/internal memoranda) with the landowners of the application site regarding any proposals for the deposit within the application site of excavated silt material from the existing lake bed.
  - Details of any communications with the Highways Agency concerning the potential for creating a new slip road for accessing the application site from the M23 motorway between junctions 10A and 11.
  - Details of any communications with Network Rail concerning use of the Brighton to London railway in connection with the import and export of materials or waste in connection with the construction of the proposed dam.
  - Details of any communications with West Sussex County Council concerning the identification as the preferred access route, in connection with the construction of the proposed development."
8. The EA responded on 4 September 2012 and disclosed the information it held relating to its communications with the Highways Agency, Network Rail and West Sussex County Council.

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[http://www.crawley.gov.uk/pub\\_livx/groups/operational/documents/plappother/int204408.pdf](http://www.crawley.gov.uk/pub_livx/groups/operational/documents/plappother/int204408.pdf)

However, it stated that it required additional time to locate and consider the information regarding its communications with the landowners.

9. The EA wrote to the complainant again on 17 September 2012. It said it had interpreted his request for communications with the landowners to include the following; internal communications relating to communications with the landowners, communications with the landowners, and the heads of terms being negotiating with the landowners. It also said that it would consider this information under the provisions of the Environmental Information Regulations 2004 (the EIR).
10. Having considered this information under the EIR, the EA said that it was withholding it in its entirety under Regulations 12(4)(d)- unfinished or incomplete data, 12(4)(e)- internal communications and 13(1)-personal data.
11. On 23 September 2012 the complainant wrote to the EA and clarified that the outstanding part of his request related to any information held in connection with discussions with the landowners over the disposal of excavated material for the Clay's Lake Lane dam planning proposals. He then questioned whether the information requested was so sensitive as to be withheld in its entirety under the EIR and requested an internal review.
12. Following an internal review the EA wrote to the complainant on 15 November 2012. It provided the complainant with a list of 67 items falling within the scope of the request for communications with the landowners. Of these 67 items it disclosed 19, redacted 19 and withheld the remaining 29. Of the items it either redacted or withheld it applied the exceptions under Regulations 12(4)(e) and 13(1) of the EIR.

## **Chronology**

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13. On 13 March 2013 the Commissioner wrote to the EA and requested copies of the withheld and redacted information together with any further arguments it wished to advance in respect of its application of the exceptions in the EIR.
14. The EA responded on 28 March 2013 with copies of the withheld and redacted information to which it said it was applying not only Regulations 12(4)(e) and 13(1) of the EIR as stated to the complainant but also Regulations 12(4)(d), 12(5)(b), 12(5)(d) and 12(5)(e).

15. On 3 April 2013 the Commissioner wrote to the complainant requesting confirmation that the only outstanding issue regarding his complaint related to the EA's response to the first of his 4 questions concerning communications with the landowners. The Commissioner also said that he would be writing to the EA requesting it to identify all the recorded information it held in relation to question 1 together with details of which exceptions it wished to apply to each item of information and the reasons why.
16. Following an exchange of correspondence, the Commissioner wrote to the complainant on 1 May 2013 confirming that the scope of his investigation would be restricted to the EA's response to question 1 of his request dated 5 August 2012.
17. On 7 May 2013 the Commissioner wrote to the EA and invited it to reconsider whether all of the withheld and redacted items on the list it submitted to the complainant fell within the scope of question 1 of his request dated 5 August 2012.
18. The EA responded on 12 May 2013 and stated that, having reconsidered question 1 of the complainant's request, it had reduced the number of items falling within its scope to 20, five of which had already been disclosed. Of the remaining 15, 6 had been redacted and 9 withheld in their entirety.

### **Scope of the case**

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19. The complainant contacted the Commissioner on a number of occasions in 2013 to complain about the way his request for information had been handled. In particular, he complained about the EA's decision to withhold or redact certain items falling within the scope of question 1 of his request.
20. The Commissioner has agreed with the complainant that his investigation will be limited to the EA's response to question 1 of his request dated 5 August 2012 when it identified 15 outstanding items falling within its scope which had been either redacted or withheld under the EIR.

## Reasons for decision

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

21. The first question for the Commissioner to consider is whether the information requested is 'environmental' within the scope of the EIR.
22. The Commissioner notes that the EA has dealt with the complainant's request under the EIR.

#### Regulation 2(1) of the EIR

23. Regulation 2(1) of the EIR defines in detail what is meant by 'environmental information'.
24. The Commissioner has seen the information which has been redacted and withheld by the EA and is satisfied that it is 'environmental' within the meaning of the Regulation 2(1)(c) of the EIR as it is information on 'measures' and 'activities' affecting or likely to affect the elements and factors referred to in 2(1)(a) and 2(1)(b) as well as measures or activities designed to protect those elements.

#### The exceptions in the EIR applied by the EA

25. The EA has applied 5 different exceptions in the EIR, namely, Regulations 13-third party personal data, 12(4)(d)-unfinished or incomplete data, 12(4)(e)-internal communications, 12(5)(d)-confidentiality of the proceedings and 12(5)(e)-confidentiality of commercial information.
26. The Commissioner will now deal with each of the above exceptions cited by the EA starting with Regulation 13.

#### Regulation 13 of the EIR—third party personal data

27. This exception provides that third party personal data is excepted from public disclosure under the EIR if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act 1998 ("the DPA").

#### Personal data

28. Personal data is defined by the DPA as any information that relates to a living and identifiable individual.

Relates to a living individual

29. In terms of whether the information 'relates to' an individual the Commissioner has taken into account the approach set out in his guidance 'Determining what is personal data'<sup>3</sup>. This guidance explains that if data is used to influence or inform actions or decisions about an identifiable individual then the information will be personal data. The guidance actually discusses data relating to particular property:
30. 'Context is important here. Information about a house is often linked to an owner or resident and consequently the data about the house will be personal data about that individual. However, data about a house will not, by itself, be personal data.'

Would disclosure breach the Data Protection Principles?

31. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations

32. When considering whether a disclosure of personal information is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the individual. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.

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[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Data\\_Protection/Detailed\\_specialist\\_guides/PERSONAL\\_DATA\\_FLOWCHART\\_V1\\_WITH\\_PREFACE001.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Data_Protection/Detailed_specialist_guides/PERSONAL_DATA_FLOWCHART_V1_WITH_PREFACE001.ashx) -

33. Such expectations could be shaped by: what the public authority may have told them about what would happen to their personal data; their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights; the nature or content of the information itself; the circumstances in which the personal data was obtained; particular circumstances of the case, e.g. established custom or practice within the public authority; and whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.

#### Consequences of disclosure

34. When assessing fairness the Commissioner will consider to the likelihood of the disclosure of causing damage or distress to an individual. In consideration of this factor the Commissioner may take into account: whether information of the nature requested is already in the public domain; if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?

#### Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

35. Notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
36. The EA has applied the exception in Regulation 13 to 4 of the redacted or withheld items solely and 11 of the items with other exceptions.

#### Applying the exception under Regulation 13 to the withheld/redacted information

37. Item 1 consists of a single email dated 25 January 2012 between the private firm of surveyors instructed by the EA and the EA's Project Team Manager which has been copied to its two Project Managers and Legal Advisor. This email makes reference to the discussions between the EA's external surveyor and one of the landowner's surveyors concerning the application site.
38. Item 2 consists of two emails. The first is dated 12 January 2012 between the external surveyors instructed by the EA and the EA's Project Manager and provides a summary of the legal advice

provide to the EA by an external barrister at a conference on 11 January 2012. The second is dated 13 January 2012 between the EA's Project Manager and various individuals at the EA and has the first email attached to it.

39. The parts of the email dated 12 January 2012 that have been redacted relate to the specific legal advice given to the EA by the barrister in relation one of the two landowners connected with the application site.
40. Item 3 consists of 4 emails. One dated 3 January and the other 3 dated 9 January 2012. The email dated 9 January 2012 and timed at 18:40 has the remaining 4 emails attached to it. The only redactions made by the EA have been to the email dated 3 January 2012 timed at 14:18 between its external surveyor and one of the landowner's surveyors where it has removed the name of one of the private landowners and a reference to another private individual(s).
41. Item 4 consists of 3 emails dated 6 March, 9 March and 12 March 2012. The only information redacted by the EA is from the emails dated 6 and 9 March 2012. The email dated 6 March 2012 is from the EA's Project Team Manager to the EA's external surveyor and has been copied to its two Project Managers. The part redacted relate to proposed arrangement with one of the landowners (and his relative) of the application site both of whom are named.
42. The email dated 9 March 2012 is from the EA's Project Team Manager to a member of the High Street Action Committee (HSAC) and has been copied to the EA's two Project Managers and its flood and Coastal Risk Manager. The parts redacted from this email also relate to information on a proposed arrangement with one of the landowners (and his relative) of the application site both of whom are named.
43. Item 5 comprises of 5 separate emails. 1 dated 25 February, 1 dated 26 February and 3 dated 27 February 2012
44. One of the emails dated 27 February 2012 and timed at 19:00 is from the EA's Project Team Manager to two of its Project Managers to which is attached a chain of the four remaining emails dated 25, 26 and two dated 27 February 2012. The email dated 27 February 2012 and timed at 08:20 is one passing between a member of the HSAC and one of the landowners and a relative concerning a meeting and discussions with the EA concerning various planning issues. This email also makes specific reference to one of the other landowners. The emails dated 25 and 26 February 2012 are ones



passing between a member of the HSAC and one of the landowners and a relative.

45. Item 6 comprises of 2 emails both dated 16 May 2012. The first email dated 16 May 2012 and timed at 09:05 is from the EA's external surveyor to one of its Project Manager. The second email dated 16 May 2012 and timed at 09:05 is an internal one from the EA's Project Manager to its other Project Manager and Project Team Manager and refers to and attaches the earlier email dated 16 May 2012. The emails relate to various financial issues concerning one of the landowners (who is named) of the application site.
46. Item 7 comprises of 5 emails (3 dated 16 May and 2 dated 18 May 2012) all of which have been withheld in their entirety by the EA under Regulations 13, 12(4)(d), 12(4)(e), 12(5)(d) and 12(5)(e) of the EIR. The first email dated 16 May 2012 and timed at 09:05 is from the EA's external surveyor to the EA's Project Manager. The second email dated 16 May 2012 and timed at 09:05 is an internal one from one of the EA's Project Managers to another one of its Project Managers and the Project Team Manger to which the earlier email dated 16 May has been attached. The third email dated 16 May 2013 and timed at 15:16 is from one of the EA's Project Managers to another and has been copied to the EA's Project Team Manager and its external surveyor. The first email dated 18 May 2012 and timed at 10:31 is from the EA's external surveyor to the EA's two Project Managers and copied to its Project Team Manager. The second email dated 18 May 2012 and timed at 11:31 is an internal email from one of the EA's Project Managers to its Principal Solicitor and copied to the EA's other Project Manager and its Project Team Manager. Attached to this email is a copy of the earlier one dated 18 May and the other three dated 16 May 2012.
47. All of the 5 emails that comprise item 7 make reference to the EA's surveyor's thoughts and proposals and those of its staff in relation to the effect of the planning proposal on one of the landowners of the application site.
48. Item 8 comprises of 2 emails, both dated 16 February 2012, which have been withheld in their entirety by the EA under Regulations 13, 12(4)(d), 12(4)(e), 12(5)(d) and 12(5)(e) of the EIR. The first one timed at 14:39 is from the EA's Project Team Manager to one of the application site's landowner's relatives and that person's surveyor and has been copied to the EA's Flood and Coastal Risk Manager and a member of the HSAC. The second one timed at

15:27 is from the EA's Project Team Manager to its external surveyor and copied to the EA's two Project Managers.

49. Both emails that comprise item 8 make reference to the EA's thoughts, proposed discussions and proposals in relation to the effect of the planning proposal on one of the landowners of the application site.
50. Item 9 comprises of 4 emails, 3 dated 16 May 2012 and 1 dated 18 May 2012. The first email dated 16 May 2012 and timed at 09:05 is from the EA's external surveyor to one of its Project Managers. The second email dated 16 May 2012 and timed at 09:05 is an internal one from the same EA's Project Manager to its other Project Manager and Project Team Manager to which a copy of the earlier email dated 16 May is attached. The third email dated 16 May 2012 is from the EA's Project Manager to its other Project Manager and is copied to its external surveyor and Project Team Manager. The email dated 18 May 2012 and timed at 10:31 is from the EA's external surveyor to its two Project Managers and has been copied into its Project Team Manager. This email is included as part of item 7 and has already been dealt with above. The information contained within all of the emails relates to financial matters concerning one of the landowners (who is named) and the EA's planning application.
51. Item 10 comprises of 3 emails dated 25 January 2012 all of which have been withheld by the EA in their entirety under Regulations 13, 12(4)(d), 12(4)(e), 12(5)(d) and 12(5)(e) of the EIR. The first email dated 25 January 2012 and timed at 13:24 is from the EA's external surveyor to the EA's Project Team Manager and copied to its two Project Managers and solicitor. The second email dated 25 January 2012 and timed at 14:01 is from the EA's solicitor to the EA's external surveyor and Project Team Manager and copied to the EA's Project Managers and a member of its legal department. The third email dated 25 January 2012 and timed at 14:06 is from the EA's external surveyor to the EA's solicitor and Project Team Manager and copied to its two Project Managers and a member of its legal department. The information contained within these three emails refers to discussions between the EA's external surveyor, one of the landowner's surveyors and the EA's staff relating to the various planning issues in connection with the application site.
52. Item 11 comprises of two emails dated 15 June 2011 both of which have been withheld by the EA in their entirety under Regulations 13, 12(4)(d), 12(4)(e), 12(5)(d) and 12(5)(e) of the EIR. The first email dated 15 June 2011 and timed at 10:46 is between one of the landowners' surveyors and the EA's external

surveyor. The second email dated 15 June 2011 and timed at 11:17 is from the EA's external surveyor to its Project Manager and Project Team Manager and attaches and refers to the earlier email from one of the landowner's surveyors. Both of the emails refer to meetings and discussions between one of the landowners (who is named) and that persons surveyors and the legal rights and obligations for the EA.

53. Item 12 consists of three emails dated 10, 12 and 13 September 2011 between a member of the HSAC and the EA's Project Team Manager which include the minutes of a meeting between the HSAC and the EA on 8 September 2011 which have been copied to various individuals at the EA and members of the HSAC. The only information that has been redacted from this item is the personal/private email addresses of two of the private attendees who are members of the HSAC.
54. Item 13 consists of one email dated 1 March 2012 between the EA's Project Team manager and one of the landowner's surveyors which has been copied to one of the landowners and the EA's Flood and Coastal Risk Manager. The information redacted from this email is the personal email address of the individual landowner and the EA's detailed proposals in respect of that person's private land.
55. Item 14 is the draft Heads of Terms between one of the landowners and the EA relating to the application site. This information has been withheld in its entirety by the EA under Regulations 13, 12(4)(d), 12(4)(e), 12(5)(d) and 12(5)(e) of the EIR. The draft Heads of Terms document contains details of the various party's financial and legal obligations and also names and refers to the other landowner. The Heads of Terms document is still in draft form has not been agreed or signed.
56. Item 15 consists of 3 emails, 1 dated 1 November and the other 2 dated 2 November 2011. The only information that has been redacted by the EA is a named reference to a private individual in the second email dated 2 November 2011 and timed at 14:59. This email is from the EA's external consultants to its project Team Manager and has been copied to various individuals at the consultants.
57. The EA has argued that all of the information outlined above is the personal data of the landowners concerned who would have a reasonable expectation that it would remain private.

58. The Commissioner agrees that the withheld information is the personal data of the named landowners concerned who would have a reasonable expectation that their personal data would remain private and confidential. The Commissioner therefore finds that the disclosure of this information would be unfair under the DPA and has not been provided with any compelling public interest arguments which might override the individual's expectation of privacy in this case.
59. As the Commissioner is satisfied that Regulation 13 of the EIR is engaged he has not gone on to consider any of the other exceptions cited by the EA.

## Right of appeal

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60. 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: 0116 249 4253  
Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)
61. 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.
62. 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 .....**

**Rachael Cragg  
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