

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 18 December 2020

Public Authority: West Berkshire Council
Address: Council Offices
Market Street
Newbury
Berkshire
RG14 5LD

Decision (including any steps ordered)

1. The complainant requested from West Berkshire Council ("the Council") various information relating to planning application 18/02975/FUL. The Council disclosed some information, but also withheld some information under regulation 12(4)(e) of the EIR (internal communications) and regulation 12(5)(d) of the EIR (confidentiality of proceedings).
2. The Commissioner's decision is that, on the balance of probabilities, the Council did not hold further information that fell within the scope of the request. The Commissioner also finds that the Council did not comply with its obligations under regulation 5(2) of the EIR by not responding to the request within the statutory timeframe.
3. The Commissioner's decision is that the Council were entitled to withhold some, but not all, of the requested information under regulation 12(4)(e).
4. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the information previously withheld under regulation 12(4)(e) which is not classed as an "internal" communication, which is three emails exchanged between the Council and a member of the public.

5. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 28 June 2019 the complainant wrote to the Council and requested information in the following terms:

"Please can I be provided with electronic copies of all correspondence sent or received by the council, any minutes of any meetings held either in person or on telephone, any reports or ancillary documents produced, sent or received by the council, or members of the Eastern Area Planning Committee, in relation to planning application 18/02975/FUL relating to the Swan at Streatley application for Overflow Car Park.

I am happy to receive the documentation via drop box or similar data transfer medium and will not require any paper printed copies. However, for completeness my postal address is [redacted].

I would like this disclosure to include (but not exclusively be limited to) in relation to planning application 18/02975/FUL:

- all correspondence, meeting minutes, telephone call minutes and any other communications between the Planning officers and any members and councillors of the West Berkshire Eastern Area Planning Committee

- all correspondence, meeting minutes, telephone call minutes and any other communications between members or councillors or substitute members of the West Berkshire Eastern Area Planning Committee

- all correspondence, meeting minutes, telephone call minutes and any other communications between councillors or members or substitute members of the West Berkshire Eastern Area Planning Committee and members of the public

- all internal council communications in whatever form recorded in which the application is discussed or mentioned."

7. The Council wrote to the complainant on 25 July 2019 and advised that it required a further 20 working days to respond to this request.
8. The Council wrote to the complainant again on 20 August 2019 and 16 September 2019 to apologise for the delay as it had not yet responded to the request.
9. On 4 October 2019, the Council issued its response to this request. It stated:

"The Council holds a total of 57 email trails in relation to this planning application, which include communications between Planning Officers and Members of the Eastern Area Planning Committee. The Council does not hold any meeting minutes, other than those of the Eastern Area Planning Committee that are published on the Council's website, and neither does it hold any telephone call minutes.

Of the 57 email trails that are held, 35 are attached with this response, which include a number of redactions under Regulation 12(4)(e) (Internal Communications) and Regulation 13 (Personal Information) of the Environmental Information Regulations 2004. Also attached are the handwritten minutes taken at the Eastern Area Planning Committee meeting held on 26 June 2019.

22 email trails have been withheld as detailed below: -

- (i) Thirteen emails have been withheld under Regulation 12(4)(e) (Internal Communications) of the Environmental Information Regulations 2004 and a copy of the annex is attached.*
- (ii) Eight emails have been withheld under Regulation 12(5)(d) (confidentiality provided by law) of the Environmental Information Regulations 2004, as they contain legal advice and a copy of the annex is attached.*
- (iii) One email has been withheld under Regulation 13 (Personal Information) of the Environmental Information Regulations 2004 as it contains third party personal information.*

In addition, we have not included any correspondence between your solicitors and our solicitors or our internal discussions in relation to the proposed litigation."

10. On 7 October 2019, the complainant requested an internal review. In particular, he raised concerns about the Council's application of regulation 12(4)(e) to the withheld thirteen email chains. He also stated that the disclosed information referenced a specific meeting dated 13 May 2019 and asked for "*the minutes/notes/record of what was said*".
11. On 25 October 2019, the Council provided its internal review decision. It stated that it had reconsidered the content of the thirteen email chains withheld under regulation 12(4)(e). In its internal review decision the Council concluded that:
 - four of the emails chains were correctly withheld under regulation 12(4)(e).
 - three of the emails should have been withheld under regulation 12(5)(d) instead of 12(4)(e).
 - four of the email chains related "*to internal discussions concerning the proposed legal challenge*" and these continued to be withheld.
 - One email was not relevant to this request.
 - It disclosed two further emails.
12. As the complainant had not raised it when requesting an internal review, the Council did not review or reconsider its application of 12(5)(d) to the withheld information.
13. In relation to the meeting of 13 May 2019 that was referenced in the information disclosed, it stated that "*I have discussed this with the officers who attended the meeting and understand that no record was made of this meeting and therefore, I am unable to provide you with any information*".
14. Following the internal review, on 19 November 2019, the complainant wrote to the Council and raised further concerns. He argued that he did not agree that the withheld emails could be considered to be current as the planning application has been formally refused. He also explained his understanding about the meeting of 13 May 2019 as follows:

"[the meeting...] involved the senior officers liaising with a senior and influential councillor who we suspect pre-determined the application due to a vested interest in the site. This would, therefore, appear to be a key meeting and for there to be absolutely no record of it would be a considerable deviation from normal and recommended practice. Even in the unusual event that there are no written minutes, I am sure that the officers took appropriate notes for themselves, so I would request that

you please provide these together with the officer's own recollection of the meeting via witness statements."

15. On the same day, the Council stated that it had nothing further to add following its internal review decision and referred the complainant to the ICO.

Scope of the case

16. The complainant contacted the Commissioner on 27 January 2020 to complain about the Council's handling of his request. He complained about the amount of time the Council had taken to respond to his request. He raised two main concerns about the contents of the Council's response:
 - The complainant disagreed with the Council's argument that information should be withheld under 12(4)(e) as the matter is still live. The complainant stated the matter was not live as the planning application had been refused.
 - The complainant disagreed with the Council's position that it had no record of the meeting of 13 May 2019. The complainant believed that the Council held this information.
17. The Commissioner wrote to the complainant on 29 April 2020 to ask him to clarify the scope of his complaint. He confirmed that, *"I believe information is being withheld either through the improper interpretation of the rules or through denying the information exists [...] I find it hard to believe that a governmental body would not keep any record whatsoever of seemingly important internal meetings, especially one attended by a counsellor"*. He confirmed that he wished the Commissioner to investigate the Council's application of regulation 12(4)(e) and regulation 12(5)(d) of the EIR and also investigate whether the Council held any further information within the scope of his request.
18. However, as the complainant was clear when requesting an internal review what aspects of the Council's response to his request he wished this to cover and this did not include the citing of regulation 12(5)(d) by the Council, the Commissioner has not investigated the Council's use of this exception. This means the Commissioner has also not investigated the information the Council has withheld under both regulation 12(4)(e) and 12(5)(d).
19. Therefore, the scope of this notice is to determine only whether the Council was entitled to refuse to provide some of the requested

information under regulation 12(4)(e) (internal communications) of the EIR. It will also consider whether the Council holds any further information within the scope of this request under regulation 5(1) of the EIR. This notice will also consider the timeliness of the Council's responses.

20. For clarity, the Council withheld some information under regulation 13 of the EIR (personal data), however the complainant confirmed that he did not wish this to be covered further within this notice.

Reasons for decision

Regulation 2 – Is the requested information environmental?

21. Environmental information must be considered for disclosure under the terms of the EIR rather than the FOIA.
22. Regulation 2(1)(c) of the EIR defines environmental information as any information on "*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 [2(1)](a) and (b) as well as measures or activities designed to protect those elements.*"
23. The request in this case is for information relating to planning matters. The Commissioner is satisfied that the requested information is therefore on a measure that would or would be likely to affect the elements listed in regulation 2(1)(a) and is, therefore, environmental under regulation 2(1)(c).

Background

24. This requested information relates to a planning application (18/02975/FUL) which was refused by the Eastern Area Planning Committee ("EAPC"). The application and decision was reported about in local media. The application was for planning permission for the formation of an overflow car parking area and associated landscaping at a Hotel, "the Swan at Streatley" located on the High Street, Streatley.
25. The meeting minutes of the Eastern Area Planning Committee dated 26 June 2019 are published on the Council's website¹. This includes

¹ <http://decisionmaking.westberks.gov.uk/mgAi.aspx?ID=50983>

Streatley Parish Council's representations, Ward Member representations, questions and debate regarding the application.

26. In this meeting, a senior planning officer presented a report regarding the planning application. This mentioned that previous planning applications had been refused due to the impact they would have on the North Wessex Downs Area of Outstanding Natural Beauty ("NWD AONB") and the site's location external to the settlement boundary. The Conservation Officer's concerns were that the benefits of the proposal did not outweigh the harm to the designated heritage assets. The Parish Council did not object to the application. The NWD AONB Board had lodged an objection to the application on the grounds that the proposed development did nothing to conserve or enhance the natural and scenic beauty of the AONB.
27. The Council had requested that the applicant produce a formal assessment of the expected impact on the local road network regarding safety, flows and convenience from successful and unsuccessful attempts to park at the site once the redevelopment of the hotel had completed. However this had not been submitted.
28. The officer recommendation from this meeting was to refuse planning permission due to the harmful impact the development would have on the AONB and Conservation Area and the absence of the highway impact information that had been requested. It was debated at this meeting that while a strong recommendation for refusal had been given by officers, traffic congestion and parking were both issues for the area. It was highlighted that 46 letters of support had been received about the proposed development and only four letters of objection.
29. The Chairman of the Committee expressed his opinion that the views of Streatley residents were evenly divided for and against this application. He argued that while traffic issues and parking were related, they were separate issues and that approval of this car park would not help to ease congestion or traffic in Streatley. Councillors referenced the traffic survey/assessment that had not been provided by the applicant to fully inform their views on the issue. The Chairman ultimately proposed to accept the Officer's recommendation to refuse planning permission.
30. It was resolved that the Head of Development and Planning be authorised to refuse planning permission for the following reasons:
 - *"impact on the North Wessex Downs Area of Outstanding Natural Beauty"*.
 - *"Conservation Area and Setting of the Listed Building Refusal Reason"*

- *"Lack of Information on Traffic and Highway Implications"*

31. A local news article of 21 June 2019 comments on the officers' proposal before the meeting of 26 June 2019. This states that the hotel was set to reopen after a four-year £12 million refurbishment but states that the hotel is concerned about having enough car parking. The article provides comment from the owner of the hotel, a parish council representative and a statement from the NWD AONB Board. The article reports that reasons for objecting to this proposal were *"light pollution, adverse effects on the natural surroundings, and encouraging more car use"*. Reasons in support of the application were *"a lack of parking in the village, increased visitors following the hotel reopening, and that local residents would be able to use the car park"*².
32. For context, the information request was made on 28 June 2019. The planning application this request relates to was formally refused on 11 July 2019. The Council have stated *"a legal challenge was issued by the applicant's solicitors the day after the planning application had been refused"*.

5(1) – Duty to make environmental information available on request

33. Regulation 5(1) of the EIR states that *"a public authority that holds environmental information shall make it available on request."* This is subject to any exceptions that may apply.
34. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information was not held, and any other reasons offered by the public authority to explain why the information was not held. She will also consider any reason why it is inherently likely or unlikely that the requested information was not held.
35. For clarity, the Commissioner is not expected to prove categorically whether the information was held, she is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities. This is in line with the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)* in which it stated that *"there can seldom be absolute*

² <https://www.readingchronicle.co.uk/news/17721541.swan-streatley-car-park-plans-will-decided-next-week/>

certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records". It clarified that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities.

36. It is also important to note that the Commissioner's remit is not to determine whether information should be held, but only whether, on the balance of probabilities, the requested information was held by the Council at the date of the request.

The Council's view

37. In the Council's initial response to this request, it stated that it did not hold any meeting minutes other than those of the Eastern Area Planning Committee (that are published on the Council's website) nor does it hold any telephone call minutes.
38. As part of his internal review request, the complainant queried the absence from the information disclosed to him of a copy of the minutes/notes/records for a meeting which was referred to in an email that was disclosed in response to his request. This email was sent from a Councillor, dated 8 May 2019, and referred to a meeting held on 13 May 2019. The Council stated that they had discussed this with the officers who attended the meeting and understood that no record was made of the meeting so were unable to provide this information to the complainant.
39. In response to the Commissioner's investigation, the Council stated that it had again discussed these two points with the planning officer concerned. The planning officer confirmed that minutes of informal meetings with Members on planning applications are never taken. The Council also confirmed that notes are not held of telephone conversations and no record was made of the meeting with Councillor Alan Law on 13 May 2019. The Council explained that this information is not held because planning officers do not have the capacity to make these notes, stating, *"even though they would like to take meeting minutes/notes, it is not feasible"*.
40. When asked what searches had been carried out to locate this information, the Council stated that officers have checked their note pads for any notes but there are none that relate to this request. The Council reiterated that officers do not have capacity to take minutes of informal meetings or telephone conversations. The Council explained that if the information were held, it would have been held in hand written notes in officers' notepads but this has been checked and no information has been found.

41. The Council confirmed that no recorded information held relevant to the scope of the request has been deleted or destroyed.
42. The Council stated that there is no business purposes for which the requested information should be held and no statutory requirements upon the Council to retain this information. It also said that there is no information held that is similar to the information requested. It therefore stated that it did not provide advice and assistance in line with regulation 9 of the EIR.

The Commissioner's view

43. The Commissioner has examined the submissions of both parties. She has considered the searches performed by the Council, the information disclosed, the Council's explanations as to why information was not held and the complainant's concerns.
44. The Commissioner is satisfied that the Council carried out adequate and appropriately-targeted searches to locate relevant information within the scope of the request. She notes that all of the relevant officers were consulted and reasonable searches undertaken. The Commissioner considers that such searches would have located all relevant information.
45. The complainant's concern here relates to the meeting of 13 May 2019 for which he believes meeting minutes should have been taken. However, the complainant has not provided any evidence to demonstrate that these minutes exist. Therefore, in the circumstances, the Commissioner does not consider that there is any evidence that would justify refusing to accept the Council's position that it does not hold any further relevant information to that which it had already identified and disclosed to the complainant.
46. The Commissioner is satisfied that, on the balance of probabilities, the Council did not hold any further information falling within the scope of the request to that which it identified in its initial response. The Commissioner considers that the Council has complied with the requirements of regulation 5(1) of the EIR.

Regulation 12(4)(e) – Internal communications

47. Regulation 12(4)(e) states:

"For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that...

(e) the request involves the disclosure of internal communications."

48. The Commissioner's published guidance³ on this exception defines a communication as encompassing any information which someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it.
49. The EIR does not provide a definition of what is meant by "internal". However, the Commissioner's guidance provides clarification on the scenarios where communications can be defined as such. Such a scenario is where the communications have taken place solely within a public authority.
50. Regulation 12(4)(e) is a class based exception. This means that there is no requirement to consider the sensitivity of the information in order to engage the exception. However, the exception is subject to a public interest test under regulation 12(1)(b), and the exception can only be maintained should the public interest test support this.

The Council's arguments

51. The Council stated that it withheld the requested information under regulation 12(4)(e) as it considered it to be internal communications. In response to the Commissioner's investigation the Council stated that *"following the internal review it was concluded that four emails should be withheld under regulation 12(4)(e)"*. The Council provided the Commissioner with copies of the information it withheld under regulation 12(4)(e). This comprised of four email trails in a twenty page document.
52. In its responses to the complainant and the Commissioner, the Council has not clearly explained why they consider these to be "internal" communications. However in the Council's response to the complainant it has referred to the underlying rationale behind this exception being that public authorities should have the necessary space to think in private.
53. As noted above, the EIR does not define the meaning of "internal". Consequently, in the absence of a definition, a judgement must be made that considers the context of the communications. In this case, the information withheld under regulation 12(4)(e) is email trails. These trails comprise emails between Councillors and Council officers in the planning department regarding the planning application. It also includes

³ https://ico.org.uk/media/fororganisations/documents/1634/eir_internal_communications.pdf

email exchanges between Council officers and a third party (a member of the public) regarding the planning application.

54. The Council have also withheld four email trails under both regulation 12(4)(e) and regulation 12(5)(d) where it has stated the emails related, "*to internal discussions concerning the proposed legal challenge*". The Commissioner has not considered the content of this withheld information as it is withheld under two exceptions and as stated above, the Commissioner is not investigating the Council's application of regulation 12(5)(d). Therefore, the Commissioner has only considered the contents of the four email chains withheld solely under regulation 12(4)(e) as referred to at paragraph 51.
55. Having examined the withheld information, the Commissioner is satisfied that the majority of the information withheld under regulation 12(4)(e) comprises of communications that were solely "internal" to the Council. This is the emails exchanged only between Council officers and Councillors. Therefore, this information engaged regulation 12(4)(e).
56. However, the Commissioner does not consider the following emails to be internal communications:
 - Emails the Council has exchanged with a member of the public regarding this planning application. As this is not a communication that is internal within the Council, the exception is not engaged for this email trail and therefore this information must be disclosed.
57. The information described in the bullet point above does not engage regulation 12(4)(e) and at paragraph 4 above the Council is now required to disclose this information.
58. The Commissioner is of the view that the only information which qualifies as internal communications are the emails exchanged internally between Council officers and Councillors regarding the planning application and decision. As the Commissioner has found the exception to be engaged for this information, she has also considered the public interest test.

Public interest test

59. Where regulation 12(4)(e) is engaged, it is subject to the public interest test required by regulation 12(1)(b). This is to ascertain whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
60. In carrying out her assessment of the public interest test, the Commissioner is mindful of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Public interest in favour of disclosing the information

61. In favour of disclosure, the complainant argued that since his complaint related to the conduct of a councillor and a belief that said councillor exerted undue influence over planning committee members and officers, he argued it would be within the public interest for this information to be disclosed. He suggested that by failing to disclose internal communications, the Council were implying that decisions were being taken behind closed doors. He also stated that the presumption under the EIR must always be in favour of disclosure.
62. The complainant disputed the Council's arguments for withholding the information as he is of the view that since the planning decision has been made, there is no further deliberations or decision making to protect and disclosure is not going to affect the outcome of the planning decision. He disputed the Council's argument that the matters were still current or live because the application had already been decided upon and formally refused.
63. The Council considered the factors for disclosing the information. It said that these included accountability of the Council for an open and transparent process for administering the planning process. It stated this was particularly the case since this application relates to a prominent public house, which will be of interest to a large number of residents.
64. In relation to the withheld information, the Commissioner recognises that there is a strong public interest in disclosure as this would add to public understanding about the processes and decision making of the Council.

Public interest in favour of maintaining the exception

65. In favour of maintaining the exception, the Council argued that there is a need for space for internal deliberation and decision making processes with regard to contentious planning applications. It stated that release of the information may create a "chilling effect" on the exchange of free and frank views in future between Councillors and Council officers. It also argued there was a legal precedent for Councils to conduct business in private. In its internal review response the Council stated *"the [ICO] guidance says that neither the EIR 2004, nor the European Directive 2003/4/EC from which the EIR are derived, provide a definition of what constitutes an internal communication. However, the underlying rationale behind the exception is that public authorities should have the necessary space to think in private."*

66. In response to the Commissioner's investigation, the Council outlined its reasons for applying regulation 12(4)(e). It stated:

"These email trails were withheld at the time as the matter was still live since a legal challenge was issued by the applicant's solicitors the day after the planning application had been refused by the Eastern Area Planning Committee. In addition, although the time period for the legal challenge and an appeal to the planning inspector with regard to the refusal have now passed, the matter is still considered to be live. This is because it is likely the applicant will submit a new planning application and the same barriers and Ward Member interest will apply. Consequently, these internal emails are still being withheld under Regulation 12(4)(e)."

67. In its internal review response to the complainant, the Council argued that the requested information relates to matters that, *"are still current, since planning permission has not been granted on the application"*.
68. Ultimately, the Council argued that the release of internal communications could jeopardise the Council's ability to deliberate in private and discuss ideas in a free and frank manner.

The Commissioner's view

69. The Commissioner notes the importance of a "private thinking space" in order to allow the Council to carry out internal deliberation. The Commissioner considers that this is a valid public interest factor in favour of maintenance of the exception of considerable weight.
70. The Commissioner's guidance on the exception 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".
71. 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.
72. The Commissioner considers that there will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of

environmental matters, a free exchange of views, and more effective public participation in environmental decision-making, all of which ultimately contribute to a better environment.

73. The weight of this interest will vary from case to case, depending on the profile and importance of the issue and the extent to which the content of the information will actually inform public debate. However, even if the information would not in fact add much to public understanding, disclosing the full picture will always carry some weight as it will remove any suspicion of "spin".
74. The Commissioner is mindful that the public interest is time and context sensitive and she accepts that, with the passage of time, the sensitivity of the information may diminish. The Commissioner accepts that there is a need for the Council to have a safe space for internal deliberation and decision-making processes. The Council should be able to communicate in private and discuss ideas in a free and frank manner where there is a need to do so.
75. The Commissioner understands that the release of internal communications may create a "chilling effect" on the free and frank exchange of views and ideas, also on future discussions and debates. These exchanges, she agrees, are necessary in order for the Council to take decisions based on advice and consideration of all of the options relating to environmental plans. The Commissioner accepts the risk of such an effect is likely to be higher if information is disclosed whilst the plans are live and ongoing.
76. From the Council's website, it is clear that this planning decision notice was issued on 11 July 2019⁴. Therefore at the time of receiving this request (28 June 2019) it can be considered that the issue was current because the decision had not yet been made. From the planning notice, it appears to be the case that any appeal must be submitted within six months of the date of issue⁵. As the decision had not yet been made, this does add weight to the Council's argument that the matter was still current at the time of the request. At the time of writing the time period for the legal challenge and an appeal to the planning inspector with regard to the refusal of the application has now passed. However, at the time of the information request, the time period for the legal challenge

⁴ <https://publicaccess.westberks.gov.uk/online-applications/applicationDetails.do?activeTab=summary&keyVal=PI6UGJRD04Z00>

⁵ <http://planning.westberks.gov.uk/rpp/index.asp?caseref=18/02975/FUL>

and appeal to the planning inspector had not yet passed as the decision had not yet been issued. The Council also maintained that the matter is still considered to be live because it considers it likely the applicant will submit a new planning application and the same barriers will apply.

77. The Commissioner has considered the competing arguments. She accepts that there is a public interest in disclosure in promoting transparency and accountability around decisions made by public authorities. The Commissioner acknowledges that there is a public interest in allowing the public to better understand how these decisions are reached. There is particular public interest in information relating to planning processes, and there is a public interest in disclosure of the information in question in order to inform about the spending of public money, transparency and increased participation over decision making where environmental issues are involved, and also informing public debate.

Conclusion

78. The Commissioner considers that the Council's argument for a safe space for internal communications carries significant weight in the case. At the time of receipt of this request, the decision on the planning application had not yet been formally made and published. The Commissioner does however note that the EAPC meeting of 26 June 2019 resolved to authorise the refusal of this planning application and that the meeting preceded the complainant's information request. However, the Commissioner accepts the Council's argument that there is the need for a space for internal deliberation and decision making processes with regard to "*contentious planning applications*". As explained earlier in this notice, the Commissioner accepts that this application has been a controversial and divisive one in the local area.
79. In its response to this investigation, the Council has argued that the matter is still live despite the time period for the legal challenge and appeal to the planning inspector having passed. The Council states that it considers the matter to be live because it is likely the applicant will submit a new planning application and the same barriers and ward member interest will apply. However, the issue here is whether the Council was correct to consider this matter as "live" at the time of the information request. While the Council's arguments about the complainant's potential actions appear speculative as at today's date, the Commissioner accepts the Council's argument that, at the time of the request, this matter was current and live because the decision on the planning application had not at that time been made, and hence the appeal period had also not expired. The Commissioner therefore accepts the Council's argument in relation to protecting live and ongoing decision making.

80. The Commissioner is also persuaded by the Council's argument that disclosure of the withheld information may create a chilling effect on the exchange of free and frank views between Councillors and Council officers. In particular, it is noted that the withheld information comprises of discussions between Council Officers regarding a Council decision.
81. The Council's view that the applicant may submit a further similar planning application should this information be disclosed is noted. It is also noted that the Council are concerned this may happen because of the legal challenge issued by the applicant's solicitors following the refusal of the planning application. The Commissioner notes that there are appropriate routes for appealing a planning application should an applicant remain dissatisfied once it has been issued.
82. In relation to the complainant's argument that withholding this information implies that the Council are taking decisions "behind closed-doors", the Commissioner considers that the Council have demonstrated transparency in the publication of the EAPC meeting minutes of 26 June 2019. These meeting minutes do provide significant detail into the debate surrounding the decision on this application. The Commissioner acknowledges the complainant's argument that by now there are no further decision making processes to protect in relation to this particular application and his argument that disclosure of this information is not going to affect the outcome of this particular decision. However, that was not the case at the time of the request and disclosure may also affect the processing of any subsequent planning decisions, as the Council has argued.
83. The Commissioner is mindful that the Council should apply a presumption in favour of disclosure. In this instance, for the reasons listed above, the Commissioner's view is that the Council has demonstrated that the balance falls in maintaining the exception. The Commissioner's decision therefore is that the balance of public interest favours maintaining the exception. Therefore, the Council is not required to disclose the emails containing internal communications it is withholding under regulation 12(4)(e).
84. 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).

85. 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(4)(e) was applied correctly. However, as outlined at paragraph 3, the Council is required to disclose to the complainant the following:

- email from the Council to a member of the public dated 7 May 2019.
- email from the Council to a member of the public dated 3 April 2019.
- email from a member of public to the Council dated 3 April 2019.

Procedural matters

Regulation 5(2) of the EIR – Time to respond

86. As explained above, Regulation 5(1) requires a public authority to provide information it holds when requested. Regulation 5(2) of the EIR requires this information to be provided to the requestor within 20 working days following receipt of the request.

87. The complainant requested the information on 28 June 2019. The Council wrote to the complainant on 25 July 2019 and advised that it required a further 20 working days to respond to this request. The Council issued its response to the request on 4 October 2019.

88. This is a period of more than the required 20 working days. Whilst an extension of a further 20 working days is permissible, the substantive response was not provided within that absolute maximum of 40 working days. Therefore the Commissioner finds that the Council breached regulation 5(2) of the EIR.

89. However, as a response has since been issued to this request, the Commissioner does not require the Council to take any further steps in relation to this breach.

Right of appeal

90. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

91. 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.
92. 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
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF