

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

**Date:** 3 August 2021

**Public Authority:** Dover District Council  
**Address:** Council Offices,  
White Cliffs Business Park  
Whitfield  
Dover CT16 3PJ

**Decision (including any steps ordered)**

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1. The complainant requested information relating to a Local Plan. Dover District Council withheld the information under the exception for internal communications – regulation 12(4)(e). During the Commissioner’s investigation Dover District Council disclosed some of the information but retained its reliance on regulation 12(4)(e) to withhold the outstanding information.
2. The Commissioner’s decision is that Dover District Council correctly handled the request under the EIR and complied with regulation 5, and that it correctly withheld the requested information under regulation 12(4)(e).
3. The Commissioner does not require the public authority to take any steps.

## Request and response

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4. On 13 July 2020, the complainant wrote to Dover District Council (the "council") and requested information in the following terms:

*"I would like to make a Freedom of Information request concerning the 'saved policy' AS1, originally part of Local Plan 2002. I would like to see records of dates and times of all face to face meetings, including video conference calls and correspondence between officials, between members and between members and officials where 'saved policy' AS1 was discussed between March 2017 and the present. This would include correspondence in both paper and electronic form."*

5. The council responded on 4 August 2020 and confirmed that it held two emails falling within the scope of the request. It confirmed that it was withholding this information under the exception for internal communications – regulation 12(4)(e) of the EIR.
6. Following an internal review the council wrote to the complainant on 23 September 2020. It confirmed that it was maintaining its position.

## Scope of the case

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7. On 21 September 2020 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. During the Commissioner's investigation the council disclosed one of the withheld emails to the complainant but continued to withhold the remaining email under regulation 12(4)(e).
9. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly applied regulation 12(4)(e) to the withheld information and whether it had correctly handled the request under the EIR.

## Reasons for decision

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### Is it Environmental Information?

10. The council handled the request under the EIR. The complainant has suggested that the request should have been dealt with under the FOIA.
11. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant parts of the definition are found in 2(1)(a) to (c) which state that it is as any information in any material form on:

*"(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

*(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

*(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements..."*

12. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
13. Information about planning matters and planning decisions are often environmental information. For example, a particular planning regulation, under which a planning decision has been made, might be a measure affecting or likely to affect the factors and elements in 2(1)(a) and (b), or designed to protect those elements. If it is, then the decision and the related planning application become environmental information because they are information on the implementation of that particular planning regulation.
14. In this case the information relates to a proposed development that is sufficiently large that its implementation would be likely to affect the state of the landscape as an element of the environment. In view of this the Commissioner has determined that the information relates to a measure as defined by regulation 2(1)(c). She has, therefore, concluded that the information is environmental in nature and that the council correctly handled the request under the EIR.

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

15. Regulation 12(4)(e) provides an exception for information which constitutes an 'internal communication'. In order for the exception to be engaged it needs to be shown that the information in question

constitutes a communication within one public authority, specifically, the authority to which the request is made.

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

*Is the exception engaged?*

17. The withheld information consists of an email between two council officers.
18. Having viewed the information the Commissioner is satisfied that it falls within the scope of the request and that it constitutes an internal communication. She has, therefore, concluded that the exception is engaged and has gone on to consider the public interest test.

*Public Interest in disclosing the information*

19. The council has acknowledged that the disclosure of information can promote transparency and accountability about its decision making. In the circumstances of this case, the council has recognised that disclosure would allow the public to understand internal deliberations relating to the development of the Local Plan.
20. The complainant has argued that their original request sought clarity about the council's current planning policy since, in the complainant's view, the council had accepted a planning application for a site which was contrary to the policies contained in the council's Local Plan 2010.
21. The complainant has suggested that the application in question is for a large residential development and they consider that the council's Local Plan policy specifically ruled out residential development. The complainant has argued that the matter is contentious and widely opposed, arguing that this generates a strong public interest in transparency.

*Public interest in maintaining the exception*

22. The council has explained that at the time of the request it was in the process of producing the evidence base and drafting the Local Plan. It explained that the draft Plan was agreed for public consultation by Cabinet in December 2020 and this proposed allocating the site for residential development.

23. The council has confirmed that the public consultation on the draft plan took place between 20 January and 17 March 2021 and the current status of the Plan is that it is considering the responses received to the consultation and preparing a final draft which will be subject to agreement by the council at the end of 2021. It explained that there will then follow a public consultation proposed for early 2022, before it is submitted for examination. The council confirmed that the Local Plan is to be adopted in 2023.
24. The council has stated that the withheld email relates to the question of the granting of the planning permission and could form the subject matter of a judicial review of the decision. Such action would expose the council to considerable expense and result in a need to allocate already stretched resources to address the matter.
25. The council considers that the internal communications were generated with the expectation that they were for internal consumption only and the author and recipient were engaged in a process of internal dialogue which existed in order to promote the better understanding of the acceptable usage of the site, in planning terms, and this process was designed to improve the overall quality of the local plan which is to serve the council and the residents of the district for many years to come.
26. The council has argued that the email relates to a matter which remains live until such point as the six-week challenge period in respect of the grant of planning permission has expired. The council considers that the fact that the issue is live is considered to militate in favour of relying on the exception. The council considers that the public interest in disclosing the information would outweigh the 'safe space' and 'chilling effect' arguments upon which it relies when such challenge period has expired and is willing to disclose the information at that point.

*Balance of the public interest*

27. The Commissioner considers that the underlying rationale for the exception is to protect a public authority's need for a private thinking space. The Commissioner considers that the extent to which disclosure would have an impact on such processes is contingent upon the particular information in question and the specific circumstances of the request.
28. The Commissioner recognises that the need to provide a safe space for public authority decision making will be strongest when the issue under consideration is still live. However, recently made decisions may also need protection as authorities will need to explain and account for their actions.

29. In this case, it is clear that the matter to which the information relates was live at the time of the request and that the council's decision making process in respect of the application was incomplete. On the one hand, the council considers that disclosing the information would invade the safe space needed to protect the candour and effectiveness of its decision making. On the other hand, the complainant considers that disclosure would force the council to be accountable for its decisions in this matter.
30. The Commissioner is alive to the complainant's concerns about the council's approach in relation to the planning application and notes the relationship with the Local Plan. She accepts that a significant residential development will have an impact on the local community and environment and that perceived discrepancies between the council's approach in this matter and the policies in its existing Local Plan provide a weighting in favour of transparency and disclosure.
31. However, the Commissioner is also mindful that both the planning process and the developing Local Plan both provide mechanisms for challenging the council's decision making. She accepts that, whilst both matters remain undecided the public interest in protecting the council's deliberations and the effectiveness of its decision making is strong. She also accepts that the council's approach in respect of the planning application is linked to its decisions in respect of the developing Local Plan.
32. Whilst the Commissioner is sympathetic to the complainant's concerns in this case, she acknowledges the precedent in the application of regulation 12(4)(e) which recognises that, whilst decision-making processes are live, the weighting in favour of protecting deliberations in internal communications is enhanced.
33. The Commissioner also considers that the planning application process and the procedure for the adoption of a new Local Plan provide remedies for expressing and addressing concerns. In addition, she acknowledges that the council has agreed to disclose the information once the decision-making processes in question are complete.
34. Having considered the arguments and the withheld information the Commissioner considers that, in this case, it is clear that disclosing the information, which relates to live decision-making processes, would damage the council's ability to make and defend its decisions. Whilst she acknowledges the complainant's genuine interest in the matter, she does not consider that the public interest in disclosing the information in this case outweighs the interest served by the application of the exception. She has, therefore, concluded that the council has correctly applied the exception to the withheld information and that the public interest in this case favours maintaining the exception.

## **Right of appeal**

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35. 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)

36. 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.

37. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Ben Tomes**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**