

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

### **Decision notice**

**Date:** 1 March 2022

**Public Authority:** Welwyn Hatfield Borough Council  
**Address:** The Campus  
Welwyn Garden City  
Hertfordshire  
AL8 6AE

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

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1. The complainant has requested copies of the minutes of the Town Centre Regeneration Board meetings held by Welwyn Hatfield Borough Council (the council).
2. The council initially withheld the information, citing section 43(2) - commercial interests, and section 36 - effective conduct of affairs, of the FOIA. Following the Commissioner's intervention, the council confirmed that, given the passage of time, it regarded the public interest to now lie in favour of the release of some of the requested information, and it provided the complainant with a copy of the minutes of the relevant meetings in a redacted format.
3. Following advice from the Commissioner, the council then reconsidered the request under the EIR; however, it maintained its view that the remaining withheld information was exempt from disclosure, now citing regulation 12(5)(e) - confidentiality of commercial or industrial information, regulation 12(4)(e) - internal communications, and regulation 12(5)(f) - interests of the information provider.
4. The Commissioner is satisfied that the council is entitled to rely on regulation 12(5)(e) of the EIR in respect of all the withheld information.
5. However, as the council wrongly handled the request under FOIA, the Commissioner has found there to be a breach of regulation 14 of the EIR.
6. The Commissioner does not require the council to take any steps as a result of this decision notice.

## Request and response

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7. On 28 November 2020, the complainant wrote to the council and requested information held about Welwyn Garden City's Town Centre Regeneration Board (the Board). He has raised concerns about the council's response to the following part of his request:

'I am also trying to track down the minutes of that Board's meetings, but again they are not on the website. Can you advise me how I can obtain copies of all of the recent meetings including those concerning the multi story carpark on Campus West?'
8. On 30 November 2020, the council advised the complainant that the Board does not hold meetings in public, and that it was therefore to consider his correspondence of 28 November 2020, as a request for information under the FOIA.
9. On 16 December 2020, the council provided the complainant with a single response to a number of information requests that he had made, including that request which is currently under consideration.
10. The council confirmed that it believed information relevant to the complainant's request was exempt from disclosure under section 43(2), and section 36(2), of the FOIA, and it provided details of the 'qualified person' who had considered the application of the latter exemption.
11. The council also confirmed to the complainant that it had considered the public interest test, and that this lay in favour of withholding the information in this case.
12. On 17 December 2020, the complainant requested an internal review, and on 3 February 2021, the council provided its response, upholding its original decision.

## Scope of the case

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13. The complainant first contacted the Commissioner on 10 February 2021, to complain about the way his request for information had been handled. He was concerned that the minutes of the meetings he had requested had been withheld in their entirety, and he was also unhappy with the time which the council had taken to provide its responses to his request.

14. In the early stages of the Commissioner's full investigation, the council confirmed that since it conducted its internal review, a full public consultation had taken place on the design of the proposed redevelopment, and planning permission had been granted on 9 December 2021.
15. Given the information that was now in the public domain, the council confirmed that it regarded the risks posed by the disclosure of some of the withheld information to have significantly reduced, and that therefore, the public interest now weighed in favour of the disclosure of some of the information requested. It went on to provide a redacted version of the minutes of the relevant meetings to the complainant.
16. Following receipt of this information, the complainant advised the Commissioner that he remained dissatisfied with the way in which the council had handled his request, stating that he believed that the council may have withheld some information which it should have disclosed.
17. The complainant also asked the Commissioner to make a formal decision about whether the council had been correct to have initially withheld all the information contained within the minutes of the Board meetings in response to his request.
18. While recognising the complainant's concerns at the way in which his request for information was handled, the Commissioner does not consider it either necessary, or an appropriate use of his regulatory resources, to progress that part of the complaint that relates to the information which has now been made available by the council.
19. It should also be noted that whilst the council took account of the passage of time when carrying out its recent review of the request, the Commissioner can only consider the circumstances relevant to the time that the request was made when deciding whether the council was correct to withhold the remaining information.
20. In addition, having considered the information within the scope of the request, the Commissioner considers the EIR to be the appropriate legislation under which to consider this request, rather than the FOIA. The reasons for this are set out in paragraphs 23 to 26 of this decision notice.
21. The council has recently confirmed to the Commissioner that should it be the case that the information was found to be subject to the EIR, it would like to revise its response; it has advised that it is satisfied that it is entitled to rely on regulation 12(4)(e), regulation 12(5)(e), and regulation 12(5)(f) of the EIR, when refusing the request.

22. The Commissioner will therefore examine whether the council is entitled to rely on the EIR exceptions cited above when withholding the remainder of the information relevant to the complainant's request. He will also consider certain procedural matters, as requested by the complainant.

## Reasons for decision

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### Correct Access Regime

23. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR, rather than the FOIA, if it meets the definition set out in regulations 2(1)(a) to 2(1)(f) of the EIR.
24. Regulation 2(1)(c) of the EIR says that any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors of the environment listed in regulation 2(1)(a) and 2(1)(b) will be environmental information.
25. The Commissioner understands that the Board was set up 'to oversee the Welwyn Garden City Town Centre regeneration'<sup>1</sup>. It is his view that the withheld information is integral to a measure (the plans, proposals, consultations, negotiations, lease changes, costs etc of the redevelopment of land) which will, or will be likely to, affect the environment.
26. Therefore, the Commissioner considers that the withheld information is environmental under regulation 2(1)(c) of the EIR, and that the request should be considered under this access regime.
27. The Commissioner will firstly consider whether the withheld information (in part or in its entirety) is subject to the exception at regulation 12(5)(e) of the EIR. He will go on to consider the council's application of regulation 12(4)(e) and then, if necessary, regulation 12(5)(f) of the EIR.

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<sup>1</sup>Report of the Corporate Director (Resources, Environment and Cultural Services)' dated 6 August 2019 [LC 00 \(welhat.gov.uk\)](https://www.welhat.gov.uk)

### **Regulation 12(5)(e) – confidentiality of commercial or industrial information**

28. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information, if to do so would adversely affect the confidentiality of commercial or industrial information, where such confidentiality is provided by law to protect a legitimate economic interest.
29. The construction of the exception effectively imposes a four-stage test and each condition as set out below must be satisfied for the exception to be engaged:
  - Is the information commercial or industrial in nature?
  - Is the information subject to confidentiality provided by law?
  - Is the confidentiality required to protect a legitimate economic interest?
  - Would the confidentiality be adversely affected by disclosure?
30. For clarity, if the first three questions can be answered in the positive, the final question will automatically be in the positive. This is because, if the information was disclosed under the EIR, it would cease to be confidential.

#### Is the information commercial or industrial?

31. The Commissioner notes that the withheld information is, broadly speaking, connected to the following:
  - Proposals, discussions, and consultation relating to tenants and leases.
  - Estimated costs connected to the development and regeneration scheme.
  - Certain plans/proposals associated with current structures that have relevance to the redevelopment plans.
  - Ideas, proposals and options relating to the regeneration scheme.
32. The Commissioner is satisfied that all the withheld information is commercial in nature as it relates to a commercial activity, namely the council's plans, proposals, tenders, costings and negotiations for a regeneration scheme in the area.

Is the information subject to confidentiality provided by law?

33. The Commissioner considers this to include confidentiality imposed on any person by the common law duty of confidence, contractual obligation, or statute.
34. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself. For purely internal information, the question will be whether the employees or members of the public authority are under an obligation of confidence imposed by the common law, contract or statute.
35. The council has argued that current tenants would not have any reasonable expectation that plans relating to their tenancies or leases would be released into the public domain.
36. The council has also confirmed that, given the nature of what is discussed at the Board Meetings, they are not open to the public, and the minutes of its meetings are not published. In the council's response to the complainant, it had explained that the Board's reports and minutes contain confidential and exempt information, as defined by Schedule 12(A) of the Local Government Act 1972, and for this reason such information is not made routinely available to the public.
37. The withheld information contains discussion about plans, proposals, tenancies/leases, contracts and costs which are unique to the council's plans for a major regeneration scheme, and, as far as the Commissioner is aware, it is information that is not currently in the public domain.
38. It is the Commissioner's view that tenants would not expect details relating to ongoing negotiations about their position, and leases, to be released into the public domain.
39. In addition, the Commissioner is satisfied that the council officers and Board members who attended the meetings would have had a reasonable belief that they were sharing information and proposals about the council's commercial activities relating to the regeneration scheme in a confidential setting, and not to the world at large.
40. Given the above, the Commissioner is satisfied that the withheld information is not trivial in nature, and that the information has the necessary quality of confidence.

Is the confidentiality provided to protect a legitimate economic interest?

41. The Commissioner considers that, in order for the third condition of the exception to be satisfied, disclosure of the withheld information would

have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.

42. It should be noted that economic interests are wider than commercial interests, and can include financial interests.
43. In this case, the council has advised that the release of the information would have a detrimental impact on the commercial interests of both itself, and also tenants who occupy the site identified for redevelopment. It argues that confidence in the council's ability to retain information provided in confidence would be lost, that this would damage its revenue, and would incentivise both current and potential tenants to seek a rental or lease arrangement with other parties, who could maintain their confidence.
44. The council has stated that disclosure of the withheld information would place into the public domain a record of discussions about the regeneration scheme that were intended to be confidential. It argues that placing this information in the public domain puts the council at a disadvantage commercially and that this would, in turn, harm its ability to achieve the best value. It also states that the release of the information could be detrimental to the council when tendering contracts for the redevelopment.
45. It is the Commissioner's opinion that the disclosure of the withheld information at the time of the complainant's request (when the proposals, discussion and plans for the regeneration were at an early stage) would have had a detrimental impact on the council's commercial relationship with its tenants, and also other external parties and contractors. It would also provide external parties with an insight and knowledge of certain aspects of the scheme that would not, otherwise from disclosure under the EIR, be available, and this would place the council at an unfair disadvantage within the market place. It would also reveal plans and ideas that were still under consideration, and should such information be placed in the public domain, it would have a negative impact on the council's commercial position.
46. The Commissioner is therefore satisfied that the release of the withheld information would adversely affect a legitimate economic interest of the person (in this instance the council) the confidentiality is designed to protect, and that the third criteria is therefore met.

*Would confidentiality be adversely affected by disclosure?*

47. The Commissioner is satisfied that, as the first three conditions of the test have been met, disclosure of the relevant information into the public domain would adversely affect the confidential nature of the

information. This would consequently harm the legitimate economic interests of the council.

48. The Commissioner is therefore satisfied that regulation 12(5)(e) is engaged in relation to the withheld information. As a result, he has gone on to consider the public interest test.

### **Public interest test**

#### The council's position

49. The council has advised that it accepts that the release of the information would provide for further transparency. However, it argues that, at the time of the request, the details set out within the minutes of the meetings relating to the regeneration scheme had not been implemented and therefore, disclosure about the proposals discussed would not offer the public the opportunity to scrutinise the council's actions.
50. The council states that disclosure would provide limited value in terms of an increase in transparency, as it would not really assist the public in determining whether value for money was achieved; however, it claims that it would damage the council's ability to procure and have open and frank discussions, and also freely investigate commercial opportunities which may be available to it.
51. The council also argues that disclosure would damage its reputation for keeping commercial information confidential, and hinder its ability to procure contracts at a competitive rate, which would be detrimental to local residents and businesses, and therefore not in the public interest.

#### The complainant's position

52. The complainant has concerns that the Board does not publish any details about its meetings, and that it is making decisions in private about matters that are of huge interest to the public. He has said that it is important for the public to know why the scheme is being promoted, and what has formed the basis for the decisions that have been made.
53. In his initial representations to the Commissioner, the complainant advised that whilst he understood that contractual commercial information contained within the minutes of the Board meetings might be redacted, he believed it was important that the public were made aware of what information was being used by the Board to 'underpin their decisions' about the potential development at Campus West.



The Commissioner's view

54. The Commissioner considers that there is always some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability which, in turn, promotes greater public engagement and understanding of the decisions taken by public authorities. It can also improve the wider public's confidence in the decisions made by a public authority.
55. The Commissioner fully appreciates that plans for a significant residential development and regeneration scheme will have an impact on the local community and environment; furthermore, there is always a public interest in knowing whether the council is following proper processes, attaining value for money, and taking appropriate steps to protect the public purse.
56. As a result, in the Commissioner's opinion, disclosure of information relating to such a large scale regeneration scheme is a weighty factor in favour of transparency and disclosure.
57. However, the Commissioner also regards it to be pertinent in his consideration of this case to take into account the information which is already in the public domain about the regeneration scheme; this information provides the public with a good understanding of the initial aims of the scheme, and the council has also continued to keep the public informed, publishing information at various stages of the process.
58. Furthermore, it is the Commissioner's opinion that disclosure of the discussions about the council's proposals, its potential options and ideas, its negotiations, and estimated costings at the time of the request, would have caused detriment to the council in terms of its commercial position. He views the public interest in protecting the council's commercial interests, and its ability to discuss proposals about how to get best value for money, the right tenders, choices of commercial options available, and maintaining trust with its tenants, to be strong.
59. 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).

60. 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 equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(e) was applied correctly.
61. The Commissioner therefore concludes that the remaining information contained within the minutes of the Board meetings is exempt from disclosure under the exception at regulation 12(5)(e) of the EIR.
62. As the Commissioner is satisfied that all the withheld information is subject to the exception at regulation 12(5)(e), it is not necessary to go on to consider the council's application of regulation 12(4)(e), or regulation 12(5)(f) of the EIR.

### **Procedural matters**

63. The complainant asked the Commissioner to consider the general handling of his request by the council; in particular he raised concerns about the time it took for the council to provide its initial responses to him.
64. With regard to the council's response times to the request, the complainant made his initial request to the council on 28 November 2020, and the council provided its response on 16 December 2020. This was therefore within the required 20 working days prescribed by the EIR.
65. The complainant requested an internal review on 17 December 2020, and the council provided its response on 3 February 2021. This was therefore within the required 40 working day time period prescribed by the EIR.
66. The Commissioner therefore finds that the council's responses to the complainant's request met the statutory times for compliance.
67. Regulation 14(3) requires a public authority to provide the requester with a refusal notice specifying the exceptions within the EIR upon which it is relying.
68. In the circumstances of this case, the Commissioner has found that although the council originally considered this request under the FOIA, it is the EIR that actually apply to the requested information. Therefore, where the procedural requirements of the two pieces of legislation differ, it is inevitable that the council will have failed to comply with the provisions of the EIR; in particular, regulation 14(3).

69. During the Commissioner's investigation, the council reconsidered the request under the EIR and revised its position accordingly; therefore the Commissioner does not require the council to take any steps in this regard.

## Right of appeal

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70. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

71. 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.
72. 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**  
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