

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

### **Decision notice**

**Date:** 20 October 2016

**Public Authority:** Cheshire West and Chester Council

**Address:** HQ Building  
58 Nicholas Street  
Chester  
CH1 2NP

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

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1. The complainant has requested recorded information from Cheshire West and Chester Council. The requested information concerns an application to build houses on land off School Bank, Norley, Cheshire, under planning reference 14/00629/OUT. The Council has refused to disclose some of the recorded information it holds in reliance on Regulations 12(4)(e) – internal communications, 12(5)(b) – prejudice to the course of justice and 12(4)(d) – where the information is in the course of completion. The withheld information is not routinely published by the Council on its planning portal.
2. The Commissioner's decision is that the Council has correctly applied Regulations 12(4)(e), 12(5)(b) and 12(4)(d) to the information it has not published on its planning portal. The Council is therefore entitled to withhold that information.
3. The Commissioner requires the public authority to take no further action in this matter.

#### **Request and response**

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4. On 20 April 2015, the complainant wrote to Cheshire West and Chester Council and requested information in the following terms:

*"This request relates to the above planning application submitted to CWAC in February 2014. This request also relates to a previous EIR request/replies which took place between February and July 2014 (your ref 1870444), Please supply me with all information including copies of*

*materials, electronic or any material forms, including emails) relating to 14/00629/OUT. This should include all materials relating to the open book viability assessment in line with CWAC's Review decision (02/07/14) that it was in the public interest that such information should be released without redaction (I am happy for any personal information to be redacted).*

*Please also respond to the following questions:*

- 1. Why, if it is in the public interest to disclose materials relating to the viability study, these materials have not been made available to the public eg via CWAC's planning portal;*
- 2. Why this application remains undetermined 14 months after it was violated."*
5. The Council wrote to the complainant on 21 May 2015 to inform her that her request falls to be considered under the EIR. The Council apologised for its delay in responding to the request and advised the complainant that her request had been logged request under reference 2959506.
6. The Council's email referred to a previous request for information which it had considered under reference 1870444. In that case, the Council provided the complainant with a copy of a Viability Appraisal and email correspondence. Personal data contained in the email correspondence was withheld by virtue of section 40(2) of the FOIA, on the grounds that disclosure would contravene the provisions of the Data Protection Act 1998.
7. In response to the complainant's questions, the Council advised her that it is under no obligation to publish materials relating to the viability study online and that it would normally keep them confidential at the request of the applicant on the grounds of commercial sensitivity.
8. The Council also advised the complainant that the application remained under consideration owing to the numerous issues associated with the site and time extensions had been agreed by the applicant to allow the matter to be concluded before it was eventually withdrawn on 14 May.
9. On 27 May 2015, the complainant wrote to the Council to ask for a review of its handling of her request. The complainant stated that she was unhappy with the Council's response because all of the information she had requested has not been disclosed and that the Council had not explained why it had not sent her 'all' the information associated with application 14/00629/OUT.
10. The Council wrote to the complainant again on 3 June. It apologised for misinterpreting her request and asked her to set out her grounds for

seeking an internal review. The Council asked the complainant to confirm her intention to continue with her request in view of the withdrawal of application 14/00629/OUT. The Council stated:

"If it is your intention to continue with your request for all information and correspondence currently not available on the Planning Portal, we will treat this as a separate request and respond within 20 working days."

11. The complainant wrote to the Council on 4 June to confirm her intention to pursue the request she had made on 20 April 2015. The complainant made clear that she objected to her request being treated as a new request.
12. On 3 July 2015, the Council wrote to the complainant to inform her that it was seeking the views of 10 third parties regarding the disclosure of correspondence which is not available on its planning portal.
13. The complainant wrote again to Council on 5 July to question its need to refer to third parties when dealing with her request.
14. The Council wrote to the complainant on 7 July to explain it considered it was appropriate to refer to the third parties.
15. On 24 July, the complainant sent the Council an email chasing a response to her request and the complainant asked the Council when she would receive the information she had asked for. This email was followed by further emails in which the complainant chased the Council for a response to her request.
16. On 26 October the Council sent the complainant its response to her request. The Council informed the complainant that some of the information she seeks is subject to exceptions to disclosure which are provided by the EIR. Some information was therefore withheld in its entirety or redacted from documents which the Council disclosed. The Council applied the following exceptions to disclosure: Regulation 12(4)(e) – internal communications; Regulation 12(5)(b) – prejudice to the course of justice; Regulation 12(4)(d) – material which is in the course of completion; and Regulation 12(3) – the personal data of third parties. The Council provided the complainant with its consideration of the public interest test in respect of the exceptions it applied.
17. On 4 November 2015, the complainant wrote to the Council to ask for an internal review. She asked the Council to confirm whether it had withheld any information in relation to her request of 20 April which concerns the open book viability assessment for application 14/00629/OUT. She asked the Council to tell her under what exception that information is withheld and to provide the reasons why disclosure is

not in the public interest – contrary to its decision to disclose the Viability Assessment disclosed in case 1870444.

18. The complainant referred to the planning officer having submitted a recommendation to refuse application 14/00629/OUT and she asserted that the planning officer must have finalised his/her consultations and deliberations in order to make his/her recommendation. That being the case, the complainant stated that this must 'have gone beyond the stage of the 'necessary space to think' as required by the guidance'. She therefore asked the Council whether any material exists which recommend a decision on 14/00629/OUT and whether any of this material has been exempted from the Council's response.
19. The Council carried out a review of its handling of the complainant's request and wrote to her on 7 December 2015 to inform her of its final decision. The review found that the Council had failed to respond to the complainant's request within the statutory time period provided by the EIR. The review also found that the complainant has received all the information which is held by the Council, other than that information which is subject to the proper application of the exceptions referred to above.

### **Scope of the case**

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20. The complainant contacted the Commissioner 11 January 2016 to complain about the way her request for information had been handled.
21. The Commissioner has investigated whether the Council has handled the complainant's request in accordance with the EIR. Specifically, the Commissioner has investigated whether the Council is entitled to rely on Regulations 12(4)(e), 12(5)(b) and 12(4)(d) of the EIR in respect of the information it is withholding.
22. Additionally, the Commissioner asked the Council questions in respect of the complainant's contention that the Council failed to review the questions she asked in her email of 4 November. This element of the Commissioner's investigation is dealt with in the 'Other matters' section of this notice.

## **Reasons for decision**

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

23. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
24. The first question to consider is whether the information is a 'communication' for the purposes of the Regulations. The Commissioner considers that a communication will encompass any information someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it.
25. Having examined the withheld information, the Commissioner is satisfied that it constitutes communications for the purpose of the Council's application of Regulation 12(4)(e). The withheld information consists of emails which have passed between the Council's officers and can therefore be properly characterised as communications for the purpose of this exception.
26. There is no definition of what is meant by 'internal' contained in the EIR.
27. In this case, given that the withheld information comprises emails passing between the Council's officers, the Commissioner readily accepts that they are internal communications: The Commissioner is therefore satisfied that Regulation 12(4)(e) is engaged.
28. Where Regulation 12(4)(e) is engaged, it is subject to a public interest test required by Regulation 12(1). The test is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
29. When carrying out the test the Commissioner must take into account a presumption towards the disclosure of the information which is required by Regulation 12(2).

### **The public interest in the information being disclosed**

30. The central public interest in the information being disclosed relates to retaining the openness and transparency of planning decisions which will ultimately affect the local community.
31. The Commissioner notes the string argument that planning decisions and the process leading to those decisions should be as open and transparent as possible. Ideally all parties should be fully informed about

the issues considered by the Council. The public should be satisfied that the final decisions have been made openly and have been fully explained.

32. The public affected by planning decisions should know all the facts and reasoning which lies behind them and consequently, being better informed, the Commissioner believes that the public would have a greater ability and be more inclined to actively participate in the decision making process.
33. Many of the arguments supporting greater openness rest in the decisions themselves and in the general openness of the planning process. This is generally provided by the availability of documents associated that process.

### **The public interest in maintaining the exception**

34. In essence the public interest considerations relating to the Regulation 12(4)(e) relate to the protection of thinking space and the ability to have full and frank discussions without fear that the information will be disclosed.
35. In this case, the withheld information relates to the 'safe space' needed for the Council to properly carryout its functions away from interference and distraction. Essentially, the Council is concerned that disclosure of the information would affect the ability of its officers to discuss the merits of proposals and decisions internally with a necessary degree of candour. Ultimately the 'safe space' allowed by this exception facilitates the Council's ability to make informed decisions without there being outside pressure and interference.
36. Disclosure of the withheld information would inhibit the Council from having free and frank discussions in the future and the resulting loss of frankness and candour would damage the quality of advice leading to poorer decision making – in essence disclosure would have a 'chilling effect'.
37. The Commissioner considers that the Council should be able to have free, frank and necessary consideration of relevant issues, without the requirement to disclose confidential matters which could damage the Council's interests or prejudice its position. She agrees with the Council that safeguarding the interests of landowners and businesses to obtain planning advice and opinion is an important factor which merits significant weight.
38. Likewise, the Commissioner recognises the need for officers to discuss issues and to notify appropriate colleagues of matters of importance to the Council as the relevant planning authority. Clearly it is important for

the Council to be able to document its thinking, to make action notes and to flag-up areas of doubt and concern.

39. It is also important for this type of documentation to remain confidential within the Council at least during the planning application process.
40. Following his examination of the withheld information, the Commissioner is satisfied that there is nothing in the withheld information which would add to the public's understanding of the reasoning behind the Council's actions, and which would increase the weight of the public interest which favours disclosure of the withheld internal communications.
41. The large amount of publically available information concerning the relevant planning application is, in the Commissioner's opinion, sufficient to satisfy the public interest in there being a transparent planning process.
42. There is a clear public interest in allowing officials to communicate with one another about a particular matter, without fear of disclosure and before that matter is finally settled. If that information was to be disclosed prematurely, it could be used to challenge the decision via judicial review.
43. Discussions of the type contained in the withheld information are part of the processing of a planning application: The outcome of these discussions may or may not form part of the outcome but it is right that the Council and its Officers can have such discussions openly and in a recorded manner to ensure that all relevant aspects of policy and procedure are considered, even where these discussions do not ultimately affect the final outcome.

## **Conclusion**

44. The Commissioner has considered the Council's representations. She recognises the merit in those arguments favouring disclosure as well as those favouring continued reliance on Regulation 12(4)(e). The question of balancing the factors to determine whether the information should be disclosed is not an easy one in this case.
45. The Commissioner considers that internal communications about the merits of an application should not be subject to public debate or scrutiny. She accepts that Council officers must be free to conduct these types of discussions freely and be free to seek advice and assistance from each other as required. Whilst these discussions are part of the processing of the application, the outcome of such discussions does not necessarily form part of the outcome. In the Commissioner's opinion, it is right that the Council and its officers should be able to discuss matters with candour and to record those discussions to ensure that its policies

are considered and its procedures are followed, even where such matters do not ultimately affect the final outcome.

46. Consequently the Commissioner considers that disclosure of the withheld information, at the time the request was made, could detrimentally affect the Council's decision making procedures and potentially lead to less full and frank advice being provided by officers of the Council.
47. On balance, the Commissioner has decided that greater weight has to be given to those factors which favour withholding the internal communications. She is particularly persuaded by the need for the Council's officers to have a 'safe space' in which to deliberate potentially controversial issues. She also recognises the real danger of the 'chilling effect' which disclosure could have in respect of future planning issues and decisions.
48. The Commissioner has decided that the public interest lies in maintaining the exception in this instance and that the Council is entitled to rely on Regulation 12(4)(e) to withhold its internal communications.

### **Regulation 12(5)(b) – prejudice to the course of justice**

49. Regulation 12(5)(b) provides an exception from the duty to disclose information where the disclosure would adversely affect "the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature".
50. The Council has informed the Commissioner that it has applied Regulation 12(5)(b) to information which attracts legal professional privilege.
51. The withheld information attracts advice privilege because it concerns advice from a senior legal manager within the Council to their client within the Council's Planning Service and it concerns the interpretation of planning law.
52. Whilst the requested information does not attract litigation privilege, it is feasible that had court action been taken to enforce the s106 agreement, litigation privilege would have arisen.
53. The Council has advised the Commissioner that the legal professional privilege attached to the withheld information has not been lost. This is because it has not been disclosed outside of the Council and the advice remains current in relation to the nature of a section 106 covenant.



54. The Council asserts that disclosure of the legally privileged information would cause general harm to the principle of legal professional privilege and this on its own is sufficient to meet the 'adversely affect' test.
55. The withheld information sets out the Council's stance in respect of matters which are relevant to all planning applications with similar issues: To disclose the advice contained in the withheld material would reveal the Council's position and zone of tolerance in respect of future negotiation in respect of such matters and would potentially adversely affect the Council's position in future planning applications.
56. The Commissioner's examination of the withheld information substantiates the Council's position. She is satisfied that the information relates to the nature of a section 106 covenant.
57. In its decision in *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037), the Information Tribunal highlighted the requirement needed for this exception to be engaged. It explained that there must be an "adverse" effect that would result from the disclosure of the requested information. Another Tribunal decision – *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the Tribunal interpreted the word "would" as being "more probable than not".
58. The Commissioner accepts the Council's position and she has decided that Regulation 12(5)(b) is properly engaged. Notwithstanding this decision, the Commissioner must now consider where the balance of the public interest lies.

### **The public interest in the information being disclosed**

59. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis and how public authorities make their decisions. This in turn fosters trust in public authorities and may allow greater public participation in the decision making process.
60. In this case, disclosure of the withheld information would help the public to understand some of the issues considered by the council in respect of a section 106 covenant and that the Council is acting in compliance with planning procedure.

### **The public interest in maintaining the exception**

61. In the Commissioner's previous decisions, she has expressed the view that disclosure of information relating to legal advice would have an adverse effect on the course of justice through a weakening of the

general principle behind the concept of legal professional privilege. This view has also been supported by the Information Tribunal.

62. It is very important that public authorities are able to consult with their lawyers in confidence and be able to obtain confidential legal advice. Should such legal advice be subject to routine or even occasional public disclosure without compelling reasons, this could affect the free and frank nature of future legal exchanges and/or may deter the public authority from seeking legal advice in situations where it would be in the public interest for it to do so. The Commissioner's published guidance on legal professional privilege states the following:

*"Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice."*

63. Where a public authority is engaged in any form of legal action of its own initiation is faced with a legal challenge, or a potential legal challenge, it is important that the authority can defend its position properly and fairly. Should the public authority be required to disclose its legal advice, its opponent would potentially be put at an advantage by not having to disclose its own position or legal advice beforehand.
64. The Commissioner considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a long-standing, well established and important common law principle. The Information Tribunal affirmed this in the *Bellamy* case when it stated:

*"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."*

65. This does not mean that the counter arguments favour public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect.
66. In this case, the Council's reliance on Regulation 12(5)(b) does not affect the transparency of the Council's actions as the relevant planning authority. This is because final documentation is available to the public as part of the final planning application. In the Commissioner's opinion, it is not necessary for the public to know the content of the legal advice and the details of the debate behind the documents. Disclosure of legal

advice may deter the Council from seeking that advice in the future and consequently the quality of the Council's decision making may be prejudiced.

### **Balance of the public interest arguments**

67. The Commissioner appreciates that there is a general public interest in public authorities being as accountable as possible for the decisions they make. In this case the Commissioner considers that accountability has been provided through the publication of the information which the Council is obliged to publish in respect of planning applications.
68. Having considered the withheld legally privileged information, the Commissioner has decided that the public interest arguments which favour withholding the requested information are greater than those which favour disclosure.
69. The Commissioner is satisfied that the public interest is best served in this case by maintaining the Council's right request and obtain legal advice within a safe space. This allows its officers to provide and discuss legal advice in confidence. The fact that the Council publishes significant amounts of information in respect of planning applications is key to the Commissioner's decision.
70. The Commissioner's decision is that the Council has properly applied Regulation 12(5)(b) and it is entitled to withhold the legally privileged information it is withholding.

### **Regulation 12(4)(d) – where material is still in the course of completion**

71. Regulation 12 (4)(d) provides an exception to the duty to disclose environmental information where the information relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
72. The Council has furnished the Commissioner with a copy of the information it is withholding in reliance of this exception. This information consists of draft documents, plans and incomplete documents which concern the planning process.
73. The Council argues that its officers should have a 'thinking space' which will allow them to review and refine their approach to a particular subject. Likewise it argues that applicants must also be entitled to submit and discuss draft documents without the fear that they will be released, and particularly where documents are likely to change. Such disclosure would be of little relevance to the final application and/or approval.

74. Having examined the withheld information, the Commissioner has determined Regulation 12(4)(d) has been correctly applied.
75. Therefore the Council may continue to withhold this information if, in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing it. Consequently the Commissioner is required to consider the public interest test.

### **The public interest test**

76. As with her analysis of the public interest for the other exceptions, the Commissioner has given some weight to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities.
77. Disclosure of information can assist the public in understanding the basis and how public authorities make their decisions and this in turn may help foster greater trust in public authorities.
78. The Commissioner also acknowledges that disclosure of information can lead to greater public participation in the public authority's decision making processes, particularly through representations made to councillors by their constituents.
79. In this case, disclosure of the requested information may help the public to understand some of the issues which are to be considered by the Council in respect of the particular planning application.
80. The Commissioner acknowledges the impact of the planning application on the adjacent properties, the local community and its possible impact on wildlife.
81. Disclosure of the withheld information could assure the public that the Council was satisfying any obligations it has in respect of its statutory functions associated with planning matters.

### **Arguments in favour of maintaining the exception**

82. As with the other exceptions applied by the Council, during the period leading to a formal planning application, there is a need for free and frank informal discussion to take place between parties concerning planning matters. This need applies to all the stages of the planning process but particularly at the pre-development stage.
83. There is a need to safeguard the right of interested persons, such as landowners or operators of businesses, to obtain planning advice and the views of Council officers in confidence.

84. At the pre-planning stage, the contents of incomplete and draft documents are not likely to affect the interests of very many people - if any, and are unlikely to have any significant effect on the general public.
85. Clearly there is a need for planning officers to consider matters which are of interest or importance to the Council as Planning Authority: Such considerations to remain confidential to the Council and its advisors unless they are relevant to the final planning application which is placed into the public domain. It should be remembered that there are no formal decisions or actions made or taken in relation to the withheld documents. There will be no documents and matters arising from them whilst they are in draft form and there is no real purpose in releasing them.

### **Conclusion**

86. The Commissioner has carefully considered the withheld information and the representations made by the complainant and the Council. The Commissioner has also weighed what he considers are the main arguments germane to the public interest test.
87. The Commissioner has given particular weight to the fact that there is no obligation for the withheld information to be published. She is particularly minded that pre-planning information which is supplied to a planning authority is provided on a voluntary basis. Disclosure could potentially deter the developers from approaching planning authorities in the future and thereby making the planning process more protracted and costly to the public purse.
88. The Commissioner gives weight to the fact that the withheld information is incomplete: it is conceivable that it contains inaccurate and potentially misleading information and could distract public debate from the final planning documents which are placed into the public domain.
89. The Commissioner has considered the public interest arguments outlined above. She has determined that the public interest considerations favouring the application of Regulation 12(4)(d) should be given greater weight than those which favour the disclosure of the incomplete/draft documents. The Commissioner has therefore decided that the Council is entitled to continue to withhold this information.

## Other matters

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90. The Commissioner asked the Council to explain why it had failed to answer the questions the complainant asked in her email of 4 November 2015.
91. The Council offered the following explanation:
- “Once an internal review is requested all further correspondence is considered as part of that review. The email of 4 November 2015 was included in the internal review bundle prepared for the panel [...] but it was not made clear to the panel that it had not been responded to. As the panel did not include any steps required in relation to this email it was overlooked.”
92. The Council advised the Commissioner that it will update its processes to ensure that all correspondence received following a request for review is either answered directly or clearly flagged with review panels where it is a matter for them to consider at review stage.
93. The Council has also confirmed to the Commissioner that none of the exempted information contained in the Open Book Viability Assessment – disclosed in respect of request reference 1870444, relates to the Viability Assessment relevant to this application.
94. Finally, the Commissioner asked the Council to confirm whether any material exists which recommended a decision on 14/00629/OUT. The Council answered this by stating:
- “There is nothing on file relating to any recommendation. The application was withdrawn by the applicant before a recommendation was made.”

## Right of appeal

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95. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

96. 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.
97. 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 .....**

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