

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 18 January 2019

Public Authority: Historic England
Address: Room 2/07, The Engine House
Fire Fly Avenue
Swindon
Wiltshire
SN2 2EH

Decision (including any steps ordered)

1. The complainant has requested information relating to Queensbury Lodge, Cottage and Stables in New Market.
2. The Commissioner's decision is that Historic England was entitled to rely on regulations 12(5)(d), 12(4)(e) and 12(5)(b) of the EIR.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. The complainant wrote to HE and requested information in the following terms:

Under the Freedom of Information Act I would like to request the following information regarding Queensbury Lodge, Cottage and Stables at 196-198 High Street, Newmarket;

1. *Copies of all correspondence, including e-mails between, English Heritage/Historic England and Forest Heath District Council, regarding this site, during the past 2 years.*
2. *Copies of any minutes of meetings of English Heritage's/Historic England's officers with officers of Forest Heath District Council, at which this site was discussed during the past 2 years.*
3. *Copies of any notes of meetings of English Heritage's/Historic England's officers with officers of Forest Heath District Council, at which this site was discussed during the past 2 years.*

4. *Copies of any file notes of conversations, including telephone conversations between officers of English Heritage/Historic England and officers of Forest Heath District Council, regarding this site was discussed during the past 2 years.*
5. *Copies of any minutes or notes or file notes of meetings or conversations between officers of English Heritage/Historic England regarding this during the past 2 years.*
5. HE responded on 8 March 2018 and provided some of the information requested. However, it refused to provide the remainder by virtue of regulations 12(5)(d); 12(5)(b); 12(4)(e) and 13(1) of the EIR.
6. Following an internal review HE wrote to the complainant on 9 April 2018 and maintained its original position.

Background

7. Historic England provided the following as background to the case. It explained it has been involved in on-going pre-application discussions in regards to this site. No formal planning application has yet been placed.
8. It has been heavily involved in discussions with the local planning authority concerning a Statement of Common ground and Local Plan. The Local Plan process is currently with the Inspector who should be drawing up her conclusions and any changes that she feels need to be made to make the Plan sound. Until the Inspector's report is issued and the Council formally adopts the Plan, it is a live issue.

Scope of the case

9. The complainant contacted the Commissioner on 2 July 2018 to complain about the way his request for information had been handled.
10. During the course of the Commissioner's investigation HE disclosed some of the withheld information outside of the EIR. However, it maintained that the exceptions still applied to the remaining withheld information.
11. The Commissioner invited the complainant to consider the additional disclosure and advise if he wished to proceed with his complaint. The complainant wrote to the Commissioner on 22 October 2018 confirming his wish to proceed, stating:

"Although Historic England did reluctantly provide some further information they are still withholding or redacting other documents.

We fail to see how they are able to justify this.

They are a public body and all we have asked for is information relating to a listed building. Their advice on listed buildings should surely be public and transparent.

We do still wish to proceed with our case.

I cannot see the "third party personal data" argument. The names and telephone numbers of the officers, including the Local Authority officers, are already in the public domain as are their office addresses.

At present, therefore, we wish our case to also challenge this ground for withholding or redacting documents."

12. Having reviewed all the withheld information, the Commissioner wrote to the complainant advising of the nature of the information withheld as third party personal data. She further advised that the information defined as 'out of scope' did not relate to the request. Consequently, she did not intend to include these matters in her decision notice. The complainant did not advise the Commissioner that he wished to pursue these matters.
13. The Commissioner therefore considers the scope of this case to be to determine if the public authority is entitled to rely on the exceptions it has cited to withhold the remaining information.

Reasons for decision

14. HE provided the Commissioner with a list of all the documents that it had considered, identifying those which had been disclosed and the exceptions it had applied to the withheld information, along with the documents themselves.

Regulation 5 – Is it Environmental Information?

15. The Commissioner notes that the complainant referred to the FOIA when making his request but that HE has dealt with the request under the EIR.
16. 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...'

17. 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.
18. In this case the withheld information relates to the use of and development of land. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of Kirkaldie v IC and Thanet District Council (EA/2006/001) ("Kirkaldie").
19. In view of this, the Commissioner has concluded that HE correctly handled the request under the EIR.

Information in scope of the request

20. The Commissioner has first considered the information that HE has determined does not fall within the scope of the request and has consequently redacted/withheld it.
21. HE advised that a number of documents have been withheld both partially and in full on the basis of relevance. Although initially thought to fall within the scope of the request (and so included in the document list), on closer inspection they were deemed either fully or partially outside of scope and so not included.

22. Having reviewed this information the Commissioner is satisfied that it does not fall within the scope of the request, as it does not relate to Queensbury Lodge, and therefore does not require any further consideration.
23. HE has, at times, applied more than one exception to the withheld information. Where this is the case, if the Commissioner finds one exception does not apply, she will then consider any other exception cited.

Regulation 12(5)(d) - Confidentiality of Proceedings

24. The Commissioner has first considered the application of regulation 12(5)(d) which has been applied to the majority of the withheld information.
25. Regulation 12(5)(d) of the EIR states that a public authority may refuse to disclose information if to do so would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.
26. The engagement of the exception involves a three stage test:
 - What are the proceedings in question?
 - Is the confidentiality of those proceedings provided by law?
 - Would disclosing the information adversely affect that confidentiality?
27. The term 'proceedings' is not defined in the EIR. However, the Commissioner, in her guidance¹ on this exception, has said that she considers that:

"...the word implies some formality, i.e. it does not cover an authority's every action, decision or meeting. It will include, but is not limited to:

- *formal meetings to consider matters that are within the authority's jurisdiction;*
- *situations where an authority is exercising its statutory decision making powers; and*
- *legal proceedings.*

¹ https://ico.org.uk/media/1626/eir_confidentiality_of_proceedings.pdf

28. In each of these cases, the proceedings are a means to formally consider an issue and reach a decision. 'Proceedings' could include, for example, the consideration of a planning application by a planning authority, or an internal disciplinary hearing in a public authority; both of these have a degree of formality."
29. HE explained it had reviewed the information, which covers the pre-application planning process and the development of a statement of common ground and Local Plan. It therefore concluded that it forms a 'proceeding' as it consists of on-going discussions between various parties and fulfils the degree of formality for a 'proceeding' as set out above.
30. The Commissioner accepts that the withheld information relates to a situation where an authority is exercising its statutory decision-making powers and, therefore, relates to formal 'proceedings'.
31. The Commissioner has then gone on to consider whether the confidentiality of these proceedings is provided by law.
32. In this case, HE has provided limited information in this regard. However, given the importance attached to confidentiality the Commissioner has made her own decision. In the Commissioner's view, the common law of confidence will apply where the following two conditions are satisfied.
33. First, the information has the necessary quality of confidence. This means that the information must not otherwise be accessible, and must be of importance to the confider and not trivial. Secondly, the information must have been communicated in circumstances importing an obligation of confidence, which can be expressed explicitly or implicitly.
34. The Commissioner has considered the withheld information and is satisfied that it is not otherwise accessible. She also accepts that the issue of the Local Plan is not trivial.
35. The Commissioner is aware that the complainant's view is that "*Their advice on listed buildings should surely be public and transparent*". However, having considered the withheld information, which comprises discussions and draft documents relating to aspects of the Local Plan, the Commissioner considers that it is evident from the nature of the contents of the withheld information that there was an expectation of confidence.
36. Having determined that the contents of the correspondence demonstrate that there was an expectation of confidence between the parties, the next step in deciding whether the exception is engaged relates to an adverse effect. The exception at regulation 12(5)(d) is only engaged

where the public authority can show that disclosing the information would adversely affect the confidentiality of the proceedings. It is not enough to show that an adverse effect may occur.

37. The Commissioner's guidance on regulation 12(5)(d), referenced previously, states:

"Adversely affect' means there must be an identifiable harm to, or negative impact on, the interest identified in the exception. Furthermore, the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse effect. 'Would' means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed. If the adverse effect would only be likely to occur, or could occur, then the exception is not engaged".

38. The interest that is protected by regulation 12(5)(d) is the confidentiality of proceedings, where that confidentiality is provided by law. In correspondence to the complainant HE explained that:

"In this case we are looking at statutory planning functions which Historic England is exercising making decisions and recommendations within its jurisdiction. These are covered by confidentiality as pre-applications discussions are by their nature confidential so that an open discussion can be had with an applicant and a local planning authority to achieve the best planning outcome before a public application is made."

39. It is the Commissioner's view that disclosure of the information would be likely to undermine the confidential element of the proceedings, and indeed the integrity of the decision-making process, rendering that element of the process essentially pointless.
40. The Commissioner accepts that the disclosure of the withheld information would have an adverse effect on the confidential element of the proceedings. She has therefore determined that the exception at 12(5)(d) is engaged, and has gone on to consider the public interest test.

Public interest test

Arguments in favour of disclosing the information

41. On receiving a request for information under the EIR, not only must a public authority weigh up the strong public interest in the requirement that it conduct its business in a transparent manner, which underpins all freedom of information legislation, but also that there is specifically a presumption of disclosure set out in regulation 12(2) of the EIR.

42. In favour of disclosure HE considered the public interest in the transparency of its work and its accountability and openness as a public authority when involved in detailed discussions with third parties, like Forest Heath District Council. It also acknowledged the presumption in favour of disclosure that is contained within the EIR.

Arguments in favour of maintaining the exception

43. In her guidance² on the public interest test as it applies to the EIR, the Commissioner explains that "in considering the public interest in relation to any particular exception, a public authority should take into account only the public interest arguments that are relevant to that exception – public interest arguments that support other exceptions are irrelevant".
44. In favour of withholding the information HE considered the argument that the information relates to on-going discussions and activities between various parties that have not yet been finalised or which may be readdressed at a later stage of the process.
45. To release the detail of these discussions would lead to a breach of the obligation of confidence and trust with other public authorities. It is essential that other organisations and authorities feel able to communicate openly with HE. By having free and frank communications all areas of discussion can be covered, ensuring that the best possible outcome is achieved. This is essential both internally and with external colleagues.
46. It is important to note that any information released under the EIR is considered to be in the public domain. While HE accept that transparency and accountability are important, it believes that the release of the information in question at this time would have an adverse effect on the process. It reiterated that this case is still very much live and on-going. It is not unreasonable for the inspector overseeing this case to ask for elements of it to be re-evaluated before its completion, and so it is essential that documentation deemed key to that process is not released prematurely and certainly not until the process is complete.
47. However Historic England would be prejudiced if it were no longer able to conduct its internal proceedings with an appropriate degree of confidentiality and that is not in the public interest.

²https://ico.org.uk/media/1629/eir_effect_of_exceptions_and_the_public_interest_test.pdf

Balance of the public interest

48. The Commissioner considers that there is a public interest in good decision-making by public authorities, and in those authorities conducting their business in an open and transparent manner.
49. However, in cases where the public authority is relying on regulation 12(5)(d), her established view, set out in her guidance as referenced previously, is that there is a general public interest in protecting confidential information. Breaching an obligation of confidence undermines the relationship of trust between confider and confidant, regardless of whether the obligation is based on statute or common law. The fact that the confidentiality is 'provided by law' also implies that there is a public interest in protecting it. Therefore, where the exception is engaged, there is always some inherent public interest in maintaining it.
50. The Commissioner is satisfied that the arguments in favour of maintaining the exception arise naturally from the nature of the exception, and has therefore given them due weight.
51. In the Commissioner's view, weight must be placed on the ability to carry out the all aspects of the Local Plan adoption process effectively. She accepts that confidentiality may be needed at certain stages of the process, to ensure that proceedings are conducted as effectively as possible. In this case, she considers that disclosing the specific information requested would adversely affect this confidentiality.
52. She is also satisfied, as she has been in previous decisions, that, the formal planning process allows for wider public involvement at the appropriate stage and the public has the opportunity to engage openly with relevant local public authorities.
53. On balance, the Commissioner finds that there is some public interest in releasing information that would shed light on HE's decision-making processes. However, in this case, there is a weightier public interest in protecting the confidentiality of proceedings by withholding the information.
54. She has determined that, taking all of the above into account, the public interest in this case lies in maintaining the exception. Her decision therefore, is that the exception to the duty to disclose environmental information at regulation 12(5)(d) applies to the withheld information, and it has not been necessary to consider HE's alternative exceptions at regulation 12(4)(d) and 12(4)(e) in relation to this particular information.

55. However, there is a small amount of information that HE has withheld solely on the basis of regulation 12(5)(b) and the Commissioner has considered this next.

Regulation 12(5)(b) - Course of justice.

56. Regulation 12(5)(b) of the FOIA states that information is exempt if 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. Regulation 12(5)(b) is a broad exception with the course of justice including, but not restricted to information attracting Legal Professional Privilege (LPP). The purpose of the exception is to ensure that there should be no disruption to the administration of justice.
57. In this case, HE has withheld information under regulation 12(5)(b) on the basis that the information is covered by LPP.
58. The Tribunal in *Woodford v IC* (EA/2009/0098)³ confirmed that the test for adverse affect in relation to LPP would be met by the general harm which would be caused to the principle of LPP, without needing to demonstrate that specific harm would be caused in relation to the matter covered by the information.

"There can be no doubt that disclosure of information otherwise subject to legal professional privilege would have an adverse effect on the course of justice."

59. Regulation 12(5)(b) will be engaged if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings. Consideration of the specific circumstances is, however, required when addressing the public interest test.
60. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal advisor acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.

³ http://www.bailii.org/uk/cases/UKFTT/GRC/2010/2009_0098.pdf

61. The Commissioner has viewed the withheld information and is satisfied the information represents confidential communications between a client and legal advisor acting in their professional capacity, and made for the sole purpose of obtaining legal advice. The Commissioner is therefore satisfied that regulation 12(5)(b) is engaged in respect of this information and has therefore gone on to consider the public interest test.

Arguments in favour of disclosing the information

62. In favour of disclosure HE acknowledged that it is in the public interest for the public to be provided with information relating to its work as an advisory body. Making such information public helps to ensure transparency.

Arguments in favour of maintaining the exemption

63. HE argued that the disclosure of legal advice has a high potential to prejudice its ability to defend its legal interests - both directly, by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance we can place on the advice having been fully considered and presented without fear or favour. There is therefore a strong public interest on such advice not being made public.

Balance of the public interest

64. In weighing the balance of public interest, whilst the Commissioner acknowledges the explicit presumption in favour of disclosure of the information provided for under regulation 12(2) of the EIR, and the general public interest in transparency and accountability in relation to the decisions made by public authorities, she is also mindful that the matter remains live, and acknowledges the general public interest in maintaining legal advice will always be strong due to the importance of the principle behind LPP: Safeguarding openness in all communications between a client and lawyer to ensure full and frank legal advice, which in turn is fundamental to the administration of justice.
65. This is further reinforced by the former Information Tribunal's ruling in the case of *Bellamy v the IC* (EA/2005/0023)⁴ which confirmed that there is a strong element of public interest inbuilt into the privilege itself. Indeed, it is worth noting that the Tribunal considers that there should be at least equally strong countervailing considerations to override that inbuilt interest.

⁴ http://www.bailii.org/uk/cases/UKIT/2006/EA_2005_0023.pdf

66. The case of *DCLG v Information Commissioner & WR [2012] UKUT (103 AAC)*⁵ (28 March 2012) concluded that the risk of the disclosure of legally privileged information leading to a weakening of confidence in the general principle of legal professional privilege is a public interest factor of very considerable weight in favour of maintaining the exception and there would have to be special or unusual factors in a particular case to justify not giving it this weight.
67. The Commissioner notes that factors which might suggest equally strong countervailing arguments include whether there is a large amount of money involved or a large number of people affected, lack of transparency in the public authority's actions, misrepresentation of advice given, or the selective disclosure of only part of that advice.
68. The Commissioner therefore considers that the balance of public interest is weighted in favour of maintaining the exception and that HE was entitled to rely on regulation 12(5)(b) to withhold the information.
69. Finally the Commissioner has considered whether HE is entitled to rely on regulation 12(4)(e) to withhold the one remaining document where no other exception is applicable.

Regulation 12(4)(e) internal communications

70. 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. The purpose of this exception is to allow a public authority to discuss the merits of proposals and the implications of decisions internally without outside interference.
71. The Commissioner acknowledges that the concept of 'internal communications' is broad and covers all internal communications, not just those actually reflecting internal thinking, and will include any information intended to be communicated to others or to be placed on file where others may consult it. However, the Commissioner considers that the underlying rationale behind the exception is that public authorities should have the necessary space to think in private.
72. Regulation 12(4)(e) is a class-based exception so it is not necessary to consider the sensitivity of the information in order for it to be engaged.

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<http://administrativeappeals.decisions.tribunals.gov.uk/judgmentfiles/j3477/%5B2012%5D%20AACR%2043bv.doc>

A wide range of internal documents will therefore be caught. However, this exception is also subject to the public interest test.

Does the withheld information constitute 'internal communications'?

73. The EIR do not provide a definition of what constitutes an internal communication. However, the Commissioner accepts that, in general, communications within one public authority will constitute 'internal communications' while a communication sent by or to another public authority, a contractor or an external adviser will not generally constitute an internal communication.
74. Having referred to the withheld information the Commissioner is satisfied that it comprises a communication sent internally within the HE.
75. It follows that she is satisfied that the information withheld under regulation 12(4)(e) comprises internal communications and that the regulation has been applied correctly to this information.
76. As she is satisfied that regulation 12(4)(e) is engaged in respect of the information withheld by virtue of that exception, the Commissioner has gone on to consider the public interest test attached to the application of this exception, as required by regulation 12(1)(b) of the EIR. 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.
77. When carrying out the test the Commissioner must take into account a presumption in favour of disclosure of the information which is required by regulation 12(2).

Public interest arguments in favour of disclosing the information

78. Arguing in favour of disclosure, the complainant told the Commissioner that he considered that the information should be disclosed for transparency and to allay any concerns that public funds may have been used inappropriately.
79. HE acknowledged that disclosure would evidence that it was, and was seen to be, acting in a transparent and open manner and that its actions and decisions were understood and open to scrutiny.

Public interest arguments in favour of maintaining the exception

80. In essence, the public interest considerations relating to 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.

81. In this case, HE argued that it was not in the public interest to disclose information that would undermine the confidentiality of the overall discussion.

Balance of the public interest

82. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exception. If the public interest in the maintenance of the exception does not outweigh the public interest in disclosure, the information in question must be disclosed.
83. There is no automatic or inherent public interest in withholding an internal communication: arguments should relate to the particular circumstances of the case and the content and sensitivity of the specific information in question.
84. The Commissioner recognises that there is always a general public interest in disclosing environmental information. This is derived from the purpose behind the EIR.
85. In her guidance on regulation 12(4)(e)⁶, the Commissioner acknowledges that public interest arguments:

"... should be focussed on the protection of internal deliberation and decision making processes.

This reflects the underlying rationale for the exception: that it protects a public authority's need for a 'private thinking space'".

86. She also recognises that:

"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".

87. In this case, the Commissioner has concluded that, in all the circumstances of the case, the public interest in maintaining the exception set out in regulation 12(4)(e) outweighs the public interest in disclosure due to the need for HE to have full and frank discussions

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

without fear that disclosure will take place. She therefore accepts that the internal communication in question should be withheld.

Right of appeal

88. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

89. 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.

90. 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

Pamela Clements
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