

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 24 March 2021

Public Authority: Ribble Valley Borough Council
Address: Church Walk
Clitheroe
Lancashire BB7 2RA

Decision (including any steps ordered)

1. The complainant requested information from Ribble Valley Borough Council ("the Council") about land at Chapel Hill, Longridge, in Lancashire. After initially considering the request under the Freedom of Information Act 2000 (FOIA), the Council provided some information, but withheld the majority of the requested information under section 31(1)(g) of the FOIA – Prejudicial to law enforcement functions.
2. After reconsidering the request under the EIR, the Council still considered the withheld information to be exempt from disclosure under regulation 12(5)(b) – Adversely affect the course of justice – and/or regulation 12(4)(e) – Internal communications.
3. The Commissioner's decision is that the exception at regulation 12(5)(b) is not engaged with respect to the information. With respect to the information which was additionally withheld under regulation 12(4)(e), the Commissioner finds that the exception is engaged, but that the balance of the public interest favours disclosure of the information.
4. The Commissioner requires the Council to take the following step to ensure compliance with the legislation.
 - Subject to the redaction of third party personal data, as described in this notice, disclose the information to the complainant.
5. The Council must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 3 November 2019, the complainant wrote to the Council. He explained that his request related to an area of land at Chapel Hill, Longridge, which was the subject of a specific planning application. He requested information in the following terms:

"1) Any internal emails or other communications between [planning officer – name redacted] and other members of the planning and/or enforcement departments following the original contact by [third party – name redacted].

2) Any file notes made relating to 2 [sic] (above).

3) Photographs made by [enforcement officer – name redacted] on his visit to the site in about June and any notes made regarding, or record made of, that visit.

4) Any communications [enforcement officer – name redacted] has had with others in the Council regarding this matter including file notes or other records of such communication.

5) Any communications between the enforcement department (whether by [enforcement officer – name redacted] or any other person) and the developers and records of any unsuccessful attempts at such communication, including file or other notes. Any communications between the planning department and the developers and records of any unsuccessful attempts at such communication, including file or other notes.

6) Any stop notices or temporary stop notices issued regarding any activities on the site between April and November of this year.

7) Photographs taken at the meeting on site in October.

8) Any records or notes made of or regarding the meeting in October.

9) (Without affecting the generality of 5 (above)) Any communications between the Council and the developers following the meeting in October whether regarding enforcement or any potential future planning application by the developers and any notes or records of any such communication.

10) Any documents or other records of or relating to the original evaluation of the complaint of the breach of planning control (by either or both of the planning and enforcement departments) including any proposed action following such appraisal.

If you require the consent of [third party – name redacted] or anyone else to release this information please let me know and I will arrange for it to be forwarded to you.

I would prefer the information to be provided electronically to this email address."

7. On 2 December 2019, the Council responded and stated that it held the information he had asked for but that it was exempt from disclosure under Section 30(1)(a)(i) of the FOIA – Investigations and Proceedings.
8. The complainant requested an internal review on 3 December 2019, stating that it was his understanding that section 30 only related to criminal investigations. On 20 December 2019, the Council wrote to him and said it was reconsidering the request and whether to disclose some information in light of section 31 of the FOIA (Law enforcement) and the public interest test.
9. The Council sent the complainant the outcome of its internal review on 15 January 2020, and revised its position. It provided him with the information he had requested at points 3 and 7, and stated that the information requested at point 6, was not held. Its position was that the other information should be withheld under section 31(1)(g) of the FOIA: Law Enforcement – prejudicial to the exercise by any public authority of its functions, with relation to the following functions set out in section 31(2):
 - section 31(2)(a) – the purpose of ascertaining whether any person has failed to comply with the law, and/or
 - section 31(2)(c) – the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

Scope of the case

10. The complainant contacted the Commissioner on 14 April 2020 to complain about the way his request for information had been handled.
11. The Commissioner wrote to the Council on 24 July 2020. She asked the Council for further explanations of its position in relation to the withheld information. She also advised the Council that, in her view, the information was very likely to fall within the definition of 'environmental information' at regulation 2(1) of the EIR, since it related to the development of a particular site including issues relating to the dumping of waste, and therefore appeared to comprise "*information on...*

measures... affecting or likely to affect the [elements and factors of the environment]" (regulation 2(1)(c) of the EIR).

12. The Council reconsidered the request under the EIR, and issued a fresh response to the complainant on 21 August 2020. It explained that it agreed that the information was environmental, but that it still considered it to be exempt from disclosure.
13. Specifically, on review of the request, it had established that no information was held relating to point 2 (file notes). In addition, no information was held relating to point 9 which did not already fall under point 5 (communications with developers).
14. The Council informed the complainant that the information requested in points 1, 4, 5, 8, and 10 was exempt under the exception at regulation 12(5)(b) of the EIR – adversely affect the course of justice.
15. It further considered that all of the information other than the information relating to point 5, comprised internal communications and was additionally exempt under the exception at regulation 12(4)(e) of the EIR – internal communications.
16. The Council considered that the balance of the public interest favoured the exceptions being maintained.
17. The Commissioner wrote again to the Council on 2 September 2020, with the complainant's agreement, providing it with the opportunity to carry out a reconsideration (internal review) under regulation 11 of the EIR, and asking it to provide its detailed outcome to her and the complainant. The Council responded on 9 October 2020 and upheld its position.
18. The Commissioner considered the withheld information and wrote to the Council on 30 November 2020 with her preliminary view of this case, and, as is her discretion, to advise that some of the withheld information appeared likely to comprise third party personal data. The Council has not responded to this.
19. This notice considers whether the withheld information is exempt under regulation 12(5)(b) of the EIR – adversely affect the course of justice. If necessary, the notice will go on to consider whether the information (other than the communications with developers) is exempt under section 12(4)(e) – internal communications.
20. The Commissioner, as is her discretion, has also considered whether the information includes third party personal data and if so, whether it is exempt under regulation 13 of the EIR.

Reasons for decision

Regulation 12(5)(b) – Adversely affect the course of justice, etc

21. Under regulation 12(5)(b) of the EIR, a public authority can refuse to disclose information to the extent that 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.

Is the exception engaged?

22. The Commissioner's guidance¹ notes that this exception is broad in nature, explaining that it can, potentially, be widely applied to information held in relation to the administration of the course of justice. This may include legally privileged information; information gathered in relation to law enforcement, investigations and proceedings; and, as stated in the wording of the exception, information whose disclosure would adversely affect the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
23. In this case, the information relates to a potential planning enforcement issue arising from a possible breach. The Commissioner is satisfied that the information falls within the class of information potentially covered by the exception.
24. The additional requirement necessary for the exception to be engaged was addressed in the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037), when the Information Tribunal highlighted that there must be an "adverse effect" resulting from disclosure of the information, as indicated by the wording of the exception.
25. The Commissioner's guidance also notes that, in accordance with the Tribunal decision in *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word "would" (in "would adversely affect") is "*more probable than not*".
26. The Council's position is that disclosure would adversely affect its ability to carry out enforcement procedures.

¹ https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

27. To establish the background, and to consider whether there would be an adverse effect, the Commissioner has made enquiries as to what was publicly known about the Council's position regarding the development, at the date of the request.
28. The Commissioner notes that, at the date of the request (3 November 2019) local residents knew that the Council had visited the site twice, in June 2019 and in October 2019, in response to reports of concerns from local residents about the dumping of earth.
29. The Commissioner has also ascertained that the residents were aware, by the date of the request, that the Council had invited the developer to submit what is known as a section 73 application: an application made under section 73 of the Town and Country Planning Act 1990 for "planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted". The Council had also advised local residents that the developer might be required to submit a revised planning application in future.
30. The Commissioner has considered the withheld information. Broadly, it comprises:
 - an exchange of emails between council officers (marked 'request category 1');
 - a separate exchange of emails between council officers, specifically following an email enquiry from a member of the public to her local councillor, which is forwarded as part of the exchange (marked 'request category 4');
 - an exchange of emails between council officers and the developers (marked 'request category 5');
 - some handwritten questions and answers pertaining to a site visit (marked 'request category 8'); and
 - a partially completed council document with some handwritten notes (marked 'request category 10').
31. The Council argued that the withheld information would adversely affect its ability to carry out enforcement activities. It stated to the complainant that *"Disclosure of the information would release into the public domain, and therefore to the potential subject of any enforcement action (and the potential defendant were criminal proceedings to arise) the considerations given by the Council to appropriate action, including the strengths and weaknesses of the Council's position. Any enforcement notice which is issued could be the subject of appeal."*

Disclosure of the information requested in these circumstances would be likely to adversely affect this and future enforcement investigations."

32. The Commissioner notes that the Council also advised the complainant that "*disclosure would inhibit the Council's ability to conduct the investigation fully, including engagement with parties affected by or responsible for works which may be unauthorized, on a confidential basis where necessary*".
33. The Commissioner is aware that the progress of the development remains an ongoing issue at the date of this notice. However, her role in this case is to consider the position, and the information held, at the date of the request – 3 November 2019. She has therefore considered the withheld information.
34. The Commissioner considered whether disclosure would, as the Council asserted, make public its private considerations of what action it might take and its assessment of its position.
35. She has considered the internal emails within the Council, and also the communications with the developers including the handwritten record of the site meeting.
36. Whilst it is not appropriate for her to disclose in detail the contents of the information, in the Commissioner's view, in light of information already known by local residents, the contents of the withheld information do not support the Council's arguments.

The Commissioner's decision – regulation 12(5)(b)

37. The Commissioner's decision is that the Council has not demonstrated that the disclosure of the information would adversely affect the course of justice. The Commissioner has therefore determined that the exception is not engaged in respect of the withheld information, and there is no need for her to consider the public interest in respect of the application of regulation 12(5)(b).
38. She is aware that the Council considers that most of the withheld information is also exempt from disclosure under regulation 12(4)(e) – internal communications – and has therefore considered this, below.
39. However, the Council has not applied any other exceptions to the correspondence with the developers, requested in points 5 and 9 of the request, and marked for the Commissioner as 'request category 5'.
40. Since the exception at regulation 12(5)(b) is not engaged in respect of this information, the Commissioner orders its disclosure, subject to paragraphs 41-46 below.

41. The Commissioner has used her discretion to consider whether any of the information marked as 'request category 5' comprises third party personal data, and, if so, whether it would be lawful to disclose it under the EIR.
42. The Commissioner considers that the bundle marked 'request category 5' includes some third party personal data. Specifically, it includes the names of the email correspondents, being individual officers at the Council and at the developers, and their email addresses and other contact details, including telephone numbers. Certain individuals' names are also included within the body of some emails.
43. The Commissioner is satisfied that this information identifies and relates to living individuals, and therefore comprises third party personal data within the definition of personal data at Section 3(2) of the Data Protection Act 2018 (DPA)².
44. Furthermore, she is satisfied that there would be no lawful basis for the processing (disclosure) of this information, and that disclosure would breach 'principle a' of the General Data Protection Regulation 2018³. Disclosure would therefore be unlawful.
45. The Commissioner has therefore determined that the parts of 'request category 5' which comprise personal data, as described above, are exempt from disclosure under regulation 13 of the EIR.
46. The Commissioner instructs the Council that, prior to disclosing the 'request category 5' bundle, all third party personal data, including any names mentioned in the body of emails, should be redacted.

Regulation 12(4)(e) – Internal communications

47. The Council's position is that the information marked as request categories 1, 4, 8 and 10 respectively comprises internal communications, and is exempt from disclosure under regulation 12(4)(e).

² "Personal data" means any information relating to an identified or identifiable living individual (DPA, section 3(2))

³ Personal data shall be: (a) processed lawfully, fairly and in a transparent manner in relation to the data subject – Article 5(1) GDPR

48. Regulation 12(4)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
49. This is a class-based exception, and so there is no requirement to consider the sensitivity of the information in order to engage the exception. However, the exception is subject to a public interest test under regulation 12(1)(b), and the exception can only be maintained should the public interest test support this.
50. The Commissioner's guidance on this exception⁴ defines a 'communication' as covering any information which someone intends to communicate to others, or places on file (including saving it on an electronic filing system) where others may consult it. The guidance indicates that this extends to notes of meetings circulated, or filed, so that they are available to others.
51. The EIR does not provide a definition of what is meant by 'internal'. However, the Commissioner's guidance indicates that 'communications' which remain within one public authority (in this case, the Council) would be internal communications.
52. The Commissioner has considered the information marked as request categories 1, 4, 8 and 10 respectively. It includes emails (request categories 1 and 4), and two handwritten documents (request categories 8 and 10 respectively), the first of which comprises notes taken at the October site meeting, and the second of which records a complaint from a third party.
53. With regard to the 'request category 4' bundle, the Commissioner notes that the withheld information includes an email from a member of the public to her local councillor, an email from the councillor forwarding the said email to the Council, and a reply from the Council to the councillor.
54. The Commissioner considers that these three emails are not 'internal' communications. Whilst emails from councillors to their Council may be being sent and responded to in the context of carrying out council business, in this case, the councillor was acting in her role as an elected representative and was making enquiries on behalf of her constituent.

⁴ <https://ico.org.uk/media/for-organisations/documents/2021/2619005/12-4-e-internal-communication-31122020-version-31.pdf>

55. Furthermore, the Commissioner considers that these three emails therefore fall outside the scope of the request, in any event. The request focused on communications within the Council, and between the Council and the developers.
56. The Commissioner considers that the three emails referenced above do not need to be considered for disclosure. Her deliberations, which follow, do not include them.
57. The Commissioner is satisfied that the remainder of the information marked as request bundles 1, 4, 8 and 10 respectively are internal council documents, including documents recorded and filed for use within the Council. She is satisfied that they are 'internal communications' in line with her published guidance and that the exception at regulation 12(4)(e) is engaged.
58. She has therefore considered the balance of the public interest, to determine whether it favours the exception being maintained, or the information being disclosed.

The balance of the public interest

59. Regulation 12(4)(e) is a qualified exemption and is, therefore, subject to the public interest test at regulation 12(1)(b), which states that information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.
60. In addition, regulation 12(2) of the EIR specifically states that a public authority shall apply a presumption in favour of disclosure, and the Commissioner has included this in her deliberations.

The Council's view

61. With regard to the internal communications, the Council has acknowledged that there is a public interest in transparency, and its importance in maintaining public confidence.
62. However, the Council has attached significance to what it calls the "*underlying rationale*" for the exception at regulation 12(4)(e): the need for public authorities to have a private thinking space; a safe space in which to develop ideas.
63. The Council argues that "*this is important when an authority is investigating a potential breach of planning legislation, so that officers can freely discuss the issue and formulate an approach on how to deal with it... disclosure would inhibit free and frank discussions in the future*

and that a loss of frankness and candour would damage the quality of advice and lead to poor decision making."

64. The Council has also explained that *"it is relevant to this issue that the matter was live at the time of the request and remains a live enforcement file"*. Its view is that, since this is a live issue, this gives more weight to the public interest in favour of maintaining the exception.

The complainant's view

65. The complainant wishes to find out the reasons behind what he considers to be a lack of enforcement action by the Council. He explained that the issue relates to *"the raising of land levels by the dumping of many thousands of tons of material over a considerable period"*.
66. The complainant explains that residents were told, variously, that the issue was "complicated", then that the alteration of land levels was temporary, and then that it was permanent and required permission. He considers that there is a public interest in being able to understand this evolving position. Since the Council had informed local residents that the developers may be required to submit a revised application following the alteration of the levels, he considers that it is in the public interest to know how this position was arrived at.
67. He considers that it was a straightforward matter for the Council to have established whether a breach of planning permission occurred. He considers that disclosure of advice between council officers would present a full picture, and that its disclosure is in the public interest.
68. He considers that it is not in the public interest for the Council to give the impression that it is prepared to follow enforcement procedures against individuals, but not against larger developers, and that only through transparency can this suspicion be allayed. He refers to the government's published National Planning Policy Framework⁵ which states that it is good practice for councils to *"consider publishing a local enforcement plan to manage enforcement proactively, in a way that is appropriate to their area"* including *"how they will monitor the implementation of planning permissions, investigate alleged cases of*

5

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/810197/NPPF_Feb_2019_revised.pdf

unauthorised development and take action where appropriate". The complainant considers that this supports transparency with regard to enforcement matters.

69. The complainant has also explained that the development in question is in a conservation area.

The Commissioner's decision – regulation 12(4)(e)

70. The Commissioner has considered the contents of the withheld information in this case, in light of the exception at regulation 12(4)(e), both parties' arguments, and the background to the case. She has also taken into account the presumption in favour of the disclosure of environmental information set out at regulation 12(2).
71. The Commissioner notes that there is always a strong interest in a public authority conducting its business in a transparent manner, particularly when the information is environmental. This adds weight in favour of disclosure.
72. She is, however, mindful of the need for public authorities to be able to have a free and frank exchange of views in cases where they may be considering next steps, and a space in which to gather information for potential actions which may follow. She agrees that it is in relation to this where the public interest should be considered, in relation to this exception. It would not be in the public interest to inhibit public authorities from being able to exchange views by email or to record notes of consultations with third parties. This is known as the 'chilling effect', where public authorities become less likely to have free and frank exchanges, leading to a negative impact on decision-making.
73. However, the Commissioner does not accept that the disclosure of internal communications in one case necessarily implies that any and all internal communications would have to be published by public authorities in future. She expects public authorities to consider any request for information on its own merits, and she herself will consider the application of the exception on a case-by-case basis.
74. She has therefore considered the contents of the information itself and whether disclosure would have a 'chilling effect' on the Council's ability to exchange views, and gather information, in future.
75. In this case, taking into account what was already known by local residents at the date of the request, the Commissioner does not consider that there is a particularly strong public interest in disclosure of the information, but neither is she persuaded that disclosure would have a chilling effect on the Council's future decision-making.

76. In cases where the public interest factors in favour of maintaining the exception (that is, withholding the information) are of equivalent weight to the factors in favour of disclosure, the Commissioner's default position is that the information should be disclosed. In this case, she considers that the factors on both sides are of broadly equivalent weight, and she has additionally taken into account the presumption in favour of disclosure, with environmental information.
77. She has determined in this case that the information should be disclosed.
78. The Commissioner therefore orders the disclosure of the information marked request categories 1, 4, 8 and 10 respectively, subject to paragraphs 79-86 below.
79. As with the information she has already ordered the Council to disclose, previously in this notice, the Commissioner has used her discretion to determine whether any of the information marked as request categories 1, 4, 8 and 10 comprises third party personal data, and if so, whether it would be lawful to disclose it under the EIR.
80. The Commissioner considers that this information includes some third party personal data. Specifically, it includes names of correspondents, and their email addresses and other contact details, including telephone numbers. The names and contact details of certain individuals, including local residents, are also included within the body of some emails.
81. The Commissioner is satisfied that this information identifies and relates to living individuals, and therefore comprises third party personal data within the definition of personal data at section 3(2) of the DPA.
82. In addition, the Commissioner considers that the following information is third party personal data within the same definition:
 - From 'request category 1' the handwritten note of the email address of the local resident referred to in the second email; and
 - From 'request category 4', in the fourth paragraph of the email dated 25 September 2019 and timed at 14:49, the part of the message reading "*so there... let me know*", which is a personal opinion of the council officer writing the email and moreover does not relate to the progress of the development and/or enforcement; and
 - From 'request category 8' which is entirely handwritten, the initials and names of all individuals; and

- From the same document, the whole of the final page of these notes which records of a specific, personal interaction; and
 - From 'request category 10' all names, addresses and initials in the handwritten sections of the document.
83. The Commissioner is satisfied that all of the information described in the paragraph above is personal data within the definition at section 3(2) of the DPA.
84. Furthermore, she is satisfied that there would be no lawful basis for the processing (disclosure) of this information, and that disclosure would breach 'principle a' of the General Data Protection Regulation 2018, as referenced previously. Disclosure would therefore be unlawful.
85. The Commissioner has therefore determined that the personal data described above in paragraphs 80 and 82 respectively is exempt from disclosure under regulation 13 of the EIR.
86. The Commissioner instructs the Council that, prior to disclosing the information, all third party personal data should be redacted.

Right of appeal

87. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

88. 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.
89. 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

Phillip Angell
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF