

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

### **Decision notice**

**Date:** 1 July 2022

**Public Authority:** Burnham Parish Council  
**Address:** Burnham Park Hall  
Windsor Lane  
Burnham  
Buckinghamshire  
SL1 7HR

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

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1. The complainant requested information from Burnham Parish Council in Buckinghamshire ("the Parish Council") about a court order and settlement. The Parish Council withheld the information under regulation 12(5)(b) (adversely affect the course of justice) and/or regulation 12(5)(e) (adversely affect the confidentiality of commercial interests) of the EIR.
2. The Commissioner's decision is that, whilst the exception at regulation 12(5)(b) is engaged, the balance of the public interests would favour the disclosure of the information. However, he finds that the exception at regulation 12(5)(e) is also engaged, and that the balance of the public interests favours the information being withheld. He is therefore satisfied that the information was correctly withheld and does not require the Parish Council to take any steps.

#### **Request and response**

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3. On 16 June 2020, the complainant wrote to the Parish Council to request information of the following description:  
  
"Under the Freedom of Information Act 2000 I am requesting the latest complete financial management statement for the Land Securities

Fund... I am interested to know the past and current expenditure and remaining balance on the account.”

4. Later that day, the Parish Council provided some information, and a link to some other information.
5. On 18 June 2020, the complainant wrote again and requested as follows:

“I note with concern that the insurance money relating to the claim against [redacted] has not been recorded. You may be aware that your predecessor pursued a claim on behalf of the Parish Council in excess of £75000. I am to understand that the matter was settled at the end of last year. Please could you confirm that payment has been made by the other side and why it has not gone back into the Land Securities Fund.”
6. On 10 July 2020, the Parish Council wrote and confirmed that the money had been received, and had been paid into the Land Securities Fund. It stated that it was prevented by a court order from disclosing the amount of the payment.
7. On 21 July 2020 the complainant wrote to the Parish Council and explained that in his view, the local residents were entitled to be “informed as to the settlement”. He also requested a copy of the order preventing disclosure of the sum.
8. On 14 August 2020, the Parish Council responded and stated that the order was exempt from disclosure under s32(1) of the Freedom of Information Act 2000 (FOIA), the exemption for court records. It did not comment on the settlement as such.
9. On 18 August 2020, the complainant wrote to the Parish Council and asked for an explanation of the fact that the Land Securities Fund was not published on its website. He commented that he could not see a mention of an audit on the said fund account. On 2 September 2020, the Council responded with some explanations.
10. On 9 September 2020, the complainant wrote to the Parish Council, referring back to his request of 21 July 2020 and saying that he still required “further information relating to the case between [redacted] and Burnham Parish Council”, and saying that he was awaiting the outcome of an internal review.
11. On 14 September 2020, the Parish Council wrote to the complainant asking for clarification of the internal review he was waiting for. He responded on 21 September 2020, saying he wished the Parish Council to consider “whether [it] will be allowed to discuss openly... whether the

Council will be permitted to disclose both the settlement under the court order and the lack of information on the management accounts”.

12. Following the intervention of the ICO, the Parish Council provided the complainant with an internal review outcome on 11 June 2021. It stated as follows:

“Whilst there has been a certain amount of correspondence that has taken place between yourself and the previous clerk, there are aspects of that which, under Section 43(3) of the FOI Act, we are exempted from either confirming nor denying as to do so could prejudice commercial interests of parties involved. Your original request received on the 16 June was ‘Under the Freedom of Information Act 2000 I am requesting the latest complete financial management statement for the Land Securities Fund... I am interested to know the past and current expenditure and remaining balance on the account.’ There is no requirement on the council to publish the statement of this fund and Burnham Parish Council are exempted from complying with your request under Section 43(2) of the FOI Act on the grounds that such disclosure could prejudice the commercial interests of parties involved. However, I can confirm to you that Burnham Parish Council was not only fully audited as usual for the year in question, there was also particular attention and exceptional inspection made by the auditors at the request of the former clerk. All monies of the council are correctly presented through the Annual Governance and Accountability Review and have been subjected to both internal and external audit.”

13. The complainant referred the matter to the Commissioner.

### **Scope of the case**

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14. By way of background, it was established that the requested information related to legal proceedings taken by the Parish Council against an individual over the performance of a professional contract. In this case, the matter was settled by means of a court order known as a Tomlin Order. These are used in civil actions when proceedings are stayed owing to the parties having agreed terms. A Tomlin Order sets out the agreed terms and makes them legally binding.
15. The complainant contacted the Commissioner on 12 October 2020 to complain about the way his requests for information had been handled.
16. The Commissioner advised the complainant and the Parish Council, at that date, that it was necessary both for the complainant to clarify the scope of his request, and for the Parish Council to clarify its position.

17. In addition, having ascertained that the matter related to the building of a new toilet block, including issues such as the positioning of a waste pipe, the Commissioner advised the Parish Council that the request may fall to be considered under the EIR, since any information held was likely to be on measures and activities affecting the elements and factors of the environment, which would fall within the definition at regulation 2(1)(c) of the EIR.
18. Following further correspondence, during which period the Commissioner notes that several different individuals occupied the posts of both Parish Clerk and Assistant Clerk, it was agreed by both parties on 13 October 2021 that the requested information should be clarified as follows:
  - 1) The amount of the settlement;
  - 2) A copy of the court order;
  - 3) A copy of the audited accounts for 2020/2021;
  - 4) The Land Securities High Street Improvement Fund income and expenditure summary from 10th October 2013 to 4 July 2021.
19. The Parish Council responded afresh to the clarified request on 25 January 2022. However it had not, evidently, considered the matter under the EIR, and its position was as follows:
  - 1) It stated that this was exempt under section 43(2) of the FOIA (commercial interests);
  - 2) It stated that this was exempt under section 32 of the FOIA (court records);
  - 3) It provided a link to its audited accounts;
  - 4) It provided this, but redacted information from which the settlement figure could be extrapolated.
20. The complainant requested an internal review with regard to 1), 2) and 4), and the Parish Council provided this on 10 March 2022.
21. In the internal review outcome, the Parish Council explained that it considered the withheld information to be environmental, and to be exempt from disclosure under the EIR since it related to "the course of justice".
22. Subsequently, in correspondence with the Commissioner, the Parish Council also reiterated that it considered that disclosure would have "an

adverse effect on both the Council and another named individual's business".

23. This notice covers whether the withheld information is exempt under the exceptions at regulation 12(5)(b) of the EIR, which provides an exception from the duty to disclose environmental information where disclosure would adversely affect the course of justice, and/or regulation 12(5)(e), which provides an exception where disclosure would adversely affect the confidentiality of commercial information.

## Reasons for decision

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### **Regulation 12(5)(b): adverse effect on the course of justice, etc**

24. Regulation 12(5)(b) of the EIR states that a public authority may 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.
25. In this case, the withheld information relates to a legal action arising from the construction of a toilet block. The Parish Council was pursuing a claim against an individual in relation to the performance of a contract.
26. The withheld information comprises the Tomlin Order dated November 2019, with attached terms, including the settlement figure, and a spreadsheet entitled Land Securities Fund, containing income and expenditure information from 2013 onwards (a redacted version of this was disclosed. The purpose behind the redaction was to keep the amount of the settlement confidential).
27. For the exception to be engaged, as the Information Tribunal emphasised in the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037), there must be an "adverse effect" resulting from disclosure of the information, as indicated by the wording of the exception.
28. 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".
29. In this case, the Parish Council's position is that it would undermine the intentions behind having reached a confidential settlement, governed by the terms of the order, if it disclosed the amount of the settlement. It

considers that since the settlement was arrived at by means of legal process, and is recorded in an order which itself states that its terms are confidential, not to abide by the terms of the order would, in itself, be adversely affecting the course of justice.

30. The Commissioner notes that the order does state that there are certain circumstances in which the terms could be disclosed and these are referred to further on in this notice. However, he agrees that disclosure of the court order's confidential terms would be contrary to its stated intentions and that this engages the exception at regulation 12(5)(b).
31. It is therefore necessary to consider whether the balance of the public interests nevertheless favours the disclosure of the information.

### **The balance of the public interests: regulation 12(5)(b)**

32. Regulation 12(5)(b) is subject to the public interest test. This means that, when the exception is engaged, public authorities also have to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Even where the exception is engaged, the information should still be disclosed if the public interest in disclosing the information is not outweighed by the public interest in maintaining the exception.
33. In addition, under regulation 12(2) of the EIR, public authorities are required to apply a presumption in favour of disclosure.

### **Factors in favour of disclosure**

34. There will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding, a free exchange of views, and more effective public participation, particularly in relation to environmental matters.
35. With regard to transparency, in this case, the complainant considers that the amount of the settlement should be public. He considers that it is important in the context of understanding the Parish Council's overall financial position.

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

36. In considering whether an EIR exception should, on the balance of the public interests, be maintained, the Commissioner will focus on matters which are inherent to that exception: here, the adverse effect on the course of justice. By finding the exception at regulation 12(5)(b) to be engaged in this case, the Commissioner has already accepted that

releasing the withheld information would negatively affect the course of justice.

37. It is not, generally, in the public interest to allow harm to the course of justice. However, the extent of the harm needs to be considered, and it needs to be weighed against any countervailing considerations.

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

38. In this case, the Commissioner notes that the court order states that its terms should remain confidential. However, it also states that this should not prevent any disclosure required by law.
39. He also notes that the information was requested more than six months after the terms of the settlement had been agreed. Disclosure of the information at that date would not have affected the progress of the legal proceedings themselves, since the settlement was a "fait accompli" by this the date of the request.
40. Therefore, after considering all of the wording of the court order and the date of the request, the Commissioner is satisfied that disclosing the withheld information would not have a significant adverse effect on the course of justice.
41. His decision is that the public interest in maintaining the exception at regulation 12(5)(b) is not sufficient to outweigh the public interest in the disclosure of the information.
42. He has therefore considered the other exception being relied on by the Parish Council: regulation 12(5)(e).

### **Regulation 12(5)(e) – adverse effect on commercial confidentiality**

43. Regulation 12(5)(e) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information, where such confidentiality is provided by law to protect a legitimate economic interest.
44. The Commissioner has published guidance<sup>1</sup> on the application of this exception. As the guidance explains, the exception can be broken down into a four-stage test.

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<sup>1</sup> <https://ico.org.uk/for-organisations/commercial-or-industrial-information-regulation-12-5-e/>

45. All four elements are required in order for the exception to be engaged. The Commissioner has considered how each of the following conditions apply to the facts of this case:

- The information is commercial or industrial in nature;
- It is subject to confidentiality is provided by law;
- The confidentiality is protecting a legitimate economic interest; and
- The confidentiality would be adversely affected by disclosure.

**Is the information commercial or industrial in nature?**

46. The Commissioner has considered the withheld information, and notes that it comprises a court order setting out the terms of a settlement agreed between the Parish Council and an individual. As stated, the individual had been engaged by the Parish Council with regard to re-developing a toilet block.

47. The Commissioner is satisfied that the information is commercial in nature since it relates to the performance of a professional contract.

**Is the information subject to confidentiality provided by law?**

48. The phrase “confidentiality provided by law” can apply to various circumstances. In this case, the Parish Council considered it had a legal duty, under the terms of the court order, to keep the amount of the settlement confidential. It also considered that disclosure would breach the common law duty of confidentiality which it owed to the individual in respect of his commercial interests.

49. As noted above, the court order states that its terms should remain confidential, but allows for the fact that disclosure may be required by law. This clearly gave rise to an expectation of confidentiality on both sides, and the Commissioner has focused on the common law duty of confidentiality owed to the individual.

50. For a common law duty of confidentiality to exist, it is required:

- (a) that the information has the necessary quality of confidence, and
- (b) that it was imparted in circumstances which gave rise to an obligation of confidence.

51. Regarding (a), whether the information has the necessary quality of confidence, this requires that the information is not trivial, and has not otherwise been made public. The Commissioner notes that the withheld



information relates to legal action taken by the Parish Council in respect of the individual's performance of a commercial contract and is, therefore, not trivial. The Parish Council has confirmed that information has not been made public. The Commissioner is satisfied that the information has the necessary quality of confidence.

52. Regarding (b), he has considered the "reasonable person test" established by Megarry J. in *Coco v AN Clark Engineers Ltd* [1968] FSR 415 and has concluded that, due to the wording of the court order, a reasonable person would expect the terms of the settlement to remain confidential.
53. Taking into account the nature of the information and the expectations around an agreed settlement which is stated to be confidential, the Commissioner is satisfied that the circumstances gave rise to an obligation of confidence.
54. The Commissioner is therefore satisfied that the information is subject to the common law duty of confidentiality: that is, confidentiality provided by law.

**Is the confidentiality provided to protect a legitimate economic interest?**

55. As the Tribunal confirmed in the case of *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011) ("Elmbridge"), to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person(s) the confidentiality is designed to protect.
56. This requires the consideration of two elements: whether a legitimate economic interest has been identified, and (because it needs to be shown that the confidentiality is provided to protect this interest, as explained below) whether the interest would be harmed by disclosure.
57. In this case, the confidentiality was designed to protect the interests of the parties to the court actions. In the case of the individual being taken to court over the performance of a professional contract, the Commissioner is satisfied that the outcome of the proceedings relates to his legitimate economic interests.
58. The Commissioner is also satisfied that disclosure, at the time of the request, would cause harm to these interests.
59. He is therefore satisfied that the Parish Council correctly considered that the confidentiality was required to protect a legitimate economic interest.

**Would the confidentiality be adversely affected by disclosure?**

60. The final requirement for the exception to be engaged is for it to be shown that an adverse effect to the confidentiality, provided to protect the legitimate economic interest, would occur from the disclosure of the information.
61. Although this is a necessary element of the exception, the Commissioner's approach is that, once the first three elements are established, it is inevitable that this element will be satisfied. Disclosure of confidential information into the public domain would inevitably harm the confidential nature of that information, and would also harm the legitimate economic interests that have been identified.
62. As explained in the Commissioner's guidance, referenced previously, this was confirmed in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012, 24 May 2010), in which the Tribunal stated that, given its findings that the information was subject to confidentiality provided by law and that the confidentiality was provided to protect a legitimate economic interest: "it must follow that disclosure... would adversely affect confidentiality provided by law to protect a legitimate economic interest" (para 14).
63. The Commissioner is satisfied that the exception is engaged.

**Balance of the public interests: regulation 12(5)(e)**

64. As previously stated, there are general interests in transparency when it comes to the financial affairs of the Parish Council, and the Commissioner would refer to his comments at paragraphs 32-35 above.
65. In the case of the exception at regulation 12(5)(e), it is necessary for the Commissioner to consider whether the adverse effect on commercial confidentiality which has been identified, is outweighed by the public interest in the disclosure of the information.
66. The Commissioner is not aware of any concerns that the Parish Council, aside from the issue of the withheld information, has failed to be transparent over its affairs in general. In his view, it would be concerning if withholding the settlement figure meant that the public was less able to scrutinise the Parish Council's financial position than before. He has therefore considered whether withholding the information has affected the public's ability to scrutinise the financial affairs of the Parish Council.
67. He has ascertained that the Parish Council disclosed the settlement figure to its auditors, and that its accounts for the relevant periods were

subsequently audited and published in the normal way, in the same level of detail as is usual practice.

68. He also notes that the Land Securities Fund spreadsheet is not a document which is normally published. He notes that the Parish Council makes available the balance of the Fund to enable the public to gain an overall understanding of the Fund's position.
69. The Commissioner is satisfied that withholding the settlement figure has not had a detrimental effect on the Parish Council's usual level of transparency over its financial affairs, nor inhibited public scrutiny.
70. Whilst it is understandable that the local community is interested in the outcome of the court proceedings, the Commissioner does not consider that the public interest in the withheld information itself is sufficient to outweigh the factors which favour the exception being maintained.
71. The Commissioner's decision is that the balance of the public interests in this case favours the exception at regulation 12(5)(e) being maintained, and that the Parish Council was therefore correct to withhold the information.
72. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*: "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure... the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).
73. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced.
74. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(e) was applied correctly.

## **Right of appeal**

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

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

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

76. 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.
77. 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 .....**

**Sophie Turner**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**