

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 14 July 2022

Public Authority: Burcot & Clifton Hampden Parish Council
Address: clerkatcliftonhampden@gmail.com

Decision (including any steps ordered)

1. The complainant requested information from Burcot & Clifton Hampden Parish Council in Oxfordshire ("the Parish Council") about the local Neighbourhood Development Order. After reconsidering the outstanding three requests under the EIR, the Parish Council withheld some information under, respectively, regulation 12(5)(b) the course of justice, etc; regulation 12(4)(d) material in the course of completion, etc; and regulation 13(1) personal data.
2. The Commissioner's decision is that all three items of withheld information were withheld correctly under the three respective exceptions of the EIR, including, where relevant, on the balance of the public interests.
3. The Commissioner does not require the Parish Council to take any steps.

Case background

4. The complainant initially wrote to the Commissioner on 30 March 2021 with supporting evidence for his complaint. He provided correspondence showing that he had raised various concerns with the Parish Council over the progress of the local Neighbourhood Development Order ("NDO"), including making some requests for recorded information.
5. The Commissioner noted that the Parish Council had responded to a large number of his requests, and sought clarification from the complainant, who explained which requests he considered were

outstanding. However, further enquiries determined that not all of these outstanding requests had been made in writing; some had been made verbally.

6. The Commissioner determined that the information which the complainant considered to be outstanding, and which he had requested verbally, was not "environmental information" within the definition at regulation 2(1)(c) of the EIR.
7. In his investigation, the Commissioner has not been required to consider the handling of any requests for non-environmental information which were made verbally. This is because verbal requests for information are not valid, under FOIA. The following section sets out the requests which remained outstanding and which the Commissioner has been able to investigate.

Requests and responses

8. On 7 December 2020, the complainant requested (request 1):

"Please may we have a copy of the counsel's opinion you have obtained on the NDO... ."
9. On 1 January 2021, he requested (request 2):

"Any financial assessments in relation to the development... ."
10. The Parish Council responded to both of these requests on 19 February 2021. It considered that counsel's opinion was legally privileged, citing section 42(1) FOIA, and considered that information which comprised "financial assessments" was commercially sensitive, citing section 43(2) FOIA. However, it stated that it intended to publish both counsel's opinion and the financial assessments at a future date, and cited section 22 FOIA.
11. On 9 May 2021, the complainant requested (refined from a previous request dated 21 March 2021) (request 3):

"All individual responses, redacted to comply with GDPR and providing anonymity to the individual but otherwise complete, that residents made to the "Have your Say" consultation conducted in December 2020 and March/April 2021".
12. The Council declined to respond to this, having refused the previous version of the request under section 41 FOIA: information provided in confidence.

Scope of the case

Environmental information

13. During the investigation, the Parish Council reconsidered the withheld information, including the survey responses, and agreed that it was all information on proposed measures and activities affecting, or likely to affect, the environment. The information is, therefore, environmental information under regulation 2(1)(c) of the EIR, and the requests fell to be considered under the EIR. The Parish Council accordingly clarified/ revised its position as follows.

Request 1: Counsel's Opinion

14. During the investigation, the Parish Council advised the Commissioner that the requested Opinion, which is dated 2 October 2020, was not intended for publication because it had since published a later, amended version. The complainant however confirmed he wished to see the 2 October 2020 version.
15. Since there is no intention to publish, and in light of the Parish Council's previous reliance on legal professional privilege, the Commissioner has considered whether this information is exempt under the exception at regulation 12(5)(b) of the EIR: adversely affect the course of justice.

Request 2: Financial assessments

16. The Parish Council clarified that, at the date of the request, it held a "working document" – a spreadsheet – falling within the scope of this request, but now considered it to be exempt under regulation 12(4)(d) of the EIR: material in the course of completion, unfinished documents or incomplete data.

Request 3: Consultation responses

17. The Parish Council confirmed that it considered the entirety of the consultation responses were covered by the exception at regulation 13(1) of the EIR (personal data).

Summary of scope

18. This notice covers whether, under the EIR:
- Counsel's Opinion dated 2 October 2020 is exempt under regulation 12(5)(b) (course of justice, etc);
 - The financial spreadsheet is exempt under regulation 12(4)(d) (unfinished documents); and

- The consultation responses are exempt under regulation 13(1) (personal data).

Reasons for decision

Regulation 12(5)(b) of the EIR – adverse effect on the course of justice, etc

19. 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.
20. In this case, the withheld information is the written opinion of counsel dated 2 October 2020 (“the Opinion”).
21. Having reviewed the Opinion, the Commissioner is satisfied that it is, albeit largely in fact, in draft form. Certain sentences and figures remain in square brackets with comments.
22. 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.
23. 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”.
24. The Commissioner has first considered whether the Opinion was, at the date of the request, subject to legal professional privilege (LPP). LPP attaches to communications between a lawyer and their client made for the dominant purpose of obtaining, or providing, legal advice. It is well-established that overturning this important legal principle is a highly relevant factor when considering, under the EIR, whether an adverse effect on the course of justice would arise from the disclosure of information.

25. The Commissioner's guidance¹ on this refers to the case *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC) (28 March 2012), case number GIA/2545/2011, in which the Upper Tribunal (UT) considered the significance of LPP under the EIR. The UT stated that an adverse effect on the course of justice can result from the undermining of the general principles of legal professional privilege and of the administration of justice. The UT also accepted that it was not inevitable that the disclosure of privileged information would adversely affect the course of justice; but suggested that there would need to be special or unusual factors in play for this not to be the case.
26. In this case, the Opinion was obtained by the developers, but was written with the specific intention that it be shared with the Parish Council and the local District Council: South Oxfordshire ("SODC"). It states: "I understand that this Opinion will be provided to both the Parish Council and the District Council, as part of the discussions on the submission of the CRBO."
27. In the Commissioner's view, this is likely to amount to what is known as a limited waiver of LPP. Limited waiver is where a privileged document is shared with a third party (or third parties), for a limited and specific purpose, on terms that the third party will treat the information disclosed as confidential. Importantly, limited waiver allows the disclosing party – in this case, the developers – to retain LPP over the document generally, and does not result in loss of privilege.
28. In any event, any waiver of LPP is not necessarily a bar to regulation 12(5)(b) being engaged. Regulation 12(5)(b) does not depend on the requested information being legally privileged, but on the broader notion of an adverse effect on the course of justice being caused.
29. It is not relevant here that the Opinion was subsequently revised during 2021, and that a later version dated 22 July 2021 has now been published. This notice covers whether the Parish Council was entitled to withhold the Opinion dated 2 October 2020, at the time when it was considering the request.
30. Since the Opinion is in draft, which indicates that discussions were "live", and was written specifically for consideration by three named organisations to aid their discussions over the details of the proposed development, the Commissioner is persuaded that disclosure, at the

¹ https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-5-b-the-course-of-justice-and-inquiries-exception/#125b_LPP

date of the request, would have been contrary to the stated purposes of the document and would have undermined the progress of ensuing discussions. He is satisfied that disclosure to the public at this date would have inhibited the parties' consideration of, and free and frank discussions around, the Opinion.

31. In addition, the fact that the Opinion remained, effectively, privileged, and in the absence of any exceptional circumstances, the Commissioner is satisfied that disclosure would have undermined the principle of LPP.
32. He is satisfied that these factors would have caused an adverse effect to the course of justice and that the exception is engaged. He has therefore considered the balance of the public interests.

Regulation 12(5)(b): the balance of the public interests

33. 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 it is not outweighed by the public interest in maintaining the exception. 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. In this case, the complainant considered that the public was entitled to be fully informed of the legal position, in order to take part in a consultation.

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. It is not, generally, in the public interests for there to be an adverse effect on the course of justice.
37. In this case, he considers that maintaining the exception enabled the Parish Council, the developers and SODC to have the space in which to

check relevant factors before moving forward with the consultation process. Enabling the effective conduct of the Parish Council's business by allowing it to reach an informed position is strongly in the public interest.

The balance of the public interests

38. In this case, the Commissioner notes that, whilst some residents were unhappy with the conduct and progress of the consultation which began in December 2020, they were able to express this through various means, and indeed the concerns were addressed by the Parish Council.
39. Having reviewed the Opinion, the Commissioner has not identified anything within which would usefully have added to the public debate at that date, nor is he aware of anything within which would have impacted upon the next steps of the process.
40. In this case, the Commissioner is not persuaded that the public interest in disclosing the legal advice is sufficient to outweigh the public interest in maintaining the exception at regulation 12(5)(b).
41. 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).
42. 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.
43. 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)(b) was applied correctly.

Regulation 12(4) (d) – material in the course of completion, unfinished documents or incomplete data

44. Regulation 12(4)(d) of the EIR states that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.

45. As the Commissioner's guidance² makes clear, the fact that the exception refers to both "**material** in the course of completion" and "unfinished **documents**" implies that these terms are not necessarily synonymous.
46. In this case, the Parish Council has not specified which term it considers covers the document provided to the Commissioner for consideration. However, it has described the spreadsheet as a working document, and explained that the information on it, which was still being added to, will feed into a final viability assessment.
47. Having considered the spreadsheet, and his guidance, the Commissioner is satisfied that the spreadsheet itself comprises material in the course of completion, and that the exception at regulation 12(4)(d) is engaged. He has therefore considered the balance of the public interests.

Regulation 12(4)(d): the balance of the public interests

48. As with regulation 12(5)(b), regulation 12(4)(d) 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 it is not outweighed by the public interest in maintaining the exception.
49. Also as mentioned previously, under regulation 12(2) of the EIR, public authorities are required to apply a presumption in favour of disclosure.

Factors in favour of disclosure

50. 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.

Factors in favour of maintaining the exception

51. In considering whether an EIR exception should, on the balance of the public interests, be maintained, as explained above the Commissioner

² https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf

will focus on matters which are inherent to that exception: here, the effects of disclosing materials in the course of completion.

52. The Parish Council stated: "we do not believe that it is in the Public Interest to provide information that is a work in progress and therefore incomplete. The full Viability and Financial Assessment will be published and available at the forthcoming formal consultation."
53. The Commissioner also notes that, in correspondence with the complainant, the Parish Council explained that "the current financial information does contain estimates and assumptions regarding negotiations of the financial settlement for the parish" and stated that, in its view, disclosure could prejudice the commercial interests of the Parish Council. It also stated that a summary of the share of the financial benefits to each party (the parish, the landowner and the developer) was published on the Parish Council website during the internal review period.
54. The Parish Council's position is that these factors – the fact that the material is incomplete and includes estimates and assumptions, and the concerns over commercial prejudice – mean that the balance of the public interests lies in maintaining the exception.

The balance of the public interests

55. The Commissioner understands that the local community would wish to be kept apprised of financial considerations in a project such as this, in order to be as fully informed as possible before contributing to any consultation exercises. He also notes the importance of transparency.
56. However, he also considers that a small public authority needs to be able to keep a working document on which to record estimates, carry out calculations and make draft assessments, and considers that publishing this type of information does not necessarily inform public debate in a useful way.
57. Furthermore, publication of this type of information can at times lead to confusion, and some disruption to the public authority if a subsequent conversation develops around figures and estimates which were only intended as a draft or an assumption.
58. In this case, the Commissioner is not persuaded that the public interest in disclosing the spreadsheet is sufficient to outweigh the public interest in maintaining the exception at regulation 12(4)(d).
59. As before, the Commissioner's decision has been informed by the presumption provided for in regulation 12(2) and the Vesco decision, but he has concluded that the balance of the public interests favoured

maintaining the exception and that the exception provided by regulation 12(4)(d) was applied correctly.

Regulation 13 of the EIR – personal data

60. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
61. In this case the relevant condition is contained in regulation 13(2A)(a)³. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UKGDPR').
62. The Commissioner must first determine whether the withheld information is personal data, defined at section 3(2) of the Data Protection Act 2018 as: "any information relating to an identified or identifiable living individual".
63. The Commissioner has viewed a sample of the withheld information, which in full comprises over 100 responses to a survey/consultation. He is satisfied that, as well as including names and addresses, the responses include personal opinions and information relating to personal circumstances. The information clearly relates to the responders and identifies them, either directly or indirectly. He is satisfied that the information comprises personal data.
64. The fact that information is personal data does not mean that it cannot be disclosed under the EIR. However, it can only be disclosed in line with the DP principles, as referred to above.
65. Specifically, the principle relevant to a request for information made under FOIA or the EIR is principle (a):

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
66. In order for the processing (in this case, disclosure) of personal data to be lawful, a lawful basis must exist for the processing. The Commissioner's established view is that lawful basis set out at Article 6(1)(f) of the UKGDPR is most applicable here:

³ As amended by Schedule 19 Paragraph 307(3) DPA.

“processing [is lawful when it] is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”⁴.

67. Therefore, for disclosure of personal data to be lawful in the context of a request for information under the EIR, it is necessary to consider the following three-part test:-

- Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
- Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;
- Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

Legitimate interests

68. In this case, the Commissioner is satisfied that there would be a general interest in understanding the views of the responders to the consultation(s) which had taken place at the date of the request.

Is disclosure necessary to meet the legitimate interest?

69. In this case, whilst some analysis of the responses has subsequently been published by the Parish Council, the Commissioner accepts that, at the date of the request, disclosure would have been necessary to meet

⁴ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

the legitimate interests in the detailed contents of the information, described above.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

70. In this case, the Commissioner understands that responders had no expectation that their individual responses would be disclosed. Whilst they would have expected some sort of extrapolated analysis to be published, such as the percentage of responders who were in favour of a particular matter, there was no expectation that individual answers to questions would be made public.
71. This is a key consideration in balancing the legitimate interests in disclosure against the data subjects' interests and fundamental rights and freedoms.
72. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to an individual. The Commissioner is aware of the contentious nature of neighbourhood plans and in his view, one neighbour would not wish their responses to be made public and open to challenge and comment from another neighbour.
73. In this case, it is evident from the wording of the request that the complainant considered that personal data could be redacted from the responses, in order to anonymise the information for public disclosure. The Commissioner has considered this, but is satisfied that non-identifying information cannot readily be extracted from the responses such as to leave anything meaningful for disclosure.
74. He would also note that, whilst an anonymised summary of the responses has subsequently been published, this has required more than a simple extraction of certain information. There is no requirement for a public authority to generate new information, such as the now-published analysis, in response to an information request.
75. In this case, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
76. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent. He is satisfied that the consultation responses have been correctly withheld under regulation 13(1) of the EIR.

Right of appeal

77. 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

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

78. 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.
79. 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

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