

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

### **Decision notice**

**Date:** 28 June 2023

**Public Authority:** Vale of Glamorgan Council  
**Address:** Civic Offices  
Holton Road  
Barry  
Vale of Glamorgan  
CF63 4RU

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

---

1. The complainant made a six-part request to the Vale of Glamorgan Council (the Council). Their complaint focuses on part one, a request for "all recorded information" between two named people – a Council official and a developer.
2. Whilst the Council has disclosed some information to the complainant in response to part one of the request, the complainant is concerned about the Council withholding parts of an email chain of March 2022 (the email chain).
3. The Council handled the whole six-part request under the Freedom of Information Act 2000 (FOIA). It cited section 43(2) of FOIA (commercial interests) in relation to the email chain.
4. The Council has said that if the EIR (not FOIA) apply to the request, the Council would refuse disclosure under regulation 12(5)(e) (the exception for commercial confidentiality).

5. The Council also said to the Commissioner during his investigation that parts of the email chain were withheld because they are not relevant.
6. The Commissioner finds that the information within scope of this case (the email chain) falls under the EIR, so the Council considered it under the wrong access regime.
7. The Commissioner considers that all of the information within the email chain is relevant to the request.
8. The Commissioner finds that the Council has failed to demonstrate that regulation 12(5)(e) of the EIR is engaged.
9. The Commissioner finds that the Council breached regulation 14(2) of the EIR as it failed to issue a refusal notice within 20 working days.
10. The Commissioner requires the Council to take the below step to ensure compliance with the legislation.
  - Disclose the email chain, subject to any appropriate redactions for personal data.
11. The Council must take these steps 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 FOIA, and may be dealt with as a contempt of court.

## **Request and response**

---

12. On 25 May 2022 the complainant wrote to the Council and requested, under FOIA, "all recorded information" between a named Council official and a named developer, and between 1 January 2021 and 31 May 2022.
13. On 1 June 2022 the Council sought clarification, asking which site the complainant was specifically referring to, and "Does this relate to Albert Road Methodist Church, Penarth?"
14. The complainant replied (1 June 2022):

**"I'm looking for all recorded information between both parties** [emphasis added] in each instance. It is only the last instance where it is in relation to Albert Road Methodist Church ...

  1. **All recorded information** [emphasis added] between [name redacted] and [name redacted] for dates provided ...

1-4 **could** [emphasis added] relate to Albert Road Methodist Church, **but could easily include other discussions also** [emphasis added].

If this not possible, then yes, please relate it to Albert Road Methodist Church, Penarth”.

15. The Council responded on 10 August 2022, citing section 43 of FOIA in response to part one of the request. Arguing that the public interest in withholding the information outweighs the public interest in disclosing it, the Council emphasised a “duty to protect the commercial interests of our suppliers, contractors and consultants” and said that disclosure “would distort the procurement process” so “could make it more difficult for the Council to ensure it selected those bids which provide best value for money”.
16. Following an internal review, the Council wrote to the complainant on 22 December 2022. It stated that communications between the named people at part one of the request are very limited, and upheld the application of section 43 of FOIA. Additionally, in response to wider, underlying concerns from the complainant about “malfeasance” in relation to the Council’s dealings with the developer, the Council said that the reviewer “has not found anything in support of your concern”.
17. As part of the internal review correspondence, the Council had asked the complainant whether its interpretation of the complainant’s clarification (1 June 2022) had been correct. Its interpretation had been that the complainant “only wanted to see correspondence between [name redacted] and [name redacted] in relation to [Albert Road Methodist Church]” (see the Council’s email of 10 November 2022 to the complainant). In response, the complainant emphasised their preference to see all conversations between the two people.

### **Scope of the case**

---

18. The complainant contacted the Commissioner on 8 January 2023 to complain about the way their request for information had been handled.
19. They complained about the Council applying section 43(2) of FOIA, and said it is “imperative” that they read conversations about Albert Road Methodist Church between the people named in part one of the request.
20. The Commissioner conveyed the complainant’s key comments to the Council – including their focus on part one of the request and correspondence between the named people about Albert Road Methodist Church.

21. The complainant wondered whether the Council could still disclose “the flavour of the emails” whilst withholding commercial information, so the Council reviewed the email chain to see whether any additional information could be disclosed that would resolve the matter.
22. The Council subsequently (6 April 2023) disclosed a redacted copy of the email chain. The Council explained to the complainant that parts were redacted because they do not relate to Albert Road Methodist Church or because they are “commercially sensitive and/or confidential”.
23. The complainant remains unhappy with the email chain that has been disclosed with redactions, and expressed a desire to see the full content of the emails.
24. One reason the complainant was unhappy was that they were not provided with a “moving target” of emails, to include later emails up to the date of the Council’s search.
25. However the Commissioner explained to the complainant that the scope of the present case and decision will be limited to part one of their original request and the email chain, partially disclosed on 6 April 2023.
26. The complainant did not dispute the Commissioner’s scoping of the case.
27. The Commissioner asked the Council whether it had considered handling the request under the EIR rather than FOIA. He asked for the Council’s submissions regarding any exceptions, if the Council considered with hindsight that it should have handled the request under the EIR; and he directed the Council to his relevant key questions for public authorities<sup>1</sup>.
28. Based on the Council’s response of 13 June 2023, the Commissioner’s understanding is that the Council maintains that the relevant access regime is FOIA – the Council emphasised that under FOIA, it has sought to rely on section 43(2). However it did also say to the Commissioner that if the EIR were the relevant legislation, the Council would refuse to disclose the withheld information under regulation 12(5)(e) (commercial confidentiality).
29. In the next section, the Commissioner will therefore begin by considering whether the information in question is environmental.

---

<sup>1</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/key-questions-for-public-authorities-eir-2004/>

## Reasons for decision

---

### Is the requested information environmental?

30. Regulation 2(1) of the EIR defines environmental information as being:

“... any information ... 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;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c) ...”.

31. In this case, the complainant requested information “between” a Council planning official and a developer. The Commissioner has seen the email chain containing the withheld information and he considers that the emails are ultimately about development matters – they are about measures and activities affecting or likely to affect the land.

32. This includes seven emails that were removed entirely from the redacted version that was disclosed to the complainant.

33. Because he considers that the information falls under regulation 2(1)(c) of the EIR, the Commissioner has assessed this case under the EIR.

**Is any of the information irrelevant?**

34. As previously noted, the Council has said that some of the withheld information is irrelevant. The Commissioner asked the Council to label which information it regarded as irrelevant, however the Council did not do so.
35. Having seen the full, unredacted copy of the email chain – which includes the seven emails that were removed entirely from the redacted version that was disclosed to the complainant – the Commissioner considers that all of the information within the email chain is relevant to the request, as explained below.
36. The Commissioner notes that many of the emails within the chain are not direct emails between the two people named in part one of the request; furthermore, many are not about Albert Road Methodist Church, the topic in which the complainant is particularly interested.
37. However, for the purposes of the present decision, the Commissioner considers that it is important to look at the complainant's original and clarified request and note what the complainant had actually requested in part one of the request.
38. The complainant clearly requested all recorded information between the two named people – they did not limit the request to conversations about Albert Road Methodist Church, even if that is the subject in which they are most interested.
39. The whole of the email chain is therefore within scope of part one of the complainant's request – ultimately it was an email chain exchanged between the two people, within the dates the complainant specified.

**Regulation 12(5)(e)**

40. As noted already, the Council has told the Commissioner (13 June 2023) what its position would be under the EIR – the Council said it would refuse disclosure under the exception for commercial confidentiality.
41. Within its submissions, the Council said that disclosure would be refused for the same reasons as under FOIA. The Commissioner has therefore had regard to the comments the Council made in its refusal under FOIA.
42. Regulation 12(5)(e) provides 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.

43. In line with his guidance<sup>2</sup> on this exception, the Commissioner will consider the below four questions, or tests, to determine whether the exception is engaged:
- Is the information commercial or industrial in nature?
  - Is the information subject to confidentiality provided by law?
  - Is the confidentiality protecting a legitimate economic interest?
  - Would the confidentiality be adversely affected by disclosure?
44. The exception is subject to the public interest test, so if the above four tests are satisfied the Council must also demonstrate that the public interest factors in favour of disclosure are outweighed by those in favour of maintaining the exception.
45. The Commissioner's guidance gives some examples of commercial or industrial information, and they include "information about development plans for land". The Commissioner considers that the withheld information fits this description, so is commercial or industrial in nature.
46. On confidentiality, the Council has told the Commissioner (13 February 2023) that the developer named in part one of the request had "corresponded with the Council on the understanding that the exchange and information within that exchange was confidential". The Commissioner is prepared to accept that the withheld information has the necessary quality of confidence – it is not trivial, nor in the public domain. The Commissioner is therefore satisfied that the second test is met.
47. To satisfy the third test, as the Commissioner's guidance explains, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. The Council needs to consider the sensitivity of the information at the date of the request and the nature of the harm that would be caused by disclosure. The Council needs to establish that

---

<sup>2</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/commercial-or-industrial-information-regulation-12-5-e/>

disclosure **would** cause harm (on the balance of probabilities – ie more probable than not).

48. The Commissioner considers that the Council has failed to demonstrate that the third test is satisfied, both for its own interests and those of the developer, as explained below.

### **The developer's interests**

49. The Council has said (13 June 2023) that the withheld information relates to the financial interests and circumstances of the developer.
50. It also said (10 August 2022) that the Council has a duty to protect the commercial interests of its suppliers, contractors and consultants.
51. Whilst the Council said it has consulted the developer about disclosure, the Council's submissions do not contain sufficient detail about the developer's interests, or demonstrate that disclosure would cause harm.
52. The Council states that the interests are financial and commercial, but has not elaborated sufficiently.
53. On harm the Council has, for example, said that disclosure "would compromise [the developer's] ability to compete with other developers" (13 June 2023) without explaining how.
54. It also said "disclosure **might** prejudice any future development projects [emphasis added]". As explained above, however, to engage the exception the Council needs to show that disclosure **would** cause harm.

### **The Council's interests**

55. The Council's 10 August 2022 response indicates that the Council envisages harm to its own interests – it said disclosure "would distort the procurement process", therefore "**could** make it more difficult [emphasis added]" for the Council to select bids that provide best value for money.
56. Again, however, the Council failed to explain how; and did not establish the required level of likelihood of harm (the above quote shows that the Council used the word "could").
57. Given the above issues with the Council's arguments, the Commissioner is not satisfied that the third test is met – consequently he finds that the exception is not engaged.
58. He therefore requires the Council to disclose the email chain, subject to any appropriate redactions for personal data.



59. This includes the seven emails that the Council removed entirely from its disclosure of 6 April 2023.

### **Procedural matters**

---

60. Regulation 14(2) of the EIR provides that where a public authority refuses to disclose environmental information, the refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request. In this case, the complainant made their request on 25 May 2022 and clarified it on 1 June 2022, however the Council did not respond to it until 10 August 2022 – well beyond 20 working days.

## Right of appeal

---

61. 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)

62. 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.
63. 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 .....**

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