

Freedom of Information Act 2000 (FOIA)
The Environmental Information Regulations 2004 (the EIR)
Decision notice

Date: 4 January 2019

Public authority: South Gloucestershire Council
Address: PO Box 1954
Bristol
BS37 0DD

Decision (including any steps ordered)

1. The complainant has requested from South Gloucestershire Council various information in connection with himself, Whale Wharf, his various companies and a number of planning applications.
2. South Gloucestershire Council has disclosed some of the requested information but withheld the rest under Sections 41 and 43(2) of the Freedom of Information Act 2000 (the FOIA) and Regulations 12(4)(e) and 12(5)(b) of the EIR.
3. South Gloucestershire Council has set out the withheld information in appendices numbered 8 and 9. It has stated this comprises all of the recorded information it holds falling within the scope of the complainant's request with the exception of that which has already been disclosed.
4. The Commissioner is satisfied on a balance of probabilities that South Gloucestershire Council has identified all the recorded information it holds. However, she finds that Sections 41 and 43(2) of the Freedom of Information Act 2000 (the FOIA) and Regulations 12(4)(e) and 12(5)(b) of the EIR have not been successfully applied to this information.
5. The Commissioner therefore requires South Gloucestershire Council to disclose the withheld information set out in appendices 8 and 9.
6. The public authority 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

7. On 4 October 2017 the complainant wrote to South Gloucestershire Council (the Council) and requested:

'.....under the Freedom of Information Act 2000, the release of all documents and/or correspondence relating to:

- 1. Whale Wharf, Whale Wharf Lane, Littleton Upon severn, Bristol, BS35 1NW;*
- 2. Blue View Properties Limited;*
- 3. Tull Properites Limited;*
- 4. Name redacted*
- 5. Planning Applications 04/2747, PT/06/0335/CLE, APP/PO119/C/06/2020451, PT09/5039/F, PT10/0655/CLP, PT09/5039/F, PT16/3160/PNOR, PT16/3159/PNOR, PT16/3156, PT16/2730/PNOR and PT16/2718/PNC.*

The documents that should be searched for should include any and all documents and correspondence (including all internal and external emails sent and received by employees and members of the Council) held in any medium by any department of the Council and should include, but certainly not be limited to, matters of planning (both specific applications and planning policy generally) and ancillary issues such as flood defences and roads.

The search should encompass documents produced between 2004 and today's date.

We are content to received the information in paper or electric format. We expect to receive the information promptly and, in any event within 20 days'.

8. The Council responded on 30 October 2017. It disclosed some of the requested information and redacted/withheld the rest citing Sections 21, 30, 40, 41 and 43 of the Freedom of Information Act 2000 and Regulation 12(5)(e) of the EIR.
9. On 16 November 2017 the complainant requested an internal review.

10. Following a review the Council wrote to the complainant on 12 December 2017 upholding its original decision.

Scope of the case

11. The complainant contacted the Commissioner on a number of occasions in 2018 to complain about the way his request for information had been handled. In particular, he complained about the adequacy and relevance of the searches carried out to identify and locate the requested information and also the suitability of the EIR exceptions and FOIA exemptions applied.
12. During the course of the Commissioner's investigation the Council has disclosed further information to the complainant. It has also confirmed all the recorded information it holds falling within the scope of the complainant's request has been disclosed with the exception of that which has been withheld under the FOIA and EIR. The complainant disputes this and believes further information is held in addition to that withheld.
13. The scope of the Commissioner's investigation will be to initially consider whether the Council has identified all the recorded information it holds falling within the scope of the request. Next she will consider whether this information is covered by the FOIA and/or the EIR. Finally, she will assess whether FOIA exemptions/EIR exceptions cited by the Council have been correctly applied.

Reasons for decision

Information held falling within the scope of the request

14. During the course of the Commissioner's investigation the Council provided her with 10 appendices. These contained documents representing the entirety of the recorded information held, including that withheld under the FOIA/EIR. Appendices 1 to 5 inclusive contained details of the relevant planning applications. Appendix 6 contained correspondence between the Council and private individuals in relation to planning enforcement matters. Appendix 7 contained documents with the complainant's personal data. Appendices 8 and 9 contained correspondence regarding various planning matters. Appendix 10 contained correspondence regarding various planning matters to and from the leader of the Council.
15. In response to the original request, the Council disclosed the information in appendix 7 to the complainant as part of a subject access request

under the Data Protection Act 1998. Furthermore, the Council disclosed to the complainant an amended version of appendix 6 with the third party personal data redacted under Section 40(2) of the FOIA.

16. Following discussions with the Commissioner, the Council agreed for the information in appendices 1, 2, 3, 4 and 5 being forwarded to the complainant in May 2018 and the information in appendix 10 being forwarded in July 2018. Furthermore, in October 2018 the complainant accepted the redactions made to appendix 6 and thereby removed this information from the scope of the Commissioner's investigation.
17. The information in the remaining appendices, 8 and 9, was the subject of further discussions between the Council and the Commissioner in October, November and December 2018. The outcome of these discussions was that Council agreed to disclose further information in appendix 8 and some additional correspondence not previously identified.
18. By November 2018 it was apparent that the only additional information the Council claimed to hold falling within the scope of the complainant's request was that which it had withheld in appendices 8 and 9. Specifically, two email chains in appendix 8 and five email chains in appendix 9.

Searches and enquiries carried out by the Council

19. The complainant disputes the adequacy and effectiveness of the Council's enquiries and searches and believes it holds further information which it has thus far failed to identify.
20. In support of his view, the complainant made the point that documents which the Council clearly held but had not disclosed had been made available to him from another public authority in response to a similar request. When the Commissioner drew this fact to the Council's attention it identified further documents which it agreed could be forwarded to the complainant. The Commissioner did this in May 2018.
21. In relation to the adequacy of the Council's searches and enquiries the complainant has questioned which officers and managers were contacted, what guidance was given in order that an effective search could be carried out and which systems or programmes were searched and what were the search parameters?
22. The Council responded by stating, in relation to the officers contacted, that on 4 October 2017 an email was sent to the Director of the Environment and Community Services Department, the Director of the Environment and Community Services Department, all Heads of Service within the Environment and Community Services Department, all 3rd Tier

Managers within the Environment and Community Services Department. 3rd Tier managers requested checks to be carried out by relevant officers in their teams. Also, the request was sent to the Departments of Children Adult and Health and the Chief Executive and Corporate Resources via their Generic Mailboxes. It also stated that on 11 April 2018 a further check was requested from those officers identified as potentially holding documents. Furthermore, on 23 April 2018 a specific request for further checks against *name redacted* emails was made.

23. In relation to what guidance was given in order that an effective search could be carried out, the Council stated that recipients were asked to check whether they held any records relating to, Whale Wharf, Whale Wharf Lane, Littleton Upon Severn, Bristol, BS35 1NW, Blue View Properties Limited, Tull Properties Limited and *name redacted*.
24. In relation to which systems or programmes were searched and what were the search parameters were the Council commented as follows: The search parameters were any records relating to Whale Wharf, Whale Wharf Lane, Littleton Upon Severn, Bristol, BS35 1NW, Blue View Properties Limited, Tull Properties Limited and *name redacted*. The systems searched were Email (Outlook), Uniform (Planning, Building Control, Planning Enforcement, Licensing, Trading Standards), App Flare Environmental Health, Mayrise (Highways), Kirona (Highways), CAMS (Public Rights of Way), Paper Planning Enforcement files, IDOX (eDMS), Revenues and Benefits systems, Social Care and Education Systems, Chipside – Parking services, iNovem – Consultation and Library Systems.
25. The Commissioner forwarded the additional information located by the Council to the complainant in May 2018 and made him aware of the detailed searches and enquiries it said had been carried out.
26. The complainant responded by stating that whilst he couldn't comment generally upon whether the officers/managers identified were adequate (as he did not have access to the Council's internal structure), he said it was nonetheless evident that the process was flawed. By its own admission, the Council conceded that it failed to carry out a search of *name redacted* records until April 2018. It had not confirmed whether a search of *name redacted* records was carried out at all. The complainant added that his letter to the Council dated 16th November 2017 identified a number of individuals who would have held records relevant to the search. He argued that the extent to which the initial search was inadequate, meant this was an opportunity to revisit those searches.
27. As for the methodology behind the search, the complainant commented that he was concerned regarding the rigour applied. He said it was evident that searches were left to individual employees/officers rather

than centrally resourced. He added it was unclear why that was the case given that the systems searched were electronic. Also he said it was unclear as to what guidance or training was given to enable adequate searches to be carried out. Furthermore, it was unclear what oversight was applied to the 'on the ground' searches.

28. The complainant expressed the view that his concerns were not merely theoretical. He said it was only through this process that the Council had now, for a second time, disclosed documents that were not included in the original disclosure. He also said he was aware that documents existed, either held by himself and/or disclosed by another public authority that remained undisclosed by the Council. For these reasons he remained concerned that the search process was inadequate and had not identified all relevant documents held by the Council.
29. The complainant said he had a keen commercial interest, both in obtaining the information to which he believed he was entitled and also in assisting the Commissioner to conclude her enquiries so that a decision could be made as soon as possible. He appreciated the limited resources under which the ICO was operating and understood it was very difficult for them to investigate on a remote basis. Accordingly, he considered that it would only be via more direct investigations that the true picture could be determined. Given the concerns identified and the fact that enquiries with the Council had already illustrated flaws in the its approach, he said he would be willing to fund an independent, on the ground, forensic investigation of the Council's handling of his FOI/EIR request. Amongst other things, he said this would enable a proper search of electronic systems.
30. The Commissioner responded by explaining that the ICO was unable to control and direct an independent, on the ground, forensic examination of the Council's records. She reiterated that any decision as to what information was held by the Council was one based on a balance of probabilities (rather than absolute certainty) requiring an assessment of the adequacy and relevance of the searches and enquiries claimed to have been carried out.
31. Taking into account the complainant's concerns regarding the adequacy of the searches and enquiries carried out, particularly in respect of particular named individuals, the Commissioner contacted the Council again in October 2018. Specifically, she enquired whether a search was carried out of *name redacted* records, why certain searches were left to individual employees/officers rather than centrally resourced given that the systems searched were electronic and finally what guidance or training was given to enable adequate searches to be carried out?

32. In respect of the individual named by the complainant the Council stated that her personal assistant was specifically asked if she would check the records for anything held over and above that already provided.
33. Regarding why searches were left to individuals rather than centrally searched, the Council said whilst it understood the logic of carrying out a central search of records in the electronic environment, unfortunately this was not practical or possible for many record types. For example, emails are personal to the staff member and cannot be searched centrally. To do this would breach ICT policies. Senior Managers and *name redacted* emails were searched by the relevant Personal Assistant. Not all systems were available to a central team.
34. The Council added that documents provided through the case management planning system were made available to the complainant via the public planning register. Officers were requested to supplement this information by checking their own personal drives and emails. Shared drives are not available to everyone, indeed some have very restricted access and a central search is, therefore, not possible. The Council pointed out that there was currently no resource to provide a central search facility and the outcomes of any search carried out would not be comprehensive. It said it had begun a project to implement Master Data Management which would allow more records to be retrieved centrally but would still not provide a complete record. This project is in its infancy and there are currently no timescale for implementation.
35. In relation to the guidance or training was given to enable adequate searches to be carried out the Council stated that the request was sent to 1st, 2nd, 3rd and 4th tier managers who had received training on FOI/ EIR and were regular recipients/ responders for such requests. The last specific training course was delivered by an external provider in January 2017. The training course was not compulsory. The Officers involved in the complainant's request for information were very clear about the requirements to search. Officers were provided with the parameters for the search and asked to check all record types for themselves and their teams. There is comprehensive FOI/EIR guidance available to all staff via the Council's intranet and guidance is provided, when requested, from the Information Management Team Manager and the Council's legal team.
36. The Commissioner shared the Council's further comments with the complainant at the end of October 2018 and at the same time disclosed some additional documents that had been previously withheld.
37. The complainant responded in November 2018 stating that he was still not satisfied that all the information falling within the scope of his

request had been identified by the Council and either disclosed or withheld/redacted. He pointed to a number of documents not disclosed which were already in his possession because they were either sent or received from the Council or obtained from another public authority to which the Council had been copied into. He said some of these documents were emails with existing employees of the Council created within 12-18 months of the FOI request. It seemed inconceivable to him that such documents would not still be held and be revealed following an adequate search. This he believed was indicative of an inadequate search.

38. The Commissioner contacted the Council one final time at the beginning of December 2018. She drew the Council's attention to some of the specific documents identified by the complainant and requested a final review of its searches and enquiries.
39. The Council responded by disclosing some further documents it had located which had not been identified by its earlier searches. It also said if any further information was held it would have been identified by its extensive searches as described above.

Balance of probabilities

40. In cases like this one, where a dispute arises over the extent of the recorded information that is held by a public authority at the time of a request, the Commissioner will consider the complainants' evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held, and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held.
41. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)* in which it was stated that "*there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records*". It clarified that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test the Commissioner applies in this case.
42. In discussing the application of the balance of probabilities test, the Tribunal stated that,

"We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was

then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."

43. The Commissioner has therefore taken the above factors into account in determining whether or not further information is held on the balance of probabilities.
44. In coming to a decision in this case the Commissioner has considered the evidence provided to her by the complainant in support of his submission that further information might be held. She has also considered the arguments put forward by the Council regarding the searches and enquiries it has carried out to identify and locate information falling within the scope of the complainant's request.
45. In coming to her conclusion, the Commissioner has considered what information she would expect the Council to hold and whether there is any evidence that the information was ever held. In doing so the Commissioner has taken into account the responses provided by the Council to the questions posed by her during the course of her investigation. The Commissioner is also mindful of the Tribunal decision in the *Bromley* case highlighted above.
46. The Council has now carried out relevant searches and enquiries, within all of the relevant departments, of its manual and electronic files as well as its email systems as described above. It has also clarified all relevant personnel have been contacted to request searches to be carried out. It has provided details of the search parameters, the guidance given to staff and the FOIA/EIR staff training provided.
47. Given the history of this case and the piecemeal disclosure by the Council, the Commissioner understands why the complainant remains sceptical with the assertion that further information is not held. Indeed, the Commissioner is both frustrated and disappointed at the obvious lack of rigour that had been applied to the original searches and those made after the Commissioner's initial enquiries.
48. To provide the complainant with a level of surety that the Council has now addressed his complaint appropriately by identifying and where appropriate disclosing the information which it holds, the Commissioner has provided him with details of the searches and enquiries carried out by the Council as illustrated above.

49. In view of the circumstances as described above and following the Council's disclosure of further information during the course of her investigation, the Commissioner does not consider there is any further evidence that undermines the Council's position that it has now identified and where appropriate disclosed all of the information relevant to this request.
50. Taking all of the above into account, the Commissioner is satisfied that on the balance of probabilities, no further information is held by the Council apart from that which has been withheld.

The relevant legislative regime and FOIA exemptions/EIR exceptions

51. The withheld information comprises of a number documents in two of the appendices disclosed to the Commissioner. Specifically, this information consists of two email chains in appendix 8 and five email chains in appendix 9. The Council has applied Sections 41 and 43(2) of the FOIA to the information in appendix 8 and Regulations 12(4)(e) and 12(5)(b) of the EIR to the information in appendix 9.
52. The first question for the Commissioner therefore is which legislative regime applies to the withheld information. The FOIA, the EIR or a combination of the two?

The information in appendix 8

53. The Commissioner has viewed and considered the remaining information in appendix 8 which comprises of two email chains. Both chains relate to confidential discussions involving the Council about a possible development opportunity. The Council has withheld all of this information under Sections 41 and 43(2) of the FOIA on the basis that it relates to confidential and commercial matters.
54. In its initial response to the complainant dated 30 October 2017 (which was upheld following the internal review on 14 December 2017) the Council applied Sections 30, 41 and 43 to the requested information.
55. On 5 April 2018 the Commissioner wrote to the Council requesting a copy of the withheld information, details of any FOIA exemptions/EIR exceptions it wished to apply together with any public interest arguments.
56. The Council responded on 3 May 2018 with a copy of the withheld information and reiterated it was maintaining its reliance on Sections 30, 41 and 43 of the FOIA. Whilst accepting as a public authority it had a duty to remain transparent in its dealings, it added that there were times when it should be allowed to discuss and share issues and form a position. It said this position might lead to enforcement and potential

legal action. It expressed the belief that internal email exchanges should not be released. In the circumstances therefore it argued that the public interest in maintaining these exemptions outweighed the public interest in disclosure.

57. On 15 June 2018 the Commissioner contacted the Council again. She suggested that as the information contained in appendix 8 related to planning permission and related enforcement action, it might be environmental and therefore covered by the EIR rather than the FOIA. She said if the Council agreed, would it advise whether it still wished to withhold it in its entirety and if so, on the basis of which exemption or exemptions. She also asked it to indicate which exemption(s) relate(d) to which specific document(s). On the other hand, if the Council did not agree, she asked it to explain in detail as to why it believed the information was not environmental?
58. The Council responded on 4 July 2018 with a detailed schedule of the all the withheld information together with the FOIA exemptions/EIR exceptions it wished to apply specific to each document.
59. In relation to specific information which is still outstanding in appendix 8, comprising of two email chains, the Council stated it was applying Sections 41 and 43(2) of the FOIA. Specifically, it said the email chains contained information relating to an enquiry from a commercial company regarding possible sites for relocation. It said these enquiries were forwarded from a government agency on the basis that the Council would treat them in confidence. No further arguments or explanations were advanced by the Council.
60. The private company's specific requirements were set out in an email from the government agency dated December 2015. A copy of this was forwarded to the Council which was then shared with a number of local enterprise partnerships and development agencies. The deadline set by the private company for a response was 8 January 2016.
61. The Commissioner has viewed the withheld information and agrees with the Council that it is not environmental as it relates to an enquiry for a potential UK based development opportunity in general terms as opposed to a development at a specific site. The location specified by the private company was done so in broad, generic terms that did not refer to the land type or use, but rather demographic and commercial requirements. The Commissioner considers this information in relation to a general development opportunity without a specific site or location is too remote to be regarded as environmental as defined by the EIR.
62. The Council has applied Sections 41 and 43(2) of the FOIA to the withheld information. The Commissioner will now consider each exemption in turn.

Section 41 of the FOIA (information provided in confidence)

63. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and disclosure would constitute an actionable breach of confidence. This exemption is absolute and therefore not subject to a public interest test.

Was the information obtained from another person?

64. The information was forwarded to the Council by a government agency on behalf of a private company seeking a development/relocation opportunity.

Would disclosure constitute an actionable breach of confidence?

65. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:

- Whether the information has the necessary quality of confidence;
- Whether the information was imparted in circumstances importing an obligation of confidence; and
- Whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

66. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.

67. The Council has advised the information is confidential as it relates to an enquiry about a potential development/relocation opportunity from a private company passed to it by a government agency. The correspondence from the government agency makes it clear that the private company had requested its name to be 'kept confidential'.

68. The Commissioner has had sight of the withheld information and would accept that it is not otherwise accessible and it cannot be said to be trivial. Consequently, the Commissioner is satisfied that the information has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

69. The Commissioner refers to the test set out in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, specifically:

'If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence'.

70. An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend on the nature of the information itself and/or the relationship between the parties.
71. The Commissioner has viewed the withheld information and notes that it does not name the private company interested in the potential development/relocation opportunity. However, it is apparent from this information that the government agency that passed it to the Council, made it expressly clear that the 'name' of this company should be kept confidential. What is less clear is whether this obligation of confidentiality was intended to apply to the actual proposal itself.
72. The only argument advanced by the Council in relation to the obligation of confidentiality was that the information was passed to it by the government agency on the basis that it would be treated in confidence.
73. The Commissioner is not persuaded that, with the exception of the name of the private company, the rest of the information provided to it by the government agency was imparted with an obligation of confidence.

Would disclosure would be an unauthorised use of the information to the detriment of the confider?

74. The Council has not provided any evidence or advanced any arguments as to why the unauthorised use of the information would be to the detriment of the government agency that provided it.
75. The deadline for responses from the Council to the enquiry from the government agency was January 2016. The complainant's request was made 21 months later in October 2017. The Commissioner has not been provided with any evidence of any proposals or suggestions put forward by the Council that resulted in the private company's development being accepted or agreed. The Commissioner is not convinced that after this amount of time there would be any detriment to the government agency if the requested information was disclosed.
76. Accordingly, the Commissioner does not find that Section 41 of the FOIA is successfully engaged.

Section 43(2) of the FOIA – prejudice to commercial interests

77. The Council has also applied the exemption in Section 43(2) to the information in appendix 8. However, the only argument it has advanced in respect of this exemption is that the information constitutes an enquiry from a commercial company forwarded to it by a government agency in confidence.
78. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. The exemption is subject to the public interest test which means that even if it is engaged account must be taken of the public interest in releasing the information.
79. The exemption can be engaged on the basis that disclosing the information either 'would' prejudice someone's commercial interests, or, the lower threshold, that disclosure is only 'likely' to prejudice those interests. The term 'likely' is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice is more probable than not.
80. In this case, the Council has not been specific as to whether disclosure of the requested information would or would be likely to prejudice its commercial interests. The Commissioner will therefore apply the lower threshold of Section 43(2) namely, that disclosure would be likely to prejudice its commercial interests. Although relying on the lower threshold makes it easier to engage the exemption it also reduces the value in maintaining the exemption when it comes to consider the public interest test.
81. The Council has not been specific either as to whose commercial interests would be likely to be prejudiced by disclosure. The Commissioner has therefore assumed the Council had its own commercial interests in mind when it applied the exemption.
82. For Section 43(2) to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the Council alleges would be likely, to occur if the withheld information was disclosed has to relate to the commercial interests;
 - Secondly, the Council must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e. whether there is a real and significant risk of the prejudice occurring.

83. The Commissioner accepts the enquiry from the private company relates to a commercial interest in that it concerns a possible relocation/development. However, in this case, the Council has not been specific as to what harm, if any, would be likely to occur by disclosure and if so, to whom.
84. The Commissioner therefore is not persuaded by the Council's arguments in relation to the application of Section 43(2) and therefore finds it is not engaged.

The information in appendix 9

85. The Council has withheld the entirety of the information in appendix 9 under Regulations 12(4)(e) and 12(5)(b) of the EIR.
86. The first question for the Commissioner to consider therefore is whether the information in appendix 9 is environmental within the meaning of the EIR.

Regulation 2(1) of the EIR – Environmental information

87. Under Regulation 2(1) of the EIR environmental information is defined as;

'any information in written, visual, aural, electronic or any other material form on: (a) the state of the elements of the environment such asland, landscape and natural sites including wetlands...biological diversity...(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'.

88. The Commissioner has viewed and considered the remaining information in appendix 9 which comprises of five email chains. The information in these chains relates to the use of a particular piece of land for a specific purpose and terms attached to planning permission granted.
89. The Commissioner is satisfied that the email chains contain environmental information as the contents relate to measures likely to affect the state of the elements of the environment, namely land and landscape and also measures designed to protect those elements. The Commission has therefore concluded that the EIR is the relevant law in this case.

Regulation 12(2) - Presumption in favour of disclosure

90. Regulation 12(2) of the EIR states that a public authority shall apply a presumption in favour of disclosure.

The Exceptions

91. The Council has applied the exception under Regulations 12(4)(e) and 12(5)(b) of the EIR to withhold the entirety of the requested information.
92. The exceptions in regulation 12(4) relate to the nature of the request or the type of information while those listed under regulation 12(5) relate to situations where disclosing the requested information would have an adverse effect.

Regulation 12(4)(e) of the EIR – internal communications

93. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. The purpose of this exception is to allow a public authority to discuss the merits of proposals and the implications of decisions internally without outside interference.
94. The Commissioner acknowledges that the concept of 'internal communications' is broad and covers all internal communications, not just those actually reflecting internal thinking, and will include any information intended to be communicated to others or to be placed on file where others may consult it. However, the Commissioner considers that the underlying rationale behind the exception is that public authorities should have the necessary space to think in private.
95. Regulation 12(4)(e) is a class-based exception so it is not necessary to consider the sensitivity of the information in order for it to be engaged. A wide range of internal documents will therefore be caught. However, this exception is also subject to the public interest test outlined in regulation 12(1)(b) of the EIR.

Does the withheld information constitute 'internal communications'?

96. The EIR do not provide a definition of what constitutes an internal communication. However, the Commissioner accepts that, in general, communications within one public authority will constitute 'internal communications' while a communication sent by or to another public authority, a contractor or an external adviser will not generally constitute an internal communication.

97. Having referred to the withheld information the Commissioner is satisfied that it comprises communications sent internally within the Council.
98. It follows that she is satisfied that the information withheld under regulation 12(4)(e) comprises internal communications and that the regulation has been applied correctly to this information.

The public interest test

99. As she is satisfied that regulation 12(4)(e) is engaged in respect of the information withheld by virtue of that exception, the Commissioner has gone on to consider the public interest test attached to the application of this exception. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

100. There is a general public interest in favour of openness and transparency to demonstrate sound decisions have been made and allay any concerns that public funds may have been used inappropriately.
101. The Council acknowledged that disclosure would evidence that it was, and was seen to be, acting in a transparent and open manner and that its actions and decisions were understood and open to scrutiny.

Public interest arguments in favour of maintaining the exception

102. In essence, the public interest considerations relating to regulation 12(4)(e) relate to the protection of thinking space and the ability to have full and frank discussions without fear that the information will be disclosed.
103. In this case, the Council has argued that it would not be in the public interest to disclose the requested information as it would undermine the confidentiality of its overall discussions. It stated there were times when it should be allowed to discuss and share issues and form a position. It added that such a position might lead to enforcement action.
104. The Council has also stated that disclosure would inhibit free and frank discussions in future, and be detrimental to the way in which it develops its thinking on sensitive/complex issues. It therefore concluded that public interest in maintaining a safe space for reaching decisions outweighed in this instance the public interest in disclosure of this information.

Balance of the public interest

105. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exception. If the public interest in the maintenance of the exception does not outweigh the public interest in disclosure, the information in question must be disclosed.
106. There is no automatic or inherent public interest in withholding an internal communication; arguments should relate to the particular circumstances of the case and the content and sensitivity of the specific information in question.
107. The Commissioner pointed out to the Council that the withheld communications, which are dated October and November 2016, are connected with a proposal that was no longer live at the time of the request. The Commissioner also noted that some of the information withheld has already been disclosed to the complainant. She therefore invited the Council to consider whether it was now prepared to disclose the information.
108. Whilst accepting that time had moved on since the original request was made, the Council has stated its detailed planning history relating to the site concerned should still be withheld. However, the Council did not explain why this would be the case.
109. The Commissioner has considered the various arguments as described above and has concluded that the public interest in maintaining the exception is not outweighed by the public interest in disclosing the withheld information. In short, the Commissioner is completely unconvinced by the broad and generic arguments advanced by the Council and has not seen any causal link demonstrated between the actual withheld information and the negative consequences that are claimed to be a likely result of disclosure.
110. The Commissioner's decision is that Regulation 12(4)(e) of the EIR is not engaged.

Regulation 12(5)(b) of the EIR – prejudice to the course of justice

111. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

"the course of justice, 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".

112. The successful application of the exception is therefore dependent on a public authority being able to demonstrate that the following three conditions are met:

- the withheld information relates to one or more of the factors described in the exception;
- disclosure would have an adverse effect on one or more of the factors cited; and
- the public interest in maintaining the exception outweighs the public interest in disclosure.

113. In addition, the fact that the information is capable of attracting legal professional privilege is not sufficient for it engage regulation 12(5)(b). For the exception to be engaged its disclosure must have an adverse effect on the course of justice.

114. As long as it can be shown that disclosure would produce an adverse effect, as specified in the exception, the exception is engaged. The extent or severity of that adverse effect is not relevant here, though it is relevant to the public interest test.

115. The term 'would have an adverse effect' is taken to mean that it is more probable than not that the adverse effect would happen.

116. In her guidance¹ the Commissioner recognises that the 'course of justice' element of the exception at regulation 12(5)(b) is very wide in coverage.

117. In its submission to the Commissioner, the Council has advanced the same arguments in relation to its application of Regulation 12(5)(e) as it has in relation to its application of Regulation 12(4)(d) of the EIR. Specifically, it has stated that there were times when it should be allowed to discuss and share issues and form a position. It added that such a position might lead to enforcement action. It is apparent to the Commissioner from viewing the withheld information that the enforcement action referred to the possibility of a potential breach of planning conditions.

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

118. The Council has not raised any specific arguments to suggest that any of the withheld information relates to or is covered by LPP.
119. With regard to the course of justice generally, the Council has not raised any specific arguments as to why this would be relevant in this case.
120. The Commissioner is not persuaded by the very limited arguments put forward by the Council that the withheld information engages Regulation 12(5)(b). The Commissioner notes that the information relates to a factual reiteration of the Council's understanding of the context and history of the site and that no planning breaches are actually suggested. If the Council are concerned about future activity or plans, then it would appear to the Commissioner that the facts of the matter as relevant to any future circumstance are relevant to any decision that might be taken at that time.
121. The Commissioner's decision is therefore that Regulation 12(5)(b) of the EIR is not engaged.

Other matters

122. The Commissioner would like to draw the Council's attention to Part 1 of the Lord Chancellor's Code of Practice in relation to records management under Section 46 of the FOIA². As noted within the decision notice above, the Commissioner was both surprised and disappointed at the piecemeal nature of disclosure in response to the request and the Commissioner's further enquiries. It is understandable that the requestor should have doubts as to the veracity of the Council's position if, after every challenge, new information is uncovered.
123. Whilst eventually satisfied that sufficient searches had been completed, it is clear to the Commissioner that significant time and resources could have been saved if all of the information that was eventually uncovered had been done so at the outset.
124. The Commissioner's guidance provides further information in relation to this Code of Practice and the Council is invited to consider this too³.

² <http://www.nationalarchives.gov.uk/documents/information-management/foi-section-46-code-of-practice.pdf>

³ <https://ico.org.uk/media/1624142/section-46-code-of-practice-records-management-foia-and-eir.pdf>

Right of appeal

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

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

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

126. 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.

127. 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

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