

**Freedom of Information Act 2000 (FOIA)  
Environmental Information Regulations 2004 (EIR)**

**Decision notice**

**Date:** 20 May 2019

**Public Authority:** London Borough of Redbridge  
**Address:** Town Hall  
128-142 High Road  
Ilford Essex  
IG1 1DD

**Decision (including any steps ordered)**

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1. The complainant requested information in relation to enforcement action the public authority had pursued against the At Taqwa Trust further to alleged breaches of planning conditions. The public authority disclosed some of the information held within the scope of the request and withheld the remaining information relying on the exceptions at regulations 12(4)(e) and 12(5)(b) EIR.
2. The Commissioner's decision is that the public authority was entitled to rely on the exceptions at regulations 12(4)(e) and 12(5)(b) EIR.
3. No steps required.

## Request

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4. On 9 May 2018 the complainant submitted a request for information to the public authority in the following terms:

“I would like to make a F.O.I request: LBR recently took legal action against the At Taqwa Trust [the Trust] + And,or, others of 1041-1043, high road, chadwell heath. I would like everything LBR has including but not limited to communications emails letters records of telephone conversations between any + all parties INTER LBR department communications witness statements interviews with and statements by current or past L.B.R. staff, all court papers.”
5. The public authority responded on 6 June 2018. It disclosed some of the information held within the scope of the request and withheld the remaining information relying on the exemptions at sections 40(2) and 41(2) FOIA.
6. The complainant requested an internal review of this decision on 19 June 2018.
7. On 23 July 2018 the public authority wrote back to him with details of the outcome of the internal review. The review upheld the original decision to rely on sections 40(2) and 41(2).

## Scope of the case

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8. The complainant contacted the Commissioner on 27 July 2018 to complain about the public authority's decision to withhold the remainder of the information held within the scope of his request. However, the complaint was not accepted for investigation until 5 November 2018 after the complainant had supplied all of the supporting documents required by the Commissioner in order to process his complaint.
9. During the course of the Commissioner's investigation, the public authority re-examined its handling of the request and revised its decision to rely on the exemptions at sections 40(2) and 41(1) FOIA.
10. Upon further review of the request and the information in scope, the public authority decided that the request should have been handled under the EIR and that the remainder of the information in scope was actually exempt on the basis of the exceptions at regulations 12(4)(e) and 12(5)(b) EIR. This revised decision and the reasons in support of

same was communicated to the complainant in writing by the public authority on 25 March 2019.

11. The complainant has however not added any specifics to his original ground for complaining to the Commissioner which was that he was dissatisfied with the public authority's response to his request for information.
12. The scope of the Commissioner's investigation therefore was to determine whether the public authority was entitled to rely on the exceptions at regulations 12(4)(e) and 12(5)(b) EIR to withhold the remaining information held by the public authority within the scope of the complainant's request of 9 May 2018 (the withheld information).

## **Reasons for decision**

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### **Applicable access legislation**

13. The public authority explained that having considered the nature of the subject matter of the request, ie the proceedings it took against the At Taqwa Trust for breaches of planning conditions, it concluded that the EIR, and not the FOIA, is the correct access regime to apply to the request. The reason for this, it explained, is that "the case relates to breaches of Enforcement Notices (non-compliance of planning conditions) contrary to Section 179 of the Town and Country Planning Act 1990." Key conditions of the planning permission (Application number 2470/10) relate to preventing the use of the premises in a way that would constitute a source of nuisance and disturbance to occupants of neighbouring property. A further condition relates to a Green Travel Plan to encourage travel to the premises by means other than private cars. The public authority considers that the withheld information is environmental information within the meaning in regulations 2(1)(a), 2(1)(b) and 2(1)(c) EIR.
14. The Commissioner is satisfied that the withheld information relates to measures and activities likely to affect the elements and factors (in regulations 2(1)(a) and 2(1)(b)) and as such is caught by the definition

of environmental information in regulation 2(1)(c) EIR<sup>1</sup> it considers applies to the withheld information.

### **Withheld information**

15. The withheld information consists of:

1. Emails between Council Officers and Council Lawyers
2. Emails between Council Officers
3. Emails between Council Lawyers and Counsel
4. Emails between Council Lawyers and Solicitor for the At Taqwa Trust
5. Emails between Council Lawyers and another Solicitor for the At Taqwa Trust
6. Emails between Council Officers, Council Lawyers and, the At Taqwa Trust.

16. The public authority considers items 1 and 2 above exempt on the basis of the exception at regulation 12(4)(e) and, items 1, 3, 4, 5 and 6 exempt on the basis of the exception at regulation 12(5)(b).

### **Application of Regulation 12(4)(e)**

17. Regulation 12(4)(e) states:

“A public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.”<sup>2</sup>

18. The public authority’s submission on the application of the exception is summarised below.

19. Almost all the emails were exchanged internally between the public authority’s staff in relation to a planning complaint and enforcement action. Accordingly, the information at items 1 and 2 above clearly falls within the definition of internal communications and therefore regulation 12(4)(e) applies.

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<sup>1</sup> The full text of regulation 2(1) EIR is available here:  
<http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made>

<sup>2</sup> <http://www.legislation.gov.uk/uksi/2004/3391/regulation/12/made>

20. With respect to the balance of the public interest the public authority acknowledged that there is a public interest in how public authorities consider the legal arguments for and against particular courses of action a public authority may seek to take in respect of planning enforcement matters.
21. However, all internal communication was exchanged in the public authority's belief that such communication would be private. Officers need to be able to consider options and advice as part of their deliberations on any particular matter. This being a fundamental part of the ability to consider a range of options and arrive at a reasoned view when attempting to resolve matters. This is considered especially so when contemplating the use of formal powers available under the planning and planning enforcement regimes. The disclosure of information at items 1 and 2 would prejudice this process for two reasons.
22. Firstly, although the prosecution case against the Al Taqwa Trust concluded on 6 January 2017 the issues remain live and matters are being monitored. There is therefore potential for further action to be taken. The relevant withheld information detail specific considerations of the officer's view on enforcement options available. Disclosing the information would hinder the public authority's ability to rely on such information gathered should it decide to take any further prosecution action if warranted. There is therefore a public interest in maintaining a safe space in which to consider planning complaints and decided what action to take in a subject matter that although is not live per se has the potential of becoming live.
23. In response to the Commissioner's request for the public authority to clarify why it considers that the subject matter of the request "is not live per se but has the potential of becoming live" the public authority provided the explanation below.
24. The site has a contentious history with complaints often received about activities on the site from the complainant and another individual. The individual in question also complained to the Local Government Ombudsman resulting in an adverse finding against the public authority by the Ombudsman on 13 May 2016. Evidence suggests that if the site is not monitored the Trust reverts to breaching the planning conditions.
25. The Commissioner notes that a number of further complaints about activities on the site have been submitted since the request in this case was submitted in May 2018.

26. Secondly, disclosing the relevant withheld information could undermine similar considerations of other enforcement complaints in the future as the relevant information may be of advantage to those who would wish to use it in an effort to undermine the planning and planning enforcement process for which the public authority is responsible. Disclosure would therefore inhibit free and frank discussions in the future and such loss of frankness and candour would damage the quality of deliberations, particularly in respect of discussing legal advice, and as such this would ultimately impede sound decision making which is not in the public interest.

### **The Commissioner's considerations**

#### *Is the exception engaged?*

27. The Commissioner considers that the term "internal communication" within the meaning of regulation 12(4)(e) refers to a communication that stays within one public authority. Once a communication has been sent to someone outside the authority, it will generally no longer be internal.
28. The Commissioner is therefore satisfied that the "Emails between Council Officers and Council Lawyers" (item 1) and the "Emails between Council Officers" (item 2) is caught by the definition of internal communication and consequently that the public authority was entitled to engage the exception at regulation 12(4)(e).

#### *Balance of the public interest*

29. The exceptions from the duty to disclose information are subject to the public interest test set out in regulation 12(1)(b) EIR. Therefore, the Commissioner has gone on to consider whether in all the circumstances of the case the public interest in maintaining the exception at regulation 12(4)(e) outweighs the public interest in disclosing the withheld information at item 1 and item 2.
30. There will always be a public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters and more effective participation in environmental decision making. More specifically in the circumstances of this case, there is a public interest in knowing the options considered by the public authority further to complaints about possible breaches of planning conditions by the Trust.
31. However, the Commissioner considers that there is a strong public interest in ensuring that internal deliberations regarding allegations of

possible breaches of planning conditions on the site remain free and frank.<sup>3</sup> The loss of frankness and candour in the course of such deliberations is highly likely to damage the quality of advice to decision makers and consequently inhibit the public authority's ability to make informed decisions further to complaints about the site.

32. The Commissioner has attached some weight to the chilling effect argument in view of the fact that there remain ongoing concerns about possible breaches of planning conditions on the site. As mentioned, further complaints have been made to the public authority about possible breaches of planning conditions on the site. There is therefore a strong public interest in ensuring that officers and lawyers are able to address any issues raised by the complainants and others in a free and frank manner. Disclosing the withheld information at item 1 and item 2 is likely to result in a chilling effect on similar deliberations regarding the site in future.
33. On balance therefore, the public interest in maintaining the exception outweighs the public interest in disclosing the withheld information at item 1 and item 2.

### **Application of Regulation 12(5)(b)**

34. Regulation 12(5)(b) states:

"A public authority may refuse to disclose information to the extent that its 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."<sup>4</sup>

35. The public authority considers that the information at items 1 and 3 above specifically attract legal professional privilege (LPP) and, disclosure of the information at items 4, 5 and 6 above would adversely affect the course and administration of justice.<sup>5</sup>

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<sup>3</sup> Inhibiting free and frank discussions is often referred to as the "chilling effect."

<sup>4</sup> <http://www.legislation.gov.uk/ukxi/2004/3391/regulation/12/made>

<sup>5</sup> **Item 3** - Emails between Council Lawyers and Counsel, **item 4** - Emails between Council Lawyers and Solicitor for the At Taqwa Trust, **item 5** - Emails between Council Lawyers and another Solicitor for the At Taqwa Trust, and **item 6** - Emails between Council Officers, Council Lawyers and, the At Taqwa Trust.

36. The Commissioner has already concluded that the public authority was entitled to withhold the information at items 1 and 2 further to the application of the exception at regulation 12(4)(e). Therefore, the Commissioner is not required to consider the application of the exception at regulation 12(5)(b) to the information at item 1 which the public authority has additionally withheld on that basis. However, in the circumstances of this case, the Commissioner has exercised her discretion and considered whether the public authority was also entitled to withhold the information at item 1 on the basis of regulation 12(5)(b).
37. The public authority's submission on the application of the exception is summarised below.
38. With respect to the information the public authority considers attracts LPP, it noted that the exception at regulation 12(5)(b) is broad in coverage and includes information which is subject to LPP. The relevant withheld information is subject to both legal advice privilege and litigation privilege. This is because when officers discovered the breaches and served Enforcement Notices pursuant to the relevant planning legislation, "...legal advice was necessary and...Court proceedings were contemplated/proposed." "Further, it can be seen that the communication passing between lawyer and client officer was created for the dominant purpose of providing legal advice."
39. Disclosure would reveal the strengths and weaknesses of the different options that were (and possibly are) available and the strategies adopted. This would prejudice the public authority's ability to seek and use legal advice for the purposes of any enforcement proceedings in the future. Undermining the public authority's position and therefore unbalancing the level playing field under which adversarial proceedings are meant to be carried out would make it harder for the public authority to take any further action in respect of the subject matter. The public authority confirmed that privilege had not been waived at any time.
40. In terms of the withheld information at items 4, 5 and 6 of the request, the public authority considers that disclosure of the information would adversely affect the course and administration of justice. In support, it drew attention to the following part of the Commissioner's guidance on the application of regulation 12(5)(b) specifically in relation to the scope of the exception:

"information about law enforcement investigations or proceedings. This would cover the obvious example of information about a police investigation but could also include information about other types of civil



and criminal investigations and proceedings, such as those carried out under planning or charity law....”

41. The relevant withheld information is caught by regulation 12(5)(b) because it is held in respect of planning enforcement functions, “involves the principle of confidence” which is of fundamental importance to effective enforcement and disclosure would therefore make it harder for the public authority to take any further action on the subject matter in the future and/or to take enforcement action in similar cases.
42. With respect to the balance of the public interest the public authority restated its view that there is a public interest in disclosure for the reasons previously set out further to the application of regulation 12(4)(e).
43. However, the public interest is in favour of maintaining the exception due to the importance of the principle of LPP – ie safeguarding the principle of openness in all legal communications to ensure access to full and frank legal advice which is fundamental to the administration of justice. Given that the legal advice is still being relied upon in relation to the subject matter and similar planning enforcement cases the public authority considers that it is in the best interests of the public to apply the exception in order to preserve its ability to use the advice in relation to a variety of decision making processes.
44. Further, the public authority as an enforcement authority is responsible for ensuring that proceedings are conducted in such a manner as to ensure that no party is prejudiced and that all considerations are dealt with in an even handed manner. Accordingly, disclosure of the relevant withheld information would not be in the interests of justice and neither will it facilitate fairness of any likely enforcement actions that the public authority may contemplate in the future for the benefit of local residents and the environment.
45. Specifically in relation to the communication between the public authority and the At Taqwa Trust and/or its Solicitors, there is very little to add to the public’s understanding of the reasons behind the decisions taken by the public authority during the proceedings. There is a greater public interest in allowing the public authority the space to undertake its enforcement functions effectively.

## **The Commissioner's considerations**

### *Is the exception engaged?*

46. The Commissioner considers that the scope of the exception at regulation 12(5)(b) extends to information covered by LPP and information generated further to investigations under planning law.
47. The Commissioner is therefore satisfied that the withheld information at items 1, 3, 4, 5 and 6 falls within the scope of the interests the exception at regulation 12(5)(b) is designed to protect.
48. The exception may be engaged by a public authority if disclosure of the withheld information "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.
49. The Commissioner considers that "adversely affect" means there must be an identifiable harm to or negative impact on the interests identified in the exception. "Would" adversely affect means that there is more than a 50% chance that the adverse effect would occur if the information were disclosed.
50. The Commissioner first considered whether the public authority was entitled to engage the exception with respect to the withheld information at items 1 and 3 on the basis that the information attracts LPP.
51. The Commissioner considers that there are two types of privilege under the principle of LPP; advice privilege and litigation privilege.
52. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer made for the dominant (main) purpose of seeking or giving legal advice. The legal adviser must have given advice in a legal context; for instance, it could be about legal rights, liabilities, obligations or remedies. Advice from a lawyer on an operational or strategic issue is unlikely to be privileged unless it also covers legal concerns such as advice on legal remedies to a problem.
53. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation. In order for information to be covered by litigation privilege it must have been created for the dominant (main) purpose of giving or obtaining legal advice or for lawyers to use in preparing a case for

litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation.

54. The Commissioner considers that the withheld information at items 1 and 3 attracts litigation privilege. This is because the information was generated with a view to a prosecution under the Town and Country Planning Act 1990. The public authority sought to bring an action in the Magistrates Court against the At Taqwa Trust for an alleged breach of a condition of its planning permission in relation to use of the site in a manner that does not constitute a source of nuisance and disturbance to occupants of neighbouring property.
55. The Commissioner finds that the withheld information at items 1 and 3 attracts LPP and the public authority was therefore entitled to engage the exception at regulation 12(5)(b) in respect of that information. She is satisfied that disclosure of the privileged information would adversely affect the course of justice.
56. The Commissioner next considered whether the public authority was entitled to engage the exception with respect to the withheld information at items 4, 5 and 6 on the basis that the disclosure of the information would adversely affect the course of justice.
57. The Commissioner has considered the withheld information which in the main relates to the grounds for the impending prosecution of At Taqwa Trust at the Magistrates Court. In the circumstances, it is clear that discussions between the public authority and the Trust and representatives of the Trust were held in confidence pursuant to the impending prosecution.
58. Part of the discussions refer to evidence in support of the public authority's case and the Trust's response. Therefore, the Commissioner considers that disclosing the withheld information would adversely affect the public authority's ability to successfully enforce similar planning conditions whether against the Trust or other organisations. Similar organisations are likely to be less willing to negotiate with the public authority if they feel that discussions between them and the public authority further to the enforcement of planning conditions could be released while the matter is still live.
59. The Commissioner finds that public authority was entitled to engage the exception at regulation at 12(5)(b) in respect of the withheld information at items 4, 5 and 6.

*Balance of the public interest*

60. The Commissioner has gone on to consider whether in all the circumstances of the case the public interest in maintaining the exception at regulation 12(5)(b) outweighs the public interest in disclosing the withheld information at items 1, 3, 4, 5 and 6.
61. The Commissioner considers that the public interest factors identified in support of disclosure further to the application of regulation 12(4)(e) equally apply in respect of the application of this exception.
62. In terms of the public interest in maintaining the exception, the Commissioner considers that the public interest in preserving LPP will always be strong due to the importance of the principle behind it: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice which is turn fundamental to the administration of justice. In the words of the Information Tribunal, there must be "clear, compelling and specific justification that at least equals the public interest in [maintaining LPP]..."<sup>6</sup> "....At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest."<sup>7</sup>
63. Given that the matter is still live the Commissioner considers that there is also a strong public interest in withholding the relevant withheld information and maintaining LPP in order not to prejudice the ability of the public authority to successfully prosecute alleged breaches of planning conditions on the site.
64. Furthermore, there is a strong public interest in not adversely affecting the course of justice by disclosing confidential discussions between the public authority and the At Taqwa Trust and/or the Trust's representatives. It is not in the public interest to prejudice the ability of the public authority to successfully enforce planning conditions whether against the Trust or other organisations. The Commissioner has found no reason to dispute the public authority's suggestion that the withheld information at items 4, 5 and 6 would not substantively add to the public's understanding of the reasons behind the decisions taken by the public authority during the proceedings.

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<sup>6</sup> Crawford v Information Commissioner & Lincolnshire County Council (EA/2011/0145)

<sup>7</sup> Bellamy v Information Commissioner & the Secretary of State for Trade and Industry (EA/2005/0023)

## **Procedural Matters**

65. Under regulation 14(2) EIR a public authority refusing a request for environmental information is required to do so in writing as soon as possible and in any event no later than 20 working days following the date the request was received.
66. The Commissioner therefore finds the public authority in breach of regulation 14(2) EIR for failing to inform the complainant within 20 working days of his request that it was relying on the exceptions at regulations 12(4)(e) and 12(5)(b).

## Right of appeal

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67. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

68. 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.
69. 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 .....**

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