

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

**Date:** 4 March 2014

**Public Authority:** Basildon Council  
**Address:** The Basildon Centre  
St. Martin's Square  
Basildon  
Essex  
SS14 1DL

**Decision (including any steps ordered)**

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1. The complainant submitted a request to Basildon Council (the Council) for copies of communications between two of its departments, namely Countryside Services and Planning, regarding a particular planning application. The Council withheld the information on the basis of regulation 12(4)(e), the internal communications exception of the EIR. The Commissioner is satisfied that the public interest in maintaining the exception outweighs the public interest in disclosing the information.

## Request and response

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2. The complainant submitted the following request to the public authority on 7 June 2013:

*'Please supply copies of all communications between Countryside Services and the Planning department particularly between [Named official A] and [Named official B] on the one hand and [Named official C] on the other, concerning planning application 12/1080/OUT (Dry Street Pastures LoWS, Longwood Equestrian Centre, Basildon College, etc) between 27<sup>th</sup> March 2012 and the present.*

*Please also supply any correspondence between those departments concerning the mitigation proposals which had been submitted by Parsons Brinckerhoff for the Local Wildlife Site'.<sup>1</sup>*

3. The Council responded on 27 June 2013 and confirmed that it held information falling within the scope of this request but considered it to be exempt from disclosure on the basis of regulation 12(4)(e) of the EIR, the internal communications exception.
4. The complainant contacted the Council on 10 July 2013 and asked it to conduct an internal review of this decision.
5. The Council informed the complainant of the outcome of the review on 16 August 2013; the review upheld the application of regulation 12(4)(e).

## Scope of the case

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6. The complainant contacted the Commissioner on 29 August 2013 in order to complain about the Council's decision to withhold the information he requested. He provided the Commissioner with detailed submissions to support his view that the public interest favoured disclosure of the withheld information and these are referred to below.

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<sup>1</sup> The application concerns proposals to build 725 houses. It was considered by the Council's Department Control and Traffic Management Committee on 4 June 2013 and who went on to pass the application.

## Reasons for decision

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### Regulation 12(4)(e) – internal communications

7. Regulation 12(4)(e) states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. The exception is a class based one; that is to say if information falls within the scope of the exception then it is engaged – there is no need for a public authority to demonstrate some level of prejudice.
8. The Commissioner is satisfied that the withheld information clearly falls within the scope of this exception given that it constitutes emails exchanged between Council employees.
9. Regulation 12(4)(e), like all of the exceptions contained within the EIR, is a qualified exception and therefore for the information that he accepts constitutes an internal communication, the Commissioner must consider whether the public interest in maintaining the exception outweighs the public interest in disclosing the information.

#### *Public interest arguments in favour of disclosing the information*

10. The complainant explained that, as one would expect, the Council published a significant amount of information concerning the application prior to the hearing of the Development Control and Traffic Management Committee ('the Committee') on 4 June 2013.<sup>2</sup> The complainant noted that the information published included the opinions of various Council departments who had been consulted on the application. The complainant specifically noted that in the online documentation there was a section entitled 'Consultee comments' which contained the responses of various departments. As with other departments, in relation to the 'Manager of Countryside Services' the reader was directed to an information tab where the observations of that department would presumably be; however, the tab did not contain any information about the 'Manager of Countryside Services'.
11. Similarly, the detailed report which was published to accompany the agenda for the Committee meeting of 4 June 2013, referred to the

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<sup>2</sup> <http://planning.basildon.gov.uk/online-applications/advancedSearchResults.do;jsessionid=E8388665994A1B03C2A9E7EE8EF46105?action=firstPage>

comments of the various Council departments.<sup>3</sup> The complainant noted that a wide range of departments had provided comments on the application and where a department had not made a submission this had itself been recorded. The complainant argued that it was curious therefore that there had been no mention of Countryside Services, even to observe that no comment had been forthcoming.

12. The complainant argued that this amounted to a serious omission given that the prepared documents had been drawn up to inform the Committee's decision makers, as well as the general public.
13. The complainant argued that this omission was particularly strange given that, in his view, Countryside Services had in the past played a significant role in ensuring that sensitive landscape and wildlife sites were checked, resulting in some being listed as Local Wildlife Sites, including 'Ba24', ie the site which would be affected by this application. Furthermore, the complainant explained that an Ecology Workshop arranged by consultants GL Hearn had been held on 14 June 2012 to ascertain views on the proposals and their potential impact on the ecology of the site. Amongst the attendees was the Manager of Countryside Services, and it was clear, in the complainant's view, that this individual had serious concerns about the development of the site. (The complainant provided the Commissioner with a copy of the minutes for this workshop).
14. Consequently, the complainant argued that it was particularly surprising that the consultation and further explanatory documentation published by the Council did not refer to the views of Countryside Services. The complainant explained that when this particular point was raised during the Committee hearing of June 2013, the Manager of the Planning Services explained that the Head of Countryside Services 'had deferred to' Planning.
15. The complainant therefore argued that the planning decision was taken by the Committee without the benefit of specific input from one of the Council's own departments; ie the views of what Countryside Services might have thought about the proposal to develop a Local Wildlife Site. The complainant suggested that it could therefore be argued that the planning decision went ahead without all of the vitally important information being made available.

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<sup>3</sup> <http://www.basildonmeetings.info/documents/s52336/1201080OUT%20-%20Nethermayne.pdf>

16. Moreover, the complainant argued that the explanation that Countryside Services had deferred to the Planning Department was a clearly unsatisfactory response, which raised further questions, not least why there had been no reference to such a deferral in the online documentation published by the Council concerning the application.
17. Consequently, the complainant argued that those within the community who for many years had worked so hard over the years to uphold the regional importance of the Langdon ridge in terms of recreational, landscape, environmental and ecological considerations were very concerned about this issue. The complainant argued that it was strongly in the public interest to disclose the requested information in order to provide some insight into the discussions between the Planning and Countryside departments in order to clarify what had occurred.

*Public interest arguments in favour of maintaining the exception*

18. In the internal review, the Council explained that the rationale behind the exception was to allow the public authorities to discuss the merits of proposals and implications of decisions internally without outside interference. That is to say, the Council needed a 'safe space' to develop ideas, debate live issues and reach decisions away from external influence and distraction. In the context of this case, the Council noted that although the Committee had resolved to grant permission to the application in June 2013, this permission had not yet been issued as a result of needing to finalise section 106 issues; as such the Council took the position that at the time of the request the issue remained 'live'.<sup>4</sup>
19. The Council argued that it was in the public interest for the Council to be able to explore who might be best placed to give professional advice to help inform decision makers – eg the Committee in question – and disclosure of such discussions can stifle consideration of such issues. The Council noted that the Countryside Services Manager did not provide professional advice to the Committee regarding the ecological impact and mitigation for this specific application and, in the Council's opinion, this significantly reduced the public interest in disclosing the withheld information.

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<sup>4</sup> Planning obligations under Section 106 of the Town and Country Planning Act 1990, commonly known as 'section 106 agreements', are a mechanism which make a development proposal acceptable in planning terms that would not otherwise be acceptable. They are focused on site specific mitigation of the impact of development. In terms of this particular application, the planning permission was ultimately issued in December 2013.

20. In its submissions to the Commissioner the Council elaborated as to why it believed that the public interest favoured maintaining the exception. The submissions made direct and detailed reference to the content of the withheld information and therefore the Commissioner has not replicated them in this notice.
21. However, the Commissioner can confirm a number of key aspects of the Council's further submissions, some of which follow the logic of the points made in the internal review outcome. Firstly, the safe space to have such discussions was vital and necessary in order to allow the Council to review, consider and make effective decisions. Secondly, the Council obtained independent specialist advice on the impact of the development on the ecological integrity of the site. This advice, together with the comments received from the statutory and specialist groups, enabled the Council to make an informed decision about the application and the published Committee report presents comprehensive details of these ecological issues. Thirdly, and as result of such independent advice, the views of the Countryside Services department did not form part of the professional advice provided to the Committee.

*Balance of the public interest*

22. With regards to the arguments in favour of maintaining regulation 12(4)(e), although a wide range of information will be caught by the exception, in the Commissioner's view, the public interest should be focused on the protection of the internal deliberation and decision making processes. As the Council itself has noted, arguments about protecting such deliberations and processes often relate to preserving a 'safe space' to allow a public authority to debate issues away from external scrutiny. Furthermore, they also relate to preventing a 'chilling effect' on free and frank views in the future. The weight that applies to these factors will vary from case to case, depending on the timing of the request and the content and context of the particular information in question.
23. As a general principle, the Commissioner agrees with the position advanced by the Council that there is a clear public interest in decision makers being in a position to make sound decisions and this necessitates the Council being able to freely explore and decide who is best placed to give such advice.
24. Turning to the circumstances of this case, in the Commissioner's opinion, the Council's arguments regarding safe space deserve to be given significant and notable weight. This is because at the time of the request, although planning permission had been granted (in June 2013) this permission was not issued until after the request given the outstanding section 106 issues. As result the Commissioner accepts that

the decision making process in respect of this particular application remained live at the time of the request. Furthermore the development in question – and in particular the decision in June 2013 to grant permission – clearly attracted a lot of interest, and indeed opposition, from some members of the local community. Therefore, the Commissioner accepts that disclosure of the withheld information at the time of the request would, in the circumstances of this case, have been likely to result in an infringement into the Council's safe space to develop ideas and reach decisions in relation to the outstanding section 106 issues away from external interference and distraction.

25. With regards to the possibility of the disclosure of the withheld information having some sort of 'chilling effect' on future internal discussions surrounding the planning application, the Commissioner recognises that there is a strong counter argument to this position. Namely that, public officials are charged with giving advice; they are expected to be impartial and robust in meeting their responsibilities and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, the possibility of a chilling effect cannot be dismissed out of hand. The Commissioner accepts that the chilling effect can attract weight in some circumstances.
26. In the circumstances of this case, in the Commissioner's opinion given that the discussions around the section 106 agreements in relation to this development remained live at the time of the request he accepts the possibility that disclosure of the information could have led to a loss of frankness and candour in submissions in relation to the outstanding aspects of this application. Furthermore, the Commissioner accepts that disclosure of the withheld information could plausibly risk undermining the candour of similar internal discussions regarding other planning applications in the future.
27. With regard to the public interest arguments in favour of disclosing the withheld information, the Commissioner recognises the fact that the Countryside Services department did not offer professional advice to the Committee. However, the Commissioner does not agree with the Council that, in the particular circumstances of this case, this means that the public interest in disclosure of any comments made by Countryside Services is significantly reduced. Rather, in the Commissioner's opinion there remains a strong public interest in the disclosure of the withheld information in order to clarify why such advice was not provided to the Committee. In the Commissioner's view such an argument attracts particular weight in light of the previous interest and comments attributed to the Countryside Services department regarding the development, not least the minutes of the workshop of June 2012 referred to by the complainant.

28. In attributing this weight to the public interest in disclosure of the withheld information, the Commissioner wishes to emphasise that this is done simply on the basis of what he considers a significant need to bring some greater transparency as to the role of Countryside Services, and that department's discussion with the Planning department, in commenting on the application in question rather than because of any alleged or perceived error in process. In other words, the Commissioner would be reluctant to endorse the complainant's suggestion that the planning decision potentially went ahead without all vital information being provided. This is because the Commissioner notes and recognises that the Council sought independent ecological advice regarding this application and such advice was discussed in the published documentation.
29. In conclusion, the Commissioner does not dispute that there is a significant public interest in disclosing the withheld information for reasons discussed in the preceding paragraphs. However, in his view this interest is narrowly outweighed by the public interest in maintaining the exception. The Commissioner has reached this decision in light of the significant - and ultimately compelling weight - which he believes the safe space arguments attract because at the time of the request the decision making process remained live. The case for maintaining the exception is also given greater support in light of the additional weight that should be given to the chilling effect arguments.



## Right of appeal

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30. 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: 0116 249 4253

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)

31. 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.
32. 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 .....**

**Gerrard Tracey**  
**Principal Policy Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**