

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

### **Decision notice**

**Date:** 13 September 2016

**Public Authority:** Welwyn Hatfield Borough Council

**Address:** The Campus  
Welwyn Garden City  
Hertfordshire  
AL8 6AE

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

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1. The complainant has requested information relating to the "Estate Management Scheme".
2. The Commissioner's decision is that Welwyn Hatfield Borough Council (the council) has correctly applied the exceptions at regulations 12(4)(d), 12(4)(e) and 12(4)(b). However the Commissioner also finds that the public interest in maintaining the exception at 12(4)(e) is outweighed by the public interest in disclosing some the withheld information.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation:
  - Provide the complainant with the information listed in the annex.
4. The council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

#### **Request and response**

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5. On 16 September 2015 the complainant made a request for information in the following terms:

*"I would be grateful if you would supply a list of all meetings since*

*2011, whether private or public, minuted or not, where the future of the Estate Management Scheme was discussed. This request is to include dates, locations and who attended. Please also supply all minutes, notes (formal and informal), presentations, emails, letters, and any other documentation, that relate to the future of the Estates Management Scheme, again since 2011."*

6. The council responded on 14 October 2015 and provided some information within the scope of the request, specifically.

*"a list of all meetings since 2011, whether private or public, minuted or not, where the future of the Estate Management Scheme was discussed. This request is to include dates, locations and who attended",*

7. It refused to provide the remaining information citing regulation 12(4)(e) as its basis for doing so.

8. The council provided an internal review on 20 November 2015 in which it maintained its original position with regard to the second part of the request, namely:

*"Please also supply all minutes, notes (formal and informal), presentations, emails, letters, and any other documentation, that relate to the future of the Estates Management Scheme, again since 2011."*

9. In addition the council cited the exceptions at regulation 12(4)(d) and 12(5)(b) of the EIR.

## **Scope of the case**

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10. The complainant contacted the Commissioner on 2 December 2015 to complain about the way his request for information had been handled.
11. The Commissioner considers the scope of this case to be to determine if the council has correctly handled the request in accordance with the EIR.

## **Reasons for decision**

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12. **Regulation 12(4)(e)** - This has been applied to the information in documents C, G, H, I, J, K Q, 2, 3, 5, 11, 12, 15, 17, 18, 19, 20, 22, 25, 26, 28, 30, 36, 37

13. The council has applied regulation 12(4)(e) to the majority of the withheld information. The Commissioner has therefore considered this exception first.
14. 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.
15. 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 in 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.
16. 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'?*

17. 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.
18. During the course of her investigation the council provided the Commissioner with a copy of the withheld information within the scope of the request. That information comprises of emails exchanged between council employees and presentation slides to an internal meeting about the review.

19. The Commissioner has consulted her published guidance on this exception<sup>1</sup> which addresses the issue of internal communications. That guidance considers various scenarios including:
- communications sent both internally and externally;
  - forwarded communications and attachments; and
  - emails and email chains
20. Having considered the withheld information, and consulted her guidance, the Commissioner is satisfied that the information listed above falls within the class of information described in regulation 12(4)(e). She is therefore satisfied that regulation 12(4)(e) is engaged.

*Public interest test*

21. As she is satisfied that regulation 12(4)(e) is engaged in respect of the withheld information, the Commissioner has gone on to consider the public interest test attached to the application of this exception, as required by regulation 12(1)(b) of the EIR. 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.
22. When carrying out the test the Commissioner must take into account a presumption in favour of disclosure of the information which is required by regulation 12(2).

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

23. The council has not provided any details of what arguments it considered in favour of disclosure.
24. The Commissioner accepts that there is an inherent public interest in the overall transparency and accountability of public authorities and in members of the public having access to information that enables them to understand more clearly why and how the council took particular decisions. This helps members of the public to challenge such decisions from a more informed position should they wish to do so.

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[https://ico.org.uk/media/fororganisations/documents/1634/eir\\_internal\\_communications.pdf](https://ico.org.uk/media/fororganisations/documents/1634/eir_internal_communications.pdf)

### **Public interest arguments in favour of maintaining the exception**

25. The council has explained that its public interest arguments have always been centred around the council requiring time and space to consider options before these were made public.
26. If these were disclosed prematurely the council would not be protected from having to expend public resources in explaining options that may never be final and where discussions have been going on for a number of years both at officer and member level.
27. The council further explained that the review of the EMS has been ongoing for a number of years. It is still a live debate with a number of options being considered with none being ruled in or out. The latest state of play is clearly set out in the report to Cabinet on 15 July 2015 and this has been supplied to the requestor.

### **Balance of the public interest arguments**

28. 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.
29. There is always a general public interest in disclosing environmental information. This is derived from the purpose behind the EIR. In addition, there may be an argument for informing public debate on the particular environmental issue that the information relates to. Certainly where planning matters are concerned there is often a degree of contentiousness about planning projects due to the effect on the environment and on surrounding communities.
30. The Commissioner also accepts that there is an inherent public interest in the openness and transparency of public authorities and their decision making process.
31. In balancing the public interest arguments in this case the Commissioner has given due weight to the position that a public authority needs a safe space to develop ideas, debate live issues and reach a decision away from external interference and distraction. However, it is open to the Commissioner to consider the severity and extensiveness of any harm that disclosure might cause to such a safe space, or, in relation to the extent of any 'chilling effect' which the possibility of future disclosure

might have on council staff's willingness to contribute uninhibited and robust advice.

32. A factor in assessing the weight of public interest arguments is the extent to which the information itself would inform public debate on the issue concerned. The Commissioner is mindful that information may be within the scope of a request but nevertheless shed little light on the issue itself. In that case the weight of the argument for disclosure may be less than it otherwise would be.
33. The Commissioner is also mindful that a requester's private interests are not in themselves the same as the public interest, and what may serve those private interests does not necessarily serve a wider public interest.
34. In this case, the Commissioner has recognised a public interest in preserving a private space in order to carry out the planning process. Taking all the above factors into consideration, the Commissioner finds that while the public interest favours withholding some of the withheld information where Regulation 12(4)(e) is engaged, the public interest favours disclosure in respect of the remainder.
35. The Commissioner has produced a schedule as an appendix to this notice which specifies the information to be disclosed.

### **Regulation 12(4)(d) – material in the course of completion**

36. The Commissioner has considered the application of regulation 12(4)(d) to documents E, H, 4, 13, 14 and 21 22.
37. Regulation 12(4) states that for the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

*(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.*

38. The Commissioner's guidance states that:

*"Regulation 12(4)(d) is engaged when the request relates to material that is still in the course of completion, unfinished documents or incomplete data.*

- *Material which is still in the course of completion can include information created as part of the process of formulating and developing policy, where the process is not complete.*
- *Draft documents are unfinished even if the final version has been produced.*

- *Data that is being used or relied on at the time of the request is not incomplete, even if it may be modified later."*

39. The aims of the exception are:

- to protect work a public authority may have in progress by delaying disclosure until a final or completed version can be made available. This allows it to finish ongoing work without interruption and interference from outside; and
- to provide some protection from having to spend time and resources explaining or justifying ideas that are not and may never be final.

40. Having viewed the information where this exception has been cited the Commissioner considers that it is part of material which is unfinished documents or relates to incomplete data and therefore the exception is engaged. This can also include cover emails related to those documents

#### *Emails as part of material in the course of completion*

41. Emails themselves are not drafts, because once sent they are finished documents (although an email may have a draft document attached to it), but they could be part of material in the course of completion.
42. The exception specifies 'material' as well as 'documents' and 'data', and the fact that all three terms are used suggests that 'material' can mean something more than a specific document or dataset.
43. The Commissioner's guidance<sup>2</sup> says that "while a particular document may itself be finished, it may be part of material which is still in the course of completion". An email chain can represent an organisation's thinking process, including communications with external bodies, prior to it making a decision. The 'material' in this case is related to the future of the EMS, which is still in the course of completion. The correspondence is a necessary part of the process of finalising that plan.
44. The [Aarhus Implementation Guide](#) (AIG), in dealing with the equivalent clause in the Aarhus Convention says that "*in the course of completion*" *relates to the process of preparation of the information or the document and not to any decision-making process for the purpose of which the given information or document has been prepared*". In this case, there is a document which was being prepared, and the emails were part of the

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1637/eir\\_material\\_in\\_the\\_course\\_of\\_completion.pdf](https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf)

'process of preparation'. That document was the report on the future of the EMS.

45. To take the alternative view, namely that emails can't be covered because, once sent, they are 'complete' documents, would lead to an unacceptable conclusion in some cases. It would mean that if a public authority were exchanging emails with an external body in order to formulate policy or make a decision on environmental matters, then (absent any other exception) those emails could be accessible via an EIR request as soon as they were sent.
46. There is some support for the view that emails can be part of material in the course of completion in the following cases:

[EA/2012/0105](#). This case concerned an email chain between DEFRA and two external organisations, prior to DEFRA carrying out a consultation on a revised English Scallop Order. At the time of the request the consultation document had been issued. Some of the disputed information was not covered, because it was preparatory material for the consultation document that had been published immediately prior to the request. However, at para 35 the Tribunal accepted that the exception did apply to emails discussing matters that were not covered in the eventual consultation; they were proposals that were still under consideration or work in progress. In other words, while these emails were complete, in the sense that they were sent, they were part of material in the course of completion.

[DN FER0517476](#) concerned correspondence held by DEFRA about the Door Drop Preference Service, a voluntary scheme intended to reduce the number of unaddressed flyers being delivered. The scheme was still under discussion at the time of the request. The Commissioner found that the correspondence fell under 12(4)(d), even though each letter was 'finished' (paras 24-26).

47. As regulation 12(4)(d) EIR is subject to the public interest test, the Commissioner has next gone on to consider the public interest factors in favour of disclosure and the public interest factors in favour of maintaining the exception.

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

48. The council has not provided any details of what arguments it considered in favour of disclosure.
49. The Commissioner accepts that there is an inherent public interest in the overall transparency and accountability of public authorities and in members of the public having access to information that enables them



to understand more clearly why and how the council took particular decisions. This helps members of the public to challenge such decisions from a more informed position should they wish to do so.

### **Public interest arguments in favour of maintaining the exception**

50. The council has not provided any additional arguments with regard to the public interest and as these have already been described above in relation to Reg 12(4) (e), for brevity they have not been repeated here.

### **Balance of the public interest arguments**

51. As detailed in the ICO guidance the Commissioner accepts that public authorities need a safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction. The need for a safe space will be strongest when the issues are still live.
52. Premature disclosure of information would compromise the safe space which officials could freely consider policy options. This could potentially have negative consequences by precluding better options due to premature disclosure.
53. The Commissioner gives weight to the general public interest in the council operating in an open and accountable manner. He considers greater transparency leads to a better public understanding of particular issues and enables the public to assist in the decision making process where possible.
54. The Commissioner considers that effective policy making depends on good decision making which depends not only on sound evidence but on candid communications that allow a full consideration of the options without any concern over premature disclosure. Council policy needs to be thoroughly evaluated before it can be properly implemented and this can only happen when all parties have the confidence that there is no risk those exchanges will be disclosed prematurely. The impact on these processes and weight to be given to these arguments must be determined on the circumstances of each case.
55. With regard to the council's safe space and chilling effect arguments, the Commissioner notes that the complainant made his request subsequent to the report to the Cabinet.
56. The Commissioner sought further clarification from the council with regard to the current status of the EMS. The council explained that there has been a substantial delay in progressing the review, and a further report is due to be presented to Cabinet. This report will also be available when the Cabinet agenda is published.

57. The council considered that this is still live debate and will continue to be so until consultation and the results of this has been carried out and reported so that decisions can be made.
58. The Commissioner is also of the opinion that this matter is still live and has taken due consideration of this when reaching her decision.
59. In all the circumstances of this particular case the Commissioner considers that the public interest in maintaining the exception outweighs the public interest in disclosing the majority of the requested information. However, she is also mindful of the presumption in favour of disclosure and therefore considers that some of this information can be disclosed, subject to the consideration of any further exceptions being applied.

**Regulation 12(5)(b) – Adverse effect to the course of justice**

60. 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, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature."*

61. The council applied regulation 12(5)(b) and 12(4)(d) to document 14. Having reviewed the document it is the Commissioner's view that it is a completed document and therefore cannot be withheld by virtue of regulation 12(4)(d). She has therefore gone on to consider whether the council is entitled to withhold document 14 by virtue of regulation 12(5)(b).
62. The council stated that this document is an internal email and report. The information consists of a cover email, an agenda, action points from a previous meeting and a report. The Commissioner has reviewed the action points and notes that they do not contain information that falls within the scope of this request, and it is therefore excluded from consideration.
63. Legal professional privilege protects the confidentiality of communications between a lawyer and a client. It has been described by

the Tribunal, in the case of *Bellamy v the Information Commissioner and DTI*<sup>3</sup> as:

*"...a set of rules or principles which are designed to protect the confidential of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and event exchanges between clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation."* (paragraph 9).

64. There is no specific exception within the EIR referring to information which is subject to legal professional privilege. However, both the Commissioner and the Tribunal have previously decided<sup>4</sup> that regulation 12(5)(b) encompasses such information. The Commissioner considers that legal professional privilege is a key element in the administration of justice and a key part of the activities that will be encompassed by the phrase 'course of justice'.
65. In order to reach a view as to whether the exception is engaged the Commissioner must firstly consider whether the information is subject to legal professional privilege and then decide whether a disclosure of that information would have an adverse effect on the course of justice.
66. There are two types of privilege – litigation privilege and legal advice privilege. The Council was provided with the Commissioner's definition of each, together with the criteria which would need to be met for them to apply. From this, the Council confirmed to the Commissioner that the withheld information attracted litigation privilege.
67. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. The communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
68. Litigation privilege may only be relied upon in circumstances where the following criteria are met:

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<sup>3</sup> Appeal no. EA/2005/0023

<sup>4</sup> See, for example, EA/2006/0001 *Kirkaldie v ICO & Thanet District Council*, paragraph 21

- Where litigation is underway or anticipated. Where litigation is anticipated there must be a real likelihood of litigation taking place; it is not sufficient that litigation is merely a possibility;
  - The dominant purpose of the communications must be to obtain advice to assist in the litigation;
  - The communications must be made between a professional legal adviser and client although privilege may extend to communications made with third parties provided that the dominant purpose of the communication is to assist in the preparation of the case.
69. The Commissioner referred the council to these criteria and asked it to demonstrate, with reference to them, how the withheld information met the requirements for attracting litigation privilege. She also asked whether such privilege had at any time been waived and why disclosure of such information would adversely affect the course of justice. She asked it to ensure that the explanation it provided demonstrated a clear link between the disclosure of the information that has actually been withheld and any adverse effect. She also asked the council to set out the public interest arguments it had taken into account when determining whether or not to disclose the withheld information.
70. In its response to the Commissioner the council did not present any arguments or evidence to support the application of regulation 12(5)(b), merely stating it was an internal email and report.
71. Due to the sensitivity surrounding legal professional privilege the Commissioner has, nevertheless, considered if this information should be withheld.
72. Having reviewed document 14 the Commissioner considers that there is no indication that this contains any legal advice or any information that could be considered to be covered by regulation 12(5)(b). She also considers that, similarly the attached agenda cannot be construed to contain any legal advice. With regard to the attachment of 'Action Points', there is nothing relevant to the EMS and therefore this falls out of scope of the request.
73. The final attachment entitled SLG EMS Report has already been found to be exempt from disclosure by virtue of regulation 12(4)(d).
74. Therefore the Commissioner concludes that the email and agenda labelled document 14 should be disclosed to the complainant.

## Other matters

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75. The Commissioner considers that the council's response to her enquiries was generally of a poor standard. It failed to provide details of why it considered regulation 12(5)(b) applied to documents C, 1, 13, 14 and 17. Explanations to support the application of any of the exceptions were brief and lacked any substantial detail.
76. The council did not provide a list of the council employees involved which made it difficult to determine if all the documents where regulation 12(4)(e) had been cited, were indeed 'internal' communications.

### *Public interest submissions*

77. The Commissioner has published guidance on the public interest test. In that guidance, he states:

*"In carrying out the public interest test, the authority should consider the arguments in favour of disclosing the information and those in favour of maintaining the exemption. The authority should try to do this objectively, recognising that there are always arguments to be made on both sides".*

78. In this case, the Commissioner considers that the council failed to identify arguments in favour of disclosing the requested information.
79. The Commissioner expects that in future the council will take the above into consideration when responding to a request for information.

### *Multiple exceptions*

80. In a case such as this where a public authority is citing multiple exceptions in respect of the same information, the Commissioner expects the public authority to ensure that the extent to which exception(s) apply - or whether it considers all the exceptions apply equally to all the information - is clear.
81. The Commissioner expects the council, in future cases where multiple exceptions are relied on, to ensure that withheld information is clearly marked up to show the extent to which the exceptions apply.

## Right of appeal

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82. 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)

83. 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.
84. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

## **Appendix of information to be disclosed**

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- Documents as submitted to the Commissioner labelled G, H, J
- Cover emails labelled documents 12, 15, 19
- Cover email and agenda labelled document 14