

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

**Date:** 15 October 2021

**Public Authority:** Shrewsbury Town Council  
**Address:** Riggs Hall  
Castle Gates  
Shrewsbury  
SY1 2AS

**Decision (including any steps ordered)**

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1. The complainant requested correspondence and documents between Shrewsbury Town Council and its solicitors, Hatchers, relating to the disposal of land adjacent to Greenfields Recreation Ground. Shrewsbury Town Council refused to disclose the requested information citing Sections 42 and 43 of the FOIA.
2. The Commissioner's decision is that the requested information is environmental as defined by the EIR and Shrewsbury Town Council has incorrectly applied Sections 42 and 43 of the FOIA. Furthermore, Shrewsbury Town Council has failed to engage regulation 12(5)(b) and regulation 12(5)(e).
3. The Commissioner also finds that the Council has breached Regulation 5(2) of the EIR by failing to respond to the complainant within 20 working days.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the requested information
5. The public authority 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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6. On 25 May 2020 the complainant wrote to Shrewsbury Town Council (the Council) and requested information in the following terms:

*"...could I ask for the correspondence and documents between the Town Council and Hatchers Solicitors for the disposal of Greenfields Recreation Ground. I request this as an FOI request".*

7. The Council responded on 25 June 2020. It stated it was unable to provide the requested information as it was exempt from disclosure under Section 42 (Legal Professional Privilege) and Section 43 of the FOIA (Commercial Interests).
8. As the complainant was unhappy with the response he requested a review.
9. Following an internal review the Council wrote to the complainant on 19 November 2020 and copied in the Commissioner. It stated that it was maintaining its reliance on Sections 42 and 43 of the FOIA.

## **Scope of the case**

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10. The complainant contacted the Commissioner on various occasions in 2020 and 2021 to complain about the way his request for information had been handled. In particular, he was unhappy with the Council's decision to apply a blanket refusal under Sections 42 and 43 of the FOIA.
11. The Commissioner contacted the Council on a number of occasions in relation to the complaint and on 1 July 2021 requested copies of the withheld information. Although the Commissioner had not seen the information she suggested it might be environmental as defined by the EIR and invited the Council to consider this point when responding.
12. The Council responded on 18 August 2021 with copies of the withheld information which it reiterated was being withheld under Sections 42 and 43 of the FOIA. It also provided a copy of the Commercial Property Standard Enquiries Form (CPSE.7) relating to the sale of the land at Greenfields which was disclosed to the complainant during the course of the Commissioner's investigation on 16 March 2021.
13. The scope of the Commissioner's investigation will be to determine whether the information is environmental as defined by the EIR and if

so, whether the arguments advanced by the Council to withhold it have been engaged.

## **Reasons for decision**

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14. In its responses to the complainant and the Commissioner the Council has maintained its reliance on the FOIA and in particular, the exemptions under Sections 42 and 43. The first question for the Commissioner to determine is the appropriate legislative regime applicable to the complainant's request.

### **Is the requested information environmental as defined by the EIR**

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

*(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

*(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

*(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;*

*(d) reports on the implementation of environmental legislation;*

*(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*

*(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*

16. The Commissioner considers that, as the information requested in this case relates to the sale of public land to a private developer for domestic housing, it is a measure affecting or likely to affect the elements and factors of the environment, such as land and landscape, as defined by Regulation 2(1)(a). She is therefore satisfied that the information falls within the definition of environmental information under Regulation 2(1)(c) of the EIR.

### **Regulation 5(1) – Duty to make environmental information available on request**

17. Regulation 5(1) of the EIR states that "*a public authority that holds environmental information shall make it available on request.*" This is subject to any exceptions that may apply.

### **Regulation 5(2) of the EIR – Time to respond**

18. As explained above, Regulation 5(1) requires a public authority to disclose requested information. Regulation 5(2) of the EIR requires this information to be provided to the requester within 20 working days following receipt of the request.
19. The complainant requested the information on 25 May 2020 and the Council responded on 25 June 2020.
20. This is a period of more than the required 20 working days. Therefore the Commissioner finds that the Council breached Regulation 5(2) of the EIR.

### **The FOIA Exemptions applied by the Council**

21. The Council has applied Sections 42 and 43 of the FOIA to the requested information without specifying which exemption or exemptions apply to which individual document or documents. Also, it has not advanced any arguments as to why the exemptions should apply apart from stating 'legal professional privilege' and 'commercial interests' respectively.

### **Section 42(1) – legal professional privilege**

22. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings.
23. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTI* (EA/2005/0023)

("Bellamy") as:

*"... a set of rules or principles which are designed to protect the confidentiality 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 even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation."*

24. There are two categories of LPP – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but where legal advice is needed. In both cases, 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.
25. Communications made between adviser and client in a relevant legal context will, therefore, attract privilege.
26. The Commissioner's view is that for legal professional privilege to apply, the information must have been created or brought together for the dominant purpose of litigation, or for the provision of legal advice. With regard to legal advice privilege, the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice. With regard to litigation privilege, the information must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation.
27. As the requested information is environmental, the Commissioner has considered this request under the EIR. The comparable provision to Section 42 of the FOIA under the EIR is Regulation 12(5)(b).

**Regulation 12(5)(b) – adverse affect to the course of justice**

28. Regulation 12(5)(b) 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 inquiry of a criminal or disciplinary nature".*

29. 'Adversely affect' means that there must be an identifiable harm to or

negative impact on the interests identified in the exception. Furthermore, the threshold for establishing an adverse effect is a high one, since it is necessary to establish that disclosure **would** have an adverse effect. 'Would' means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the

30. As the Council cited Section 42 of the FOIA and stated 'Legal Professional Privilege' in its responses to the complainant and the Commissioner, the Commissioner considers that it believed some or all of the requested information was covered by LPP. The Commissioner accepts that the exception under Regulation 12(5)(b) of the EIR is designed to encompass information that would be covered by LPP.
31. The Commissioner has seen the requested information and is not persuaded it consists of legal advice provided to Council. Furthermore, despite the Commissioner requesting such, the Council has not advanced any arguments as to why disclosure of the requested information would adversely affect the course of justice.
32. The Commissioner's decision is therefore that insufficient arguments have been advanced by the Council to engage either Section 42 of the FOIA or Regulation 12(5)(b) of the EIR.
33. In addition to Section 42 the Council has cited Section 43 of the FOIA.

### **Section 43 – Commercial Interests**

34. Section 43(2) of the FOIA states that:

*"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."*

35. The exemption can be engaged on the basis that disclosing the information either "would" prejudice commercial interests, or the lower threshold that disclosure only "would be likely" to prejudice those interests. For the Commissioner to be convinced that prejudice "would" occur, she must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of "would be likely to" occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.
36. In the Commissioner's view it is not sufficient for a public authority to merely assert that prejudice would be likely to occur to another party's commercial interests to engage the exemption. Nor is it sufficient for

any third party to assert that such prejudice would be likely to occur. The public authority must draw a causal link between disclosure of the information and the claimed prejudice. It must specify how and why the prejudice would occur.

37. As the requested information is environmental, the Commissioner has considered this request under the EIR. The comparable provision to Section 43 of the FOIA under the EIR is Regulation 12(5)(e).

**Regulation 12(5)(e) – adverse affect to confidentiality of commercial information**

38. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect "*the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest*".
39. The Commissioner considers that in order for this exception to be applicable, the following conditions must be met:
- Is the information commercial or industrial in nature?
  - Is the information subject to confidentiality provided by law?
  - Is the confidentiality provided to protect a legitimate economic interest?
  - Would the confidentiality be adversely affected by disclosure?
40. In this case the Council has not advanced any arguments as to why disclosure of the requested information would prejudice commercial interests or adversely affect the confidentiality of commercial or industrial information. All it has stated in its responses is; 'Section 43 – Commercial Interests'. The Commissioner is not persuaded that any or sufficient arguments been advanced by the Council to engage either Section 43 of the FOIA or Regulation 12(5)(e) of the EIR.

**Other matters**

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41. The Commissioner would like to remind the Council of the importance of engaging with her when responding to requests for detailed arguments under the FOIA and EIR, including those relating to the public interest, in support of any information redacted or withheld. The Commissioner

would also like to draw the Council's attention to her detailed guidance on the FOIA<sup>1</sup> and the EIR<sup>2</sup> on the ICO's website.

42. The Commissioner uses intelligence gathered from individual cases to inform our insight and compliance function. This aligns with the goal in our draft "Openness by design"<sup>3</sup> strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our "Regulatory Action Policy"<sup>4</sup>.

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<sup>1</sup> <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/>

<sup>2</sup> <https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/>

<sup>3</sup> [https://ico.org.uk/media/about-the-ico/documents/2615190/openness by - design strategy 201906.pdf](https://ico.org.uk/media/about-the-ico/documents/2615190/openness_by_design_strategy_201906.pdf)

<sup>4</sup> <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/>



## Right of appeal

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

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

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

44. 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.
45. 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 .....**

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