

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

**Date:** 8 June 2022

**Public Authority:** Ceredigion County Council  
**Address:** [foi@ceredigion.gov.uk](mailto:foi@ceredigion.gov.uk)

**Decision (including any steps ordered)**

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1. The complainant requested information about a particular planning application. Ceredigion County Council (the Council) provided some information and stated other requests were not requests for recorded information but answered these as business as usual questions and also stated that all information relating to the planning application was on the planning portal. At the time of its internal review the Council confirmed that additional documentation had been uploaded onto the planning portal and stated that no further information was held. The complainant alleged that further information was held which the Council had not provided nor was available on the planning portal. During the Commissioner's investigation, the Council identified further recorded information falling within the scope of the request and stated that it considered this additional information to be exempt under regulations 12(4)(e) (internal communications) and regulation 12(5)(b) (course of justice). The Commissioner's decision is other than the information disclosed and the information withheld the Council does not hold any further information relevant to the request. The Commissioner also finds that the Council has correctly applied regulation 12(4)(e) and regulation 12(5)(b) to withhold some of the requested information and that the public interest favours maintaining the exceptions. Finally, the Commissioner has identified that the Council breached regulations 5(2), 11(4) and 14(2) by failing to handle the request within the statutory timescales. The Commissioner does not require the Council to take any steps.

## Request and response

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2. On 3 February 2021 the complainant wrote to the Council and requested information in the following terms:

"This request concerns planning applications A200642 and A190006 which both relate to a building erected without planning permission in August 2019.

I am making this request under Freedom of Information legislation and/or Environmental Information Regulations legislation, as appropriate.

1. Please provide all documentation and correspondence relating to the above two planning applications. Please include internal, external and inter-departmental :-

letters

emails

telephone conversations

notes/minutes of meetings

memos

2. Please also provide the following information re application A200642 :-

2.1 The Planning Officer's report, unambiguously recommending refusal of the application, appeared on the planning portal on 30th October 2020 and the application was shown as 'refused'. However an obviously incorrect decision notice appeared alongside.

How long was the incorrect decision notice displayed on the planning portal?

Was the decision notice actually sent out to the applicants or any other party?

2.2 There are legal precedents where a Council has issued the wrong decision notice 'in error'. Where the intention of the planning authority was clear as the result of the Planning Officer's report or other evidence, the courts have found that it was legally acceptable to issue an immediate correction. This was particularly so when the correction was issued in a timely fashion and could not therefore be said to have caused monetary loss to the applicant. In the case of A200642 it was decided that no such correction should be issued.

At what level was this decision taken?

Was there any contact with the applicants or their agent between the appearance of the incorrect Decision Notice on the Planning Portal and

(a) removal of the Decision Notice and the Planning Officer's report and/or (b) the decision not to issue a corrected Notice?

2.3 What, therefore, is the current legal status of this planning application? Has the application been determined or not?

2.4 Has the LPA's stated 'intention to refuse' as well as the Planning Officer's report, reached after full and proper process, now been set aside?

2.5 Have the applicants withdrawn application A200642?

3.1 [name of Council officer redacted] has said in an email to us on 28th January 2021 that "the LPA does now have the option of issuing a notice of discontinuance under s.102 of the Town and Country Planning 1990 Act". Please confirm how long this option has been available to the LPA in relation to this unauthorised building.

3.2 [name of Council officer redacted] has also stated "If additional land has not been acquired within 6 months the LPA will review the situation and consider at that point whether or not it is expedient to issue a Discontinuance Notice" Please tell us:-

a. What are the start and end dates for this 6 month period?

b. Please state the reasons for offering this extra 6 month period when the Planning Officer stated in his report "The applicants provided some information regarding an enquiry to purchase land near Talybont, however there was no substantiation to this purchase and therefore bears little relevance to this assessment."

Have the applicants provided any new evidence of a viable prospective land purchase? If so please indicate the nature of this evidence.

c. How much land do the LPA consider constitutes sufficient "additional land"?

d. If the applicants are able to demonstrate that they have purchased more land within this 6 month period will the LPA require them to make a full new retrospective planning application?

e. Insufficient land was only one aspect of the Planning Officer's report and conclusion. Are the LPA therefore disregarding the other grounds for refusal outlined in the report

– for example "The design of the building is not considered to be agricultural in character"?

f. If the applicants have not purchased sufficient additional land within the 6 month period could the LPA simply grant them another extension? Given that the LPA have declined to issue a discontinuance notice from

Aug 2019 until now what could or would cause the LPA to take such action?"

3. The Council responded on 19 April 2021 and stated that some of the questions had been answered as business as usual as they were not requests for recorded information. The Council also confirmed that all information about the planning applications was available on the planning portal on its website and provided the relevant link.
4. On 19 April 2021 the complainant requested an internal review of the handling of the request with specific reference to questions 1, 2.2 and 3.2(b) of the request.
5. The Council provided the outcome of its internal review on 6 October 2021. It apologised for the delay in conducting the internal review which was missed by the FOI team previously. The Council confirmed that it had now uploaded all documentation relating to the applications on to the planning portal (question 1). In relation to question 2.2 the Council stated that it did not hold the information requested as no decision had been made. In respect of question 3.2(b), the Council explained why a six month period was offered to the planning applicant to purchase additional land.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 4 May 2021 to complain about the way their request for information had been handled. The Commissioner advised the complainant to await the outcome of the Council's internal review, requested on 19 April 2021.
7. The complainant contacted the Commissioner again on 19 October 2021 following receipt of the Council's internal review response to confirm they remained dissatisfied with the handling of the request.
8. During the course of the Commissioner's investigation the Council agreed that the request fell to be considered under the EIR as opposed to the FOIA. The Council also confirmed that it had identified additional information relevant to the request which it considered to be exempt under regulations 12(4)(e) and 12(5)(b).
9. In light of the above, the scope of the Commissioner's investigation into this complaint is to determine whether the Council has correctly applied regulations 12(4)(e) and 12(5)(b) to the withheld information. The following analysis also covers which access regime is relevant to the complainant's request, the timescales in which the request was handled and whether the Council identified all the information it held that fell within the scope of the request.

## Reasons for decision

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### Background

10. This complaint concerns a retrospective planning application for a two storey agricultural shed, which was built in 2019. The planning officer's report recommended refusal of the application on a number of grounds. However, despite determining that the application should be refused permission in October 2020, due to an administration error the Council issued an incorrect planning decision notice stating that planning permission had been granted. The reasons for 'granting' the planning permission as shown on the decision notice were "refusal as not in accordance with the requirements of Welsh Government TAN 6 and Ceredigion Local Development Plan Policy SO4".
11. Following the issuing of the incorrect decision notice, the Council agreed to allow the planning applicant six months to acquire additional land, following which the applicant would need to submit a fresh planning application which would be considered by the Council.

### Correct access regime

12. The Commissioner has first considered whether the information requested is environmental in accordance with the definition given in regulation 2(1) of the EIR. Environmental information is defined within regulation 2(1) as:

"...any information in written, visual, aural, electronic or any other material form 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) and (b) 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 elements of the environment referred to in (b) and (c);”

13. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
14. The Commissioner has produced guidance<sup>1</sup> to assist public authorities and applicants in identifying environmental information. The Commissioner’s well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
15. The requested information in this case relates to planning matters. Planning and development of land is a measure which is likely to affect the elements of the environment, namely land and landscape. The Commissioner is therefore satisfied that the requested information would fall within the definition at regulation 2(1)(c) and that the request should be considered under the EIR.

## **Regulation 5 – duty to make environmental information available on request information held**

### **Regulation 5(1)**

16. Under regulation 5(1) of the EIR and subject to a number of EIR provisions, a public authority that holds environmental information shall make it available on request.
17. The complainant told the Commissioner that they believed the Council holds further information relevant to the request. As stated earlier in

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<sup>1</sup> [https://ico.org.uk/media/fororganisations/documents/1146/eir\\_what\\_is\\_environmental\\_information.pdf](https://ico.org.uk/media/fororganisations/documents/1146/eir_what_is_environmental_information.pdf)

this notice, during the course of the Commissioner's investigation the Council identified further information falling within the scope of the request which it considers exempt under regulations 12(4)(e) and 12(5)(b). The Commissioner has considered whether the Council has correctly applied exceptions to this information later within this notice. However, the Commissioner has also investigated whether the Council has located all information relevant to the request.

18. The complainant raised a number of points in support of their view that the Council had not identified all information relevant to the request and this information was not available on the planning portal, which are summarised below:
  - a. The absence of internal or inter-departmental documents including letters, emails, notes of meetings, notes of telephone calls.
  - b. The absence of correspondence between the Council and the planning agent between December 2020 and September 2021.
  - c. The absence of any information concerning the issuing of the incorrect decision notice and the reasons why the planning department offered the applicant an additional six month period to acquire more land.
19. The Council advised the Commissioner that all information held relevant to the request would be held electronically. Any written correspondence would have been received electronically, either by email or via scanned documents from the Council's post room. The Council also confirmed that all electronic data is stored on corporate systems and no information is kept on personal devices.
20. The Council confirmed that the case officer carried out searches of all email and scanned documents relevant to the planning application at the time of the request, and during the internal review. With the exception of the information which has been withheld under regulations 12(4)(e) and 12(5)(b), the Council confirmed that all information pertaining to the planning case has been published on the planning portal. The Council also confirmed that no information relevant to the request has been deleted or destroyed.
21. With specific reference to the points raised by the complainant the Council confirmed that, with the exception of communications relating to the incorrect planning decision notice which was issued, all other internal communications are available on the planning portal. The Council also advised that internal telephone conversations and meetings are not recorded.

22. In relation to the complainant's concerns about the absence of recorded information between the planning department and the applicant's agents between December 2020 and September 2021, the Council advised that it wrote to the applicant in December 2020 to confirm that it was allowing six months to acquire additional land. The next communication took place in September 2021 when the Council contacted the agent to enquire about the progress made in acquiring the additional land. The Council confirmed to the Commissioner that it was not aware of any other communications between itself and the applicant/agent between these dates
23. The complainant has also expressed concern at the lack of information concerning the issuing of the incorrect decision notice and the decision to allow the applicant time to acquire additional land. The information that the Council has withheld in this case comprises communications relating to this matter, including legal advice on the options available to the Council to rectify the error. In terms of the decision to allow the applicant time to purchase additional land, the Council advised the Commissioner that this decision was made by senior officers during an internal meeting which was held virtually. Details of the meeting were not recorded by the Planning Service.
24. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, he will consider any reason why it is inherently likely or unlikely that information is not held.
25. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. He will also consider the searches carried out by the authority and other information or explanation offered by the authority which is relevant to his determination.
26. The Council has confirmed that it has searched its server for all planning records associated with the relevant application. It has confirmed that, with the exception of the information it is withholding all information relating to the application is available to view on the planning portal. The Commissioner considers that the Council's explanation about how it keeps its planning records is entirely credible and that the searches of those records that it has undertaken were appropriate.



27. The Commissioner has found no evidence that any additional information exists that is being withheld. Having considered the Council's responses, and in the absence of any evidence to the contrary, the Commissioner is satisfied that, on the balance of probabilities, the Council does not hold any further information within the scope of the requests other than that which is on the planning portal and the information which has been withheld. The Commissioner's decision is that, on the balance of probabilities, the Council holds no further information that is relevant to the request and has complied with regulation 5(1) of the EIR.

### **Regulation 5(2) - timescales**

28. Under regulation 5(2), information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
29. The complainant submitted their request to the Council on 3 February 2021. The Council responded on 19 April 2021 and provided some information and explained that all other information was available to view on its website. At the time of its internal review, the Council confirmed that it had identified other relevant information which had been uploaded to its website.
30. The Council advised the Commissioner that, at the time it received the initial request, the Complaints and FOI team had a number of staffing issues including a new member of staff and long term staff absences. Additional support was acquired from another service during the early stages of the Covid 19 pandemic, and this individual undertook various admin tasks associated with processing FOIA/EIR requests. The team is responsible for processing and co-ordinating all complaints made to the Council, FOIA/EIR requests, Ombudsman/ICO activities and general enquiries/potential complaints received by the Council. At the time the request was received the team had a considerable amount of work to deal with, which was challenging in light of having to adapt to new working arrangements as a result of the pandemic including training new staff remotely. The Council assured the Commissioner that the situation has now improved significantly and the team has a full complement of trained staff.
31. The Commissioner notes the explanations for the delay provided by the Council, and he hopes that the situation will improve in the future. However, as the Council failed to respond to the request and make the information held available within the appropriate timescale the Commissioner finds that the Council breached regulation 5(2).

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

32. Regulation 12(4)(e) provides an exception for information which constitutes an 'internal communication'. In order for the exception to be engaged the information must constitute a communication within one public authority, specifically, the authority to which the request is made.
33. The exception for internal communications is class-based, meaning that there is no need to consider the sensitivity of the information in order to engage the exception. However, other factors might be relevant when considering the balance of the public interest.

### **Is the exception engaged?**

34. The withheld information in this case consists of emails between council officers for the purpose of obtaining observations, comments and advice about the incorrect decision notice that was issued in October 2020.
35. The Commissioner is satisfied that the withheld information falls under the description of "internal communications". Accordingly, the Commissioner is satisfied that the exception at Regulation 12(4)(e) is engaged. The Commissioner has therefore gone on to consider the public interest test.

### **The public interest test**

36. Regulation 12(1)(b) requires that where the exception under Regulation 12(4)(e) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner is mindful of the provisions of Regulation 12(2) which state that a public authority shall apply a presumption in favour of disclosure.

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

37. The Council acknowledges that there is a public interest in transparency and accountability in planning matters.
38. The complainant considers that there is a strong public interest in disclosure of the information in this case particularly in terms of when, why and by whom particular decisions relating to the application have been taken. The decisions have, according to the complainant, resulted in "an ongoing failure to take any effective enforcement action in a case of unauthorised development, and where there have clearly been attempts to abuse the planning system and bypass normal planning controls and policies. The decisions and action (or lack of it) have allowed an unauthorised development to stand even when a proper

democratic process (a retrospective planning application) has found that it contravenes both national and local planning policies”.

39. The complainant has asserted that the public interest does not just concern themselves as neighbours with a personal interest, but it also affects others in the community. The complainant believes that disclosure would improve the public’s ability to trust in the probity and governance of the Council’s planning service, local planning procedures and policies.

40. The complainant also referred to a Welsh Government report on the performance of planning authorities<sup>2</sup> which states on page 40 that:

“As with previous years, one LPA’s performance is so poor that it significantly skews the all-Wales average for this performance indicator. Ceredigion County Council consistently determines a very high proportion of applications contrary to officer advice. There are either tensions in the relationship between Members and officers, or Members are displaying insufficient regard for the plan-led system, or both. This is counterproductive and creates uncertainty within the planning system, which communities and developers rely upon to create confidence in the shape and location of future development and leads to low levels of public confidence in the planning service locally”.

The complainant stated that the report also showed the Council to be the worst performing local authority in terms of the average time to take positive enforcement action (table on page 52 of the report).

41. Finally, the complainant also alleges that there is a plausible suspicion of wrongdoing in this case as the planning applicant in this case has previously undertaken unauthorised development on their property. The complainant considers that the Council has shown undue lenience towards the applicant in question as a result of their standing in the community.

42. The Commissioner recognises that there is a general public interest in openness and transparency regarding the consideration of planning applications. The Commissioner also accepts that planning decisions and the process leading to those decisions should be as open and transparent as possible. He acknowledges that the public should be able to participate in the decision making process, and be satisfied that the final decision had been made openly and fully explained.

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<sup>2</sup> [planning-services-annual-performance-report-2018-to-2019\\_0.pdf \(gov.wales\)](#)

### **Public interest in maintaining the exception**

43. The Council argued that internal deliberation and decision making should be protected by preserving a 'safe space' for officers to debate issues away from external scrutiny. The Council considers that it is of vital importance that officers are able to discuss options and how to approach matters such as the incorrect issuing of a planning decision notice away from external interference and distraction.
44. In the particular circumstances of this request the Council confirmed that at the time of the request, and at the time of the internal review response, the matters under consideration were very much live as the planning application in question remained ongoing as the applicant had been given more time to acquire additional land.
45. The Council also contends that disclosing its internal deliberations in this case would provide an unfair advantage to third parties involved in the planning case itself.

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

46. The Commissioner's guidance<sup>3</sup> on this exception explains that although a wide range of internal information will be caught by the exception, public interest arguments should be focussed on the protection of internal deliberation and decision-making processes. This reflects the underlying rationale for the exception being that it protects a public authority's need for a 'private thinking space'.
47. The Commissioner has carefully considered the arguments put forward by the complainant and by the Council. He recognises the legitimate public interest in disclosing information that would inform the public about decisions concerning activities that may have an impact (whether positive or negative) on the environment. Accordingly he is mindful that access rights under the EIR are designed to support public access to environmental information, public participation in decision making and access to justice.
48. Whilst the Commissioner notes the references the complainant made to the Council's poor performance as referred to in the planning report, he has seen no evidence in this case to suggest that the issuing of the incorrect decision notice was anything other than an administration error on the part of the Council. In addition, the Commissioner acknowledges

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<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/2021/2619005/12-4-e-internal-communication-31122020-version-31.pdf>

the complainant's arguments that refusing to disclose the information suggests that the Council has "something to hide". However, it cannot be assumed that a refusal to disclose information is based on a desire to cover up wrongdoing. In the Commissioner's experience there are many cases where the withheld information may be relatively innocuous, but the act of disclosure would have a detrimental effect on the public authority's ability to conduct its business effectively. In any event, the Commissioner has not seen any evidence of wrongdoing, therefore the complainant's argument does not carry significant weight in this case.

49. With regard to attributing weight to the public interest arguments in favour of maintaining the exception, the Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This may carry significant weight in some cases. In particular, the Commissioner considers that the need for a safe space will be strongest when the issue is still live.
50. In the circumstances of this case the Commissioner accepts that at the time of the request and at the time of the internal review, matters concerning the planning application were still ongoing. Furthermore, the Commissioner is satisfied that the issues covered in the withheld information are ones that are related to the outstanding matters concerning the planning application. The Commissioner is also conscious that the withheld information contains frank internal discussions about a novel planning matter. In light of this, in the Commissioner's view, significant weight should be attributed to the safe space arguments in this particular case.
51. Whilst he accepts that the arguments in favour of disclosure in this case carry some weight the Commissioner does not consider that they match the weight of the arguments in favour of withholding the information. The Commissioner's conclusion is, therefore, that the public interest in the maintenance of the exception outweighs the public interest in favour of disclosure of the requested information.
52. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019):  
  
"If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).

53. As covered above, the Commissioner has concluded that the public interest in maintaining the exception at regulation 12(4)(e) outweighs the public interest in disclosure of the information. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(e) was applied correctly.

### **Regulation 12(5)(b) – course of justice**

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

55. The Commissioner considers that the course of justice element of the exception is wide in coverage and accepts that it can include information about civil investigations and proceedings.

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

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

57. The Commissioner has issued guidance on the application of regulation 12(5)(b)<sup>4</sup>. The guidance confirms that the exception will be likely to be engaged if the information in question is protected by legal professional privilege (LPP). This is due to the adverse effect on the course of justice that would result through the disclosure of, otherwise confidential, information covered by LPP.

58. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of

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<sup>4</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-5-b-the-course-of-justice-and-inquiries-exception/>

*Bellamy v The Information Commissioner and the DTA (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.”

59. There are two categories of LPP – litigation privilege and 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. Advice privilege applies when no litigation is in progress or contemplated. 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.

### **Is the exception engaged**

60. The withheld information in this case comprises communications between planning officers (as clients) and the Council’s legal services team, and communications between the Council (as client) and external professional legal advisors. The Council considers that the withheld information attracts legal advice privilege as the communications were made for the dominant purpose of obtaining legal advice.
61. The Commissioner has had sight of the withheld information and he is satisfied that the correspondence comprises confidential communications between client and lawyer, made for the dominant purpose of seeking and/or giving legal advice, and is therefore covered by LPP on the basis of advice privilege.
62. Having considered the Council’s representations, as far as the Commissioner has been able to establish, the withheld information was not publicly known at the time of the request and there is therefore no suggestion that privilege had been waived.
63. In order to engage the exception under regulation 12(5)(b) it must be established that disclosure of the information in question would adversely affect the course of justice.
64. The Council asserts that disclosure of the withheld information:  
  
“would more likely than not affect the course of justice as the case is still live and disclosure would mean public access to the privileged information. This would disclose advice and the strength and

weaknesses of the options which the Council could take in the matter which would unbalance the playing field between the applicant and Council as local planning authority”

65. The Commissioner is of the view that disclosure of information which is subject to LPP will have an adverse effect on the course of justice. This is because the principle of LPP would be weakened if information subject to privilege were to be disclosed under the EIR.
66. The Commissioner notes that although the planning application had in effect been determined at the time of the request, due to an administration error an incorrect decision notice was issued granting planning permission. The withheld information relates to the Council's options and decision making relating to the incorrect planning decision notice. The outcome of the Council's decision making was that the planning applicant be allowed six months to obtain additional land, and then submit a fresh planning application for consideration. As such, the Commissioner agrees that the legal advice was live at the time of the request.
67. Based on the above, the Commissioner is therefore satisfied that regulation 12(5)(b) is engaged in respect of this information and has therefore gone on to consider the public interest test.

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

68. The Commissioner has taken into account the public interest factors in the disclosure of the information which he has already considered under his analysis of regulation 12(4)(e).

### **Public interest in maintaining the exception**

69. The Council pointed out that there is a significant public interest in maintaining the principle behind LPP in terms of safeguarding openness of communications between a client and his or her lawyer to ensure access to full and frank legal advice. This process serves the wider administration of justice.
70. The Council considers that there is an inherent public interest in it having the private space to seek and obtain legal advice to inform its legal responsibilities as planning authority. Disclosure would undermine this basic right to obtain legal advice in private.
71. The Council advised that additional weight was given to the fact that the legal advice was recent at the time of the request and relates to a live matter as planning matters relating to the site are still ongoing. This is not a case where any harm caused through disclosure is reduced due to the matter being a 'historic' one.



## **Balance of the public interest**

72. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible in relation to their actions. In this case it appears there has been an irregularity in relation to the granting of planning permission and the Commissioner's view is that there is a valid public interest in favour of disclosure in order to enhance public knowledge and understanding of how this came about.
73. However, in line with previous decisions of the Information Tribunal, the Commissioner also considers that there will always be a strong public interest in maintaining LPP due to the important principle behind it which safeguards openness in all communications between client and lawyer to ensure access to full and frank legal advice. The Commissioner acknowledges that LPP is, in turn, fundamental to the course of justice.
74. The Commissioner has taken into account the fact that the withheld advice was still live at the time of the request and related to an ongoing planning case. Whilst the complainant or others might disagree with the council's position, there are existing legal channels available for those wishing to challenge planning decisions. In order to justify circumventing these channels and interfering with the course of justice, sufficiently weighty public interest factors will need to be present.
75. The Commissioner considers that the public interest in the context of the EIR refers to the broader public good. Where decisions made by authorities have a significant effect on the local community the balance in favour of disclosure might carry enough weight to challenge the weight in favour of maintaining the confidence attached to LPP. However, the Commissioner has no evidence that these effects are present in this case.
76. The Commissioner considers that it is highly likely that disclosing the information would damage the Council's ability to undertake its planning duties effectively and compromise its legal position. This, in turn, would represent an unwarranted interruption of the legal process and would result in specific damage to the course of justice. The Commissioner has not been presented with any evidence that there are grounds for circumventing the legal mechanisms and remedies which are already available in relation to this matter.
77. The Commissioner considers that there is a strong public interest in allowing local authorities to carry out their duties in respect of planning as effectively as possible, particularly in situations where decisions made might be subject to legal challenge.

78. In view of the above, the Commissioner's conclusion is that the valid public interest in the disclosure of the information in question is outweighed by the public interest in favour of maintaining the exception under regulation 12(5)(b).
79. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As covered above, in this case, the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(b) was applied correctly.
80. The Commissioner concludes that the Council has correctly applied the exception at regulation 12(5)(b) and that, in this case, the public interest favours maintaining the exception.

#### **Regulation 14 -Refusal to disclose information**

81. Under regulation 14(2) of the EIR, if a request for environmental information is refused by a public authority under regulation 12, the refusal must be made as soon as possible and no later than 20 working days after the date of receipt of the request.
82. As referred to in this notice, during the course of the Commissioner's investigation the Council identified further information relevant to this request which it considered exempt under regulations 12(4)(e) and 12(5)(b). In failing to issue a refusal notice within the required timescale, the Commissioner finds that the Council breached regulation 14(2) of the EIR.

#### **Regulation 11 - representations and reconsideration**

83. Under regulation 11(4) of the EIR, (4) a public authority must provide an internal review as soon as possible and no later than 40 working days after the date of receipt of the request for a review.
84. In this case, the complainant requested an internal review on 19 April 2021 and the Council did not provide the outcome of its review until 6 October 2021. This is significantly in excess of the 40 working day requirement and therefore, the Commissioner finds that the Council breached regulation 11(4) of the EIR.

## Right of appeal

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85. 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@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)

86. 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.
87. 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 .....**

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