

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

### **Decision notice**

**Date:** 12 September 2022

**Public Authority:** West Chiltonton Parish Council

**Address:** clerk@wcpc.org.uk

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

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1. The complainant requested information held by Chiltonton Parish Council (the parish council) about its Neighbourhood Plan.
2. The Commissioner's decision is that the parish council does not hold information relevant to part 1 of the complainant's request.
3. The Commissioner is also satisfied that the parish council is entitled to rely on regulation 12(4)(b) of the EIR in respect of part 5 of the request.
4. The Commissioner does not require the parish council to take any steps as a result of this decision notice.

#### **Request and response**

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5. The complainant first wrote to the parish council requesting information about the Chiltonton Neighbourhood Plan on 13 May 2021. Parts 1 and 5 of this request are relevant to the complaint that is being considered

by the Commissioner, and are as follows:

“ACTION 1

Freedom of Information Act request 1: Please confirm that all staff within West Chiltington Parish Council; [name redacted] and Parish Councillors who have had communication with Horsham District Council and AECOM<sup>1</sup>, including its employees, servants or agents either professionally on the West Chiltington Neighbourhood Plan from January 2020, professionally on any planning group, committee or blog, or socially have made a declaration of interest and that the West Chiltington Parish Councils declaration of interest policy has been followed.

ACTION 5

Freedom of Information Act request 5: Please provide copies of all correspondence in any form (e-mails, letters and telephone attendance notes) relating to the West Chiltington Neighbourhood Plan or any land within the Parish boundary passing between Parish Councillors, its employees, servants or agents. ”

6. On 17 May 2021, the council issued a refusal notice, citing section 12 of the FOIA. It suggested that the complainant refine their request to cover a specified time period.
7. On 18 May 2021, the complainant submitted a new request as follows:

“I will refine my request for the period 1st March 2020 to the current date (up to an including the 20 day period for actioning the request).”
8. Whilst the parish council provided some information in its response of 8 June 2021, the complainant subsequently stated that they had not received the information that they had requested in parts 1 and 5 of their request.
9. Further correspondence was then exchanged between the parties; the parish council maintained its view that to deal with part 5 of the request

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<sup>1</sup> AECOM was commissioned by the parish council to prepare a Housing needs Assessment (published August 2018) following its decision to prepare a Neighbourhood Plan for the parish area

would exceed the cost limits, and that the complainant would therefore need to further refine this part of their request.

10. On 15 June 2021, the complainant contacted the parish council again to express their dissatisfaction about the way in which part 1 and part 5 of their request had been handled. The Commissioner considers this correspondence to have been a request for an internal review.
11. On 1 July 2021, the parish council provided a response, which the Commissioner considers to be its internal review decision.
12. The parish council advised the complainant that it had already explained on two previous occasions that it was not possible to provide all the emails that it held. However, it confirmed that it had been possible to isolate the emails sent between councillors about the amendments to the AECOM Report, and it provided copies of these to the complainant.

### **Scope of the case**

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13. The complainant contacted the Commissioner on 15 July 2021, to complain about the way their request for information had been handled by the parish council.
14. During the Commissioner's investigation, the parish council advised that it was now relying on regulation 12(4)(b) of the EIR, rather than section 12 of the FOIA, as its basis for refusing to comply with part 5 of the complainant's request of 18 May 2021.
15. The parish council has also advised the Commissioner that whilst it regarded part 5 of the request to be manifestly unreasonable, it had 'agreed' with the complainant what could be provided, and had supplied this information with its response of 1 July 2021.
16. The complainant disagrees with this, stating that they have still not received all the information held that is relevant to part 1 and part 5 of their request of 18 May 2021.
17. The Commissioner will therefore decide:
  - Whether the parish council holds any information relevant to part 1 of the request.
  - Whether the parish council is entitled to rely on regulation 12(4)(b) of the EIR in response to part 5 of the request.

## **Reasons for decision**

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### **Correct Access Regime**

18. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR, rather than the FOIA, if it meets the definition set out in regulations 2(1)(a) to 2(1)(f) of the EIR.
19. Regulation 2(1)(c) of the EIR says that any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors of the environment listed in regulation 2(1)(a) and 2(1)(b) will be environmental information.
20. The information requested relates to the Neighbourhood Plan and matters associated with this. It is the Commissioner's view that the withheld information is integral to a measure (proposals to redevelop land) which will, or will be likely to, affect the environment.
21. Therefore, the Commissioner considers that the request is for environmental information, and that the EIR is the appropriate access regime.

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

22. 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.
23. 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 he will consider any other reasons offered by the public authority to explain why the information is not held. The Commissioner will also consider any reason why it is inherently likely or unlikely that information is not held.
24. The complainant has stated that they have not received the information relevant to part 1 of their request, that being the recorded information which confirms the declarations of interest made by two councillors.
25. Whilst the parish council provided some explanations in response to part 1 of the request, it is the Commissioner's view that it did not provide the recorded information that has been requested by the complainant.

26. However, the parish council has advised the Commissioner that whilst it is aware that two particular councillors did make a declaration of interest, and it has publicly confirmed this to be the case, this was not recorded in the minutes of any meeting.
27. Whether this information should have been recorded as part of any meeting is not a matter for the Commissioner. Having considered the information available, he is satisfied that there is no evidence which indicates that the requested information is held.
28. Given this, the Commissioner concludes that, on the balance of probabilities, the information requested in part 1 the request, is not held in a recorded format by the parish council.

### **Regulation 12(4)(b) – manifestly unreasonable**

29. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request is manifestly unreasonable. Where it is found to be engaged, regulation 12(4)(b) of the EIR is also qualified by the public interest test.
30. Although there is no definition of 'manifestly unreasonable' within the EIR, the Commissioner's opinion is that 'manifestly' implies that a request should be obviously or clearly unreasonable.
31. Regulation 12(4)(b) of the EIR is designed to protect public authorities from exposure to a disproportionate burden or an unjustified level of distress, disruption or irritation in handling information requests. In effect, it works in similar regards to two exemptions within FOIA; section 12, where the cost of complying with a request 'is too great', and section 14, where a request is vexatious.
32. There are no appropriate cost limits under the EIR, and the considerations which are associated with the application of regulation 12(4)(b) on the grounds of costs are broader than those relevant to section 12 of the FOIA. Under EIR, the public authority must consider the proportionality of the burden or costs involved, and decide whether they are clearly and obviously unreasonable.
33. The Commissioner considers the appropriate cost limits relevant to section 12 of the FOIA to serve as a useful guide when considering whether a request is manifestly unreasonable on the basis of costs. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations) confirm that the costs associated with the activities required to deal with the request should be worked out at a standard rate of £25 per person; for local authorities, the appropriate limit is set at £450, which is the equivalent of 18 hours work.

34. The parish council refused part 5 of the request, on the basis of cost and the burden on its resources.
35. The parish council states that the initial searches carried out, using the search terms 'Neighbourhood Plan', 'NP', 'Horsham', and 'Stephens', led to the identification of over 17,000 emails for the time period specified by the complainant. It has provided the Commissioner with a spreadsheet of the results in support of this claim. Following receipt of further correspondence from the complainant, the parish council states that it then conducted a further search using the key words, 'AECOM', and 'Neighbourhood Plan', and this led to the identification of 4189 emails.
36. The parish council has estimated that it would take 2 minutes to consider the content of each email, and that this would exceed the 18 hours of an officer's time as set out within the cost limits.
37. Whilst the Commissioner regards the search terms used by the parish council to be reasonable, he does not necessarily agree with its estimated 2 minutes required to deal with each email. However, he has calculated that, in order for the request to fall within the cost limits set out in paragraph 33 of this decision notice, the parish council would have, on average, less than 16 seconds to consider each email; it is the Commissioner's view that this is not achievable.
38. The Commissioner is therefore satisfied that to deal with all the emails identified as being potentially relevant to part 5 of Request 1, would far exceed the cost limits, and that it would require the parish council to spend disproportionate costs and effort in order to comply.
39. The Commissioner concludes that part 5 of the request is manifestly unreasonable, and that regulation 12(4)(b) is engaged.

### **Public interest test**

40. Regulation 12(4)(b) is subject to the public interest test. This means that when the exception is engaged, public authorities also have to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

#### The complainant's position

41. The complainant argues that there has been a lack of transparency in relation to the process and that there has been prejudice, predetermination, and bias in relation to the decisions that have been made. They believe that there should be full disclosure of the information held by the parish council to show that they have acted in

the best interests of the parishioners, and not for their own personal gain.

The parish council's position

42. The parish council has confirmed that it publishes all the relevant information on its website about the Neighbourhood Plan and associated matters, and that all documents are made available to the public. It says that whilst parish councillors made comments after reading the AECOM Report, everything that they did decide to put forward in terms of amendments is recorded in the meeting notes; furthermore, the full list of amendments agreed upon in the discussions of the parish council's Working Group is available on its website.
43. The parish council argues that the public interest in matters that relate to the complainant's request is served by the publication of the full list of amendments identified by the Working Group. It states that it is not necessary to see who may have asked for any one amendment, and this would not provide any further understanding of the outcome. Furthermore, the Working Group considered the documents, making comments which the whole group agreed upon before the list was sent to AECOM.
44. The parish council goes on to say that the AECOM Report is available for public inspection and comment, and if the plan proceeds, it will be looked at by an Independent Examiner who can reject the whole process if it is felt that it has not been handled correctly. It argues that it has been open and transparent and that there has not been any 'cover up' about the process which has been followed.
45. The parish council claims that it has sought to assist the complainant and has tried to provide as much information as it can without it becoming an unreasonable burden on resources. It states that the parish council is small, that it has already spent a number of hours trying to provide responses to the complainant, and that the work required to deal with the request has had to be outsourced as the resources inhouse are not available; it state that this has been at some considerable cost to the parish council.

The Commissioner's view

46. When making his decision, the Commissioner has taken into account the information which is in the public domain about the matters to which the complainant's requests relate. He has also considered the fact that there are appropriate mechanisms available to the public to challenge the legality or fairness of planning matters.

47. It is the Commissioner's view that the public interest favours maintaining regulation 12(4)(b) of the EIR in respect of part 5 of the request. This is because the financial and time burden that disclosing the withheld information would cause to the parish council would be disproportionate, and not in the public interest. His conclusion is, therefore, that the public interest in the maintenance of the exception outweighs the public interest in favour of disclosure, and so the parish council was not obliged to comply with part 5 of the complainant's request.
48. 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).
49. 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(4)(b) was applied correctly.



## Right of appeal

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50. 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)

51. 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.
52. 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 .....**

**Suzanne McKay**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**