

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

### **Decision notice**

**Date:** 5 June 2023

**Public Authority:** Wealdon District Council  
**Address:** Vicarage Lane  
Hailsham  
East Sussex  
BN27 2AX

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

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1. The complainant requested various information between Wealdon District Council (the 'Council') and the developers at Old Marshfoot Farm. The Council refused the request citing regulation 12(5)(b) (the course of justice) of the Environmental Information Regulations 2004 (the 'EIR'). The Commissioner's decision is that the Council was entitled to rely on regulation 12(5)(b) to refuse the request. The Commissioner does not require any steps

#### **Request and response**

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2. On 24 November 2022, the complainant wrote to the Council and requested the following information:  

"..a copy of all communications since 21<sup>st</sup> July 2022 between WDC Planning (including enforcement/environment) and the developers at Old Marshfoot Farm...To include Coinford, Bovis, Linden, Vistry homes and any other third party contractors."
3. The Council received the following clarification on 16 December 2022:

"These all relate to the same application (WD/2017/0458/MAO) and I am only interested in communication that WDC have had with the developer and/or contractors with regards to failure to comply with the conditions associated with the application.

Predominantly these would be conditions 5 and 24. I am looking to ascertain what, if any, action/communication WDC Planning have taken to enforce failings to comply with these conditions.

I imagine that my request may be restricted to the WDC Enforcement/environment section or any on the subject of [named individual 1] or [named individual 2] on this matter."

4. The Council responded on 22 December 2022. It informed the complainant that their request had been considered under the EIR as it relates to development of land, and cited regulation 12(5)(b) to refuse the request on the basis that disclosure would adversely affect the ability of the Council to conduct an inquiry of a criminal or disciplinary nature.
5. This position was upheld at the internal review, details of which were provided to the complainant on 26 January 2023.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 26 January 2023 to complain about the way their request for information had been handled. The complainant does not accept that the exception is engaged on the basis that the requested information is communications which have already been made between the parties, so both parties are aware of what has been conveyed. They have added that they have not asked for internal or inter-departmental information and they do not accept that disclosure would be divulging material which would be detrimental to the parties in question.
7. The scope of the following analysis is whether the Council is entitled to rely on regulation 12(5)(b) of the EIR as its basis for refusing to disclose the requested information.

### **Reasons for decision**

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

8. Regulation 12(5)(b) of the EIR states that information is exempt if 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.

9. The exception at regulation 12(5)(b) is broad and encompasses any adverse effect on the course of justice; as such, the Commissioner accepts that 'an inquiry of a criminal or disciplinary nature' is likely to include information about investigations into potential breaches of legislation, for example, planning law or environmental law.
10. The Council has confirmed that the complainant has asked for communications between itself and the developers in relation to a major planning application granted by the Council on 21 October 2022. It further informed the Commissioner that on 31 January 2023, a breach of condition notice was issued under section 187A of the Town and Country Planning Act 1990 because it was considered that a condition imposed on the grant of planning permission had not been complied with.
11. The Council explained that whilst the current notice had not been issued at the time of the request, it is not the first notice that has been issued in relation to the site and it is actively investigating a number of ongoing issues. It added that the requested information is subject to current and ongoing live investigations and subsequent rolling planning enforcement cases to ensure that any agreements are fulfilled. It considers that disclosure at this time would likely impede the gathering of information and evidence in ongoing investigations as it is considered that those under investigation will be less willing to provide information voluntarily if they thought it would be placed in the public domain.
12. The Council has further informed the Commissioner that planning enforcement is a legal matter, and the developer has a legitimate expectation that the information would not be shared into the public domain. It argued that disclosure of the requested information would be prejudicial to the Council's legal position in relation to such matters which remain to be concluded, and that it should therefore be considered exempt.
13. The Commissioner accepts that the information was obtained by the Council as part of a live and ongoing inquiry in order to help make informed decisions about whether there had been any breach of planning laws.
14. It is the Commissioner's view that the public disclosure of such information at the time of the request, and whilst the investigation remains ongoing, would not only inhibit the council's ability to effectively conduct an inquiry, but would damage public confidence in such

inquiries being undertaken appropriately and with due regard to the rights and expectations of involved parties.

15. In view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the information would adversely affect the course of justice, and that the exception provided by regulation 12(5)(b) is therefore engaged.
16. As regulation 12(5)(b) is subject to the public interest test, the Commissioner has gone on to consider the balance of the public interests in this case.

### **Public interest test**

#### Factors in favour of disclosure

17. The Council has acknowledged the general public interest in transparency and accountability.
18. The Council is also mindful that disclosure would promote greater awareness, understanding and participation in the decision making process pertaining to environmental and enforcement matters.
19. The Council has also recognised the public interest in being satisfied that planning matters are conducted in a proper and professional way.

#### Factors in favour of maintaining the exception

20. The Council has argued that the timing of the request is a significant factor when considering the public interest, and if the matter is live, the public interest in maintaining the exception will be strong.
21. It considers that the fact that this request relates to a live enforcement case, places a very strong public interest in maintaining the exception.
22. The Council argues that the adverse effect on an enforcement investigation which has not yet been concluded would be counter to the public interest and that, on balance, the public interest rests in maintaining the exception.

#### The Commissioner's conclusion

23. The Commissioner would highlight that 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 and only where there is an overriding public interest in maintaining the exception should information not be released in response to a request.

24. The Commissioner acknowledges that there is always some public interest to be associated with planning issues, and in particular with the local community. It allows for transparency and accountability in terms of the processes that are followed; it can also improve the wider public's confidence in the decisions made by a public authority. The Commissioner therefore recognises that there is a broader public interest in the release of information about a potential breach of planning control and the actions taken by a public authority in response.
25. However, having considered the withheld information, and the fact that the investigations were ongoing at the time of the request, it is the Commissioner's view that disclosure would represent an unwarranted interruption to the process, which would most likely undermine the Council's investigations. This would clearly not be in the public interest. The Commissioner has therefore concluded that in all the circumstances of the case, the balance of the public interest is weighted in favour of maintaining the exception.

## Right of appeal

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26. 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)

27. 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.
28. 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 .....**

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