

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

### **Decision notice**

**Date:** 21 June 2023

**Public Authority:** **Fareham Borough Council**  
**Civic Offices**  
**Civic Way**  
**Fareham**  
**Hants**  
**PO16 7PU**

### **Decision**

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1. The complainants requested information from Fareham Borough Council ('the council') relating to a specific planning issue. The council refused to provide the requested information citing Regulations 12(5)(b), 12(4)(d) and 12(4)(e) of the EIR.
2. The Commissioner's decision is that the council is entitled to rely on Regulations 12(5)(b) and 12(4)(d) to refuse to provide the requested information, apart from one document. The Commissioner has also decided that the council was not correct to apply Regulation 12(4)(e) to a small number of documents, and therefore requires that these are disclosed to the complainant. He has also decided that the council did not comply with the requirements of Regulation 5(2).
  - The Commissioner requires the council to disclose documents 7, 8, 19, 36, and part of document 23 to the complainants in response to their request, subject to appropriate redactions under Regulation 13 (personal data of third parties).
3. 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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4. The complainants made the following information request to the council on 26 January 2021:

"...we are writing to kindly request copies of all communications with Fareham Borough Council in respect of this matter from the date of validation until the period of 3 days after the date of the decision.

The information we require includes, but is not limited to officer reports, communications with officers by councillors or between councillors: and communications with officers and with any external planning consultants about the application and its implications (whether or not retained by the council for the purposes of this application or otherwise)."

5. The council responded on 11 March 2021. It disclosed some information and said it would respond further in due course. Following further correspondence from the complainants relating to the delay in providing the further response, it responded further on 15 September 2022. It disclosed additional information in respect of the request.
6. The complainants subsequently requested that the council conduct an internal review of its decision on 15 November 2022.
7. Following its internal review, on 23 December 2022 the council disclosed further information. However, it withheld information from a schedule of documents, applying Regulations 13 (personal data of third parties), 12(4)(d) (material still in the course of completion), 12(4)(e) (internal communications) and Regulation 12(5)(b) (course of justice).

## **Scope of the case**

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8. The complainants made their complaint to the Commissioner on 23 March 2023. They indicated that their central concern was the redaction and withholding of information under Regulation 12(5)(b).
9. The following analysis covers whether the council was correct to withhold the information it did under the exceptions in Regulation 12(5)(b), 12(4)(e) and 12(4)(d).
10. The complainants did not complain about the redaction of information under Regulation 13 (personal data of third parties), and so the Commissioner has not considered this further within this decision notice.

## **Reasons for decision**

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11. The background to this request relates to an enforcement notice issued by the council against the complainant's clients on the basis of a breach of planning laws, and subsequent appeals and litigation relating to this.
12. The Commissioner must make his decision based upon the circumstances of the case as at the time that the request for information was responded to, on 11 March 2021.
13. Although the legal issues between the parties were resolved via a court hearing on 1 November 2022, at the time of the council's responses to the request, on 11 March 2021 and on 15 September 2022, the withheld information related to a live matter.

### **Regulation 12(5)(b) – Course of Justice**

14. This reasoning covers whether the council is entitled to rely on Regulation 12(5)(b) to refuse to disclose some of the requested information. The specific documents withheld under this exception were highlighted to the complainants and the Commissioner via a schedule of documents.
15. Regulation 12(5)(b) allows a public authority to 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.
16. The exception is wider than simply applying to information which is subject to legal professional privilege. Even if the information is not subject to legal professional privilege it may still fall within the scope of the exception if its disclosure would have an adverse affect upon the course of justice or the other issues highlighted.
17. The council provided the Commissioner with a schedule of documents detailing the withheld information. It highlights that the relevant documents were withheld or redacted on the basis that they contained information which was either subject to litigation privilege or advice privilege.
18. The Commissioner is satisfied from viewing the withheld information that it would constitute confidential communications between a client and a professional legal adviser made for the dominant purpose of seeking and/or giving legal advice, or in preparation for litigation between the parties. The exception to this is document 36. This is not a communication sent with the dominant purposes of made for the

purpose of providing or obtaining legal advice about proposed or contemplated litigation. The Commissioner therefore requires that document 36 is disclosed.

19. The Commissioner is also satisfied that at the time of the response to the request for information there was ongoing litigation between the complainants and the council. As noted above, the complainants highlighted that the legal case was heard on 1 November 2022.
20. The complainants have provided no evidence that privilege has been waived, and the withheld information is not otherwise in the public domain. The Commissioner therefore considers the information to be covered by legal professional privilege on the basis of both litigation and advice privilege.
21. As the withheld information is subject to legal professional privilege and related, at the time of the response, to a live matter, a disclosure of the information would undermine the level playing field which is intended between the parties during the course of litigation proceedings. It would disclose confidential communications between one party and their legal advisers regarding the litigation.
22. The Commissioner is therefore satisfied that disclosure of the requested information would have an adverse effect on the course of justice and therefore finds that the exception at Regulation 12(5)(b) is engaged. The Commissioner will now go on to consider the public interest test.

#### The public interest

23. With regards to the public interest test, in its internal review response, the council outlined the factors it took into account in favour of disclosing the requested information. It stated that there is a legitimate public interest in transparency and accountability as to how justice is administered, and this would be furthered by the disclosure of the requested information. The Commissioner agrees that there is a public interest in creating transparency in planning matters and in highlighting the work of the council relating to its planning and enforcement functions.
24. The council argued that there is generally a strong public interest in maintaining legal professional privilege, and that this is stronger when a matter remains live. It argued that disclosing the information would prejudice its legal deliberations on the issues involved. The Commissioner notes a strong public interest in allowing clients to speak freely and frankly with their legal advisers on a confidential basis. This is a fundamental requirement of the English legal system.

25. The Commissioner has taken into account the circumstances surrounding the request, both party's arguments, the timing of the request and the nature of the withheld information. He is satisfied that the public interest in allowing free, frank, and full confidential discussions on a matter which was the subject of ongoing litigation lies with the exception being maintained in this instance.
26. 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. Whilst the Commissioner has taken into account the requirements of Regulation 12(2), he considers that the public interest that lies in favour of maintaining the exception clearly outweighs that in the information being disclosed in this instance. As the withheld information concerns an ongoing live issue which was, at the time still subject to ongoing litigation, the Commissioner does not consider that the presumption in Regulation 12(2) tips the balance in favour of disclosure in this instance.
27. Therefore, 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, other than for document 36 of the schedule.

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

28. Under Regulation 12(4)(d) of the EIR a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
29. Regulation 12(4)(d) is class-based, which means that it is engaged if the information in question falls within its scope. If the information falls into one of the three categories, then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception. However, Regulation 12(4)(d) is subject to the public interest test set out in Regulation 12(1).
30. The council provided the Commissioner with copies of the documents which it has withheld under this exception. They are draft copies of the reports relied upon by the council.
31. Having considered the withheld information, the Commissioner accepts that the reports are in draft form and are therefore unfinished documents. His decision is therefore that the exception in Regulation 12(4)(d) is engaged by this information. The Commissioner has therefore gone on to consider the public interest test.

The public interest

32. The Commissioner has considered the public interest in favour of the information being disclosed. As above, there is a public interest in transparency and accountability as to how justice is administered which would be furthered by the disclosure of the requested information. More widely, there is a public interest in general transparency over issues to do with planning decisions, appeals, and the enforcement of planning laws generally.
33. There is also a strong public interest in the general fairness of decisions as regards planning decisions and the administration of justice.
34. However, the Commissioner notes that at the time that the request was responded to by the council, the parties were still involved in litigation regarding the planning issues, and an appeal was ongoing regarding it.
35. A disclosure of draft documents during the course of the case would potentially highlight weaker arguments or areas where the council had issues concerning the legal arguments it was preparing. A disclosure of the draft documents could therefore undermine the council's arguments in the court hearing by highlighting areas of potential weakness to the other party.
36. The Commissioner recognises that there is a strong public interest in allowing private thinking space to allow council staff and its legal advisers to develop their arguments, to outline the reasons for their decisions in the best way it can, and to have an ability to have the final version of that document used for the purposes for which it was created. A disclosure of draft documents prior to the final decision on the appeal being taken risks encroaching on that safe space, even though the final versions of the documents had by that time been completed. The litigation, of which the final reports played a part, was still ongoing.
37. As above, the Commissioner has considered the presumption towards disclosure required by Regulation 12(2). His decision on the application of Regulation 12(4)(d) is that the public interest in maintaining the exception clearly outweighs that in the information being disclosed.
38. Therefore, even with the presumption towards disclosure required by Regulation 12(2), the Commissioner is satisfied that the exception was correctly engaged and the public interest rests in it being maintained in this instance.

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

39. Regulation 12(4)(e) states that information a public authority may refuse to disclose information to the extent that it is an internal communication. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. Regulation 12(4)(e) is, however, subject to a public interest test under Regulation 12(1) where it is engaged. The council highlighted the information which it was applying Regulation 12(4)(e) to in its schedule of documents.
40. Determining whether communications are 'internal' depends on the facts of any particular case, taking into account both the nature of the relationship between the parties and the communications themselves.
41. A communication sent internally, but which is copied or also sent to an external third party, is not an internal communication. It has been communicated both internally and externally. The unique feature of an internal communication is that it is *only* circulated internally.
42. The Commissioner has viewed the withheld information. It is correspondence, comments and draft reports which are being shared between parties at the council. He notes, however, that the correspondence involves, or is copied to, external experts, and to legal advisers in other authorities.
43. The Commissioner's decision is therefore that Regulation 12(4)(e) cannot apply to these documents. As the Commissioner has decided that the exception was not engaged for these documents there is no requirement for him to conduct a public interest test under Regulation 12 for this information.
44. In line with this decision the Commissioner requires the council to disclose copies of documents: 7, 8, 19, and the relevant part of document 23.

### **Regulation 5(2)**

45. Regulation 5(2) requires that an authority responds to a request as soon as possible and no later than 20 working days after the date of receipt of the request.
46. The complainant made their request for information on 26 January 2021. The council provided its partial response to this on 11 March 2021, but stated that it would respond to the remainder of the request in due course. The council did not, provide the remainder of its response until 23 December 2022, however.

47. The Commissioner has therefore decided that the council did not comply with the requirements of Regulation 5(2).



## Right of appeal

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48. 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)

49. 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.
50. 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 .....**

**Ian Walley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
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**Water Lane**  
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