

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

**Date:** 17 May 2017

**Public Authority:** Babergh District Council  
**Address:** Corks Lane  
Hadleigh  
IPSWICH  
IP7 6SJX

**Decision (including any steps ordered)**

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1. The complainant has requested information regarding communication between Babergh District Council (the council) and Taylor Wimpey relating to the Wolsey Grange development. The council provided some information but sought to withhold the remainder under regulation 12(4)(d) and 12(5)(f) as the information is incomplete data and also its disclosure would adversely affect the interests of the developer.
2. The Commissioner's decision is that the council has failed to adequately demonstrate that the exceptions at 12(4)(d) and 12(5)(f) apply to the requested information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld information.
4. 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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5. On 30 December 2015 the complainant made the following request for information:
  1. *Details of any communications between Taylor Wimpey & Babergh District Council e.g records of telephone conversations, meeting minutes, dates & times of meetings, agenda (non-exhaustive list) relating to the Wolsey Grange development and land in Chantry Vale.*
  2. *Details of any entertainment provided by Taylor Wimpey for Babergh District Council representatives & their names/position at Taylor Wimpey/BDC.*
  3. *Details of any entertainment provided by Babergh District Council for Taylor Wimpey representatives & their names/position at BDC/Taylor Wimpey.*
6. The council responded on 26 January 2016 and provided some information within the scope of question 1, but refused to provide the remainder relying on regulation 12(4)(d). it also stated that no information was held in respect of questions 2 and 3.
7. The complainant requested an internal review on 26 February 2016. The council provided the outcome of this on 23 May 2016 in which it revised its position and stated that the council also relied on regulation 12(5)(f) to withhold the pre-application meeting minutes at part 1. However, it also explained to the complainant that it would look at the minutes again to determine if there are parts which could be disclosed. The council stated that this may take some time due to the need to involve other parties. To date, no such information has been disclosed. The council also maintained its position that the information requested at 2 and 3 was not held.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 22 August 2016 to complain about the way her request for information had been handled. She complained that the council had withheld the majority of the information within the scope of the request. She also complained about the time taken to deal with the request.
9. In her initial letter to the complainant, the Commissioner clarified that as the focus of her complaint letter was on part 1 of the request, this would form the focus of the investigation. Therefore, the Commissioner considers the scope of this case to be to determine whether the council was entitled to rely on the exceptions cited to withhold the requested

information sought in part 1 of the request of 30 December 2015. She will also record any procedural breaches of the EIR.

## Background

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10. The planning application for the development of 475 Houses at Wolsey Grange was submitted to the council on 29 July 2015. The application was initially determined at the Planning Hearing of 25 November 2015, in which the application was refused. During that hearing a note was passed to a member of the planning committee, and consequently, the council decided to hold a second planning hearing in front of a differently constituted planning committee. This took place on 10 February 2016 and permission was then granted, subject to the terms of a section 106 agreement.
11. The request was made following the first decision on 25 November 2015 in which permission was refused. The internal review was requested and completed after 10 February 2016 when the planning permission had been granted subject to a section 106 agreement on.

## Reasons for decision

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### Regulation 12(4)(d) information in the course of completion

12. Regulation 12(4)(d) states:

*"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—*

*(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data"*

13. The aims of the exception are:

- to protect work a public authority may have in progress by delaying disclosure until a final or completed version can be made available. This allows it to finish ongoing work without interruption and interference from outside; and
- to provide some protection from having to spend time and resources explaining or justifying ideas that are not and may never be final.

14. The council applied the exception to all of the withheld information, which consists of 11 sets of minutes of meetings between the council,

the developer and at times other interested parties. These meetings discussed detailed pre-planning application matters in respect of the development at Wolsey Grange. The council provided the Commissioner with a copy of the minutes numbered 1 – 11.

15. The Council argued that the exception applied as the information was incomplete. It advised the Commissioner that:

*"The actual planning application is the completed data which should be referred to. The notes of meetings before the application is submitted are just "reminders" of the issues to be addressed in the formal application. The final application documents are the completed data the meeting notes are working towards."*

16. The Commissioner has considered whether the withheld information relates to information in the course of completion. It is the Commissioner's view that the relevant consideration here is the information contained within each document itself and the purpose for which it was created not the overall application to which it relates.
17. At the time of the internal review, the planning application had been decided, and had been granted subject to a 106 agreement, which has not yet been finalised. However, the issue for the Commissioner to determine is whether the withheld information constitutes material which is still in the course of completion.
18. Having viewed the withheld information and considered the council's arguments, the Commissioner is of the view that it does not satisfy that test. The minutes cannot be considered as incomplete data as they are agreed final records of the meetings in question, and stand alone as completed documents. It is clear that they were created to form an accurate and agreed record of those meetings, and are not "reminders" of issues to be addressed in the formal application as suggested by the council, not least because the application has been granted, albeit subject to section 106 conditions.
19. The Commissioner therefore does not agree that the information created and retained in the process of a planning application will be material in the course of completion, awaiting the implementation of the planning decision.
20. As noted above, the aims of this exception are to allow a public authority to complete a piece of work free from unwarranted interference and interruption from outside, or to provide some protection from spending resources justifying or explaining ideas that may never be final. Given that the minutes themselves are completed documents, and the planning application to which they relate has been granted, subject to conditions, the Commissioner does not accept that

disclosure of the withheld information would prevent those aims being fulfilled. There is no final or completed version of the minutes to be finished, as the minutes are completed documents. In addition the majority of information relating to the planning application, once it was submitted is publicly available information. It does not follow therefore that earlier information on the same topic should be considered as incomplete and not available for disclosure, when information on the matter generated since then is already available.

21. The Commissioner therefore considers that the withheld information is clearly not unfinished documents or incomplete data itself. Consequently, she has determined that the requested information did not relate to material in the course of completion at the time of the request and that the exception in regulation 12(4)(d) was not engaged. She has therefore gone on to consider the council's application of regulation 12(5)(f).

### **Regulation 12(5)(f) – detriment to confiders**

22. Regulation 12(5)(f) states that:

*"a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—*

*(f) the interests of the person who provided the information where that person—*

*(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;*

*(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and*

*(iii) has not consented to its disclosure."*

23. In the Commissioner's view, the purpose of this exception is to protect the voluntary supply to public authorities of information that might not otherwise be made available to them. In such circumstances a public authority may refuse disclosure when it would adversely affect the interests of the information provider. The wording of the exception makes it clear that the adverse effect has to be to the person or organisation providing the information rather than to the public authority that holds the information.
24. The council has applied regulation 12(5)(f) to all the withheld information as described in paragraph 14.

25. Following the lead of the Information Tribunal<sup>1</sup>, the Commissioner finds it useful to consider the following four stage test to assist in determining whether the exception is engaged:

- Would disclosure adversely affect the interests of the person who provided the information to the public authority?
- Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?
- Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?
- Has the person supplying the information consented to its disclosure?

26. In considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (i.e. more than trivial), and to explain why disclosure **would**, on the balance of probabilities, directly cause the harm.

27. There is no requirement for the adverse effect to be significant – the extent of the adverse effect would be reflected in the strength of the public interest test arguments, once it is established that the exception is engaged. However, the public authority must be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur. The need to point to specific harm and to explain why it is more probable than not that it would occur reflects the fact that the requirement here is to show that the adverse effect **would** occur. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party's interests.

28. The council first applied regulation 12(5)(f) at internal review in which it stated that withholding the information "*has been Babergh and Mid Suffolk councils' traditional stance on pre-application discussion and it was within this view that the pre-application meetings ... took place.*" The council advised that during the internal review it considered current advice and guidance on the matter which indicated a range of approaches to pre-application meetings, and is therefore looking at the most appropriate way to handle pre-application meetings, and as a

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<sup>1</sup> John Kuschnir v Information Commissioner and Shropshire Council (EA/2011/0273; 25 April 2012)

result the traditional stance may change. In relation to the specific request it stated that the council would review the minutes again to determine whether parts could be disclosed. However, at this time, no further information has been disclosed.

29. In its submissions to the Commissioner, the council stated that disclosure of the withheld information would adversely affect the interests of the developer who provide the information to the council on the basis that it was given in confidence. The council explained that it does not have any power to require information to be provided to it prior to submitting a formal application for planning permission. In addition to this, at the time of the meetings, the council treated pre-application meetings as confidential, and did not make the developer aware that minutes of the meetings may be the subject of requests for information.
30. The council informed the Commissioner that it is reviewing its approach to pre-application meetings with a view to making it clear to developers that disclosure could occur.
31. The Commissioner accepts that the developer was not legally obliged to provide the information to the council, and that the council was not entitled to disclose it other than through EIR. However, no arguments were provided regarding the adverse effect disclosing the information would have on the developer.
32. Although the Commissioner stated in her initial letter to the council that she will usually give one opportunity to public authorities to provide their full and final arguments, in this case she asked the council to provide further detailed arguments regarding its application of the exception. She specifically advised that the council needed to demonstrate a causal link between the information requested and the adverse effect on the provider of that information. The Commissioner provided a link to her guidance on the adverse effect test, and advised the council to consider it.
33. The council did not meet the Commissioner's deadline for providing further submissions, and despite being given an extension to respond at the council's request, to date, no further arguments have been received. The council has failed to demonstrate a causal link between the withheld information and any adverse effect on the developer. Therefore, the Commissioner has concluded that the council has failed to engage the exception at regulation 12(5)(f).
34. In its submissions the council also stated that it would provide the Commissioner with a further set of the withheld information with the commercially sensitive information highlighted. However, at the time of writing this decision notice, and despite asking for further information, the Commissioner has not been furnished with any such information.

The Commissioner considers therefore that whilst the council has referred to commercially sensitive information, it has not cited any exceptions to this effect or even identified which parts of the withheld information this would relate, and consequently, she has not considered it further in this notice.

### **Regulation 11 – Internal review**

35. Regulation 11(1) provides that an applicant may make representations to a public authority, if he or she considers that the authority has failed to comply with the requirements of the EIR in relation to the request.
36. Regulation 11(3) requires that the public authority consider the complainant's representations, along with any supporting evidence provided by the complainant, and to decide whether it has complied with the requirements of the EIR. Finally, regulation 11(4) requires that the authority notify the applicant of its decision in relation to the applicant's representations no later than forty working days after receipt of those representations.
37. The complainant requested an internal review on 26 February 2016. The council did not provide the outcome of this until 23 May 2016. As this is outside the prescribed 40 working day time frame, the Commissioner finds that the council failed to comply with regulation 11(4).

### **Other matters**

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38. The complainant has complained to the Commissioner about the delays experienced during this investigation, and has asked whether any sanctions can be applied in respect of this.
39. As recorded above, the council has failed to provide substantive arguments on the application of the exceptions, despite the Commissioner offering additional opportunities to do so. In addition, the arguments that have been submitted were provided outside the deadline set out by the Commissioner.
40. The council explained that the delay in providing its submission was due to the Information Management Specialist dealing with the case also overseeing information management issues for the office move as part of the working together strategy of Babergh District Council and Mid Suffolk Council. The Commissioner is aware that this employee deals with information management matters for both councils and would remind both councils to ensure that the situation does not continue to impact negatively on its compliance with information rights matters. The Commissioner will write separately on this issue to the councils

concerned and enquire as to the procedures and policies in place to ensure ongoing compliance.

## Right of appeal

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41. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

42. 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.
43. 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 .....**

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