

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

Decision notice

Date: 26 October 2018

Public Authority: Waverley Borough Council
Address: The Burys
Godalming
Surrey
GU7 1HR

Decision (including any steps ordered)

1. The complainant requested information from Waverley Borough Council ("the Council") relating to the Waverley Borough Council Local Plan. Specifically, he wished to be provided with correspondence between the Planning Inspectorate and the Council between particular dates.
2. The Council disclosed some of the correspondence during the course of the Commissioner's investigation.
3. The Commissioner's decision is that the Council correctly withheld the remainder of the information under regulation 12(5)(d) because disclosure would adversely affect the confidentiality of proceedings.
4. The Commissioner does not require the Council to take any steps.

Request and response

5. On 19 October 2017, the complainant wrote to the Council and requested information in the following terms:

"All e mails and attachments to e mails between PINS Inspector [redacted name] or his staff and all and any member of Waverley

Borough Council staff together with all Councillors, both Executive and Full Council relating to Waverley Borough Council Local Plan Part 1 and Consultation on Local Plan Part 1 [between] 06.00 hours on Thursday 6 July 2017 through to 06.00 hours on Friday 8 September 2017."

6. On 15 November 2017, the Council responded and explained that it had identified 85 emails between its staff and the Local Plan Inspector's Programme Officer ("PO"); it also explained that it did not hold any emails between Council staff and the Inspector himself, since the PO is the point of contact between Council officers and the Inspector. Furthermore, it stated that it did not hold any emails between councillors and either the PO or the Inspector for the relevant period.
7. With regard to the 85 emails, the Council explained that it was withholding them under regulation 12(5)(d) of the EIR because disclosure would adversely affect the confidentiality of proceedings.
8. The complainant requested an internal review on 21 November 2017, raising a number of points, and mentioning that no public interest test appeared to have been carried out. The Council sent him the outcome of its internal review on 18 January 2018. It explained that, while it was still withholding the information under regulation 12(5)(d), it also considered that it would additionally be exempt from disclosure under regulation 12(5)(b) as disclosure would adversely affect the course of justice. It also explained some details of the public interest test that had been carried out.

Background to the case

9. The Council has explained that the withheld information relates to the Waverley Local Plan Part 1 Examination Process ("the Examination Process"), which began in December 2016 with the submission by the Council to the Planning Inspectorate of its draft Local Plan Part 1, and concluded in February 2018 (after the date of the request) with the publication of the Local Plan Inspector's final report.
10. The Council also explained that "*Examination Hearings*", which are meetings attended by the public, took place between 27 June and 6 July 2017, and that these were followed by further consultation with the Planning Inspector's office and the public.

Scope of the case

11. The complainant contacted the Commissioner on 2 February 2018 to complain about the way his request for information had been handled.
12. During the course of the investigation, the Council reconsidered its position with regard to the withheld information. It determined that 38 of the 85 withheld emails could be disclosed in their entirety. It also determined that a further 12 of the emails could be disclosed subject to some redactions being made, predominantly to third party personal data. This information was accordingly disclosed. The complainant has not asked for the redacted information in the 12 emails to be disclosed.
13. The scope of the analysis which follows is to determine whether the remaining 35 emails have been correctly withheld under the exceptions at regulation 12(5)(d) and/or 12(5)(b) of the EIR.

Reasons for decision

Regulation 12(5)(d) – the confidentiality of proceedings

14. Regulation 12(5)(d) of the EIR states that a public authority may refuse to disclose information if to do so would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.
15. The engagement of the exception involves a three stage test:
 - What are the proceedings in question?
 - Is the confidentiality of those proceedings provided by law?
 - Would disclosing the information adversely affect that confidentiality?
16. The term 'proceedings' is not defined in the EIR. However, the Commissioner, in her guidance on this exception¹, has said that she considers that:

"...the word implies some formality, i.e. it does not cover an authority's every action, decision or meeting. It will include, but is not limited to:

¹ https://ico.org.uk/media/1626/eir_confidentiality_of_proceedings.pdf

- *formal meetings to consider matters that are within the authority's jurisdiction;*
- *situations where an authority is exercising its statutory decision making powers; and*
- *legal proceedings.*

In each of these cases, the proceedings are a means to formally consider an issue and reach a decision. 'Proceedings' could include, for example, the consideration of a planning application by a planning authority, or an internal disciplinary hearing in a public authority; both of these have a degree of formality."

17. The Council explained the Examination Process, as set out previously in this notice.
18. It considers that the Examination Process and Examination Hearings are proceedings which are formally convened under the Planning and Compulsory Purchase Act 2004 (as amended), and which require both the Council and the Planning Inspectorate to exercise their statutory decision-making powers.
19. The Council has explained in this case that the withheld information relates to the decision-making process for both parties, leading to the eventual adoption of an agreed Local Plan. The Planning Inspectorate's decision relates to the soundness of the Local Plan, and the Council's decision relates to whether to adopt the Local Plan.
20. The Commissioner is aware that the procedure to be followed by a local authority leading to the adoption of a Local Plan is a statutory process, the details of which are set out in various pieces of planning legislation.
21. She accepts that the withheld information relates to a situation where an authority is exercising its statutory decision-making powers and, therefore, relates to formal 'proceedings'.
22. The Commissioner has then gone on to consider whether the confidentiality of these proceedings is provided by law.
23. In this case, the Council has said that the information is subject to the common law duty of confidence. In the Commissioner's view, the common law of confidence will apply where the following two conditions are satisfied. First, the information has the necessary quality of confidence. This means that the information must not otherwise be accessible, and must be of importance to the confider and not trivial. Secondly, the information must have been communicated in

circumstances importing an obligation of confidence, which can be expressed explicitly or implicitly.

24. The Council has argued as follows:

"It is the Council's position that the dialogue with the Inspector, in which the Council sought his guidance and advice on the modifications it intended to make to its Local Plan, attracts the necessary quality of confidence at common law as to fall within the exception in Regulation 12(5)(d). There is a clear expectation on the part of the Inspector, as communicated by his Programme Officer, that guidance he was providing was confidential and not for publication... The remaining 35 emails do attract the necessary quality of confidence, and that confidentiality should be maintained."

25. The Commissioner has considered the withheld information and is satisfied that it is not otherwise accessible. She also accepts that the issue of modifications to the Local Plan is not trivial.

26. The Commissioner is aware that the complainant's view is that *"there is no reasonable expectation of confidence within the exchanges of emails"* and that the parties to the correspondence should have expected that the information may be made public. However, having considered the withheld information, which comprises discussions and draft documents relating to aspects of the Examination Process and the Local Plan, the Commissioner considers that it is evident from the nature of the contents of the withheld information that there was an expectation of confidence. It is made explicit that the parties are discussing draft versions of documents with the aim of finalising them, and the correspondence includes reminders that documents are not ready for publication.

27. Having determined that the contents of the correspondence demonstrate that there was an expectation of confidence between the parties, the next step in deciding whether the exception is engaged relates to an adverse effect. The exception at regulation 12(5)(d) is only engaged where the public authority can show that disclosing the information would adversely affect the confidentiality of the proceedings. It is not enough to show that an adverse effect *may* occur.

28. The Commissioner's guidance on regulation 12(5)(d), referenced previously, states:

"'Adversely affect' means there must be an identifiable harm to, or negative impact on, the interest identified in the exception. Furthermore, the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure would have an

adverse effect. 'Would' means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed. If the adverse effect would only be likely to occur, or could occur, then the exception is not engaged".

29. The interest that is protected by regulation 12(5)(d) is the confidentiality of proceedings, where that confidentiality is provided by law.

30. The Council has explained that:

"the Examination process under the 2004 Act is one which incorporates... elements of open public consultation (both prior to the Examination Hearings and following), open public inquiry by way of the Examination Hearings themselves, and private dialogue with the Examining Inspector in order for the Council... to develop its Local Plan as the Examination Process proceeds... Disclosure of correspondence in which the Council was seeking the views and advice of the Inspector in respect of modifications the Council was considering making to its Local Plan, following the Examination Hearings, including drafts and redrafts of draft Local Plan policies, would... undermine the integrity of the Examination process in which there is by design an element of private discussion with the Inspector open to the Council. In fact... following an Examination Hearing, an Inspector will expect the local authority to go away and take on board the advice and guidance he has provided in open session during the Hearings, and to then produce a final set of modifications to its Local Plan that the Inspector agrees with. The opportunity for private dialogue with the Inspector during this time enables open dialogue and discussion of ideas and revisions to policies that might not ultimately be considered by the Inspector to be sound".

31. The Council, specifically, argued that disclosure of the 35 emails and attachments would undermine the confidential element of the proceedings, and indeed *"the integrity of the decision-making process"*, rendering that element of the process *"essentially pointless"*.

32. The Commissioner accepts that the disclosure of the withheld information would have an adverse effect on the confidential element of the proceedings. She has therefore determined that the exception at 12(5)(d) is engaged, and has gone on to consider the public interest test.

The balance of the public interest

Arguments in favour of disclosing the information

33. On receiving a request for information under the EIR, not only must a public authority weigh up the strong public interest in the requirement

that it conduct its business in a transparent manner, which underpins all freedom of information legislation, but also that there is specifically a presumption of disclosure set out in regulation 12(2) of the EIR.

34. The complainant has argued that *"it is in the public interest for the information requested to be made public... increasing public confidence in the openness of the process"*.
35. He explained that he was seeking information on how certain decisions were made while the Local Plan was being shaped. He considers that there is a public interest in finding out whether certain decisions were predominantly led by one party or another.

Arguments in favour of maintaining the exception

36. In her guidance² on the public interest test as it applies to the EIR, the Commissioner explains that *"in considering the public interest in relation to any particular exception, a public authority should take into account only the public interest arguments that are relevant to that exception – public interest arguments that support other exceptions are irrelevant"*.
37. The Council has put forward arguments relating to the importance of protecting the confidentiality of proceedings.
38. It argues that, at this stage of proceedings, it is important to discuss certain ideas frankly and openly, away from public scrutiny, and to be allowed time and space *"to develop and formulate ideas and proposals"* in relation to the Local Plan.
39. It has argued that this issue extends beyond this specific case, and that: *"If the Inspector and local authority in this case, or in any other case, were aware that such advice and guidance were to be subject to public disclosure, then inevitably this would make both inspectors and local authorities hesitant to guide and seek guidance (respectively) and could see the post-Hearings process halted completed"*.
40. Specifically, it has argued that disclosure would *"discourage any Inspector and local authority from engaging in post-Hearing dialogue to any degree of openness and frankness in situations where confidentiality is required in order to discuss potential modifications to policies that could be highly sensitive... the publication of proposed modifications that*

² https://ico.org.uk/media/1629/eir_effect_of_exceptions_and_the_public_interest_test.pdf

ultimately may not form part of a final version of the Local Plan could undermine the integrity of the ultimate decision-making process".

41. In the Council's view, therefore, the disclosure of the information would harm both its Examination Process and, potentially, that of other local authorities in their dealings with the Planning Inspectorate.
42. In addition, the Council considers that further weight is added to the public interest in maintaining the exception because the information is *"current and actively being relied upon... [and] relates to a live ongoing matter which the Council may seek advice in the future. The Council requires space and time to consider matters relating to its emerging Local Plan"*.
43. The Council explained that there is an expectation that certain information will not be placed in the public domain *"whilst the process remains live, and was supplied in order to facilitate the frank and open exchange of ideas in what was viewed to be a confidential setting"*.
44. While not directly relevant to the adverse effect on the confidentiality of proceedings, the Council also set out the view that it considered there was only limited public interest in the withheld information itself since *"the Local Plan process is statutory and requires public consultation at the appropriate stages. Planning and legal processes provide parties with other remedies to scrutinise and challenge the Councils' decision making by virtue of judicial review... the plan and Inspector's findings will become public knowledge and will allow the public to ask questions and understand the rationale behind any options which are put forwards"*.
45. The Council has explained that many documents detailing aspects of the Local Plan adoption process are in the public domain. It explained that *"vast numbers of examination documents... were published by the Council... which the Inspector required to be published by the Council, and which were produced by numerous parties to the Examination process during its course. A list of these documents and representations can be found at [link provided]."*
46. Ultimately, the Council has argued that *"the public interest is best served by progress being made"*.

The Commissioner's decision

47. The Commissioner considers that there is a public interest in good decision-making by public authorities, and in those authorities conducting their business in an open and transparent manner.

48. However, in cases where the public authority is relying on regulation 12(5)(d), her established view, set out in her guidance as referenced previously, is that there is a general public interest in protecting confidential information. Breaching an obligation of confidence undermines the relationship of trust between confider and confidant, regardless of whether the obligation is based on statute or common law. The fact that the confidentiality is 'provided by law' also implies that there is a public interest in protecting it. Therefore, where the exception is engaged, there is always some inherent public interest in maintaining it.
49. The Commissioner is satisfied that the arguments in favour of maintaining the exception set out at paragraphs 38 - 43 of this notice do arise naturally from the nature of the exception, and has therefore given them due weight.
50. In the Commissioner's view, weight must be placed on the ability to carry out the all aspects of the Local Plan adoption process effectively. She accepts that confidentiality may be needed at certain stages of the process, to ensure that proceedings are conducted as effectively as possible.
51. In this case, she considers that disclosing the specific information requested would adversely affect this confidentiality.
52. She is also satisfied, as she has been in previous decisions, that, during the formal planning process, the public has the opportunity to engage openly with the Council.
53. On balance, the Commissioner finds that there is some public interest in releasing information that would shed light on the Council's decision-making processes. However, in this case, there is a weightier public interest in protecting the confidentiality of proceedings by withholding the information.
54. She has determined that, taking all of the above into account, the public interest in this case lies in maintaining the exception. Her decision at paragraph 3 above, therefore, is that the exception to the duty to disclose environmental information at regulation 12(5)(d) applies to the withheld information, and it has not been necessary to consider the Council's alternative exception at regulation 12(5)(b).

Right of appeal

55. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

56. 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.
57. 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

Ben Tomes
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF