

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

### **Decision notice**

**Date:** 24 May 2018

**Public Authority:** Stratford-on-Avon District Council  
**Address:** Elizabeth House  
Church Street  
Stratford-Upon-Avon  
Warwickshire  
CV37 6HX

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

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1. The complainant has requested internal communications relating to the council's handling of his previous information requests. The council refused the request, withholding the information under the exceptions for disclosure of personal data, internal communications, and the adverse affect to the course of justice/the ability to conduct an inquiry of a criminal nature – regulations 13, 12(4)(e) and 12(5)(b) of the EIR.
2. The Commissioner's decision is that for the most part, the council has applied the exception to disclosure provided by regulation 12(4)(e) of the EIR correctly, however there are a small number of documents to which regulation 12(4)(e) has been claimed where on balance the public interest lies in favour disclosure, and the council has therefore breached the EIR in respect of these.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information as listed in the annex with suitable redactions made to remove the personal data, specifically the contact details, e.g., email addresses and telephone number of senior council officers.

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 29 August 2017 the complainant wrote to the council and requested information in the following terms:

*"I wish to make another FOI request – for all internal correspondence relating to the handling of this FOI request and the initial request."*

6. On 6 October 2017 the council responded. It stated that it assumed the request related to previous information requests it had received from the complainant on 13 July 2017 and 8 August 2017, and refused to provide the information citing regulation 12(4)(e) as its basis for doing so.
7. On 6 December 2017 the council carried out an internal review and wrote to the complainant with its decision. It maintained its original position and in addition cited regulation 12(5)(b) for withholding the requested information.

## Scope of the case

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8. On 11 December 2017 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. On 18 January 2018, the Commissioner wrote to the council about the complainant's request for information and asked it a series of questions. On 9 February 2018 the council responded confirming it was relying on regulation 12(4)(e) and 12(5)(b) and in addition cited regulation 13 to withhold the requested information.
10. The Commissioner considers the scope of her investigation to be to consider whether the council was correct to refuse the request under regulations 13, 12(4)(e) and 12(5)(b) of the EIR.

## Reasons for decision

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## **Regulation 12(4)(e) of the EIR – Disclosure of internal communications**

11. Under this exception a public authority can refuse to disclose information on the basis that *“the request involves the disclosure of internal communications”*. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. Rather, as long as the requested information constitutes an internal communication then it will be exempt from disclosure, subject to the public interest test.
12. The Commissioner has published guidance<sup>1</sup> on regulation 12(4)(e), which includes a description of the types of information that may be classified as ‘internal communications’. Therefore, there must be consideration of whether the information in question can reasonably be described as an ‘internal communication’.
13. There is no definition contained in the EIR of what is meant by ‘internal’. Consequently, in the absence of one, a judgement on what is an internal communication must be made by considering the relationship between a sender and recipient, the particular circumstances of the case and the nature of the information in question. Typically, however, an internal communication is one that stays within a public authority.
14. In her guidance on the exception, the Commissioner acknowledges that the concept of a ‘communication’ is broad and will encompass any information someone intends to communicate to others, or places on file where others may consult it. She states that an email sent from one individual within a public authority to multiple recipients within that public authority will constitute an internal communication. An email sent within a public authority and copied to a third party will not constitute an internal communication. Similarly, an internal email will cease to be an internal communication once someone within the public authority has communicated it to someone outside the authority, as it is no longer a purely internal communication, and the exception will not be engaged.
15. In this case the withheld information consist of emails sent internally between council officers who are deliberating on, drafting and finalising responses to the complainant’s previous information requests. The Commissioner is therefore satisfied that the withheld information falls within the definition of an internal communication and regulation 12(4)(e) is engaged.

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1634/eir\\_internal\\_communications.pdf](https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf)

16. However, there are a number of documents within the withheld information which the Commissioner has found do not fall within the scope of the request. These fall into the following categories:
- (a) The documents to which the council has solely applied regulation 12(5)(b) and further applied regulation 13. These documents do not fall within the scope of an internal communication and therefore do not fall within the scope of the request. This is because, these communications are between the council and an external third party in relation to the council's enforcement investigation. The documents concerned are listed in the annex.
  - (b) Emails between the complainant and the public authority. These documents do not fall within the scope of an internal communication and therefore do not fall within the scope of the request. This has been recognised by the public authority. The documents concerned are listed in the annex.

### **The public interest test**

17. Where the exception in Regulation 12(4)(e) is engaged it is subject to a public interest test required by Regulation 12(1) of the EIR. The test is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. When carrying out the test the Commissioner must take into account a presumption towards disclosure of the information which is required by Regulation 12(2) of the EIR.

### **Public interest in favour of disclosing the requested information**

18. The council confirmed to the Commissioner that it had taken into account the presumption in favour of disclosure as required by Regulation 12(2). It also identified a general public interest in disclosure as a means to promote transparency and accountability. It said that these arguments are however limited because disclosure of the particular information in this case [internal communications relating to its handling of the complainant's previous information requests] would not lead to any greater awareness and understanding of environmental matters, a free exchange of views, more effective public participation in environmental decision making or ultimately contribute to a better environment.
19. The complainant has alleged that council officers have conspired to block disclosure of the withheld information in order to 'cover up a misdemeanour' by a council officer.

20. The Commissioner notes that although the complainant has requested internal communications relating to the council's handling of his previous information requests, those requests relate to environmental information, e.g., a planning enforcement case. The Commissioner considers that there is always a general public interest in environmental information derived from the purpose of the EIR.

### **The Public interest arguments in favour of maintaining the exception**

21. In essence, the public interest considerations relating to Regulation 12(4)(e) relate to the protection of thinking space and the ability to have full and frank discussions without fear that the information will be disclosed.
22. As stated in her aforementioned guidance on the subject, there is no automatic or inherent public interest in withholding an internal communication. Arguments should relate to the particular circumstances of the case and the content and sensitivity of the specific information in question.
23. The Commissioner notes that at the time of submitting his request for information to the council, the complainant also requested an internal review of its handling of his previous request dated 8 August 2017, specifically its decision to apply regulation 12(5)(b) to withhold the requested information. The council provided its review decision [in which it maintained its original position] on 6 December 2017. The complainant contacted the Commissioner about the council's handling of that request on 9 December 2017. Following her investigation into the matter the Commissioner decided [FER0720759] that the council had correctly applied Regulation 12(5)(c) to withhold the information. The complainant has since raised an appeal to the Information Tribunal about the Commissioner's decision.
24. In this case, the council argues that releasing the requested information would prevent it from having the necessary thinking space to consider matters that were live at the time of the request and some that still remain live now and would also inhibit free and frank discussion in consideration of these matters: *"the information requested is internal communications comprising legal advice, deliberations, drafting and finalising responses to the two preceding information requests (which were ultimately sent to [redacted]) about a planning enforcement investigation that was live then and remains live now. Incidentally, the internal communications include information about the live planning enforcement investigation. There is also public interest in preserving a safe space to seek and consider advice and this particular advice also*

*addresses the volume of information concerning the live planning enforcement investigation."*

25. The Commissioner recognises that she must take into account the presumption towards disclosure required by regulation 12(2) as well as the council's arguments in reliance on regulation 12(4)(e). The question of balancing the factors to determine whether the information should be disclosed is not an easy task.

### **The balance of the public interest test**

26. The Commissioner notes that the EIR carries a presumption in favour of disclosure when considering the public interest in maintaining an exception. She also recognises that there is an inherent public interest in the transparency of decision making, in this case this relates to decisions made in respect of the complainant's information requests.
27. The Commissioner considers that the underlying rationale behind this exception is that public authorities should have the necessary space to think in private. The original European Commission proposal for the Directive (COM(2000)0402) explained the rationale as follows: *"It should also be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns [...] internal communications."*<sup>2</sup>
28. Although a wide range of internal information might be caught by the exception, the Commissioner is of the opinion that, following the above European Commission proposal (which the EIR are intended to implement), public interest arguments should be focussed on the protection of internal deliberation and decision making processes. She therefore accepts that there is a requirement for public officials to maintain a safe space in which to develop policy unhindered by outside influence and unnecessary additional explanations.
29. On balance, the Commissioner has decided in this case that greater weight has to be given to those factors which favour withholding the internal communications. She is particularly persuaded by the need for council officers to operate in a 'safe space' where they can deliberate on live issues, e.g., previously the council's internal review relating to the complainant's request of 8 August 2017, and currently the complainant's appeal to the Information Tribunal and also the council's live enforcement investigation. The Commissioner also recognises that disclosure of internal communications could inhibit council officers from

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<sup>2</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0402:FIN:EN:PDF>

expressing their views freely and prevent matters being thoroughly considered (chilling effect) and consequently have an adverse effect on the council's decision making process and its ability to respond appropriately in respect of decisions being made concerning appeals and investigations.

30. The Commissioner has decided that the public interest lies in maintaining the exception in this instance and that the council is entitled to rely on Regulation 12(4)(e) to withhold the internal communications.
31. The Commissioner however notes that there are a small number of emails [within the withheld information] that although fall within the definition of an internal communication, their content specifically and solely relate to the allocation and/or administration of the request and so disclosure of this information is unlikely to impact the council's ability to discuss and/or debate issues, and it is therefore her view that the balance of the public interest lies in favour of disclosure of these emails, and 12(4)(e) does not apply. These documents should be disclosed with suitable redactions made to remove the personal data, specifically the contact details, e.g., email addresses and telephone number of senior council officers. The documents concerned are listed in the annex.
32. In respect of the council's application of both regulation 14(4)(e) and 12(5)(b) to portions of the same withheld information, as the Commissioner has decided that the council was entitled to rely on the former exception, it has not been necessary for her to go on to consider its application of 12(5)(b) to this same information. The documents concerned are listed in the annex.

## **Right of appeal**

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34. 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)

35. 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.
36. 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** .....

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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