

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

### **Decision notice**

**Date:** 29 March 2019

**Public Authority:** Eden District Council  
**Address:** Town Hall,  
Corney Square  
Penrith  
Cumbria  
CA11 7QF

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

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1. The complainant has requested a copy of an officer report which recommends the non-enforcement of a planning condition relating to the stopping up of a footpath. The council applied Regulation 12(5)(b) to withhold the information.
2. The Commissioner's decision is that the council was not correct to apply the exception to withhold the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - To disclose the requested information to the complainant.
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 27 February 2018, the complainant wrote to the council and requested information in the following terms:

*"Re. Planning application no. 15/1097: I understand that EDC has formally agreed to NOT pursue enforcement of planning condition 13 at the Story Homes site at Cross Croft Appleby....*

*...Consequently, please may I have a copy of the officer report that recommended nonenforcement [sic], and a copy of the minute of committee proceedings associated with that."*

6. The complainant made a further, related request for information on 8 March 2018 which is not the subject of this complaint.
7. The council responded on 25 April 2018. It said that the information was held but was exempt under Regulation 12(5)(b), and that the public interest rested in the exception being maintained.
8. Following an internal review the council wrote to the complainant on 11 July 2018. It upheld its initial decision.

## Scope of the case

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9. The complainant contacted the Commissioner on 30 July 2018 to complain about the way his request for information had been handled.
10. The complainant believes that the council is not correct to withhold the information under Regulation 12(5)(b).

## Reasons for decision

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### Background to the case

11. Eden District Council approved a planning application for the construction of a number of houses in an area known as Cross Croft/Black Lane in Appleby. The planning permission restricted the number of houses which could be built to 32 until a planning condition attached to the approval was met. The planning condition required the 'stopping up' of an existing public right of way which crosses a railway line, owned by Network Rail, and the developer to come to an

agreement with Network Rail to allow the footpath to be diverted so that there is no longer a need to cross the railway line.

12. The number of houses which could be built without the condition being met was increased to 64 in November 2015 following an application by the developer. In doing so the condition for stopping up the footpath was amended.
13. Again the planning condition required that the developer sought to stop up the right of way prior to building further houses beyond the specified number of houses. Alternatively the condition required that "*the Secretary of State, upon consideration of a lawfully made stopping up order as aforementioned in point i) does not confirm the order*". In essence therefore the condition required the developer to obtain the stopping up order and develop the alternative route, or that the Secretary of State confirmed that no stopping up order was required.
14. On 4 January 2017 the planning inspector issued a decision that the stopping up order was not necessary. This was on the basis that the development would be built regardless of the decision that he reached regarding the stopping up order. The inspector did not consider the merits of the stopping up order when making his decision but based it purely on the fact that the wording of the condition meant that it was impossible for him to find that the stopping up was necessary in order for the development to be completed as permission would be granted whichever decision he chose to make.
15. On this basis the developer considered that the planning condition was now met and it was free to complete the full quota of properties which planning permission allowed. It therefore built further properties, above the number restricted by the planning condition.
16. However Network Rail subsequently brought a judicial review of the Secretary of State's decision before the high court<sup>1</sup>. The High Court's decision was that the Secretary of State, in the form of the planning inspector, needed to reconsider the decision by considering the merits of the stopping up application.
17. This decision was also appealed, however the decision on this was issued by the Court of Appeal in September 2018<sup>2</sup>, after the complainant's request for information had been made, and after the

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<sup>1</sup> [2017] EWHC 2259 (Admin)

<sup>2</sup> [2018] EWCA Civ 2069

review of his subsequent complaint had been issued. It cannot therefore be taken into account in the Commissioner's consideration of this complaint. Nevertheless, the Commissioner can take into account that an appeal had been launched to a higher court at the time of the request, and that a decision on the stopping up order was therefore still ongoing.

18. The situation was, therefore, that at the time of the review of the complainant's request, the developer had built more properties on the site beyond the 64 which the planning condition restricted it to. However, the Secretary of State's initial decision has been overturned and the process of reaching a decision on the stopping up order was therefore still ongoing.

Regulation 12(5)(b)

19. Section 12(5)(b) of EIR states that a public authority may 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.
20. Planning enforcement issues can be criminal offences, and so the council is correct to identify that Regulation 12(5)(b) may be relevant.
21. The council argues that a disclosure of the information would have an adverse effect on potential future or ongoing investigation relating to potential enforcement proceedings. Its argument is that a disclosure of the information at this stage risks an adverse effect on its ability to conduct an ongoing, or a future, investigation.

The Commissioner's view

22. The planning condition which is in question states:

*i) A footpath diversion and stopping up order that incorporates the diversion of the existing footpath adjacent to the cemetery, the stopping up of it to prevent any access to the Carlisle-Settle public railway crossing from the site (including the erection of signage and fencing prohibiting such access) and re-routing of the footpath to the north east of the site that it can in principle afford connectivity to Drawbriggs Lane, has been made and confirmed by the LPA or Secretary of State, or*

*ii) The Secretary of State upon consideration of a lawfully made stopping up order as aforementioned in point i) does not confirm the order.*

23. In essence, the meaning of these conditions is that if the stopping up order is agreed then the development can go ahead providing the developer builds the appropriate alternative route. If, however, the Secretary of State decides that no stopping up order is required, then the development can then be completed without an alternative being developed. The condition effectively places the decision as to the need for the stopping up order onto the planning inspector.
24. The reasons for the judicial review was not on the basis of the development itself. It was a technical point relating to the planning inspectors decision. In reaching his decision he did not take account of the merits of the stopping up application because he considered that the condition made no material difference to whether the development occurred, and stopping up orders can only be agreed where doing so is *necessary*.
25. Network Rail however believed it was important for the merits of the stopping up order to be fully considered before a decision was reached. It therefore sought the judicial review of the decision. The High Court decided that that Network Rail's view was correct, and therefore reverted the decision back onto the planning inspector, requiring him to make another decision.
26. The issue which is under appeal purely relates to whether the planning inspector was correct to make his decision without reference to the wider merits of the stopping up order. Regardless of the ultimate decision, the developer would be able to complete the full number of properties providing the diverted footpath is completed if the stopping up order is found to be warranted.
27. Regarding the enforcement recommendation, the complainant argues that the issue of the development is one of public safety. He is therefore seeking further information on the basis the planning condition was not being enforced by the council. In an email to the council dated 8 March he asked the council *"Why has enforcement of a planning condition which was stated as being applied in order to address the Council's apparent concerns for public safety at the rail-crossing been 'deferred' / not been enforced; especially when the level of occupation at the development has exceeded (by a considerable amount) the limit imposed by the condition?"*
28. In its response to the request for review the council confirmed that *"Members considered a report which informed them of the circumstances relating to the complaint and that you were seeking disclosure of the report and minute of the Planning Committee meeting which considered planning application reference 15/1097. This related to*

*the enforcement of a planning condition in relation to the [name of developer redacted] site at Cross Croft, Appleby."*

29. As regards the issue of potential future enforcement, the Commissioner understands that at the time of the review the council could have potentially reopened consideration of taking enforcement action, as it suggests could be the case. However, in reality the Commissioner considers that this would only occur in limited circumstances.
30. There is no suggestion that the developer was covertly seeking to avoid the steps it was required to take by the planning condition, and the evidence suggests that it actively continued to engage with the council with the requirements of the condition in mind. By the time that the council had issued its review of the decision the developer had submitted a planning statement/application to the council to dispense of the relevant planning condition altogether in order for it to complete its development. This was submitted to the council by the developer on 27 June 2018.
31. In its submission it provided evidence demonstrating that it had already taken significant steps in creating an alternative footpath, avoiding the need for residents to cross the railway line. It said that it was expecting to complete this work imminently, thereby partially meeting its obligations under the planning condition. In effect, therefore, the developer had taken steps to provide an alternative route, and a planning decision regarding the stopping up order was already under way in the courts. Significantly, regardless of the outcome of the decision of the Secretary of State, once the alternative pathway was completed the obligation under the condition would then have been met by the developer, with only minor actions required of it should the stopping up order be confirmed, (i.e. the erection of signage and fencing prohibiting access to the old footpath crossing the railway).
32. The Commissioner therefore considers that, although there remains the possibility of the council deciding to take enforcement action in the interim, due to the changes in circumstance, this would be on different grounds to that considered in the withheld information.
33. The Commissioner considers that, due to the changes in circumstances, a disclosure of this information would not impinge upon any different potential enforcement proceedings which might occur.
34. The Commissioner also notes that the council subsequently published a copy of the planning statement/application of 27 June 2018 submitted by the developer on its website which included minutes of a meeting which relates to the withheld information in this case. This specifically pointed to the issue which the council has been considering. The

complainant noted this new planning statement, and wrote to the council asking it to confirm if part of the evidence submitted by the developer with that statement was in fact the council minutes recording the outcome of the meeting on the potential enforcement action to which his request relates.

35. When this was highlighted to it by the complainant, the council confirmed that that was the case, but it said that the information was published in error and the information was then removed from its website. In effect therefore the outcome of the council's consideration is already known to the complainant. The council argues however that mistakenly publishing that information and then removing it when it realised this does not prevent it applying the exception to the information which it has withheld. The Commissioner accepts that may be the case, however she also considers the publication of the information, even in error, reduces the likelihood that an adverse effect on potential future investigations might be caused by the disclosure of the requested information under the EIR.
36. The Commissioner also considers that an important point regarding this is that the minutes were included by the developer – it therefore already had access to information relating to the potential enforcement proceedings, and the determination of this decision by the council. Thus, it therefore already had an understanding of the withheld information. Therefore any causative effect by the disclosure of this information would be weakened, if not negated. The council told the complainant that:

*"The Investigating Officer was given time to consider the relevance of the planning statement. [...] has confirmed that the document should not have been forwarded to [the developer] and it has been taken off the Council's website."*

### Conclusions

37. The council has argued that a disclosure of the information would potentially have an adverse effect upon any future investigation it might bring. It has not explained why a disclosure of this withheld information would have the effect it argues, nor has it explained this with direct reference to the withheld information. It has not explained what information, if disclosed, would have caused an adverse effect, nor why it would do so. It has instead sought to apply the exception in a blanket manner to any information relating to potential enforcement proceedings on the basis that disclosure would then cause an adverse effect to potential future enforcement action.
38. The Commissioner notes that actions taken on enforcement matters will often fall within the scope this exception. Enforcement matters are often

sensitive and potentially relate to criminal offences being committed. However, under the circumstances of this case she considers that the council has failed to justify the application of the exception to this information. Any future enforcement would be likely to be on different grounds to those which were under consideration at that time. The circumstances of the case would also be materially different given the change in circumstances surrounding the development. Additionally, the developer already has access to information which informs it of the outcome of the council's deliberations regarding the potential for enforcement.

39. Having considered the withheld information the Commissioner has not been persuaded that the council's arguments are clear as to why an adverse effect would occur if this information were to be disclosed. Nor is she satisfied that the council has established a clear likelihood that such effects would occur if the information were disclosed.
40. In conclusion, therefore, the Commissioner has decided that the council was not correct to apply the exception in Regulation 12(5)(b) as it has failed to justify that an adverse effect would occur should this information be disclosed.

## 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**  
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**Cheshire**  
**SK9 5AF**