

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 25 May 2023

Public Authority: Newark and Sherwood District Council

Address: Castle House
Great North Road
Newark
NG24 1BY

Decision (including any steps ordered)

1. The complainant requested various information in respect of a published 'Audit Report - lessons learnt London Road Municipal Buildings'. Newark and Sherwood District Council ("the Council") provided some limited information but withheld the bulk of the information relevant to the request on the basis of section 36 (prejudice to the effective conduct of public affairs) and section 42 (legal professional privilege). The Commissioner's decision is that the Council should have considered the request under the Environmental Information Regulations 2004 (the EIR) and that regulation 12(4)(e) (internal communications) and regulation 12(5)(b) (the course of justice) are engaged in respect of the withheld information. The Commissioner does not require further steps.

Request and response

2. On 5 July 2022, the complainant wrote to the Council and requested the following information:

"In a published report 'Audit Report – lessons learnt London Road Municipal Buildings' reference is made to a delegated officer decision

on 19 January 2021 in relation to a covenant. It is not published on the Council website. The information requested is:

- 1) The record of the decision
 - 2) The reason for the decision including any legal or commercial justification
 - 3) Any background papers, reports or correspondence relating to the decision
 - 4) Details of any consultation with politicians in relation to the decision including the responses of those politicians."
3. The Council responded on 5 September 2022. It provided a response to item four of the request, and some limited information in respect of item one, but refused the remainder under sections 36, and 42 FOIA.
4. Following an internal review the Council wrote to the complainant on 12 October 2022. It upheld its original response to the request.

Reasons for decision

The appropriate legislation

5. The Commissioner has first considered whether the information requested is environmental in accordance with the definition given in regulation 2(1) of the EIR. Environmental information is defined within regulation 2(1) as:

"...any information in written, visual, aural, electronic or any other material form on-

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and

activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);”

6. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
7. The Commissioner has produced guidance¹ to assist public authorities and applicants in identifying environmental information. The Commissioner’s well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
8. The requested information in this case relates to the removal of a covenant which had restricted the use of an area of land. Potential changes to the use of the land and its development is a measure which is likely to affect the elements of the environment, namely land and landscape. The Commissioner is therefore satisfied that the requested information would fall within the definition at regulation 2(1)(c) and that the request should be considered under the EIR.

¹ https://ico.org.uk/media/fororganisations/documents/1146/eir_what_is_environmental_information.pdf

Regulation 12(4)(e) internal communications

9. As the Commissioner had concluded that the request should have been considered under the EIR, the information the Council withheld under section 36 FOIA has been considered under regulation 12(4)(e).
10. Regulation 12(4)(e) of the EIR provides an exception from disclosure to the extent that the requested information comprises 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 falls within the scope of the exception.
11. The Commissioner's guidance on regulation 12(4)(e)² defines the concept of communications as 'broad and will encompass...letters, memos, and emails, but also notes of meetings or any other documents if these are circulated or filed so that they are available to others.'
12. The information which has been withheld under regulation 12(4)(e) consists of the minutes of the Council's Senior Leadership Team dated 22 December 2022.
13. Having viewed the withheld information the Commissioner is satisfied that it constitutes internal communications and therefore regulation 12(4)(e) applies to the information. The Commissioner has therefore gone on to consider the public interest test required by Regulation 12(1)(b). When doing so, he has taken into account the presumption in favour of disclosure required by Regulation 12(2).

Public interest test

14. The Council has identified the 'general principles of transparency in regard to its decision making that underpins both FOIA and the EIR'.
15. The Council has also acknowledged that there is a heightened public interest in the issue of the covenant as it has been a contentious issue.
16. The complainant considers that the Council has given insufficient weight to the public interest and they have argued that there is a compelling public interest in transparency regarding a decision to place a 'nil' value the covenant in question as it resulted in a substantial financial loss.

² [Internal communications \(regulation 12\(4\)\(e\)\) \(ico.org.uk\)](https://ico.org.uk)

17. They have further argued that the independent audit report contains serious and misleading errors which have had the combined effect of misleading Council Members and the public about the circumstances relating to the London Road Municipal Buildings. They have alleged that a six figure loss has been incurred by the Council on the basis of decisions which were not transparent or properly taken within the Council's governance framework.
18. In relation to the public interest in maintaining the exception, the Council has placed considerable weight on the need to protect the safe space to allow employees to 'express themselves candidly in respect of the various options available when deliberating over key decisions'. It considers this is particularly important where those decisions may be contentious, such as in this case.
19. The Council has further argued that there is sufficient information in the public domain to fully inform the public about the reasons for the decision, including an independent Audit Report which has been published in full.
20. In response to the complainant's comments regarding the independent Audit Report containing serious and misleading errors, the Council has argued that the matter was subject to independent oversight of the evidence available, and subject to scrutiny by both elected District Councillors and the public. It added that the issue of the covenant was specifically discussed at the Council's Audit and Governance Committee in July 2022, and provided the link to these relevant documents.

The Commissioner's conclusion

21. The Commissioner has carefully considered the competing arguments and accepts there is a public interest in disclosure insofar as this would promote transparency and accountability.
22. He also recognises the legitimate public interest in disclosing information that would inform the public about decisions concerning activities that may have an impact (whether positive or negative) on the environment. In this case, the Commissioner accepts that disclosure would provide the public with information relating to the contentious decisions around the sale of the London Road Municipal Buildings and the subsequent removal of the covenant.
23. With regard to attributing weight to the public interest arguments in favour of maintaining the exception, the Commissioner's guidance on

24. this exception³ explains that public interest arguments should be focussed on the protection of internal deliberation and decision-making processes. This reflects the underlying rationale for the exception being that it protects a public authority's need for a 'private thinking space'
25. The Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This may carry significant weight in some cases. In particular, the Commissioner considers that the need for a safe space will be strongest when the issue is still live.
26. In the circumstances of this case the Commissioner accepts that at the time of the request, matters concerning the land in question were not live, but remained contentious. He is also mindful of the fact that the decisions made by the Council in respect of the property resulted in it incurring significant financial loss, as discussed in the Audit Report information online.
27. However, although the report is critical of the Council, the investigation/audit concluded that:

"We did not find any evidence of financial irregularities from the evidence and documents examined."

Albeit with the caveat that many of the relevant officers no longer work for the Council.
28. Having considered the Audit information online, the Commissioner considers that it provides significant information in respect of the decisions taken by the Council in relation to London Municipal Building and the surrounding land. He is also mindful of the conclusion of the Report that there was no evidence of financial irregularities.
29. Added to this is the underlying rationale for the exception being that it protects a public authority's need for a 'private thinking space' for internal deliberation and decision-making. On balance, the Commissioner agrees that the public interest lies in maintaining the exemption and the Council was not obliged to disclose the withheld information.

³ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-4-e-internal-communications/>

Regulation 12(5)(b) – the course of justice

30. Regulation 12(5)(b) of the EIR states that information is exempt if 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. Regulation 12(5)(b) is a broad exception with the course of justice including, but not restricted to information attracting Legal Professional Privilege (LPP). The purpose of the exception is to ensure that there should be no disruption to the administration of justice.
31. The Council has confirmed that the withheld information is several emails between the Council and its lawyers in respect of a decision regarding a covenant.
32. It considers that the disclosure of this information would adversely affect the course of justice as it would undermine the general principle of LPP and there would need to be special or unusual factors to play for this not to be the case. Having considered whether such circumstances apply in this case, the Council concluded there were not.
33. The Commissioner is satisfied that the withheld information constitutes confidential legal advice provided by a legal adviser to their client. This means that this information is subject to LPP, and the Commissioner is aware of no evidence suggesting that this privilege has been waived. The exception provided by regulation 12(5)(b) of the EIR is therefore engaged in relation to this information. The Commissioner will now go on to consider the public interest test.

Public interest test

34. As with regulation 12(4)(e), the Commissioner he has taken into account the presumption in favour of disclosure required by Regulation 12(2).
35. Additionally, the Commissioner recognises that there will always be a general public interest in transparency and accountability.
36. The Commissioner also acknowledges the complainant's argument that there is a public interest in disclosure of information regarding a decision which resulted in substantial financial loss to the Council. The Commissioner notes however, that this is partly counterbalanced by the publication of an independent Audit Report and Appendices including the Lessons Learnt.

37. On the other hand, the Commissioner must also take into account that there is a public interest in the maintenance of a system of law which includes LPP as one of its tenets.
38. In balancing the opposing public interest factors under regulation 12(5)(b), the Commissioner considers that it is necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of LPP.
39. The general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. A weakening of the confidence that parties have that legal advice will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately and thus erodes the rule of law and the individual rights it guarantees.
40. It is well established that where regulation 12(5)(b) of the EIR is engaged in respect of LPP, the public interest in maintaining the exception carries strong, in-built weight, such that very strong countervailing factors are required for disclosure to be appropriate. The Commissioner notes the decision in the *Cabinet Office v Information Commissioner and Gavin Aitchison* (GIA 4281 2012) where, at paragraph 58, Upper Tribunal Judge Williams said:

"...it is also, in my view, difficult to imagine anything other than the rarest case where legal professional privilege should be waived in favour of public disclosure without the consent of the two parties to it".
41. In reaching his decision in this case, the Commissioner has considered the prior findings of the Commissioner and the Information Tribunal in relation to legal professional privilege. He has also had regard to the content of the withheld information.
42. The Commissioner is mindful that, while the inbuilt weight in favour of the maintenance of LPP is a significant factor in favour of maintaining the exception, the information should nevertheless be disclosed if that public interest is equalled or outweighed by the factors favouring disclosure.
43. In all the circumstances of this case, however, the Commissioner is not satisfied, from the evidence he has seen, that there are factors present that would equal or outweigh the strong public interest inherent in this exemption.

44. The Commissioner has therefore concluded that the public interest in maintaining the exception at regulation 12(5)(b) outweighs the public interest in disclosure. It follows that the Council was entitled to refuse this part of the request in reliance on regulation 12(5)(b) of the EIR.

Right of appeal

45. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. 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.

47. 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

**Catherine Dickenson
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**