

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

**Date:** 9 December 2024

**Public Authority:** Wiltshire Council  
**Address:** County Hall  
Bythesea Rd  
Trowbridge  
BA14 8JNX

**Decision (including any steps ordered)**

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1. The complainant requested information relating to a specific planning application. Wiltshire Council (the "Council") disclosed some information and withheld other information under the exceptions for information in the course of completion (regulation 12(4)(d)), the course of justice (regulation 12(5)(b)) and third party personal information (regulation 13).
2. The Commissioner's decision is that the Council correctly withheld the information under regulation 12(4)(d) and regulation 12(5)(b) but that it failed to provide its internal review in time and breached regulation 11(4).
3. The Commissioner does not require further steps.

## **Request and response**

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4. On 11 April 2024 the complainant wrote to the Council and requested the following information:

“Copies of all communications relating to planning application PL/2022/05416 including but not limited to those between the case officer and any consultee (statutory or otherwise), employee of Wiltshire Council, member of Southwick Parish Council, the developer, the applicant or any person representing them. Details of meetings held with the applicant or any party acting on their behalf. Where written meeting minutes do not exist, please provide date, location, list of attendees and agenda.”

5. The Council responded on 10 May 2024 and disclosed some information. It withheld other information under a range of exceptions.
6. On 14 May 2024 the complainant asked the Council to carry out an internal review.
7. On 12 June 2024 the Council issued a review response. However, the Council has subsequently clarified that this review erroneously addressed a different request made by the same complainant.
8. During the Commissioner’s investigation the Council provided the complainant with a new review response on 12 November 2024 which addressed the request which is the subject of this notice. The Council disclosed additional information to the complainant and confirmed that it was now relying on the exceptions for information in the course of completion (regulation 12(4)(d)), the course of justice (regulation 12(5)(b)) and third party personal information (regulation 13).

## **Scope of the case**

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9. On 22 July 2024 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
10. The Commissioner confirmed with the complainant that this decision notice would consider whether the Council correctly withheld information under the exceptions in regulation 12(4)(d) and regulation 12(5)(b).

## Reasons for decision

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### Is the requested information environmental?

11. Regulation 2(1) of the EIR defines environmental information as being information 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)...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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
12. In this case the withheld information relates to decisions taken in respect of a planning application. The Commissioner is, therefore, satisfied that the information relates to measures as defined in regulation 2(1)(c). For procedural reasons, he has therefore assessed this case under the EIR.

### **Regulation 12(4)(d) – material in the course of completion**

13. Regulation 12(4)(d) of the EIR provides that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents, or to incomplete data.
14. Regulation 12(4)(d) is a class-based exception, which means that if the information falls within its scope then the exception is engaged. It is not necessary to demonstrate that disclosure would have any particular adverse effect in order to engage the exception. However, regulation 12(4)(d) is subject to the public interest test.
15. The Council has confirmed that at the time of the request (and at the time of writing this notice) the planning application in question was still live and undecided. It explained that the information consists of communications between parties regarding the decision making process.
16. The Commissioner is satisfied that the withheld information can be categorised as material in the course of completion. He accepts that the information in question forms part of the process of assessing the planning application as part of the Council's statutory role as planning authority. That process is not yet settled, and no final decision has been made. As such, the Commissioner has decided the Council was entitled to apply regulation 12(4)(d) of the EIR to the information it is withholding. He has, therefore, gone on to consider the public interest test.

### **Public interest in disclosure**

17. The Council has acknowledged the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. Publication of information can assist the public in understanding how public authorities make their decisions which is likely to lead to greater trust in public authorities.
18. The Council also noted that disclosing the requested information could assure the public that the Council was satisfying any obligations it has in respect of its statutory functions associated with planning matters.
19. The complainant has argued that the planning application site is allocated for development in the neighbourhood plan and they have referred the Commissioner to Government guidance on Neighbourhood

Planning<sup>1</sup>. The complainant has argued that this clarifies that neighbourhood planning is designed to give communities direct power to develop a shared vision for their neighbourhood and shape the development and growth of their local area. Disclosure, therefore, would help to facilitate community engagement in the planning process.

20. The complainant has argued that the local Parish Council made no effort to engage local people in the early stages of the proposed development. They have stated that the only opportunity to comment on the application was after the application was submitted to the Council, by which point communities have very little 'direct power'.
21. The complainant has stated that there is no evidence of any concerns or comments from local people being taken into account, as the development proposals remain unchanged. Disclosure of the information, they argue, would enable local people to see whether or not their concerns had been considered and reassure themselves that important decisions, which will affect the neighbourhood, have been made in an honest and transparent way.
22. The complainant confirmed that they submitted their request in order to allay their concerns that the application was being given favourable treatment by the Council and whether any arguments against it were being ignored.

### **Public interest in maintaining the exception**

23. The Council has argued that during the period leading to a formal planning application there is a need for free and frank informal discussion to take place between parties concerning planning matters. This need applies to all the stages of the planning process but particularly at the pre-development stage.
24. The Council has further argued that there is a need for planning officers to consider matters which are of interest or importance to the Council as the Planning Authority; these considerations remain confidential between the Council and its advisors unless they are relevant to the final planning application which is placed into the public domain.

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<sup>1</sup> <https://www.gov.uk/guidance/neighbourhood-planning--2>

## **Balance of the public interest**

25. It has already been covered in this notice that there is an inherent public interest in public authorities conducting business in a transparent manner, and that, in the case of environmental information, there is a presumption of disclosure. The notice has also covered the complainant's views in favour of disclosure.
26. The Commissioner acknowledges that the outcome of the planning application in question, which relates to the building of 30 dwellings, will have a significant impact on the local community. He accepts that this identifies a specific public interest in transparency and accountability to ensure that the public has confidence the matter has been given proper attention by the Council.
27. With that said, the Commissioner also recognises that the Government has established the building of new homes as a priority to remedy a significant shortfall in available properties. He considers that the need to provide adequate levels of housing represents an equally valid, competing public interest and, arguably, enhances the need for effective decision-making in this matter<sup>2</sup>.
28. Given that the planning application was undecided at the time the Council received the complainant's request, the Commissioner accepts that the disclosure of the requested information - information he has found to relate to material in the course of completion - would frustrate the process of reaching a decision and inhibit the Council's ability to finish this work. This is the very activity which the exception is formulated to protect.
29. The Commissioner accepts that disclosing information whilst a decision making process is ongoing would have an impact on the Council's ability to reach an effective decision. Releasing incomplete or unfinished material into the public domain would distract public debate away from the substantive environmental issues that the information relates to. Instead, debate could focus on secondary issues such as any deficiencies in the information, perceived errors or disagreements around approaches taken.
30. The Commissioner considers that safe space in this context enables authorities to consider factors which might subsequently be rejected in any final decision. Disclosing such information would result in authorities

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<sup>2</sup> <https://www.gov.uk/government/news/housing-targets-increased-to-get-britain-building-again>

having to field queries about speculative approaches and potential decisions which may have no bearing on the actual decision reached. The public interest balance here, therefore, is on the Council being able to utilise its resources effectively.

31. Accordingly, the Commissioner gives more weight to the argument that disclosure would present a real risk of prejudice to the 'safe space' to consider factors and reach a decision, away from public scrutiny.
32. The Commissioner recognises that the complainant has genuine concerns about the Council's approach to the planning application, however, he has no evidence that there has been any impropriety and, in any event, as a planning decision has not been made any concerns remain speculative in nature.
33. The Commissioner takes the view that the mechanisms in place which allow for information to be made available to the public as part of the planning application process and the disclosures made by the Council provide the necessary transparency and openness of the process.
34. In this case, the Commissioner considers that the Council has demonstrated that the information relates to and informs a decision making process that is incomplete and that its disclosure would, by misinforming public debate, impede the decision-making process that it supports.
35. On balance, the Commissioner's decision, whilst informed by the presumption in favour of disclosure under regulation 12(2), is that the Council was correct to rely on regulation 12(4)(d) to withhold the information.

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

36. Regulation 12(5)(b) of the EIR provides 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.
37. 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.
38. The information withheld under this exception consists of correspondence between the Council's planning department and the Council's legal team. The Council has argued that the information is subjected to LPP.

39. LPP is not defined under the EIR but is a common law concept shaped by the courts over time. LPP is intended to protect the confidentiality of communications between a professional legal advisor and their client.
40. A professional legal advisor for the purposes of LPP could be a solicitor, barrister, licensed conveyancer or a legal executive holding professional qualifications recognised by the Institute of Legal Executives (ILEX). The legal advisor can be either an external lawyer or an in-house lawyer employed by the public authority itself. This was confirmed in the former Information Tribunal's ruling in *Calland v Information Commissioner and FSA* (EA/2007/0136; 8 August 2008).
41. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal advisor acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
42. The Council confirmed that it considers the information to attract 'advice' privilege'. The Council also confirmed that the information remains confidential.
43. The Council said that the information constitutes legal opinions and other confidential communications between professional legal advisors and its planning department for the purposes of seeking and giving legal advice in relation to the consideration of a planning application..
44. 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.
45. In addition, and turning to the requirement to show that there would be an adverse effect on the course of justice from disclosure of the information, the Commissioner's established view is that disclosure of information subject to LPP, particularly legal advice which remains live and relevant, will have an adverse effect on the course of justice.
46. The Commissioner considers that it is inevitable that disclosure of privileged information would adversely affect the course of justice. He has not identified any special or unusual factors at play for this not to be the case.
47. In light of the Council's arguments, the nature of the withheld information and the subject matter of this request, the Commissioner is

satisfied that disclosure of the requested information would have an adverse effect on the course of justice and, therefore, finds that the exception at regulation 12(5)(b) is engaged. The Commissioner will now go on to consider the public interest test.

### **Public interest in disclosure**

48. The Council has acknowledged that there is a general public interest in openness and transparency and accepts that disclosure of the information would serve the public interest in these principles. The council has also recognised that disclosure would assist the public interest in furthering understanding of Council decisions.
49. The complainant's arguments in favour of disclosure are documented in paragraphs 19-22 above.

### **Public interest in maintaining the exception**

50. The Council has argued that there is a strong public interest in withholding the information because it would be likely to inhibit the free and frank provision of legal advice for the purposes of decision-making.
51. The Council has also noted that disclosing of the information would reveal the Council's legal position, which would undermine the principle of LPP.
52. The Council has acknowledged that, whilst there is a clear public interest in knowing that public authorities have reached decisions on the basis of sound advice this general principle does not in itself overturn the public interest in preventing adverse effects to the course of justice.

### **Balance of the public interest**

53. The Commissioner he has taken into account the presumption in favour of disclosure required by Regulation 12(2) of the EIR. Additionally, the Commissioner also acknowledges that there will always be a general public interest in transparency and accountability. In this case, the Commissioner accepts that disclosure would provide the public with information to allow them to better understand the Council's considerations in relation to the development in question.
54. However, this has to be weighed against the very strong public interest arguments in favour of maintaining a claim of LPP. LPP is a fundamental principle of justice and it is the Commissioner's well-established view that the preservation of that principle carries a very strong public interest. The principle exists to protect the right of clients to seek and obtain advice from their legal advisers so that they can take fully informed decisions to protect their legal rights.

55. There will always be a strong argument in favour of maintaining LPP because of its very nature and the importance of it as a long-standing common law concept. The Information Tribunal recognised this in the Bellamy case when it stated that:
- “...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest... It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...”<sup>3</sup>
56. To equal or outweigh the public interest in maintaining a claim of LPP, the Commissioner would expect there to be strong opposing factors, such as circumstances where there is evidence of misrepresentation, unlawful activity or a lack of appropriate transparency.
57. As noted above, the Commissioner recognises that the outcome of the planning application will have a significant impact on the local community, and he accepts that the disclosure of the withheld information would provide further transparency in relation to this. It would enable the public to have greater insight into the legal advice that was sought and received, and the Council’s decision making process. This would serve the public interest as it would demonstrate whether proper processes were followed.
58. The Commissioner acknowledges the complainant’s concerns about the proposed development, however, firstly, he is not convinced that disclosing the information would address these concerns, and, secondly, he does not see (with reference to paragraph 54) that there are specific public interest conditions here that would justify breaching the confidentiality attached to the legal advice. In the circumstances of this case the Commissioner is not satisfied that any of these factors are present to the extent that the strong public interest in protecting the principle of LPP is outweighed.
59. The Commissioner also notes that the advice in question relates to a live, undecided planning application and that there is, therefore, an enhanced public interest in favour of non-disclosure. This is because disclosing the advice would provide parties with the means to challenge and potentially undermine the effectiveness of the Council’s statutory

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<sup>3</sup> Bellamy v Information Commissioner and Secretary of State for Trade and Industry (ES/2005/0023).

planning role. The Commissioner considers that this counts strongly in favour of maintaining the exception in this case.

60. In addition, and with reference to neighbourhood plan advice (see paragraph 19 above) the Commissioner does not consider it has been shown that disclosure of this specific information is necessary to facilitate public engagement with this planning application or that non-disclosure would result in harm to this process. He is not aware of any evidence that the Council has misrepresented advice it has received or that it is otherwise not fulfilling its statutory role in relation to the application.
61. The Commissioner recognises why the complainant has concerns about the planning application, however, the planning process allows for scrutiny of information published as part of the planning application and for concerns or objections to be raised. The Commissioner does not consider it has been shown that there are reasons for disrupting this process via the disclosure of information subject to LPP.
62. The Commissioner is, therefore, satisfied that in all the circumstances of the case, the balance of the public interest favours the exception being maintained.
63. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*, "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes:  
  
"(1) to provide the default position in the event that the interests are equally balanced and  
  
(2) to inform any decision that may be taken under the regulations"  
(paragraph 19)."<sup>4</sup>
64. As covered above, in this case, the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation

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[https://assets.publishing.service.gov.uk/media/5d9dc592e5274a595bf5dabf/SGIA\\_44\\_2019ji.pdf](https://assets.publishing.service.gov.uk/media/5d9dc592e5274a595bf5dabf/SGIA_44_2019ji.pdf)

12(2), is that the exception provided by regulation 12(5)(b) was applied correctly.

## **Procedural matters**

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### **Regulation 11 – internal review**

65. Regulation 11(4) requires authorities to provide a response to an internal review request within 40 working days of the date of receipt.
66. In this case the complainant asked the Council to carry out an internal review on 14 May 2024. Whilst the Council provided an internal review response on 12 June 2024, this did not address the request identified in the review request.
67. The Council subsequently provided a review response on 12 November 2024.
68. The Commissioner, therefore, finds that, in failing to provide a review response in time, the Council breached regulation 11(4).

## Right of appeal

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69. 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](mailto:grc@justice.gov.uk)

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

70. 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.
71. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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