

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

Date: 24 September 2020

Public Authority: Natural England
Address: County Hall
Spetchley Road
Worcester
WR5 2NP

Decision (including any steps ordered)

1. The complainant has requested information about a decision to re-route a section of the coastal path. Natural England disclosed some information and said that it was not required to disclose the remainder, by virtue of regulations 12(5)(d) (confidentiality of proceedings), regulation 12(5)(f) (interests of the person providing the information) and regulation 12(4)(a) (information not held) of the EIR.
2. The Commissioner's decision is that Natural England was entitled to rely on regulations 12(5)(d) and (f) of the EIR to withhold the information from disclosure. She finds that, on the civil standard of the balance of probabilities, Natural England does not hold notes of the meetings referred to in its response to the request, and therefore that regulation 12(4)(a) was also applied correctly. However, she is not satisfied that Natural England complied fully with the requirements of regulation 11(3) of the EIR when conducting the internal review.
3. The Commissioner requires no steps as a result of this decision.

Background

4. The complainant has explained to the Commissioner that he represents a number of local landowners who are concerned about proposals to re-route a section of the coastal path in Devon.
5. In 2016 the complainant lodged an objection to a proposal, contained in the Draft Local Plan for Plymouth, to re-route a section of the coastal path along Custom House Lane, away from its existing line on Great Western Road. He says he subsequently received an email from Plymouth City Council which led him to believe that the Draft Local Plan depicted an overall strategic objective of improved public access to, and along, the waterfront, and was not intended to show the detailed line of the final waterfront walkway route. On that basis, he agreed to withdraw his objection. However, on 18 July 2019 he received a consultation letter from Natural England as part of the initial consultation phase, enclosing its published proposal that the footpath should indeed to be re-routed to follow the alignment shown in the Draft Local Plan.

Request and response

6. On 29 July 2019, the complainant submitted the following request for information to Natural England because he wanted to learn the reasoning behind the apparent U-turn regarding the re-routing of the coastal path:

"Freedom Of Information Act 2000, Request For All Information Relating To All Dealings Of Natural England With Plymouth City Council As Access and Planning Authority, The HCA [Homes and Communities Agency], And Linden Homes South West Regarding The Proposed Indicative Route Of The Coastal Path At East Quay and Millbay Marina Village

... I am seeking a schedule and notes of all of the meetings, events and correspondence leading up to the publishing of the indicative route proposals for East Quay and Millbay Marina Village. I am hereby formally requesting all of this information under The Freedom of Information Act 2000. More specifically I am requesting: -

1. A schedule of all meetings held with Plymouth City Council as The Access and/or Planning Authority regarding the indicative route of the proposed path at east Quay and Millbay Marina Village, together with a list of all participants and copies of the notes of each meeting.

2. A schedule of all meetings held with The HCA and Muse Developments acting at Quadrant Quay, Quadrant Wharf and all other land sited in the regeneration area located to the north of Millbay Marina Village, together with a list of all participants and copies of the notes of each meeting.

3. A schedule of all meetings held with Linden Homes South West regarding the proposed path at Millbay Marina Village, together with a list of all participants and copies of the notes of each meeting.

4. Copies of all correspondence from whoever relating to the proposed indicative route at east Quay and Millbay Marina Village.

5. Copies of the notes of all internal Natural England Meetings regarding the proposed indicative route at East Quay and Millbay Marina Village."

7. Natural England responded on 22 August 2019, as follows:

1. It confirmed that a meeting took place on 13 February 2019 and that a telephone conference took place on 22 May 2019. It disclosed details of the participants, but said that no notes were produced in respect of either meeting, and therefore that regulation 12(4)(a) (information not held) of the EIR was engaged.
2. It confirmed that a meeting took place on 4 March 2019 and disclosed details of the participants, but said that no notes were produced in respect of it, and therefore that regulation 12(4)(a) was engaged.
3. It confirmed that a meeting took place on 28 March 2019 and disclosed details of the participants but said that no notes were produced in respect of it, and therefore that regulation 12(4)(a) was engaged.
4. It disclosed a letter sent to all identified landowners and tenants within the proposed trail and coastal margin. It said it held further correspondence which was exempt from disclosure under regulation 12(5)(d) (confidentiality of proceedings) and regulation 12(5)(f) (interests of the person providing the information) of the EIR.
5. It disclosed information, with redactions for information which was exempt under regulation 12(5)(d) of the EIR. It also redacted a

small amount information from a document where that information did not fall within the scope of the request.

8. On 7 September 2019, the complainant contacted Natural England and asked it to conduct an internal review of its handling of the request. In particular, he questioned its claim not to hold meeting notes and asked to be given a copy of a presentation (which was referred to in the information that had been disclosed to him) which he believed contained an account of the telephone conference of 22 May 2019. He also asked it to review its wider decision not to disclose all the information he had requested.
9. Natural England provided the outcome of its internal review on 4 October 2019. The internal review only considered its application of regulation 12(4)(a) in respect of the request for meeting notes, which it upheld. On the matter of the presentation, it said:

"... The sentence provided in the minutes 'The presentation is saved on Trim' refers to a copy of the presentation which was provided to you in our original response and is titled 'East Quay and Millbay Marina Village_Redacted' This was put together by [name removed], Natural England Lead Adviser – Coastal Access to assist the Project Broad [sic] attendees on the call to discuss the position of the access through Millbay Marina Village.

Your email of the 07 September 2019 gives the impression that you consider that this presentation was related to the tele conference held with Plymouth City Council on 22 May 2019 which I can confirm is not the case and this information is not held."

Scope of the case

10. The complainant contacted the Commissioner on 9 October 2019 to complain about the way his request for information had been handled. He disagreed with Natural England's decision to redact information under regulations 12(5)(d) and (f) of the EIR. He also expressed doubt at its claim that it did not hold notes for the meetings it had identified.
11. The analysis below considers whether Natural England was entitled to rely on the regulations cited to withhold information. The Commissioner has viewed the withheld information in question. The Commissioner has also considered whether, on the balance of probabilities, Natural England holds notes regarding the meetings specified in its response to the request.
12. Natural England had identified a small amount of email correspondence between it and the complainant which it said it had not disclosed

because it believed the complainant already had it. The Commissioner notes that the correspondence is dated 21 - 25 July 2019. It post-dates the time period specified in the request (which was for information *"leading up to the publishing of the indicative route proposals"*, and therefore created before 18 July 2019). It therefore falls outside of the scope of the request and the Commissioner has not considered Natural England's decision to not disclose it.

Reasons for decision

13. The complainant cited the Freedom of Information Act 2000 ('FOIA') in his request for information, however, the Commissioner has considered whether, in fact, it fell to be dealt with under the EIR.
14. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR, rather than the FOIA, if it meets the definition set out in regulations 2(1)(a) to 2(1)(f) of the EIR.
15. The Commissioner considers the information in this case can be classed as environmental information, as defined in regulation 2(1)(c) of the EIR. This says that any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors of the environment listed in regulation 2(1)(a) and 2(1)(b) will be environmental information. One of the elements listed under regulation 2(1)(a) is land.
16. The request is for information about the routing of a stretch of the coastal path. The Commissioner considers the request clearly relates to a measure, as defined in regulation 2(1)(c) of the EIR, which would, or would be likely to, affect any of the elements described in regulation 2(1)(a), namely land.
17. The Commissioner is therefore satisfied that the request was for environmental information, and that the request fell to be dealt with under the EIR.

Regulation 12(4)(a) – information not held

18. Regulation 12(4)(a) of the EIR provides that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
19. In this case, the complainant finds it difficult to believe that Natural England would not hold notes for the meetings it attended. Natural England's position is that no notes were taken and therefore that it does not hold the requested information.

20. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner (following the lead of a number of First-tier Tribunal decisions) applies the civil standard of the balance of probabilities when making a determination. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
21. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held.
22. For clarity, the Commissioner is not expected to prove categorically whether the information is held. She is only required to make a judgement on whether the information is held using the civil standard of proof of the balance of probabilities.

The complainant's position

23. The complainant told the Commissioner:

"...it is beyond belief that a Government body does not keep a record/notes of its discussions and meetings with other public bodies; and if it generally does not against all models of best practice, then it should at the very least be totally open about the limited records it does hold."

Natural England's position

24. Natural England maintained its position. It said:

"...no meeting notes were produced or circulated by Natural England staff members who attended these meetings and therefore [sic] do not exist. We have carried out all the appropriate searches of the electronic systems where this information would be held and this provided no results. Relevant officers within Natural England were also asked to check any records they may hold off the main filing systems. Again no records were located. If meeting notes were recorded they were not supplied to Natural England."

25. As is her standard practice, the Commissioner asked Natural England a series of detailed questions about its handling of the request, with a view to evaluating its claim that it did not hold copies of meeting notes for the meetings it had identified.

26. In response, Natural England explained that if meeting minutes or notes had been created, either by it, or by a third party who subsequently provided Natural England with a copy, they would be held as electronic records. Searches were therefore undertaken by its Devon, Cornwall & Isles of Scilly Coastal Access Team of their own work laptops, network drives (Coastal Access Area Team and personal drives) and Content Manager, formally known as TRIM, which is Natural England's electronic documents and records management system. It said that these are the only places the information, if held, would be stored. It provided the Commissioner with the search terms used and confirmed that no notes were located.
27. Natural England said it had no reason to believe the information may have been held and then subsequently deleted – it said that this would not be in accordance with its retention policy, details of which it supplied to the Commissioner.
28. When asked to comment on the complainant's doubts that Natural England would conduct meetings without creating minutes or notes, it said:

"The meetings with external parties are for information gathering and not for making decisions about the route of the England Coast Path. The decision of the route is made internally by Natural England taking into account the objectives of the scheme and the information gathered with external bodies and landowners. The relevant notes of the internal meeting where the decision on the route was made were released to [the complainant] under the original EIR request."

The Commissioner's conclusion

29. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in paragraphs 20 - 22, above, the Commissioner is required to make a finding on the civil standard of the balance of probabilities.
30. The complainant finds Natural England's claim that it does not hold meeting notes for the specified meetings, not to be credible, given its position and remit. However, he has provided no evidence which casts doubt on Natural England's claim.
31. Natural England has provided a detailed explanation of the steps it has taken to check whether it holds any relevant information. The Commissioner is satisfied that the steps would be capable of locating any relevant information, if it was held. She is also satisfied that Natural England has specific reasons for believing no note was taken by it (the officers who attended the meetings have been consulted and confirmed

they hold no notes, and the purpose of the meetings themselves was not to make decisions about the coastal path).

32. On the question of whether Natural England *should* have taken a note of the meetings, it is not the Commissioner's role to make a ruling on how a public authority deploys its resources, on how it chooses to hold its information, or on the strength of its business reasons for holding information in the way that it does as opposed to any other way. Rather, in a case such as this, the Commissioner's role is simply to decide whether or not the requested information is held by the public authority. On that point, the Information Tribunal in the case of *Johnson / MoJ* (EA2006/0085)¹ has commented that the FOIA:

"... does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold".

33. The Commissioner considers the same to be the case for the EIR.
34. Having taken all the above into account, the Commissioner is satisfied that Natural England has demonstrated that, on the civil standard of proof of the balance of probabilities, it does not hold notes of the meetings and that it was entitled to claim that regulation 12(4)(a) of the EIR applied in respect of the complainant's request for them.
35. Although regulation 12(4)(a) of the EIR is subject to a public interest test, the Commissioner's position is that, where this exception is engaged, it is not necessary to consider the public interest in disclosure, as to do so would be illogical. There cannot be a public interest in information being disclosed by the public authority, if it is accepted that the information in question is not held by the public authority.

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<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i90/Johnson.pdf>

12(5)(d) - confidentiality of proceedings

36. Natural England applied regulation 12(5)(d) to withhold correspondence with and about, and submissions from, interested third parties about the proposed route of the path, in response to part 4) of the request. In response to part 5), it applied regulation 12(5)(d) to redact sections of a Powerpoint presentation which set out Plymouth City Council's position with regard to the route.
37. Regulation 12(5)(d) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority, where such confidentiality is provided by law.
38. It is important to recognise that the test for applying the exception is whether a disclosure to the world at large would undermine the confidentiality of the proceedings in question. Therefore, although some information may already be known to one or more of the parties involved in the proceedings, the Commissioner will consider the impact of disclosing the withheld information to the general public.
39. The first condition that has to be satisfied when applying regulation 12(5)(d) is whether the process has the sufficient formality to be considered to be 'proceedings'. The term 'proceedings' is not defined in the EIR but the Commissioner interprets it to include situations where an authority is exercising its statutory decision making powers. In this case, Natural England has explained that under section 296 of the Marine and Coastal Access Act 2009, it and the Secretary of State (in this case the Secretary of State for the Environment, Food and Rural Affairs) have a statutory duty to secure a route around the entire coast of England for access on foot. This is known as the 'Coastal Access Duty'. It involves securing existing access and the creation of new access routes.
40. Under section 298 of the 2009 Act, Natural England also has to prepare a 'Scheme' setting out the approach to be followed when discharging the Coastal Access Duty. The Scheme has to be approved by the Secretary of State.
41. Natural England has split the coast line of England into 'stretches', with each stretch then split into 'lengths'. Natural England produces a separate coastal access report for each length. The report is then submitted to the Secretary of State for approval.
42. As part of the process of producing the coastal access report, Natural England carries out an initial consultation with landowners, land users and other interested parties, such as the relevant local authorities. Although the default position is that the route follows the coast line, there are inevitably occasions where it has to deviate from that line in

order to accommodate other interests. Once Natural England has consulted with the interested parties along a particular length, a report is produced setting out the proposed route which takes account of any alterations from the default position of following the coast, together with any exclusions or restrictions that local circumstances may dictate. The report is submitted to the Secretary of State and published. The public then has an eight week period in which to object to the proposals or to submit any other comments. At the end of that eight week period all objections and comments are forwarded to the Secretary of State. The Secretary of State then appoints a planning inspector to consider whether the objections are admissible in accordance with pre-established criteria, and to advise the Secretary of State on how the admissible objections or comments should be determined. Natural England also has the opportunity to comment on the objections. It is then for the Secretary of State to decide whether to approve the report, with or without modifications, or reject it. In doing so the Secretary of State must have regard for their Coastal Access Duty and the Scheme.

43. The request in this case was made during the initial consultation process, ie before Natural England had published its coastal access report and submitted a copy to the Secretary of State.
44. The Commissioner accepts Natural England's position that its consideration of the most appropriate route for the coast path and the preparation of reports is part of a formal legal process which has clearly defined parameters, including the opportunity for interested parties to make formal objections and which ultimately results in matters being decided by the Secretary of State. The Commissioner is therefore satisfied that the process has the necessary formality to constitute a 'proceeding' for the purposes of regulation 12(5)(d) of the EIR.
45. The second condition that has to be satisfied when applying regulation 12(5)(d) is that the confidentiality of the proceedings in question has to be protected by law. Natural England argues that the information being withheld relates to the consultations it undertook when preparing its report for the particular length of the coast path in question and that this element of the proceedings is protected by a common law duty of confidence.
46. This means that when contributing to the initial consultation exercise, the interested third parties would have done so on the understanding that they were sharing information and views with Natural England, in confidence. For this to be the case, the information must have had the necessary quality of confidence, it must have been provided in circumstances that give rise to an expectation that it would be treated in confidence and an unauthorised use of the information must be detrimental to the confider, ie the third parties.

47. Consideration of whether the information provided by the third parties has the necessary quality of confidence itself involves two elements. Firstly, the information must be more than trivial, and second, the information must not be publicly available or otherwise accessible. The Commissioner is satisfied that the first element is satisfied; the issue to which the information relates (the proposed route of the English Coast Path) raises potentially sensitive issues around public access over private land and is not a trivial matter. Having viewed the information the Commissioner is also satisfied that there are no grounds for thinking that the information is already in the public domain. The Commissioner is therefore satisfied that the information obtained or created through Natural England's consultation with the third parties has the necessary quality of confidence.
48. The Commissioner has gone on to consider whether the information was provided in circumstances that would give rise to an expectation that it would be treated in confidence. Natural England explained that it invited representations from parties directly affected by the proposed route. They were encouraged to be open and honest with their views about the proposed route, and to suggest alternatives. The Commissioner considers that, being directly affected by the proposed route, the third parties would have been alert to the potential sensitivity of local access issues. An expectation of confidentiality would arise partly because in matters such as land use, planning, or access, there is always the potential for one consultee's view to conflict with that of other interested parties.
49. As set out earlier, once the initial consultation process has been completed and Natural England has prepared its coastal access report containing the proposed route, the report is published, and copies provided to the interested parties as well as the Secretary of State. This begins an eight week period in which the public can submit objections or comments. Natural England has advised the Commissioner that any objections or comments provided at that stage remain confidential and would not be published until the Secretary of State has made a final decision on the route for that length of the path. Given the fact that objections and comments made following the publication of the proposed route are regarded as confidential at that stage, the Commissioner considers that those whose views are solicited at the even earlier stage, ie the initial consultation stage, would have expected their views to also remain confidential, at least initially.
50. The Commissioner is therefore satisfied that the information gathered and created during the consultation process with the third parties was provided in the expectation that it would be treated in confidence, certainly during the early stages of the process.

51. The next issue when considering if the proceedings are protected by a common law duty of confidence is whether an unauthorised disclosure of the information gathered at the initial consultation stage would be detrimental to those who provided the information.
52. The Commissioner has viewed all the withheld information and recognises the sensitivity of some of the access issues to which it relates. The Commissioner considers that, due to nature of these issues, disclosing the information could attract the attention of those who hold different views and this could result in the third parties being contacted or lobbied. While the Commissioner considers it reasonable to expect the third parties to be sufficiently robust to be able to deal with such approaches, she also accepts that they should be afforded the safe space required to contribute fully to a consultation process on an important and sensitive issue and that the risk of that safe space being disturbed would be detrimental.
53. The Commissioner is therefore satisfied that the initial consultation stage of the proceedings are protected by a duty of confidence provided by common law.
54. The final consideration when applying the exception provided by regulation 12(5)(d) is that the confidentiality of those proceedings would be adversely affected by disclosing the withheld information. The term 'would be' is taken to mean that it is more probable than not that disclosing the information would harm the confidentiality of the proceedings in question, ie the consultation stage of the proceedings for determining the route of the English Coast Path.
55. Disclosing the information would interfere with the consultation process as it could hinder the third parties' ability to engage fully and frankly and distract Natural England from fully considering their input. Some of the third parties are likely to be involved in consultations on other lengths of the route and the disclosure of the requested information could make them more guarded in how they respond to those consultations. Similarly, disclosing the information may signal to others asked to contribute to future consultations that they could not do so in confidence, which would, in all likelihood, affect the quality and detail of their response. The Commissioner is therefore satisfied that disclosing the information would have an adverse effect on the confidentiality of the proceedings. The exception is therefore engaged.

Public interest test

56. As with all the exceptions under the EIR, regulation 12(5)(d) is subject to the public interest test as set out in regulation 12(1). The public interest test means that even though an exception is engaged, the information can only be withheld if, in all the circumstances of the case,

the public interest in maintaining the exception is greater than the public interest in disclosure. When considering this test, it is necessary to apply a presumption in favour of disclosure.

57. Natural England has argued that there is a public interest in organisations being able to have free and frank discussions without being subject to undue distractions from third parties. It has stated that it is not in the public interest that formal discussions and processes be disrupted, or for undue pressure to be exerted on officials or third parties. Natural England has emphasised that premature disclosure of information about the consultation phase would impact upon the already complex and potentially lengthy legal process for deciding the route of the coast path. It considers the discussions it engaged in were held in good faith as part of a well-defined legal process. It believes that its communications with the third parties identified in the request were sensitive because a final decision on the route has yet to be reached, and that until that happens their disclosure could unduly influence the decision making process and the progress of the proposals.
58. The potential for disclosure to influence decisions on the route of the coast path is also a point in favour of disclosure. In balancing the competing public interest arguments raised by this case the Commissioner has recognised the importance of individuals having access to information which will allow them to contribute to the decision making process on matters that impact on them. This often means that information is most valuable at an early stage in the process when perhaps that process is more open to influence.
59. There is also a general public interest in transparency and disclosure would enable the public to better understand the process followed when determining the route of the path.
60. However, in order for Natural England to make fully informed decisions it is important that consultees are able to contribute what is likely to be valuable information, and they require a degree of safe space in order to provide their contributions. Without that safe space their contributions would be of lower value and the resultant coastal access report would be poorer. This is not in the public interest.
61. The complainant has indicated to the Commissioner that disclosure is in the public interest because he feels he was misled as regards the intended route of the path; by withdrawing his objection to the Draft Local Plan he was consequently not entitled to make representations to the planning committee about it. On that point, the Commissioner notes that this particular concern relates to his interactions with Plymouth City Council, and not Natural England, which was the recipient of the request for information in this case. The Commissioner also notes that the complainant may participate in the eight week public consultation

process provided for under the Marine and Coastal Access Act 2009, described above. The Commissioner considers that this process provides ample opportunity for those affected to contribute to decision making whilst allowing Natural England the time to produce robust and fully informed coastal access reports.

62. The Commissioner also considers that there is public interest in Natural England being able to manage complex legal processes efficiently, so as to avoid unnecessary disruptions which would only lengthen the process and work against the public interest.
63. Taking all the above into account, the Commissioner finds that, on balance, the public interest in favour of maintaining the exception outweighs the public interest in disclosure. Natural England was therefore entitled to withhold the information to which regulation 12(5)(d) of the EIR had been applied.

Regulation 12(5)(f) – interests of the person providing the information

64. This exception has been applied to communications between Natural England and interested third parties as part of the initial consultation process, in response to part 4) of the request.
65. Regulation 12(5)(f) of the EIR says that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the interests of the person who provided the information where that person:
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure.
66. It is important to note that the term 'person' as used in the exception applies to both natural and legal persons. A legal person includes, for example, private companies.
67. The information being withheld under regulation 12(5)(f) includes that contained in correspondence sent directly from third parties (individuals or private companies), correspondence from Natural England to those parties which discusses the information they have provided and Natural England's internal communications which record information provided to it by the third parties.

68. The engagement of the exception can be broken down into a four stage test, as recognised by the Tribunal:

(i) Would disclosure adversely affect the interests of the person who provided the information to the public authority?

(ii) Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?

(iii) Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?

(iv) Has the person supplying the information consented to its disclosure?

69. The Commissioner first considered whether the disclosure of the information would adversely affect the interests of the persons who provided the information. Although the adverse effect does not have to be significant, there still needs to be some adverse effect.
70. The information that has been withheld under regulation 12(5)(f) contains the views of the third parties who contributed to the consultation process. The Commissioner recognises that the views expressed may be sensitive. Potentially, they may differ from, or oppose, those of other interested parties and therefore there is the risk that disclosing the information may cause conflict. Some of the information also includes passing references to the future intentions of the party which provided the information.
71. Natural England has not stated whether it has consulted with the parties involved when reaching its view that disclosing the information would have an adverse effect on those who supplied it. However, the Commissioner recognises that Natural England has extensive experience of handling consultations of this nature and that it has an understanding of the local issues surrounding this particular consultation exercise. Having viewed the information, the Commissioner considers that the potential for conflict is apparent, for the reasons set out in paragraph 70. Therefore, the Commissioner is satisfied that it is more probable than not that disclosing the withheld information would have an adverse effect on the interests of those who provided it.
72. Natural England has stated that those who provided the information were under no legal obligation to do so and the Commissioner notes from viewing the information that participation in the consultation appears to be entirely voluntary.
73. The third stage of the test for engaging the exception requires that if the information was supplied in circumstances such that Natural England, or

any other public authority, was free to disclose it, the exception will not apply. In practice, this involves considering whether Natural England owes a duty of confidence to those who provided the information and whether any explicit powers exist which permit Natural England to disclose the information.

74. The Commissioner considers that where a public authority solicits the views of individuals or private bodies as part of a consultation process, those who respond would have the expectation that the views they provide will be treated in confidence. The expectation of confidentiality would arise partly because, as discussed above, in matters such as land use, planning or access, there is always the potential for one consultee's view to conflict with that of a neighbour. Having viewed the information the Commissioner is satisfied that it has the quality of confidence, since the issues to which it relates are not trivial and it is not publicly available.
75. For a duty of confidence to be owed it is also necessary that an unauthorised disclosure of the information would be detrimental to the confider. This matter has in effect already been considered at paragraphs 70 and 71 above and the Commissioner concluded that disclosure would have an adverse effect.
76. In light of the above the Commissioner is satisfied that Natural England does owe the suppliers of the information a duty of confidence and the Commissioner is not aware of any specific power which would allow Natural England to override that duty of confidence and disclose the information. Therefore the Commissioner finds that the third stage of the test for engaging the exception is satisfied.
77. The final part of the test for engaging the exception is that the person who supplied the information has not consented to its disclosure. The Commissioner is not aware that any of the parties have consented. The Commissioner therefore finds that the exception is engaged.

Public interest test

78. As with the previous exception, regulation 12(5)(f) of the EIR is subject to the public interest test as set out in regulation 12(1).
79. The public interest arguments in favour of disclosure are the same as those discussed in respect of the information withheld under regulation 12(5)(d). These are discussed in paragraphs 58 and 59, above.
80. The public interest arguments in favour of maintaining the exception take account of the extent to which the interests of those who supplied the information will be harmed by disclosure, the value in maintaining the trust people have in Natural England's ability to maintain confidentiality, the impact of undermining that trust on the free flow of

information to Natural England in the future and how this would affect the ability of Natural England to perform its functions.

81. Regarding the adverse effects on the interests of those who supplied the information, the Commissioner recognises that the disclosure of some of the information would have less of an impact on those who supplied it than on others. However, the Commissioner remains of the view that the disclosure of any of the information has the potential to cause conflict between those who may hold different views on the proposals. There is therefore a real risk of relations being damaged.
82. The Commissioner also considers that it is a public interest argument of considerable weight that the public, individuals and private bodies, should have confidence that Natural England will respect the confidentiality of the information they provide to it when responding to consultation exercises. Without such trust, the public would be less willing to engage with Natural England. This would greatly reduce the amount, detail and, ultimately, the value of the information to Natural England when conducting consultation exercises. For example, where a private company has shared information on its business plans with Natural England, it may feel aggrieved if it believes Natural England has then made that information available to a wider audience. Equally, private individuals may feel vulnerable if Natural England was to disclose their contribution to the consultation. Their vulnerability may be heightened by the fact that often such consultees will live in the locality.
83. The Commissioner recognises that where an individual has provided their views as a representative of a campaign group, it may be that they would nevertheless have some incentive to continue to present their views if doing so would advance their cause. On the whole, however, the Commissioner considers that disclosing the requested information would have a marked impact on the future flow of information to Natural England, due to people's perceptions that the information they share with it could enter the public domain.
84. The Commissioner notes that even though the England Coast Path was officially opened in 2020, there are still sections at various stages of completion and certainly this was true at the time of the request. It is also quite possible that Natural England will need to carry out consultation exercises for other, similar projects in the future. If the free flow of information from consultees was hindered, the Commissioner considers there would be a detrimental impact on Natural England's ability to conduct successful and efficient consultation exercises. The amount of information it gathered in such exercises would be reduced and it would be of a less candid nature. This could lead to poorer decision making and delays in the legal process. The proposals Natural England takes forward may not properly take account of all the relevant issues and may attract additional objections during the eight week

period following the publication of a coastal access report. If this was the case, the legal process for designating the route would take longer. This works against the public interest and favours maintaining the exception.

85. In balancing the public interest arguments for disclosing the information and those in favour of maintaining the exception, the Commissioner again recognises the importance of individuals having access to information which will allow them contribute to the decision making process, particularly at an early stage in that process when it is more open to influence.
86. On that point, the Commissioner has also taken account of the opportunities that are provided within the formal process for designating the route for interested parties to firstly make their views known to Natural England during the initial consultation and again to make formal objections/representations during the eight week period before the matter is considered by the planning inspector.
87. Taking all these matters into consideration the Commissioner finds that, in respect of all the information which engages the exception provided by regulation 12(5)(f), the public interest in maintaining the exception is greater than the public interest in disclosure. Natural England was therefore entitled to apply regulation 12(5)(f) of the EIR to withhold this information.

Regulation 12(2) - Presumption in favour of disclosure

88. 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).

89. In this case, the Commissioner's view with regard to the application of both regulation 12(5)(d) and regulation 12(5)(f), is that the balance of the public interests favours the maintenance of the exceptions, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation

12(2), is that the exceptions provided by regulations 12(5)(d) and (f) were applied correctly.

Regulation 11 – representations and reconsideration

90. In broad terms, where a public authority initially refuses to provide the requested information, regulation 11 provides an applicant with the right to ask the public authority to reconsider that decision. This is commonly referred to as the right to request an internal review. The internal review process provides a public authority with an opportunity to carry out a robust review of how the request was handled.
91. When an applicant asks a public authority to review its decision, the applicant has the opportunity to set out their grounds for challenging the public authority's position. Then, under regulation 11(3)(a) of the EIR, the public authority is required to consider those representations. In this case, the complainant challenged Natural England's claim that it did not hold notes of meetings and asked it to examine its wider decision not to disclose all of the information he had requested.
92. Natural England's internal review response only considered the issue of whether or not it held meeting notes. The Commissioner is therefore not satisfied that the internal review was a thorough consideration of the complainant's representations, and that by failing to examine its application of the exceptions to withhold information, Natural England failed to properly comply with regulation 11(3) of the EIR.
93. The Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function. This aligns with the goal in her draft "Openness by design"² strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"³.

² <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

³ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

94. 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@justice.gov.uk

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

95. 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.
96. 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

Samantha Bracegirdle
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Information Commissioner's Office
Wycliffe House
Water Lane
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SK9 5AF