

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

### **Decision notice**

**Date:** 28 February 2023

**Public Authority:** Sandwell Metropolitan Borough Council  
**Address:** Sandwell Council House  
PO Box 2374  
Oldbury  
Sandwell  
West Midlands  
B69 3DE

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

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1. The complainant requested from Sandwell Metropolitan Borough Council information in connection with a planning application submitted by Network Rail. Sandwell Metropolitan Borough Council has disclosed some of the requested information but withheld the remainder under Regulations 12(4)(e), 12(5)(e) and 13(1) of the EIR.
2. The Commissioner's decision is that Sandwell Metropolitan Borough Council has correctly applied Regulation 13(1) to the third-party personal data redacted but has failed to successfully apply Regulations 12(4)(e) and 12(5)(e) of the EIR. Sandwell Metropolitan Borough Council has also breached Regulations 5(2) and 11(4) of the EIR.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information withheld under Regulations 12(4)(e) and 12(5)(e) of the EIR.
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 FOIA and may be dealt with as a contempt of court.

### **Request and response**

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5. On 2 January 2020 the complainant wrote to Sandwell Metropolitan Borough Council (the Council) and requested information in the following terms:

"There have been persistent rumours (not least from your employee xxxxxxxxxxxxxxxx [name redacted and will be sent privately]) that three senior Councillors intimated to Network Rail that their proposal for a sleeper factory at Bescot sidings would be viewed favourably and likely to be politically acceptable to the Council.

At the recent special planning committee meeting on 17th December a Network Rail spokesperson publicly stated that the proposal "had initially been welcomed" by SMBC.

1 Please disclose all correspondence, attendance notes, minutes of meetings etc passing between SMBC/individual councillors and Network Rail other than any disclosed in the formal planning application.

Without prejudice to the generality of this request please specifically disclose any documentation of whatsoever nature passing between the Leader of the Council and Jan Britton on the one side and Network Rail on the other. Clearly it is essential that your response includes all documentation indicating to Network Rail that their application would be "welcomed."

2 Please disclose all documentation of whatsoever nature in respect of internal SMBC deliberations concerning this project other than any disclosed in the formal planning application and specifically to include all pre-application consideration of the Network Rail proposal".

6. The Council responded on or about 17 November 2020 when it posted a bundle of documents to the complainant (some of which had been redacted) purporting to be in response to the complainant's request dated 2 January 2020. It stated that it was dealing with the request under the EIR and pointed out a lot of the planning information falling within the scope of the request was available on its website<sup>1</sup>. It disclosed a number of documents with personal data redacted under Regulation 13(1) but withheld the remainder in its entirety under Regulation 12(5)(e).
7. As the complainant was dissatisfied with the Council's response, he requested an internal review on 19 January 2021. In addition to his

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<https://webcaps.sandwell.gov.uk/publicaccess/applicationDetails.do?activeTab=documents&keyVal=PVNL23NRL3C00>

queries regarding the information initially requested, the complainant submitted some additional requests and general questions.

8. Following an internal review, the Council emailed the complainant on 7 July 2021 in which it not only reviewed its original response, but it also addressed the complainant's new requests and made some general comments. It also disclosed further information, some of which was redacted.
9. In relation to its response to the complainant's initial request the Council upheld its original decision and stated it had carried out detailed and reasonable searches and gave details. It therefore believed all information falling within the scope of the request had been identified and either disclosed with redactions or withheld in its entirety under Regulations 12(4)(e) [internal communications], 12(5)(e) [commercial interests], and 13(1) [third party personal data]. In response to the complainant's concerns regarding a perceived 'paucity of disclosure', the Council refuted any allegations of a cover up, pointing to the reasonable searches it had conducted.
10. The Council clarified that the internal communications did not include any of its communications with Network Rail and stated disclosure would harm the way it made decisions or gave advice. With regard to commercial confidentiality, the Council stated that this was because the negotiations related to the commercial sale and valuation of public land to a third party. Finally, in relation to personal data redactions for its officers, it stated this was in accordance with its normal practice where only grade J and above staff would not have their details redacted. It said Principal Planners were grade I and Senior Environmental Health Officers were grades F or G depending on the date.
11. To date, the Council has informed the Commissioner that the complainant has not requested an internal review in relation to the 'new' requests he submitted on 19 January 2021.

## **Scope of the case**

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12. The complainant contacted the Commissioner in September 2021 and July 2022 to complain about the way his request for information had been handled. Firstly, he was unhappy with the delays in the Council responding to his initial and internal review responses of 12 and 6.5 months respectively. Secondly, he was unhappy with the Council's claim that it had identified all of the recorded information falling within the scope of his request and questioned the adequacy of its enquiries and searches. Thirdly, he questioned the application of the EIR exceptions cited by the Council and their relevance to the specific information withheld or redacted. Finally, he queried the Council's apparent reliance

on 'legal protection privilege' without any specific reference to a particular EIR exceptions.

13. On 25 November 2022 the Commissioner wrote to the Council and requested copies of the redacted/withheld information together with any further arguments it was minded to advance in relation to the EIR exceptions applied. He also requested details of the enquiries and searches it carried out to identify, locate and extract any information falling within the scope of the complainant's request. Finally, the Commissioner gave the Council an opportunity to reconsider its position in view of the time which had elapsed since the request had been submitted, to disclose the withheld information in whole or in part.
14. The Council responded 9 December 2022 with copies of the withheld information, details of the searches and enquiries carried out and maintained its position that it had identified all recorded information falling within the scope of the complainant's request and correctly applied the EIR exceptions under Regulations 12(4)(e), 12(5)(e) and 13(1). It did however confirm it was not specifically relying on legal privilege as the information withheld was commercial and therefore covered by Regulation 12(5)(e).
15. The Commissioner will therefore consider the extent to which the council has located all the relevant information, the application of the exceptions cited, and the delays in the council's response and internal review.

## **Reasons for decision**

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### **Regulation 5 – duty to make environmental information available on request**

16. Under regulation 5(1) of the EIR, and subject to a number of EIR provisions, a public authority which holds environmental information shall make it available on request.
17. The Commissioner can rarely prove beyond doubt that a particular piece of information is or is not held. He is only required to determine whether it is more likely than not that the public authority has located all the information it holds.
18. With regard to the enquiries and searches carried out, the Council stated the planning officers who dealt with the planning application were approached for information. They each provided the information they were able to. However, given that the matter had been ongoing for a significant length of time, they were aware that there might be other information in the email accounts of former officers. Accordingly, the

Council stated that electronic searches were carried out of the email accounts of all officers, councillors, the current and former Leader, the current and former Chief Executive for any emails to and from @networkrail.co.uk email addresses. Also, a specific search was carried out on any emails to @networkrail.co.uk with the word 'welcomed'. The search results were then sifted and those in scope were reviewed. Following the internal review (with contained responses to the initial and subsequent information requests) further enquiries and searches were carried out. These included contacting existing officers to provide further clarification and information and also carrying out a further electronic search. As a result of these searches, further information was disclosed to the complainant. The remaining information falling within the scope of the request was withheld under Regulations 13(1), 12(4)(e) and 13(5)(e) of the EIR.

19. Having considered the council's explanation of the searches to date and in the absence of any compelling evidence to the contrary, the Commissioner is satisfied that the Council has located all the information it holds that is relevant to the complainant's request.
20. The Commissioner therefore concludes that, on the balance of probabilities, the Council has identified all the information that it holds that is relevant to the request.
21. As the Commissioner is satisfied the Council has identified all the recorded information falling within the scope of the request, he has therefore gone on to assess its application of Regulations 13(1), 12(4)(e) and 12(5)(e) of the EIR.

### **Regulation 13(1) of the EIR – Personal data**

22. Regulation 12(3) of the EIR states to the extent that the information requested includes personal data of which the applicant is not the data subject it shall not be disclosed otherwise than in accordance with Regulation 13.
23. Regulation 13 prohibits a public authority from disclosing third party personal data if to do so would contravene the UK General Data Protection Regulations (GDPR) or the Data Protection Act 2018 (the DPA).
24. In the present case, the Council has stated that the third-party personal data redacted was the names and contact details of its junior officers, Network Rail employees and third-party individuals. The Council added that none of these individuals would expect their information to be disclosed in response to a request under the EIR and there is no lawful basis for to process their information. The only relevant lawful basis for processing would be legitimate interests. In these circumstances, the purpose of the request was to understand the Council's decision making

in relation the planning application process. The Council believes this legitimate interest was met by the information disclosed in response the request including the names of the senior Council officers and Councillors involved in the planning process. The Council stated it did not believe the disclosure of the names and contact details of its junior officers, Network Rail employees and third-party individuals was necessary for meeting any legitimate interests. It concluded that there was no legitimate interest in the disclosure of this information and therefore no lawful basis for processing it.

25. The Council also pointed out that in the initial disclosure of information reference was made to individuals of the Action Group and members of the public involved in the consultation process. It stated that these individuals would not expect their personal information to be publicly disclosed by the Council and there was no lawful basis on which to process their information for the purpose of the request.
26. The Commissioner has viewed the third-party personal data identified and redacted by the Council and considered its application of Regulation 13(1) of the EIR.
27. Regulation 13(1) says that information is exempt information if it is the personal data of another individual other than the requestor and disclosure would contravene one of the data protection principles.
28. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
29. In this case, the Commissioner is satisfied that the withheld information is the personal data of the third parties identified by the Council.
30. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
31. When considering whether the disclosure of personal information would be lawful, the Commissioner must deliberate whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary and whether these interests override the rights and freedoms of the individuals whose personal information it is.
32. The Commissioner considers that the Council has acknowledged the public right to access information under the EIR and has recognised that there is an interest in the planning applications it considers.
33. The Commissioner considers that the complainant is pursuing a legitimate interest but that disclosure of the redacted personal information under the EIR is not necessary to satisfy it. This is because the legitimate interest has already been met through the provision of

the redacted emails disclosed. The information disclosed includes the names of its officers of grade J and above such as Principal Planners and Senior Health Officers. The withheld information would add no further understanding, or context.

34. The Commissioner considers that disclosing the withheld information would be unlawful as it would contravene a data protection principle; that set out under Article 5(1)(a) of the GDPR. The Council was therefore correct to apply Regulation 13(1) to the third-party data.

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

35. 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.
36. The information which has been withheld under Regulation 12(4)(e) comprises of emails or parts of emails discussing options in relation to the progress of the panning matter. The Council has argued that these communications clearly fall within the remit of officers requiring an opportunity to consider matters and have a safe space to consult each other on how best to progress matters. Some of the communications are in the capacity of an officer and a director discussing matters to progress a project. Accordingly, the Council stated there was no public interest in these communications being disclosed.
37. Having viewed the withheld information the Commissioner is satisfied that it constitutes internal communications and therefore Regulation 12(4)(e) is engaged.

### **The public interest test.**

38. Regulation 12(1)(b) requires that where the exception under Regulation 12(4)(e) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner is mindful of the provisions of Regulation 12(2) which state that a public authority shall apply a presumption in favour of disclosure.
39. The Council has not submitted any representations in favour of withholding the internal communications in this case. All it has stated is that 'there is no public interest in (the internal) communications being disclosed'.

40. The complainant believes there is a strong public interest in the withheld information being disclosed as it relates to a planning application by Network Rail that ultimately did not proceed<sup>2</sup>. This is against a background of rumours he has heard that three senior Councillors intimated to Network Rail that their proposal for a sleeper factory at Bescot sidings would be viewed favourably and likely to be politically acceptable to the Council.
41. The Commissioner is not persuaded that the very limited and generalised public interest argument advanced by the Council is sufficient to outweigh the presumption in favour under Regulation 12(2) of the EIR. Accordingly, he finds that the exception under Regulation 12(4)(e) has not been successfully applied.

**Regulation 12(5)(e) of the EIR – confidentiality of commercial information**

42. The Council has withheld some of the requested information under Regulation 12(5)(e) of the EIR.

43. Regulation 12(5)(e) states:

'A public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest'.

29. The purpose of this exception is to protect any legitimate economic interests underlying commercial confidentiality. The exception is broken down into a four-stage test, all four elements of which are required in order for the exception to be engaged:

- The information is commercial or industrial in nature;
- Confidentiality is protected by law;
- The confidentiality is protecting a legitimate economic interest;
- The confidentiality would be adversely affected by disclosure.

The information is commercial or industrial in nature

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[https://webcaps.sandwell.gov.uk/publicaccess/files/4F16970047BEBB90F51C44AF5C4B75A0/pdf/DC\\_19\\_63378-REFUSE\\_PERMISSION-1042131.pdf](https://webcaps.sandwell.gov.uk/publicaccess/files/4F16970047BEBB90F51C44AF5C4B75A0/pdf/DC_19_63378-REFUSE_PERMISSION-1042131.pdf)

44. The Council believes the information is clearly commercial in nature as it relates to negotiations regarding a transaction for public land including discussions about its valuation and heads of terms. Having seen the withheld information the Commissioner accepts that it is commercial in nature. The first element of the test is therefore satisfied.

Confidentiality provided by law

45. The Council has confirmed to the Commissioner that all of the negotiations relating to the land transaction were 'subject to contract'. It stated that these words were cited on some of the emails contained in the withheld documents. However, it added that all correspondence whether it contained these specific words or not was covered under the 'subject to contract' umbrella. It stated that the Council was therefore bound by the law of contract which brings with it a common law duty of confidentiality. Both parties had and continue to have, given that the transaction did not take place, an expectation of confidentiality in relation to their negotiations. In the event that it is not specifically stated within the communications, the Council still believes that there was an implied duty of confidence given the nature of the negotiations.
46. In order to establish a common law duty of confidence the information must have the necessary quality of confidence. If the information is not trivial nor in the public domain, it has the necessary quality of confidence.
47. The Commissioner has seen the withheld information and accepts that it does have the necessary quality of confidence as it is not trivial nor is it in the public domain. Therefore, the second element of the test is satisfied.

The confidentiality is protecting a legitimate economic interest

48. The Council has argued that the confidentiality of the information is to protect its own commercial and economic interests as it relates to the value of its own land. This information has the potential to be used by competitors who may wish to transact with the Council in relation to this piece of land or an alternative piece of land in the future. In this case, the transaction did not transpire due to the planning application being unsuccessful.
49. The Commissioner considers that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. The Commissioner considers that legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational

damage, or avoiding disclosures which would otherwise result in a loss of revenue or income.

50. The Commissioner has seen the withheld information and accepts the confidentiality of the information exists to protect the Council's commercial and economic interests in relation to the value of its land for resale and development. Accordingly, the third element of the test is satisfied.

The confidentiality would be adversely affected by disclosure

51. The Council considers that since the first three elements of the test are satisfied, it therefore follows that the confidentiality would be adversely affected by disclosure the withheld information.
52. The Commissioner considers that although a necessary element of the exception, once the first three elements are established, he considers it is inevitable that this fourth element will be satisfied. Disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information and would also harm the legitimate economic interests already identified. Consequently, the Commissioner considers that the Council is entitled to engage Regulation 12(5)(e) of the EIR to the withheld information.

The public interest test

53. In common with all EIR exceptions, Regulation 12(5)(e) is subject to the public interest test set out at Regulation 12(1)(b). Therefore, the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the withheld information. Furthermore, 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.
54. Despite being requested to do so by the Commissioner, the Council has only provided limited arguments in support of the EIR exceptions it has applied including the balance of the public interest. However, it did state that had the planning application been granted and the land transaction progressed, the Council would have been required to report the matter to Cabinet for approval and therefore a summary of the proposal would have been made public. This report would not have included the negotiations but any public interest in the transaction would have been met by the transparency in the Council's process. Finally, as the matter did not proceed the Council has argued that it was even more pertinent that the negotiations remained confidential.
55. The Commissioner is not persuaded that the very limited and generalised public interest arguments advanced by the Council is

sufficient to outweigh the presumption in favour under Regulation 12(2) of the EIR. Accordingly, he finds that the exception under Regulation 12(5)(e) has not been successfully applied.

### **Regulation 5(2) of the EIR – Duty to make environmental information available on request**

56. Regulation 5(2) requires that a public authority disclosed information in response to a request within 20 working days after the date of receipt of the request.
57. The complainant submitted his request for information on 2 January 2020. The Council provided its response, disclosing some of the requested information but withholding the rest under Regulations 12(4)(e), 12(5)(e) and 13(1), on 17 November 2020. This falls outside of the 20 working days required by Regulation 5(2).
58. The Commissioner has therefore decided that the Council did not comply with the requirements of Regulation 5(2) of the EIR.

### **Regulation 11(4) of the EIR - Representations and reconsideration**

59. Regulation 11(1) of the EIR allows a requester to request an internal review of the original decision should they disagree with the public authority's response to their request.
60. Regulation 11(4) of the EIR requires the public authority to provide the outcome of its reconsideration or internal review within 40 working days after receipt of the representations.
61. In this case, the complainant requested an internal review on 19 January 2021 and Council responded on 7 July 2021. This equates to 118 working days, breaching Regulation 11(4) of the EIR.

### **Other matters**

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#### **Public interest tests under the EIR**

62. The Commissioner would like to draw the Council's attention his guidance<sup>3</sup> in relation to carrying out the public interest test when applying any of the EIR exceptions under Regulations 12(4) or 12(5).

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<sup>3</sup> [How exceptions and the public interest test work in the Environmental Information Regulations | ICO](#)

63. In relation to blanket rulings the Commissioner's guidance states that:

'Under EIR regulation 12(1)(b), (a public authority) must consider whether, "in all the circumstances of the case", the public interest in maintaining the exception outweighs disclosure. Having a general approach to releasing certain types of information may help you from an administrative point of view. However, this should not prevent you from considering the balance of public interest in the circumstances of a particular request'.

64. The Commissioner would also like to remind the Council that it should be carrying out a separate public interest test for each relevant EIR exception applied.

## Right of appeal

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65. 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)

66. 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.
67. 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 .....**

**Laura Tomkinson  
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Wycliffe House  
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Wilmslow  
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SK9 5AF**