

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

### **Decision notice**

**Date:** 7 April 2025

**Public Authority:** Hertsmere Borough Council  
**Address:** Civic Offices  
Elstree Way  
Borehamwood  
Hertfordshire  
WD6 1WA

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

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1. The complainant has requested information relating to emails sent or received by a specific member of staff at Hertsmere Borough Council (the Council) in relation to breaches of a planning condition.
2. The Commissioner's decision is that the Council has correctly applied regulation 12(4)(e) (internal communications) and 12(5)(f) (interests of the information provider) of the EIR to withhold some information falling within the scope of the request.
3. However, in failing to provide some environmental information within 20 working days it breached regulation 5(2) of the EIR.
4. It also breached regulation 11 of the EIR by failing to provide an internal review.
5. The Commissioner does not require further steps.

## Request and response

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6. On 4 March 2024, the complainant wrote to the Council and requested information in the following terms:

“[name redacted] would like to raise a FOI request for all emails received and sent by member of staff [name redacted] regarding the allotment track/road – leading to the allotments from Gills Hill Lane to the allotments at Phillimore Recreation Ground between the period 1 March 2023 and up to today's date.”
7. The Council responded on 20 June 2024, providing some information falling within the scope of the request, but cited regulation 12(5)(f) (interests of the information provider) and regulation 13(1) (personal information) to refuse other information.
8. The complainant requested an internal review on 15 July 2024, the Council did not respond.

## Scope of the case

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9. The complainant contacted the Commissioner on 9 September 2024, to complain about the exceptions applied to the request.
10. Within its submission to the Commissioner, the Council revised its response to the request. It applied regulations 12(4)(e) (internal communications), 12(5)(f) (interests of the information provider) and regulation 13(1) (personal data) to withhold some information falling within the scope of the request.
11. It provided five bundles of information falling within the scope of the request to the Commissioner, confirming that information within bundles one and two had been released to the complainant as part of the Council's initial response to the request.
12. However, following intervention by the Commissioner, it confirmed that it had located further information which had, in error, not originally been included in bundles one and two. This revised information has now been provided to the complainant.
13. Bundle five contains copies of environmental reports commissioned by a local resident whose property abuts the track. These reports have already been provided to the complainant and so do not form part of this decision notice.

14. The scope of this case is therefore to consider if the Council was correct to apply the regulations noted in paragraph 10 of this decision notice to withhold the information within bundles three, four, and five.

## **Reasons for decision**

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

15. Regulation 12(4)(e) provides an exception for information which constitutes an 'internal communication'. In order for the exception to be engaged it needs to be shown that the information in question constitutes a communication within one public authority, specifically, the authority to which the request is made.
16. Regulation 12(4)(e) is a class-based exception. There is no need to consider the sensitivity of the information to engage the exception. However, the exception is subject to the public interest test.
17. The Commissioner has viewed the withheld information and is satisfied that all emails within bundle three, and some emails within bundle four, constitute internal communications as they were exchanged between council staff in regard to a complaint about the allotment track. There is no evidence to suggest any of these documents were shared outside of the Council.
18. Therefore, the Commissioner finds that regulation 12(4)(e) of the EIR is engaged in relation to bundle three and some emails within bundle four. He will now go on to consider the public interest test.

### **Public interest test**

#### Arguments in favour of disclosure

19. The Council acknowledges that there is a public interest in members of the public being able to understand how it exercises its regulatory functions in relation to planning disputes, and to understand how these are assessed and that any resultant enforcement action is justified and proportionate.
20. The Commissioner is aware that concerns relating to the track date back a number of years and that, having being replaced once, a decision had been made to order rectification works. It is these most recent works which are the subject of the complaints currently being considered and therefore there is a public interest in understanding why these were required.

21. It can also be assumed that residents whose properties abut the track have a valid interest in understanding how the Council are dealing with any issues relating to the track.

Arguments in favour of maintaining the exception

22. The Council acknowledged that there is a local interest in the issues with the track. However it considers that there is a stronger public interest in regulatory officers having a private space in which to weigh up and discuss regulatory options, before any formal action is taken.
23. It is part of the Council's role to investigate complaints about failures to comply with conditions attached to a planning permission. It stated that publishing internal communications where staff are discussing such investigations would deter a full and frank exchange of views by its staff. This could lead to such deliberations and the reason for taking, or not taking regulatory action, not being fully documented which could potentially lead to poorer regulatory outcomes.

Balance of the public interest

24. The Commissioner acknowledges that any action which may restrict the Council's planning team's ability to conduct the free and frank discussions necessary to carry out its role in taking effective regulatory action, or not, would be counter to the public interest.
25. The content of the internal communications being considered here relate to internal discussions between members of staff regarding a long running investigation about breaches of planning control. The investigation relates to the previous track to the allotments, and remedial work which was ordered.
26. The concerns being discussed in the withheld information were live at the time of the request. It is the view of the Commissioner that there is a strong public interest in allowing such discussions to take place without undue outside influence or pressure in order that fully informed and unbiased decisions can be made by the Council.
27. It can be assumed that residents whose property abuts the track in question would have an interest in any remedial work being carried out, and therefore an interest in any discussions being held. However, from the information available, it appears that only two of those residents have complained to the Council about the works.
28. Therefore, while some local interest can be assumed, this does not appear to be at a high level.

29. The Commissioner has therefore concluded that the public interest in the maintenance of the exception outweighs the public interest in disclosure of the withheld information. The Council was not, therefore, obliged to disclose the withheld information falling under regulation 12(4)(e) of the EIR.

**Regulation 12(5)(f) - Interests of the information provider**

30. The Commissioner has gone on to consider the remaining emails within bundles four and five under regulation 12(5)(f).

31. Regulation 12(5)(f) states:

“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;”

Would disclosure adversely affect the interests of the person/s who provided the information to the Council?

32. As with all the Regulation 12(5) exceptions, the Commissioner considers that, in order to demonstrate that disclosure “would adversely affect” a confider’s interests, a public authority must demonstrate that the adverse effect is more likely than not to occur.
33. The Council stated that disclosure would adversely affect the individuals who had brought concerns about a breach of planning control to its notice. This is because, if individuals considered that the Council would not protect their anonymity and/or keep their communications with the Council confidential, they would be deterred from providing further information in what was a live process.
34. This would, in turn, potentially lead to breaches of planning orders not being reported which could lead to cases becoming immune from enforcement action, restricting the Council from delivering a pro-active planning enforcement service.

35. The Council stated that if information provided by members of the public relating to breaches of planning control were disclosed, this would damage those individuals' confidence in the ability of the Council to maintain confidentiality. This means that they would likely be deterred from making further complaints about breaches of planning control even if these, as in the present case, adversely affected their interests.
36. The Commissioner considers that it is important for residents within the local area, and more widely, to feel secure when raising concerns with the Council. This includes knowing that their correspondence will be held in confidence without concern that it might be disclosed.
37. The Commissioner's view is that disclosure of the information would adversely affect the confider's interests because it could lead to the Council being unable to properly consider breaches of planning control brought to them.

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

38. The Council has confirmed that, none of the third parties identified in the withheld information were under a legal obligation to write to the Council's planning enforcement service about the track mentioned in the request.
39. On this basis the Commissioner accepts that those providing the information to the Council were not, and could not have been put under any legal obligation to supply the withheld information.

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?

40. The Commissioner's guidance states, "where information has been provided by another person, public authorities will only be able to disclose it if there is no duty of confidence or they have a specific power to do so."
41. The Council stated that, "it operates a complaints based planning enforcement service and considers that it receives complaints from residents under an implied duty of confidence and that such duty extends to any consequential communications passing between the Council and the complainants."
42. Accordingly, apart from the EIR, the Council considers that it would not otherwise be empowered to publish such information.

43. On that basis, the Commissioner is satisfied that the Council was not entitled to disclose the information apart from under the EIR.

Has the person/s supplying the information consented to its disclosure?

44. The Council stated that it has not received the consent of any of the complainants identified in the withheld information to the publication of their communications with the Council to the public at large.
45. Having found that each of the tests for regulation 12(5)(f) to be engaged are met, the Commissioner's conclusion is that the exception is engaged. He has therefore gone on to consider the public interest test.

**Public interest test**

Arguments in favour of disclosure

46. The Council's view is that there is a public interest in favour of disclosure which relates to the public understanding the nature and frequency of complaints received by the Council alleging breaches of planning control and how the Council deals with them.

Arguments in favour of maintaining the exception

47. It went onto state that, the public interest in the Council respecting the confidentiality of information received for its own sake and in order to preserve and maintain the effective functioning of a complaint based planning enforcement service, clearly outweighs any competing public interest in the disclosure of complaints received in confidence and related correspondence with complainants.

"If complainants considered that the Council would not protect their anonymity and/or keep their communications with the Council confidential, they would be deterred from making complaints thereby leading to breaches of development management control remaining undetected for longer and in some cases becoming immune from enforcement action and/or requiring the Council at a time of severe financial restraint to significantly increase the number of officers in the Planning Enforcement Service in order to deliver a pro-active planning enforcement service."

Balance of the public interest test

48. The content of the information within bundle four, and some within bundle five, relate to both historical and live complaints submitted to the Council about breaches of planning control in relation to the previous and current track mentioned in the request.

49. The underlying issue here, complaints about breaches of planning control in relation to the track, are likely well known in the local area, this would appear to lessen any public interest arguments in maintaining the exception. However, while there is a presumption of disclosure under the EIR, such disclosure of information is seen as being to the world at large. Therefore the Commissioner has considered whether the individuals providing the information would have had any reasonable expectation that the information they provided to the Council would be disclosed to the world at large.
50. The Commissioner accepts the Council's arguments that the planning complaint process is confidential. Therefore, any individual submitting information via this process would have an expectation that it would be treated as confidential and would not be disclosed to the world at large.
51. He is therefore of the view that there is a strong public interest in maintaining the confidentiality of the complaints process in order that members of the public feel confident in the system and that they will not be deterred from making complaints.
52. In this particular case, since the issue was live at the time of the request, the Commissioner is mindful that disclosure could have affected the on-going flow of information, particularly if individuals directly affected were deterred from providing further information about their on-going concerns because their information had been disclosed.
53. This could hinder such investigations and restrict the Council from delivering a pro-active planning enforcement service. This could potentially lead to it having to devote more time and effort to resolving such complaints. This would not be in the public interest since it is not an effective use of already stretched money and resources.
54. The Commissioner is of the opinion that there is a high public interest in maintaining both the voluntary supply of information from members of the public to the Council, and in maintaining the confidence of the public that they are able to supply information to the Council in confidence.
55. The Commissioner has therefore concluded that the public interest in the maintenance of the exception outweighs the public interest in disclosure. The Council was not, therefore, obliged to disclose the withheld information.



56. Having viewed the withheld information, the Commissioner is of the view that the information withheld by the Council under regulation 13, also falls under regulation 12(5)(f). Since his conclusion is that the Council was not obliged to disclose the withheld information under regulation 12(5)(f) he has not gone on to consider the application of regulation 13 of the EIR.

## **Procedural matters**

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### **Regulation 11 – reconsideration (internal review)**

57. In relation to the duty to carry out internal reviews the relevant sections of regulation 11 of the EIR state:

“(3) The public authority shall on receipt of the representations and free of charge

(a) consider them and any supporting evidence produced by the applicant; and

(b) decide if it has complied with the requirement.

(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.”

58. In this case the complainant requested an internal review on 15 July 2024, but the Council did not respond.
59. The Commissioner wrote to the Council on 13 September 2024, to inform the Council that it had accepted this case for investigation without an internal review being carried out.
60. Within the course of his investigation, the Commissioner spoke to the Council to determine why an internal review was not offered and why the Council did not respond to the internal review request submitted by the complainant. The Council stated that the only senior member of staff available to respond would have been the same person who initially responded to the request and therefore it would not be appropriate for the same person to carry out the internal review. It is unclear to the Commissioner why this explanation was not provided to the complainant at any stage during the information request process.

61. The Commissioner would remind the Council that it is a requirement of the EIR that a public authority must offer and carry out a reconsideration (internal review) of requests. Therefore the Council should ensure that it has in place the ability to carry out such reviews
62. The Commissioner finds that the Council breached regulation 11 of the EIR, as it did not carry out an internal review.

### **Other matters**

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63. Although it does not form part of this notice the Commissioner wishes to highlight the following matter of concern.
64. The Commissioner is disappointed with the lack of engagement on the part of the Council in this case.
65. Despite sending a number of emails to the Council regarding this complaint and leaving a number of phone messages asking the Council to contact him regarding this complaint, he received no response to his enquiries.
66. The Council's lack of engagement and input into the Commissioner's investigation necessitated the issuing of an Information Notice in order to obtain the information required.
67. The Commissioner considers the Council's engagement with his office on this case to have been unacceptably poor and he expects to see improvements when any future complaints are allocated for investigation. In future the Commissioner expects the Council to provide him with satisfactory responses within the timeframes set in his correspondence.

## Right of appeal

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68. 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)

69. 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.
70. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Ben Tomes**  
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