

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

### **Decision notice**

**Date:** 20 August 2014

**Public Authority:** Epsom and Ewell Borough Council  
**Address:** Town Hall  
The Parade  
Epsom  
Surrey  
KT18 5BY

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

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1. The complainant requested information from Epsom and Ewell Borough Council (the Council) about the decision-making process regarding the planning application and proposed lease of a named site to the person who had applied for planning permission.
2. The Council provided some information within the scope of the request but withheld the remainder citing the EIR exceptions for adverse effect to the confidentiality of proceedings (regulation 12(5)(d)) and to commercial confidentiality (regulation 12(5)(e)). It subsequently also relied on regulation 12(5)(f) (interests of the person who provided the information).
3. The Commissioner's decision is that the Council failed to demonstrate that the exceptions are engaged.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information withheld by virtue of regulations 12(5)(d), (e) and (f).
5. 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 the Act and may be dealt with as a contempt of court.

## Background

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6. Many councils offer a pre-application service whereby individuals can obtain advice from a planning officer prior to making a planning application.

## Request and response

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7. On 7 November 2013 the complainant made the following request for information:

*"We refer to the above Property and note that the Planning Application currently is before the Council for determination.*

*We request to be provided access to a complete unredacted set of the following documents and information (be they in draft or final form) as a matter of urgency:*

- 1. All correspondence, reports, files, draft and completed agreements for lease and lease documents, Council and committee meeting minutes and resolutions and all other documents and information relevant to the intention to lease the Property and for it to be occupied;*
- 2. All correspondence, reports, files, draft and completed agreements for lease and lease documents, Council and committee meeting minutes and resolutions and all other documents and information relevant to the proposed leasing of the Property to [name redacted] and/or [name redacted];*
- 3. All correspondence, reports, files, notes, Council and committee meeting minutes and resolutions, pre-application advice, section 106 planning obligation heads of terms documents and agreements, and other documents and information relevant to the Planning Application (as and when these items come into existence prior to determination of the Application); and*
- 4. All documents and information evidencing that 'best consideration' has been or will be achieved as regards any proposed lease of the Property, in accordance with section 123 of the Local Government Act 1972.*

*If our understanding of the matter is incorrect, could you please advise us immediately. Specifically, could you please confirm by return, and for the record:-*

*(a) Whether any decision has been taken or conclusion arrived at to enter into an agreement for lease in relation to, or grant a lease of, the Property;*

*(b) Whether section 123 of the Local Government Act 1972 has been complied with in selecting a prospective tenant of the Property and in awarding an agreement for lease and/or lease of the Property;*

*(c) Whether any decision has been taken or conclusion arrived at by the Council to recommend that the Planning Application be approved; and*

*(d) With reference to the Development Plan, please advise which planning policies, in the Council's view, apply to the Property".*

8. The Council responded, under the EIR, on 4 December 2013. It provided some information within the scope of the request but refused to provide the remainder.
- Point 1 – it provided the requested information and confirmed that it does not hold any further relevant information.
  - Point 2 – it confirmed it holds this information but refused to provide it citing regulation 12(5)(e) (confidentiality of commercial or industrial information).
  - Point 3 – it provided some of the requested information. However, with regard to the requested pre-application advice it withheld that information citing regulation 12(5)(e) (confidentiality of commercial or industrial information).
  - Point 4 – it provided the requested information.
9. The complainant requested an internal review on 2 January 2014. The Council sent her the outcome of its internal review on 8 January 2014. It revised its position, advising that it considers that regulation 12(5)(d) (confidentiality of proceedings) applies to the withheld information as well as regulation 12(5)(e).

### **Scope of the case**

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10. The complainant contacted the Commissioner on 3 February 2014 to complain about the way her request for information had been handled.
11. The Commissioner acknowledges that the Council provided the complainant with some information within the scope of her request, including paperwork about the decision to lease the property. However,

in respect of point (2) of the request it withheld information "*relating to a specific lease to a specific party*". It also withheld the pre-application planning advice within the scope of point (3) of the request.

12. During the course of the Commissioner's investigation, the Council confirmed that it considers that regulation 12(5)(e) of EIR applies to the withheld information in scope of point (2) of the request and that regulations 12(5)(d) and (f) apply to the pre-application planning advice.
13. The Commissioner considers the scope of his investigation to be whether the Council is entitled to rely on regulations 12(5)(d), (e) and/or (f) of EIR as a basis for refusing to provide the withheld information.

## **Reasons for decision**

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### *Regulation 2*

14. Environmental information is defined within regulation 2(1) of the EIR as follows:

*"any information in written, visual, aural, electronic or any other material form on –*

*(a) the state of the environment, such as air and atmosphere, water, soil, land and landscape and natural sites including wetlands...*

*(b) factors, such as substances, energy, noise, radiation or waste, emissions...affecting or likely to affect the elements of the environment referred to in (a);*

*(c) measures (including administrative measures), such as policies, legislation, plans, programmes...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...".*

15. The Commissioner considers that the requested information falls under the scope of regulation 2(1)(c). The information required relates to the lease and planning application for a specific property. This will have an impact upon the elements referred to in regulation 2(1)(a). The Commissioner therefore considers that the Council is correct to consider this request under the EIR.

### *Regulation 12*

16. The exceptions listed under regulation 12(5) are based on harmful consequences of disclosure. A public authority may refuse to disclose

information if disclosing it would 'adversely affect' (harm) one of the interests listed in regulations 12(5)(a) to 12(5)(g). In this case the Council considers regulation 12(5)(d), (e) and (f) of the EIR applies.

17. The Commissioner has first considered its application of section 12(5)(e) to the information relating to the leasing of the property.

*Regulation 12(5)(e) confidentiality of commercial or industrial information*

18. Regulation 12(5)(e) of EIR states that:

*"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—*

*(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest".*

19. The purpose of the exception is to protect any legitimate economic interests underlying commercial confidentiality. The Commissioner considers that in order for this exception to apply, there are a number of conditions that need to be met. He will consider how each of the following conditions apply to the facts of this case.

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

*Is the information commercial or industrial in nature?*

20. The Commissioner considers that, for information to be commercial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services, usually for profit.

21. With respect to its application of regulation 12(5)(e) the Council told the complainant:

*"the paperwork you request relating to a specific lease to a specific party has been withheld on the grounds that it is commercially confidential".*

22. Taking into account the context in which the information was produced - the leasing of a property owned by the Council to a third party - and its purpose, the Commissioner accepts that the information is commercial in nature. He has therefore concluded that this element of the exception is satisfied.

*Is the information subject to confidentiality provided by law?*

23. The Commissioner considers that 'provided by law' will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.
24. Therefore the Commissioner has first considered the common law of confidence, which has two key tests:
- does the information have the necessary quality of confidence?
  - was the information imparted in circumstances creating an obligation of confidence?
25. For the common law duty of confidence to apply the information must have the necessary quality of confidence, meaning the information should not be trivial in nature and should not already be in the public domain.
26. In this case, the Council explained:

*"We are under a common law duty of confidence to the proposed lessee to protect the information submitted as part of the lease negotiations... eg relating to proposed rents, turnover etc".*

27. The Commissioner is satisfied that the withheld information was not in the public domain at the time of the complainant's request. The Commissioner does not consider the information to be trivial, therefore it is capable of having the necessary quality of confidence.
28. The Commissioner also accepts that information relating, for example, to lease negotiations would be reasonably understood as having been shared in circumstances importing an obligation of confidence. On this basis the Commissioner accepts that the information at issue will be subject to the common law duty of confidence.

*Is the confidentiality protecting a legitimate economic interest?*

29. In the Commissioner's view, in order to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.

30. In his view, it is not enough that some harm **might** be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm **would** be caused by the disclosure. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets 'would' to mean 'more probable than not'.

31. The Council told the complainant that it considered that disclosure in this case:

*"would affect parties' willingness to enter into commercial negotiations with the Council".*

32. With reference to its own interests, the Council told the complainant:

*"The withheld information consists of information which is of commercial value and which, if disclosed, may impact the Council's ability to negotiate the best possible sale price in the event of remarketing the property or lead to a disruption in the process and this in turn would harm the legitimate interest of the Council".*

33. In correspondence with the Commissioner the Council confirmed its position that if it was not able to rely on commercial confidentiality while ongoing negotiations were taking place, it would affect the Council's legitimate economic interests, namely its ability to competitively enter into commercial contracts. It argued that this would put the Council *"in a commercially disadvantageous situation"*.

34. On the basis of the Council's submissions, in order to satisfy this element of the exception, the Commissioner must determine whether disclosure would harm the legitimate economic interests of the third party and the public authority.

35. Where third party interests are at stake, the Commissioner considers that the public authority should consult with the third party unless it has prior knowledge of their views. It will not be sufficient for a public authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party.

36. The Commissioner accepts that, during the course of his investigation, the Council advised that the third party does not give its consent to any of the information being disclosed. He also accepts that it explained the nature and context of the information at issue.

37. In suggesting that disclosure would result in third parties being unwilling to enter into commercial negotiations with the Council, the Commissioner recognises that the Council identifies the nature of the

harm. However, he does not consider that it provided any tangible evidence that disclosure would produce such an effect. In the absence of such evidence, the Commissioner does not accept that disclosure in this case would prejudice third party interests.

38. In respect of its own economic interests, the Commissioner considers that the Council's arguments, while identifying possible effects, fail to evidence how disclosure in this case would prejudice the Council's own commercial interests.
39. Although the Commissioner is satisfied that the Council has explained its view in relation to the effect of disclosure, he is not satisfied that the Council has demonstrated sufficiently that disclosure 'would' adversely affect the legitimate economic interest of the person the confidentiality it designed to protect – the Council itself or a third party.

*The confidentiality would be adversely affected by disclosure*

40. Although this is a necessary element of the exception, once the first three elements are established the Commissioner considers it inevitable that this element will be satisfied. In his view, disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and would harm the legitimate economic interests that have been identified.
41. However, in this case, the Commissioner is not satisfied that one of the first three elements is satisfied. Therefore he is unable to conclude that the confidentiality would be adversely affected by disclosure.

*Is the exception engaged?*

42. Regulation 12(2) specifically states that a public authority shall apply a presumption in favour of disclosure. Therefore, there may be occasions when information should be disclosed even though it is confidential and disclosure would harm someone's legitimate economic interests.
43. In this case, having considered the criteria he considers relevant, the Commissioner is not satisfied that the Council provided sufficient evidence and argument to demonstrate that regulation 12(5)(e) was engaged.
44. As the Commissioner has not found the exception engaged in respect of the information withheld by virtue of 12(5)(e), he has not gone on to consider the public interest.



*The pre-application planning advice*

45. The Commissioner has next considered the Council's application of section 12(5)(d) to the pre-application planning advice.

*Regulation 12(5)(d) confidentiality of proceedings of that or any other public authority where such confidentiality is provided by law*

46. Regulation 12(5)(d) allows a public authority to refuse a request if disclosing the information would adversely affect the confidentiality of the proceedings of that public authority, or any other public authority, where that confidentiality is provided by law.
47. The term 'proceedings' is not defined within the EIR but the Commissioner considers that an activity has to have a degree of formality to qualify as such. For example it will include, but is not limited to, formal meetings to consider matters that are within the authority's jurisdiction, situations where an authority is exercising its statutory decision making powers and legal proceedings. In each of these cases the proceedings are a means to formally consider an issue and reach a decision.

*A proceeding for the purposes of the exception*

48. In this case, the Council confirmed that it considers the 'proceedings' include situations where an authority is exercising its statutory decision making powers. In that respect it told the complainant:

*"The power to lease a property that the Council owns, and the pre-application planning negotiations would therefore fall within this exemption [sic]"*.

49. The Commissioner is satisfied that the withheld pre-application planning advice formed part of 'proceedings'.

*Provided by law*

50. It is not sufficient that the information relates to formal proceedings for it to be exempt under regulation 12(5)(d). Those proceedings also have to be confidential under UK law. This means that the information has to be protected by either a statutory duty of confidence or the common law duty of confidence.
51. In this case the Council argued that the confidentiality is provided by the common law duty of confidence.
52. In the Commissioner's view, the common law of confidence will apply where the following two conditions are satisfied. First, the information

has the necessary quality of confidence. This means that the information must not otherwise be accessible and be of importance to the confider and not trivial. Secondly, the information was communicated in circumstances importing an obligation of confidence. An obligation of confidence can be expressed explicitly or implicitly.

53. The Council told the Commissioner:

*"Our website states the pre-application planning enquiries will be treated in confidence, so a prima facie expectation of confidence underlines the pre-planning application process".*

54. From the evidence he has seen the Commissioner notes that the Council's guidance on planning pre-application advice states<sup>1</sup>:

*"We will treat your enquiry in confidence subject to the requirements of FOI legislation".*

55. Nevertheless, the Commissioner accepts that the withheld information has the quality of confidence as it is clearly not of a trivial nature and is not in the public domain.

#### *Adverse effect*

56. Even where the proceedings are confidential in the terms discussed above, the exception is only engaged where disclosing the information would adversely affect that confidentiality. It is not enough that the confidentiality is provided by law: there must also be an adverse effect on that confidentiality.

57. In correspondence with the complainant the Council said that disclosure in this case of the pre-application planning advice would adversely affect the Council's ability to enter into commercial contracts, putting the Council in a commercially disadvantageous situation.

58. It confirmed that view during the course of the Commissioner's investigation.

59. The Commissioner has issued guidance on regulation 12(5)(d).<sup>2</sup> That guidance states:

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<sup>1</sup> <http://www.epsom-ewell.gov.uk/NR/rdonlyres/240292C4-1C9A-4F27-81B2-0B740B173600/0/Guidanceonchargesforplanningpreupdated22march11.pdf>

*"'Adversely affect' means there must be an identifiable harm to or negative impact on the interest identified in the exception. Furthermore, the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse effect. 'Would' means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed".*

60. The interest that is protected by regulation 12(5)(d) is the confidentiality of proceedings, where that confidentiality is provided by law. For disclosure to adversely affect the confidentiality of proceedings, the information must form part of whatever constitutes those proceedings such as the business of the meeting or the investigation or a report submitted to a meeting and included on the agenda.
61. The Commissioner accepts that the Council, both in its correspondence with the complainant and during his investigation, argued that if the disputed information were to be released this would harm the Council's ability to exercise its statutory decision making powers – in this case to lease a property it owns.
62. While the Commissioner is mindful that pre-application advice may be provided within a confidential context, since the introduction of the EIR, authorities should be aware that no information can be subject to a blanket restriction on disclosure. It is the duty of authorities to show in each specific instance that information is being withheld for the reasons identified in the exception being applied.
63. In that respect, the Commissioner's guidance on the EIR<sup>3</sup> states:

*"You should also make your staff, contractors or others you have contact with aware of how the Regulations may affect them. You should make clear that you cannot guarantee complete confidentiality of information, and that as a public body you must*

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[http://ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Environmental\\_info\\_reg/Detailed\\_specialist\\_guides/eir\\_confidentiality\\_of\\_proceedings.pdf](http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_confidentiality_of_proceedings.pdf)

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[http://ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Environmental\\_info\\_reg/Detailed\\_specialist\\_guides/guide\\_to\\_environmental\\_information\\_regulations.pdf](http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/guide_to_environmental_information_regulations.pdf)

*consider releasing any environmental information you hold if it is requested”.*

64. Furthermore, the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse effect.
65. Having considered the matter, the Commissioner has decided that the Council has failed to show how disclosure of the withheld information would result in harm being caused to the interest the exception is designed to protect. It follows that he does not find the exception engaged.

*Regulation 12(5)(f) interests of the person who provided the information to the public authority*

66. The Commissioner has next considered the Council’s application of regulation 12(5)(f) to the pre-application planning advice.
67. Regulation 12(5)(f) states that information can be withheld where its disclosure would have an adverse affect upon:

*“(f) 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”.*

68. The Commissioner’s view is that the purpose of this exception is to protect the voluntary supply to public authorities of information that might not otherwise be made available. It operates on the principle that if those who provide information on a voluntary basis suffer as a consequence of providing that information, they will not be so willing to volunteer information in the future. Therefore, to engage the exception it is necessary to demonstrate that disclosure would result in some adverse effect on the provider of the information.
69. The Commissioner recognises that environmental information will be voluntarily provided by a third party to a public authority in a variety of circumstances and could be provided by individuals, charities and private companies. Examples include the following.

- Information gathered in consultations and surveys where there was no obligation on people to respond to them.
  - Information supplied by whistleblowers.
  - Information supplied voluntarily by environmental groups or lobby groups or individuals interested in the environment.
  - Information provided by companies in pre-planning discussions with planning authorities.
  - Privately-owned papers deposited in an archive.
70. Where information is caught within the scope of the exception, refusal to disclose is only permitted to the extent of the adverse effect.
71. The Commissioner accepts that the pre-application advice may well have been documented as a result of information provided by the third party. However, in his view, no adverse effect arises in respect of some of that information, for example information which he considers to be either factual or generic to the planning process. In that respect the Commissioner considers that further consideration should have been given by the Council as to whether any part of the information should be disclosed.
72. In the Commissioner's view, the Council also appears to have relied to a large extent on the requested information being self-evidently exempt. In his view, the arguments it advanced in its correspondence with the complainant relate to the public interest test, an issue which properly falls to be considered when, or after, the decision has been taken that the exception is engaged.
73. Notwithstanding that, on the basis of those arguments, the Commissioner accepts that the Council explained that the information was provided voluntarily and that the individual concerned has not consented to its disclosure.
74. In considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (i.e. more than trivial), and to explain why disclosure **would**, on the balance of probabilities, directly cause the harm.
75. In this case, the Council told the complainant:
- "Disclosure of the information would have an adverse effect upon the interests of the individual, in terms of further possible delays and costs and the impact on his business/commercial interests,*

*both in planning and negotiating a commercial property transaction”.*

*Is the exception engaged?*

76. In a case such as this, the Commissioner's starting point must always be to consider whether disclosure would adversely affect the interests of the third party who provided the information to the public authority. This is because the exception can only apply where disclosure would result in an adverse effect on that person's interests.
77. There is no requirement for the adverse effect to be significant – the extent of the adverse effect would be reflected in the strength of arguments when considering the public interest test. However, the public authority must be able to point to specific harm and to explain why it is more probable than not that it would occur. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party's interests.
78. In other words, the onus is on the public authority to demonstrate how disclosure of the requested information would lead to the adverse effect based on the circumstances at the time of the request. In providing evidence in support of the ascribed harm, public authorities may consult with the third party whose interests are at stake.
79. In this case, however, the Commissioner was not provided with any evidence that the Council consulted with third party and sought his views on the disclosure of the information.
80. The exception at 12(5)(f) requires there to be an adverse affect to the interests of the information provider. Having considered the Council's submissions, the Commissioner considers that it has failed to explain the causal link between disclosure and the adverse effect, as well as why it would occur should the information be disclosed.
81. It follows that he finds that the Council was incorrect to withhold the information and that the information should be disclosed.

## Right of appeal

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82. 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: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

83. 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.
84. 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 .....**

**Jon Manners**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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**Cheshire**  
**SK9 5AF**