

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

Date: 22 February 2018

Public Authority: Colchester Borough Council

Address: Rowan House
33 Sheepen Road
Colchester
CO3 3WG

Decision (including any steps ordered)

1. The complainant has asked Colchester Borough Council for recorded information related to planning applications 150239 and 160868. The Council provided the complainant with some information falling with the scope of his request but withheld other information in reliance of a number of exceptions provided by Regulation 12 of the EIR.
2. The Commissioner's decision is that Colchester Borough Council has correctly applied the exception to disclosure provided by Regulations 12(4)(e), 12(4)(d) and 12(5)(b) of the EIR.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. On 13 May 2016, the complainant wrote to Colchester Borough Council and requested information in the following terms:
 - "1. Correspondence [...] between CBC Officers, between CBC Officers and Members, and between Members in respect of planning application reference 150239 and/or 160868 relating to land north and south of Tollgate West, Stanway (also known as 'Tollgate Village').
 2. Correspondence [...] between and/or concerning CBC and Nathaniel Lichfield and Partners (NPL) in respect of planning applications reference 150239 and or 160868 including:

2.1 Instructions and brief from CBC to NPL to advise on retail, employment and any other planning matters for the application;

2.2 Copies of reports and advice (whether draft or final);

2.3 Copies of other Correspondence [...] between and/or concerning CBC and NPL in respect of the applications.

3. Details of additional external advice requested or commissioned by CBC from third parties in respect of planning applications reference 150239 and/or 160868, including:

3.1 Details of the third party and scope of advice sought;

3.2 Copies of any Correspondence [...] between and/or concerning CBC and third parties.

4. Correspondence [...] between and/or concerning CBC and the following parties in relation to planning applications reference 150239 and/or 160868:

4.1 Colchester Retail Business Association (CoBRA).

4.2 GL Hearn / M&G Real Estate.

4.3 Redwood Consulting.

4.4 CBRE / Sovereign Land / Fenwick Ltd.

4.5 Williams and Griffin Department Store.

4.6 Turnstone Estates.

4.7 Other Town Centre Stakeholders.

5. Correspondence [...] between and/or concerning CBC and other parties listed below relating to the scheme known as 'Vineyard Gate' and also in respect of planning applications reference 150239 and/or 160868:

5.1 Caddick Developments.

5.2 NewRiver Retail (UK) Limited.

5.3 Vineyard Gate Developments Limited.

6. Correspondence [...] between and/or concerning CBC and other parties relating to the scheme known as 'Northern Gateway' and the planning applications 160825, 160623, 160499 and 152711 that have been submitted in respect of the scheme (albeit that the latter application was withdrawn), particularly any Correspondence that relates to or has a bearing on planning applications reference 150239 and/or 160868."
5. The complainant made clear that the term "Correspondence" should include emails, letters, memoranda, attendance notes, agendas, notes and minutes of meetings, reports, advice, instructions, any other relevant documents, and any draft versions of the foregoing.
 6. The complainant also stated that the scope of his request "includes any Correspondence between the Colchester Borough Council Officers and other parties, internal Correspondence between CBC Officers, Correspondence between CBC Officers and Members and Correspondence between Members".
 7. The Council responded to the complainant's request on 13 July by sending him some of the information he had requested. The Council withheld the remaining information in reliance on Regulations 12(4)(e), 12(5)(b), 12(5)(d) and 12(4)(d) of the EIR. The Council also refused to provide information which is already published on its website¹.
 8. The complainant wrote to the Council on 25 August to complain about the Council's response to his information request. The complainant pointed out that the documents sent to him contained very little correspondence between officers regarding planning applications specified in his request; that there was no correspondence between officers and NPL regarding their advice/report, no correspondence has been disclosed regarding amendments to draft reports, and no draft reports or instructions to NPL were disclosed.
 9. The complainant also complained that no information had been disclosed to him in respect of part 5 of his request and no correspondence had been disclosed in relation to the 'Northern Gateway' scheme referred to in part 6 of the request.
 10. The complainant challenged the Council's reliance on the exceptions it is relying on to withhold some of the information he had asked for and he asserted that all of the requested information is capable of being released without harm.

¹ www.colchester.gov.uk/planning

11. Having considered the representations made by the complainant, the Council determined that further information could be disclosed to him. It also concluded that the remaining information should continue to be withheld in reliance of the exceptions it had previously cited.

Scope of the case

12. The complainant contacted the Commissioner on 17 January 2017 to complain about the way his request for information had been handled.
13. The Commissioner has investigated the Council's reliance on Regulations 12(4)(e), 12(5)(d), 12(5)(b) and 12(4)(d) of the EIR to withhold information within the scope of the complainant's request. This notice sets out the Commissioner's decision.

Background information

14. The Council has informed the Commissioner that the person who has made this request for information is the legal representative of applicants who were refused planning consent for an out of town retail development.
15. The Council has assured the Commissioner that, in refusing the applicant's planning consent, it followed policies set down in the adopted local plan and in accordance with the recommendations of the National Planning Policy Framework.
16. The Commissioner understands that the applicant has submitted an appeal to the Planning inspectorate and that, at the time the request for information was received, a decision had not been made.

Reasons for decision

Regulation 12(4)(e) – Internal communications

17. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
18. The Council has provided the Commissioner with all of the information it has withheld from the complainant together with a spreadsheet indicating which exception the Council has relied on.

19. The information which the Council has withheld in reliance on Regulation 12(4)(e) is comprised of emails which have passed between its officers. None of the withheld internal communications were with external contractors.
20. The first question to consider is whether the information is a 'communication' for the purposes of the Regulations.
21. The Commissioner considers that a communication will encompass any information someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it.
22. Having examined the withheld information, the Commissioner is satisfied that where the Council has applied Regulation 12(4)(e) to information that can properly be characterised as a communication for the purpose of the this exception.
23. There is no definition of what is meant by 'internal' contained in the EIR. In this case the information which the Council has withheld in reliance of Regulation 12(4)(e) constitutes internal emails sent between officers of the Council. The Commissioner is therefore satisfied that Regulation 12(4)(e) is engaged.
24. Where Regulation 12(4)(e) is engaged, it is subject to a public interest test required by Regulation 12(1). The test is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
25. When carrying out the test the Commissioner must take into account a presumption towards the disclosure of the information which is required by Regulation 12(2).

The public interest test

26. The principal public interest favouring the disclosure of withheld information relates to the requirement that planning decisions should be open and transparent. This is particularly the case where those decisions affect an entire community.
27. In the Commissioner's opinion, planning decisions and the process leading to those decisions should be as open and transparent as possible and ideally all parties should be fully informed about the issues considered by the Council.
28. The public should be satisfied that the final decisions are fully explained and they should know all the facts and reasoning which lies behind those decisions. The Commissioner believes that disclosure of publicly held and relevant information would assist the public's understanding of the

issues considered by the Council and they would be more inclined to actively participate in the decision making process.

29. Many of the arguments supporting greater openness rest in the decisions themselves and in the general openness of the planning process. This openness is generally provided by the availability of documents associated with that process on the Council's website.
30. The decisions are to some extent distanced from the public interest favouring disclosure of the withheld information and consequently this weakens the public interest arguments in favour of disclosure of the withheld information. This is because the withheld information does not necessarily affect the Council's final decision.
31. In this case, transparency of the planning process has been provided through the publication of the reasons for refusal: That the proposal was contrary to policy.
32. The Council argues that the discussions contained in the withheld emails centre around matters which are ancillary to the application itself, including how the Council should defend its legitimate position against any legal challenge which might be brought against it.
33. In essence the public interest considerations relating to Regulation 12(4)(e) relate to the protection of thinking space and the ability of a public authority to have full and frank discussions without fear that the information will be disclosed.
34. In this case the Council asserts that the release of these communications would inhibit the proper consideration of the matters discussed in the emails: It is necessary to withhold these emails to allow Council officers a "thinking space" where they can express their opinions and develop their ideas without fearing that they might be misunderstood and not read in their proper context. The Council considers the withholding of these emails is necessary to ensure a consistent approach in a matter which involves complex issues.
35. Consequently, there is a clear public interest in allowing officials to communicate with one another about a particular matter, without fear of disclosure and before that matter is finally settled. Should the internal communications be disclosed prematurely, their contents could be used to challenge the decision via judicial review.

Conclusions

36. The Commissioner has considered the representations made by the complainant and by the Council. She recognises the merit in those arguments favouring disclosure as well as those favouring continued reliance on Regulation 12(4)(e). The question of balancing the factors to

determine whether the information should be disclosed is not an easy task.

37. The Commissioner considers that the disclosure of the withheld internal communications could have reduced the thinking space which the Council had when it received the requests. In the Commissioner's opinion, disclosure is likely to have a detrimental effect on the Council's decision making process, and consequently it could result in its officers providing decision makers with less full and frank advice.
38. On balance, the Commissioner has decided that greater weight has to be given to those factors which favour withholding the internal communications. She is particularly persuaded by the need for Council officers to operate in a 'safe space' where they can deliberate on potentially controversial issues. The Commissioner recognises the real danger of a 'chilling effect' caused by the disclosure of internal communications and the negative potential of this in respect of future planning issues and decisions.
39. The Commissioner has decided that the public interest lies in maintaining the exception in this instance and that the Council is entitled to rely on Regulation 12(4)(e) to withhold its internal communications.

Regulation 12(5)(b) The course of justice, etc

40. Regulation 12(5)(b) provides an exception from the duty to disclose information where the disclosure would adversely affect "the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature".
41. The Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege.
42. The Council is relying on Regulation 12(5)(b) because disclosure of the withheld information on the grounds that it attracts legal professional privilege and would therefore detrimentally affect the course of justice.
43. Having reviewed the withheld information the Commissioner is satisfied that it attracts legal professional privilege. The information may be characterised as communications between the Council its legal advisers, including Counsel: It is information which constitutes requests for legal advice or the provision of legal advice from a properly qualified person, or communications which discuss issues associated with that legal advice.
44. The Council has confirmed that none of the withheld information which attracts the exception of Regulation 12(5)(b) has been made public and

the Commissioner has seen no evidence which indicates that the withheld information has been shared with any third parties to the extent that its confidential character has been lost.

45. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the Information Tribunal highlighted the requirement needed for this exception to be engaged. It explained that there must be an "adverse" effect that would result from the disclosure of the requested information. Another Tribunal decision – *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the Tribunal interpreted the word "would" as being "more probable than not".
46. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023) the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests". The Commissioner accepts that disclosure of legal advice would undermine this important common law principle. She further accepts that disclosure would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice.
47. In this case, the Council has advised the Commissioner that, at the time the request was received, the planning appeal was awaiting a decision. Additionally, the complainant had already submitted an appeal to the Planning Inspectorate against the Council's decision.
48. The Council advised the Commissioner that, as the appeal is already in progress, the normal rules of disclosure would apply and the appellant should not be party to internal discussions and legal advice which could skew the outcome of the appeal.
49. The Commissioner accepts the Council's position and considers that disclosure of the legal advice would adversely affect the council's ability to defend itself should it be faced with a legal challenge in connection with the planning applications. The Commissioner considers that the Council should be able to defend its position against any claim made against it without having to reveal its position in advance, particularly as challenges may be made by persons who themselves are not required to disclose their positions. That situation would be unfair.
50. In view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the requested information would adversely affect the course of justice and she is therefore satisfied that regulation 12(5)(b) is engaged in respect of the information the Council has withheld.
51. The Council's reliance on Regulation 12(5)(b) is subject to consideration of the public interest.

The public interest test.

52. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. Such disclosures assist the public in understanding the basis and how public authorities make their decisions. This in turn may foster greater trust in public authorities and allow enhanced public participation in the decision making process.
53. In this case, disclosure of the requested information would help the public to understand some of the issues considered by the Council in respect of the planning application(s) associated with the land north and south of Tollgate West, Stanway. It would also allow the public to consider the basis on which legal advice was sought by the Council's officers and also the quality of the legal advice given by the Council's legal advisers.
54. In her previous decisions the Commissioner has expressed the view that disclosure of information relating to legal advice would have an adverse effect on the course of justice through a weakening of the general principle behind the concept of legal professional privilege. This view has been supported by the Information Tribunal.
55. It is very important that public authorities are able to consult with their lawyers in confidence and be able to obtain confidential legal advice. Should legal advice be subject to routine or even occasional public disclosure without compelling reasons, this could affect the free and frank nature of future legal exchanges and may deter the public authority from seeking legal advice in situations where it would be in the public interest for it to do so.
56. The Commissioner has published guidance on legal professional privilege. Her guidance states that:

"Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice."
57. Where a public authority is faced with a legal challenge, or a potential legal challenge, it is important that the authority can defend its position properly and fairly. Should the public authority be required to disclose its legal advice, its opponent would potentially be put at an advantage by not having to disclose its own position or legal advice beforehand.
58. The Commissioner considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a long-

standing, well established and important common law principle. The Information Tribunal affirmed this in the *Bellamy* case when it stated:

"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear..."

59. This does not mean that the counter arguments favour public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect.
60. The Commissioner appreciates that there is a general public interest in public authorities being as accountable for the decisions they make.
61. Here, having considered the content of the withheld information in the wider context of this case, the Commissioner has decided that the public interest arguments favouring the continued withholding the requested information are greater than those which favour disclosure. She is satisfied that the public interest is best served in this case by maintaining the Council's right to obtain legal advice in confidence and for this information to be withheld.
62. The public interest in maintaining legal professional privilege is a particularly strong one. To outweigh the inherent strength of legal professional privilege would normally require circumstances where there are substantial amounts of public money are at stake, where the decision would significantly affect large numbers of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate authority.
63. Having considered this case and reviewed the withheld information, the Commissioner does not consider that there are any factors that would equal or would outweigh the particularly strong public interest inherent in this exception. The Commissioner's decision is that the council has properly applied regulation 12(5)(d) to the information sought by the complainant.

Regulation 12(4)(d) – Material still in the course of completion

64. Under Regulation 12(4)(d) a public authority may refuse to disclose recorded information if it relates to material which is still in the course of completion, to unfinished documents, or to incomplete data.
65. The Commissioner has published guidance on Regulation 12(4)(d) which may be accessed at:

https://ico.org.uk/media/fororganisations/documents/1637/eir_material_in_the_course_of_completion.pdf

66. For the withheld information to engage the exception provided by Regulation 12(4)(d) it must meet at least one of the following criteria:
67. It must be information which relates to material which is in the course of completion. The 'material' in question may be a final policy document. It will include information contained in a completed document if that document is intended to inform an on-going process of policy formation.
68. The interpretation of unfinished documents is more straightforward. A document will be unfinished if the public authority is still working on it at the time the request is received. Furthermore, a draft version of a document will remain an unfinished document even once a final or finished version of that document has been produced.
69. Incomplete data is data that a public authority is still collecting at the time a request for information is received.
70. In this case, the Council has advised the Commissioner that it has withheld a number of documents from the complainant because, at the time his request was received, the documents were in draft form or related to the local plan which was in the course of development through public consultation.
71. The position of the local plan at the time the request was received is clearly relevant to the application of Regulation 12(4)(d) as the withheld information can properly be considered to be 'material in the course of completion'. In view of this, the Commissioner is satisfied that the local plan was subject to potential amendment and therefore she is satisfied that the exception under regulation 12(4)(d) is engaged.
72. The Council's reliance on Regulation 12(4)(d) is subject to consideration of the public interest.

The public interest test

73. Again, the Commissioner acknowledges that the disclosure of the information provides both openness and transparency in respect of the Council and the decisions it makes.
74. However, In this case the Commissioner considers that disclosure of information where Regulation 12(4)(d) is engaged would likely discourage the public, local businesses and landowners from engaging with the Council during the 'safe space' development of the local plan. In the Commissioner's opinion disclosure of material in the course of

completion would frustrate the process of preparing the Local Plan which is a statutory requirement.

75. The Commissioner believes that disclosure of information where Regulation 12(4)(d) is engaged would likely result in a 'chilling effect' on the Council's ongoing and future discussions, and it is also likely to negatively affect the involvement of landowners and potential developers engaging with the council as part of the Local Plan process.
76. The Commissioner notes that the Council is required to undertake public consultations as appropriate stages in the Local Plan process and that the submission of a Local Plan would be subject to examination by a Planning Inspector in an 'Examination in Public.' Consequently, the Commissioner considers that the disclosure of 'material in the course of completion' when the Council received this particular request, would only serve as a distraction from the task of preparing the Local Plan.
77. The Commissioner accepts that there is always a general public interest favouring the disclosure of environmental information. Such disclosures inform public debate on the particular issue that the information relates to.
78. The Commissioner understands that Local Plans may have significant impact on local communities and she acknowledges the strength of the public interest inherent in transparency and accountability where local plans are concerned.
79. That said, the Commissioner also recognises the strong public interest arguments in favour of the maintaining this exception. She is obliged to give significant weight to the need for interested parties to engage and consult with the Council in a 'safe space' and without the 'chilling effect' which is likely to flow from the disclosure of material in the course of completion.
80. The Commissioner believes that there are occasions when a 'safe space' is needed by public authorities to allow them to formulate policy, debate live issues and reach decisions without being hindered by external comment and/or media involvement.
81. The need for a 'safe space' is to allow free and frank debate and it is the Commissioner's view that this is required regardless of any impact that the disclosure of information may have.
82. The Commissioner considers the 'safe space' to be about protecting the integrity of the decision making process and whether it carries any significant weight will be dependent on the timing of the request.

83. A 'chilling effect' directly concerns the loss of frankness and candour in debate which would flow from an untimely disclosure of information. This would likely lead to poorer quality advice and would produce less well formulated policy and decisions.
84. Here, the timing of the request is important. The Council advised the Commissioner that the Local Plan had yet to be finalised and that it planned to publish the completed Local plan once the process had been concluded
85. Notwithstanding this, the Council informed the Commissioner that it had placed a large amount of material into the public domain as is usual with regard to planning applications and that, it seeks only to withhold material which could unjustly affect the final outcome of the planning appeal if it was to be disclosed.
86. Given that the Local Plan was not finalised at the time the Council received the complainant's request, and was that it was still subject to further discussion and amendment, the Commissioner accepts that disclosure would present a real risk of prejudice to the 'safe space'. The Commissioner is satisfied that, should the relevant information have been disclosed at the time of the request, there would have been a realistic prospect that interested parties would have been discouraged from being participating with necessary candour in the ongoing discussions regarding the Local Plan.
87. The Commissioner understands that the state which governs the Local Plan process requires the Council to make information available to the public by way of public consultations and, through hearings once it has been submitted to the Secretary of State for examination. The Commissioner would not want to undermine this Local Plan process.
88. The Commissioner takes the view that the mechanisms in place which allow for information to be made available to the public at the various stages of the Local Plan process provides the necessary transparency and openness of the process.
89. The Commissioner understands that local planning authorities are required to publish information annually which shows how their Local Plans are progressing. She also acknowledges that the Council will publish its local plan once the process has been concluded.
90. In view of the above, the Commissioner has decided that the public interest favours maintaining the exception under Regulation 12(4)(d) in this instance. She therefore requires the Council to take no further action.

Regulation 12(5)(d) – Confidentiality of proceedings

91. Regulation 12(5)(d) allows a public authority to withhold environmental information in circumstances where its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority, where the confidentiality is provided by law.
92. There is no definition of 'proceedings' provided by the EIR. The Commissioner's guidance on regulation 12(5)(d) sets out that proceedings can cover a wide range of activities which public authorities are obliged to undertake in compliance with their statutory duties.
93. The ICO interprets 'proceedings' in regulation 12(5)(d) as possessing a certain level of formality. For example, legal proceedings, formal meetings at which deliberations take place on matters within a public authority's jurisdiction or where a public authority exercises its statutory decision making powers. In the ICO's view proceedings are unlikely to encompass every meeting or procedure carried out by a public authority.
94. In this case, the Council has applied Regulation 12(5)(d) to 'proceedings' associated with the planning application procedure and appeal. Since the information where Regulation 12(5)(d) is applied encompasses all of the withheld information, and is therefore subject to the application of Regulations 12(4)(e), 12(5)(b) and 12(4)(d), the Commissioner has not found it necessary to consider the Council's application of Regulation 12(5)(d).

Right of appeal

95. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

96. 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.
97. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF