

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

### **Decision notice**

**Date:** 29 March 2019

**Public Authority:** Sandwell Metropolitan Borough Council

**Address:** Sandwell Council House  
Freeth Street  
Oldbury  
B69 3DE

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

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1. The complainant has requested information from Sandwell Metropolitan Borough Council ("the council") relating to the proposed development of an area known as Lion Farm Fields. The council withheld some of the information under the Freedom of Information Act 2000, later accepting that it was subject to the Environmental Information Regulations 2004. The council relied on the regulations at 12(5)(b), 12(5)(e), 6(1)(b) and 13(1) to withhold the information. The council also stated that it did not hold some of the information.
2. The Commissioner is not persuaded that the exceptions at regulation 12(5)(b), 12(5)(e), 6(1)(b) and 13(1)(in part) are engaged. She has however decided that, on the balance of probability, there is no further information held by the council. By failing to consider the request under the EIR, the council breached the requirement at regulation 14. The council also breached regulation 5(2) by disclosing some information beyond the statutory timeframe and regulation 11(4) by failing to undertake the review within 40 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:

- Disclose the option agreement (21 May 2013), the variation of the option agreement (9 June 2014), the plan from the option agreement and the emails between the council and Jeremy Knight-Adams. The following information, however, must be redacted beforehand -

The names of all council employees below the level of Director;

All third party names from the options agreements, the plan and the emails, except the names of Directors at the council and Mr Knight-Adams;

Contact details and signatures of **all** individuals.

- Disclose the information at part nine of the request.
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 the Act and may be dealt with as a contempt of court.

## **Request and response**

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5. On 28 January 2018, the complainant wrote to the council and requested information in the following terms:

*"With regard to SMBC's hitherto secret plan to develop Lion Farm Playing Fields:*

*1 Please disclose the minutes of the first meeting between Jeremy Knight Adams and SMBC members and/or staff;*

*2 Disclose ALL documents marked as "private" that were presented in support of Agenda Item 8 at the Asset Management and Land Disposal Committee Meeting of 19th December, 2012;*

*3 Please disclose all other documents passing between SMBC and Jeremy Knight Adams and/or companies over which he exercises significant control including but not limited to all documentation in respect of each and every extension of the option agreement in favour of Jeremy Knight Adams/his companies (to include the recent variation agreed by SMBC).*

*4 Please disclose all documentation relating to the marketing of the Lion Farm Playing Fields for development since 2008;*

*5 Disclose the fees paid by Jeremy Knight Adams/his companies to SMBC relating to the option agreement and subsequent extensions. Please also state the date of receipt and amount of each and every payment.*

*6 How was the original option fee calculated and by whom? Please*

*confirm whether [named individual] was involved in any aspect of this matter.*

*7 What price has been agreed, if any, should Mr Knight Adams/his companies choose to exercise the option? If so, how was this calculated and by whom? How has SMBC ensured that the price calculated fulfils SMBC's legal obligation to secure "best value"?*

*8 What environmental tests have been conducted thus far as to industrial waste/pollution beneath the Playing Fields? What were the findings?*

*9 At paragraph 3.3 of the Report to Cabinet for the meeting on 15th November, 2017 it is said that Jeremy Knight Adams "has already incurred significant expenditure in securing adjoining land to develop the scheme. What evidence does SMBC have that this is true? What adjoining land does SMBC refer to?"*

6. The council responded on 15 February 2018 stating that it did not hold any information in relation to points one, three and four. It provided information regarding points two, five, seven and eight. The council withheld information at point six citing third party personal data. It said that the information relating to point nine was accessible by other means.
7. The complainant requested a review on 19 February 2018. The council's acknowledgement of the review explained what it intended to review. It stated that parts three, six, eight, and nine would be reviewed as this remained the areas in dispute in relation to this specific request.
8. On 27 June 2018 the council belatedly provided what appears to be its internal review.
  - In relation to part three the council stated that it held no documents directly between itself and Jeremy Knight Adams or his companies. It said that most of the correspondence within the scope of part three was between itself and Mr Knight Adams' legal representatives and was subject to legal professional privilege.
  - In relation to part six the council stated that a fee was agreed between the two parties.
  - In relation to part eight, the council stated that it did not hold any documentation in relation to the on-site environmental issues undertaken by Knight Adams.
  - In relation to part nine the council stated that the information was available from the Land Registry Office. It withheld any information provided to it by third parties as commercially confidential.

9. On 12 July 2018 the complainant expressed his discontent with the council's response.
10. On 22 August 2018 there was a further response or review from the council concerning these comments:
  - The council stated that it did not hold any information regarding meetings between it and Jeremy Knight-Adams.
  - The council confirmed that a named employee had not been involved but that it would not name members of staff who had.
  - The council confirmed that it held emails between the council and Knight-Adams' solicitors which were subject not only to legal professional privilege but were also commercially in confidence regarding ongoing negotiation.
  - The council also confirmed that the information regarding part nine was available from another source and commercially in confidence.

## Background

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11. The information request is concerned with the options agreements between the council and a developer and related material regarding a proposed designer outlet centre and facilities at Lion Farm playing fields, Oldbury, West Midlands. It involves a multi-million pound scheme which has been at public consultation. The Commissioner understands that a planning application from the developer, Jeremy Knight-Adams, is anticipated.
12. The council's report<sup>1</sup> on 15 November 2017 explains in Agenda Item 14, Junction 2 Regeneration, that, "*An option agreement is a legally binding agreement entered into between two parties which gives the one party the right, but not an obligation, to purchase the other party's asset at an agreed price in the future*" (paragraph 8.1). This same report states that "*the council can dispose of any land provided it is for the best*

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<https://cmis.sandwell.gov.uk/cmis5/Meetings/tabid/73/ctl/ViewMeetingPublic/mid/410/Meeting/36806>

*consideration that can be reasonably obtained. There is no proposal to dispose of the site for less than best consideration” (paragraph 8.3).*

## Scope of the case

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13. The complainant contacted the Commissioner on 16 April 2018 to complain about the way his request for information had been handled. The Commissioner considers the scope of this case to be -
- whether the council holds information in relation to parts one and eight of the request - Regulation 5(1) (duty to make environmental information available on request).
  - The council’s withholding of information in relation to part three of the request - Regulation 12(5)(b) (The course of justice, etc).
  - The council’s withholding of information in relation to part three and part nine – Regulation 12(5)(e) (Commercial confidentiality).
  - The council’s withholding of information in relation to part six - Regulation 13 (personal data).
14. The Commissioner has had sight of the information that has been withheld by the council which consists of the option agreement from 2013, the variation of the option agreement from 2014, the plan from the options agreement and the emails between the council and Jeremy Knight-Adams regarding this matter.

## Reasons for decision

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### **Regulation 2(1) - Is the requested information environmental?**

15. Information is “environmental” if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR.
16. The Commissioner has published guidance on regulation 2(1). The Commissioner’s guidance states that the test that should be applied by public authorities is whether the information is on, or about, something falling within the definitions in regulations 2(1)(a) – (f), and not whether the information directly mentions the environment or any environmental matter.
17. Regulation 2(1) of the EIR defines environmental information as information on:

*"(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

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

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

18. Information about the state of the elements of the environment is environmental information. The information in this case relates to the proposed development of land which is environmental information and therefore needs to be considered under the EIR.

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

Parts one and eight of the request

19. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request.
20. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the Commissioner must decide whether, on the balance of probabilities, a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
21. Due to the passage of time and changes in personnel the council was unable to confirm exactly what was held at the time of the request, though searches had been carried out then.
22. After the Commissioner send her initial letter to the council, it confirmed that it had conducted a full search of the hard copy and electronic files held in legal services. A full review was conducted of the property file and the council conducted a search of the email system for all correspondence between council officers and Mr Knight-Adams using the search term "lion farm".
23. The council maintains that with regard to part one there was no note-taker at the meeting. The individuals present at the meeting had been

asked if they held notes and these individuals confirmed that no notes had been taken.

24. In relation to part eight and the environmental issues the council reviewed the legal files, property files and searched its email system, including recovering deleted files to do so. It is important to note that this recovery was carried out after the Commissioner started her investigation. There were no legal or property files relating to this matter. A search was conducted of every council email address on the network for the phrase "lion farm" in the body of any email between it and Mr Knight-Adams.
25. The council contended that it was unlikely that any information relating to part eight would have been held by it and that there is no evidence that it was ever held. It stated that no information had been destroyed that fell within the scope of this part of the request. There is no statutory obligation to hold the requested information at that stage in the process of a development agreement. The council provided a link to its information management policy and said that departments operate one process and follow the statutory guidance, where appropriate.
26. The Commissioner is satisfied that the council does not hold any further recorded information relating to parts one and eight.

### **Regulation 12(5)(b) – the course of justice**

Part three of the request

27. Regulation 12(5)(b) EIR 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'. The Commissioner has issued guidance on the application of regulation 12(5)(b).<sup>2</sup> It is accepted by the Commissioner that the exception covers information subject to legal professional privilege ("LPP").
28. The confidentiality of communications between a client and their lawyer is protected by LPP and it is a fundamental principle that is rarely overturned. There are two categories of legal professional privilege – litigation privilege and legal advice privilege. Legal advice privilege concerns the confidential communications that pass between client and

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1625/course\\_of\\_justice\\_and\\_inquiries\\_exception\\_eir\\_guidance.pdf](https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf)

lawyer for the dominant purpose of seeking or giving legal advice. The legal adviser must be providing advice in a legal context about legal rights, liabilities, obligations or remedies. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.

29. The complainant argues that the council are trying to circumvent the provisions of the FOIA by communicating with the developer via his lawyers, claiming that these communications are then subject to legal professional privilege and that this cannot possibly be right.
30. The council explained that the email communications in relation to the options agreements were between the council's legal department and property services and that they were for the sole purpose of obtaining legal advice, that the information was communicated in a legal adviser's professional capacity and that privilege had not been waived. The council also cited litigation privilege as the agreement and the proposed development of Lion Farm Fields is commercially sensitive and open to potential litigation.
31. The Commissioner does not agree with the council in its application of LPP to the requested information at part three which consisted of the email communications regarding the options agreements. The information withheld does not fall under LPP because it is not advice provided to the council but correspondence between the council and the developer. The fact that solicitor/s may be copied in does not make it subject to LPP and consequently the exception is not engaged. The Commissioner has therefore not gone on to consider the public interest.

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

Part three and part nine of the request

32. Regulation 12(5)(e) of the EIR provides that 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".
33. There are several conditions that need to be met for this exception to be applicable. They are as follows -
  - 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?**

34. The council confirmed that the withheld information is the options agreements for large scale development involving a sum of money being paid to the council for the option to purchase some of its land. A commercial activity will generally involve the sale or purchase of goods or services, usually for profit. The Commissioner considers that the information is commercial for that reason.

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

35. The complainant has put forward the view that as no other commercial party has been involved he does not accept that it involves commercially confidential information.
36. To determine whether the information has the necessary quality of confidence the Commissioner needs to determine that the information is not trivial and is not in the public domain. She has considered whether the information requested has the necessary quality of confidence and whether the information was shared in circumstances that created an obligation of confidence.
37. In this context this will include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute. The council has explained that the information is confidential and subject to a duty of confidence provided by law under the agreements signed by both parties.
38. Although the council did not confirm that the requested information was not in the public domain, the Commissioner understands that the substantive information is not publicly available.
39. The Commissioner notes that one of the clauses in the options agreement does provide for the law requiring that the information be disclosed under freedom of information legislation. However, a public authority may explicitly accept information in confidence but also refer to the fact that it might still have to be released under the EIR (ie if the other elements of the exception or the public interest test cannot be satisfied). This type of warning that even confidential information may have to be disclosed will not undermine the fact that there is still an explicit obligation of confidence for these purposes.

**Is the confidentiality provided to protect a legitimate economic interest?**

40. The confidentiality must be “provided... to protect a legitimate economic interest”. The Information Rights Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011) that, to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
41. The general scheme of the EIR 12(5) exceptions require that “disclosure would adversely affect” the relevant interests identified in each exception.
42. The council explained to the Commissioner that confidentiality is required to protect the economic interest of the developer and the council because the future development of the site would be at risk if the information was disclosed. However, the Commissioner is aware that the information dates from 2013 and 2014 which was several years before the request was made.
43. A public authority needs to establish (on the balance of probabilities – ie more probable than not) that disclosure would cause some harm. In this case the arguments presented are limited and generic in nature in relation to the council’s own economic interests and the economic interests of the developer. There are no submissions from the developer who does not appear to have been consulted. If it is a third party’s interests that are at stake, the public authority should consult with the third party unless it has prior knowledge of their views. It is not 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.
44. The Commissioner therefore finds she is unable to conclude that the developer would be adversely affected by the disclosure of the requested information, despite the council’s statement that the development would be at risk. The specifics as to why it would be at risk remain unclear.
45. The Commissioner notes that the council did not provide enough detail to support its arguments in respect of either itself or the developer and therefore the exception is not engaged. As the third condition has not been met, she has not gone on to consider the fourth condition or look at the public interest in this matter.

## **Regulation 13(1) – personal data**

46. The council withheld the information the complainant had requested at part six of the request. Several months later (in August 2018) the council confirmed that a particular named employee was not involved in the options agreement or its development. No named individuals signed the agreement on behalf of the council. However, it stated that named individuals clearly did negotiate and deal with the agreements on behalf of the council.
47. Although the council has not specifically listed the personal data it wishes not to disclose under this exception, the Commissioner has extended her consideration to all third party personal data contained in the withheld information. Regulation 12(3) provides that third party personal data can only be disclosed in accordance with regulation 13. This exception sets out that information must not be released if it would breach any of the data protection principles. There is no additional public interest test.
48. In deciding whether regulation 13 is engaged the first issue to consider is whether the requested information is personal data.
49. At the time of compliance with the request, the relevant legislation in respect of personal data was the Data Protection Act 1998 ("the DPA 1998"). The determination in this case must therefore have regard to the DPA 1998, and the terms of the FOIA that were applicable at that time.

### **Is the withheld information personal data?**

50. In order for the exception to apply, the information being requested must constitute personal data as defined by section 1 of the DPA 1998.
51. Personal data is defined by section 1 of the DPA 1998 as:

*"...data which relate to a living individual who can be identified—  
(a) from those data, or  
(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the data controller or any person in respect of the individual..."*

52. The information consists of the names of individuals both external and internal, contact information (telephone numbers, email addresses and postal addresses) and signatures which the Commissioner accepts is linked directly to individuals and is third party personal data in accordance with regulation 13(1).

### **Does the information contain any sensitive personal data?**

53. Sensitive personal data is defined in section 2 of the DPA. It is personal information which falls into one of the eight categories set out in section 2 of the DPA.
54. Having reviewed the withheld information, the Commissioner is satisfied that none of the withheld information is sensitive personal data within the categories listed in the DPA 1998.

### **Would disclosure breach the data protection principles?**

55. Schedule 1 of the DPA 1998 sets out the data protection principles. The first data protection principle says personal data should only be disclosed if it is fair and lawful to do so. The conditions for releasing personal data are set out in schedule 2.

56. The Commissioner has identified the first data protection principle as relevant to this request. The principle requires the following –

*"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—*

*(a) at least one of the conditions in Schedule 2 is met..."*

57. In considering whether it would be fair to release this information the Commissioner needs to balance the reasonable expectations of the data subject/s and the potential consequences of disclosure set against the legitimate public interest there may be in disclosing this information.

### **Reasonable expectations**

58. The council argues that the officers involved would have a reasonable expectation that their names would not be disclosed to the complainant.

### **Consequences of disclosure**

59. Although the information relates to their public life, the council contends that releasing third party personal data to the complainant might affect their private lives and cause unwarranted harm.

### **Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure**

60. The Commissioner accepts that the release of information relating to junior members of staff involved in the options agreements and emails would be outside the reasonable expectations of the data subjects concerned. To release them would be unfair and cause distress to those concerned which would be in breach of the first data protection principle.

61. She also considers that the release of personal data concerning external individuals that were communicating with the council on behalf of their organisations should not be released. This is not the personal data of council staff and the individuals concerned would have no expectation that their personal data would be provided and it would therefore be unfair to do so.
62. The council's view is that the only argument for releasing anyone's name is transparency and openness. The Commissioner considers though that any senior member of staff involved in the withheld communications who was acting in their public capacity should have reasonable expectations that their names be released and that they cannot expect confidentiality. Similarly, the name of the developer is in the public domain and should not be withheld. Consequently the Commissioner does not accept that withholding the names of senior staff at the council involved in the email communications engages this exception.
63. However, she does accept that the contact details of the staff concerned (including any senior staff) should not be released and that regulation 13(2) is engaged. This is because disclosing this information might mean that the senior staff concerned are contacted inappropriately which would be unfair and potentially distressing and therefore in breach of the DPA 1998.

### **Regulation 6(1)(b) – information available by other means**

Part nine of the request

64. Regulation 6(1)(b) states that a public authority does not need to make information available in response to a request, if that information is already publicly available and easily accessible to the requester in another form or format.
65. The council told the complainant that the information he sought about the ownership of land was a matter of public record, and that details could be obtained from the Land Registry. The other information he sought was available by other means on the council website.<sup>3</sup> However it did not provide a link.

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<https://cmis.sandwell.gov.uk/cmis5/Meetings/tabid/73/ctl/ViewMeetingPublic/mid/410/Meeting/36806>

66. Although it is clear that the complainant knew that a Cabinet meeting had taken place on 15 November 2017 and that the Land Registry may hold some of the requested information, the council did not directly confirm whether it held or didn't hold information regarding his specific queries at the end of part nine of his request. The Commissioner does not accept that regulation 6(1)(b) is engaged as the council has not demonstrated that all the information is publicly available via the sources mentioned.

### **Regulation 5(2)**

67. The council withheld information at part six regarding the involvement or otherwise of a named individual. It later took the decision that this information should be disclosed.
68. Therefore, the council breached regulation 5(2) by failing to communicate information to which the complainant was entitled within 20 working days of the request being received.

### **Regulation 11(4)**

69. Regulation 11(4) requires a public authority on receipt of a request for a review to –

*"... 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."*

70. On 19 February 2018 the complainant asked for a review of the council's response making various points about each part. The council acknowledged the review request but did not conduct a review until 27 June 2018, some four months after the request, which the Commissioner considers to be unacceptable.

### **Other matters**

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71. Although the council did not recognise the request as environmental, it does not excuse its general inability to carry out reviews in a timely manner. However, the Commissioner understands that the council is now working hard to improve its information rights compliance.

## Right of appeal

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72. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

73. 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.
74. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**