

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

**Decision notice**

**Date:** 23 July 2021

**Public Authority:** Wrexham County Borough Council

**Address:** foi@wrexham.gov.uk

**Decision (including any steps ordered)**

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1. The complainant requested copies of communications regarding traffic and the construction of a new school on Nine Acre Field in Wrexham. Wrexham County Borough Council (the Council) withheld the information requested under section 36 of the FOIA (effective conduct of public affairs). During the course of the Commissioner's investigation, the Council reconsidered the request under the EIR and sought to rely on regulation 12(4)(e) (internal communications) to withhold the information. The Commissioner's decision is that the Council has correctly applied regulation 12(4)(e) to the withheld information. She does not require any steps to be taken.

**Request and response**

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2. On 27 May 2020, the complainant wrote to the Council and requested information in the following terms:

*"Please provide copies of all communications (electronic or physical) between any Highways Officer (Environment and Technical Department) and any Councillor or other Wrexham Council employee / officer, which mentions traffic and the construction of a new school on Nine Acre Field, Chester Road, Wrexham.*

*Specifically, this request is for any communications between 1st September 2018 and the current date (27th May 2020)".*

3. The Council responded on 25 June 2020 and confirmed that it held the information requested but it was considered exempt under section 36 of the FOIA.
4. On 20 July 2020 the complainant requested an internal review of the Council's refusal to provide the information requested. He queried whether his request should have been handled under the EIR as opposed to the FOIA.
5. The Council provided the outcome of its internal review on 16 September 2020. It stated that it believed the correct access regime for the request was the FOIA and maintained that the information was exempt under section 36.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 28 September 2020 to complain about the way his request for information had been handled.
7. During the course of the Commissioner's investigation the Council agreed that the request should have been handled under the EIR as opposed to the FOIA. The Council reconsidered the request under the EIR and stated that it was relying on regulation 12(4)(e) to withhold the information.
8. The scope of the Commissioner's investigation is to determine whether the Council correctly applied regulation 12(4)(e) to the withheld information.

### **Reasons for decision**

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#### **Is the information environmental?**

9. The Commissioner has first considered whether the information requested is environmental in accordance with the definition given in regulation 2(1) of the EIR. Environmental information is defined within regulation 2(1) as: "any information in written, visual, aural, electronic or any other material form on – (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)...".
10. In coming to a view that the requested information is environmental, the Commissioner is mindful of the Council Directive 2003/4/EC which is implemented into UK law through the EIR. A principal intention of the

Directive is to allow the participation of the public in environmental matters. The Commissioner therefore considers that the term "any information...on" in the definition of environmental information contained in regulation 2 should be interpreted widely. It will usually include information concerning, about or relating to measures, activities and factors likely to affect the state of the elements of the environment. In other words information that would inform the public about the element, measure etc under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.

11. In this case the withheld information relates to the construction of a new school and the associated traffic considerations. In the Commissioner's view, the information is clearly 'on' a measure, namely the proposed construction of a new school at Nine Acre Field, Wrexham. This is an activity which is likely to affect that land and landscape. Therefore, the Commissioner has concluded that the information is clearly environmental information by virtue of regulation 2(1)(c).

#### **Regulation 12(4)(e) – internal communications**

12. 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.
13. This is a class-based exception covering a relatively broad range of communications, including email correspondence, and there is no need for the public authority to consider the sensitivity of the information in order for the exception to be engaged. However, it is a qualified exception and, if it is engaged, the public authority is required to carry out a public interest test regarding whether or not the exception should be maintained.
14. The withheld information in scope of this request comprises an email chain between Council officers and a councillor about traffic and parking issues associated with the proposal to build a new school at Nine Acres field in Wrexham, together with a number of plans of the site.
15. Having examined the withheld information, the Commissioner is satisfied that the information comprises communications that were solely "internal" to the Council as it consists of emails exchanged only between Council officers and a councillor. As such, the exception at regulation 12(4)(e) is engaged. She has gone on consider the public interest test.

### **The public interest test**

16. Regulation 12(1)(b) requires that where the exception under Regulation 12(4)(e) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner is mindful of the provisions of Regulation 12(2) which state that a public authority shall apply a presumption in favour of disclosure.

### **Public interest in favour of disclosing the information**

17. The Council has acknowledged that there is a public interest in transparency and openness in its decision making. It also accepts that there is a general public interest in disclosure of all environmental information and a more specific interest in the subject matter to which the information relates. At the time of the request the Council explained that there may have been significant interest in relation to the site and any proposals for the planning and construction of the new school and information relating to the flow of traffic as a result of the proposed development.
18. The Council accepts that "*disclosing the 'full picture' will always carry some weight as it will remove the suspicion of spin*". The Council advised it also considered the public interest associated with accountability for the spending of public money, the number of people affected by the proposed development, any reasonable suspicion of wrongdoing and any potential conflict of interest. The Council also confirmed that it took into account the presumption in favour of disclose under regulation 2(2) when deciding where the public interest lies in this case.
19. The complainant contends that the views of the highway team on any large development, as in this case, are extremely important to be aware of as they are the experts in traffic analysis. He pointed out that the construction of a new school and any associated traffic considerations are matters which will affect many local residents for decades and as such it is in the public interest that the information is disclosed.

### **Public interest in maintaining the exception**

20. The Council considers that there is a public interest in protecting internal deliberations and decision making processes. The Council argues that it is essential that it has a safe space to consider and debate issues away from external scrutiny and thus preventing a 'chilling effect' on the free and frank exchange of views. The Council believes that disclosure of the withheld information would inhibit free and frank discussions in the future on the subject matter. The loss of frankness and candour in

discussions and deliberation would damage the quality of advice and lead to poorer decision making.

21. The Council pointed out that, at the time of the request, the matter was still live and no decisions had been made and no planning application had been submitted in relation to the proposed development. Council officers were still discussing and deliberating internally about the construction of the School in question and the best way to proceed with the proposal and no final decisions had been reached. Matters relating to the development were put on hold as a result of the Covid 19 pandemic as the Council had to prioritise more critical work and it has *"still not reached a final determination to allow it to make a planning application submission"*.
22. The Council accepts that there is a public interest in knowing the options it was considering in relation to traffic and the construction of the new school. However, it considers that, given the timing of the request and the fact that the matter was still live there is a stronger public interest in ensuring that internal discussions and deliberations about the site remained free and frank.

### **Balance of the public interest**

23. The Commissioner's guidance<sup>1</sup> on this exception explains that although a wide range of internal information will be caught by the exception, public interest arguments should be focussed on the protection of internal deliberation and decision-making processes. This reflects the underlying rationale for the exception being that it protects a public authority's need for a 'private thinking space'.
24. With regard to attributing weight to the public interest arguments in favour of maintaining the exception, the Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This may carry significant weight in some cases. In particular, the Commissioner considers that the need for a safe space will be strongest when the issue is still live.
25. The Commissioner appreciates that there is strong local public interest in matters concerning the proposed development and associated traffic issues. Disclosure would further the public's insight into the options being considered for the site.

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/2021/2619005/12-4-e-internal-communication-31122020-version-31.pdf>

26. It is clear to the Commissioner that, at the time of the request, the proposed development was at an early stage and still very much live. The Commissioner understands that statutory pre-planning consultation regarding the development was due to take place in March 2020 but it was postponed due to the pandemic and re-launched on 20 July 2020 to run to 16 August 2020. The Commissioner considers that the fact that the development has had to go through a formal pre-planning public consultation goes some way to meeting the legitimate interest in disclosure.
27. In light of the stage which matters were at at the time of the request the Commissioner accepts that the Council required a safe space in order to deliberate issues around traffic and the construction of the school. She also recognises the danger of a 'chilling effect' on future internal deliberations being caused through disclosure of the withheld information.
28. The Commissioner considers that the argument for a safe space for internal communications carries significant weight in this case. Given the detrimental impact that disclosure may have on the quality of decision making, there is a stronger public interest in not disclosing the withheld information. In this case, therefore, the Commissioner's view is that the balance of the public interests favours maintaining the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(e) was applied correctly.

## Right of appeal

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29. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

30. 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.
31. 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 .....**

**Joanne Edwards**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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