

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

**Date:** 20 April 2022

**Public Authority:** Basingstoke and Deane Borough Council  
**Address:** London Road  
Basingstoke, Hants  
RG21 4AH

**Decision (including any steps ordered)**

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1. The complainant requested information relating to the consideration by Basingstoke and Deane Borough Council of a planning application for building works.
2. The Commissioner has decided that Basingstoke and Deane Borough Council had correctly applied EIR regulations 12(4)(d) (material in the course of completion) and 12(4)(e) (internal communications) when determining the information request. He did not require any steps to be taken.
3. The Commissioner criticised delays by Basingstoke and Deane Borough Council which were in breach of EIR regulation 5(2) and for which it has apologised.
4. The Commissioner also decided that the searches Basingstoke and Deane Borough Council made for information had been appropriate and not a breach of EIR regulation 12(4)(a).

**Request and response**

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5. On 16 November 2020, the complainant wrote to Basingstoke and Deane Borough Council ("the Council") and requested information in the following terms:

"I have been advised to request full disclosure of all documentation and internal emails that the LPA [Local Planning Authority] holds on the planning history of [property name redacted] under a Freedom of Information request."
6. On 20 November 2020 the complainant added a clarification:

"Thank you for your email, application references are: [13 Council planning reference numbers redacted]."
7. The Council responded on 3 February 2021 and disclosed much of the information requested, then again with further disclosures on 30 April 2021 and 8 July 2021 following a two part internal review. The Council relied on the section 21 (information accessible to the applicant) FOIA exemption and EIR regulation 5(3) (personal information of the applicant) exception as its basis for withholding some of the requested information. The Council later relied on the EIR regulation 12(4)(d) and 12(4)(e) exceptions.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 1 June 2021 to complain about the way his request for information had been handled. He said he was unhappy with the length of time the Council has taken to respond to his request. He also considered that the Council held further, as yet undisclosed, information within the scope of his request and disagreed with the Council's decision to continue to withhold some of the information in the public interest. He said he wanted to be able to have confidence in the information that had been provided.
9. The Council told the Commissioner that it had disclosed to the complainant much of the information requested but that it had withheld all or parts of 18 email strings and four attachments relying on the EIR regulation 12(4)(e) (internal communications) exception.
10. The Council added that it had also redacted drafts of one document (document 5) relying on the EIR regulation 12(4)(d) (material in the course of completion) exception.
11. The Council had also redacted some personal information from documents it disclosed relying on the EIR regulation 13(1) exception which is not in dispute. The Council withheld some information relying on the EIR regulation 5(3) (applicant's own information) exception and

invited the complainant to make a subject access request which he did; that information too is not in dispute.

12. The Commissioner considered the Council's delays, its searches for further undisclosed information and its application of the EIR regulation 12(4)(e) and 12(4)(d) exceptions.

## **Reasons for decision**

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### **Regulation 5(2) – duty to make environmental information available on request**

13. The complainant was concerned at the delays by the Council in handling his request.
14. Regulation 5(2) of the EIR says that the public authority must make the information available as soon as possible and no later than 20 working days after the date of receipt of the request.
15. The complainant made his request on 16 November 2020 and provided the relevant information to locate the information he sought on 20 November 2020 but did not receive a full response until 8 July 2021. These delays were in breach of EIR regulations 5(2) and 11(4) and for which the Council has apologised. The Commissioner criticised these delays.

### **Regulation 12(4)(a) – information not held**

16. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
17. In cases where there is a dispute over whether information is held, the Commissioner applies the civil test of the balance of probabilities in making his determination. This test is in line with the approach taken by the then Information Rights Tribunal when it has considered whether information is held, in cases which it has considered in the past.
18. The complainant had asked to see relevant emails by a named officer (officer A) who had left the Council's employment on 19 February 2021, some time after the information request had been made. The officer's mailbox had been deleted by the Council in accordance with its retention policy.
19. The complainant added that he also wished to see emails from another named officer (officer B). He said he wanted to receive all of the

information he had requested and be able to have confidence in the information that had been provided.

20. The Council explained that it had conducted a thorough search of its relevant records for each of the 13 planning applications named by the complainant but had been unable to find any further emails within those records. In addition, its planning officers had searched their own email records for relevant information.
21. The Council said that further searches had been made at the time of its internal reviews and again during the Commissioner's investigation to ensure that there was nothing more that had previously been overlooked.
22. In the light of the explanations provided, the Commissioner accepted the Council's assurances that it had made appropriate searches.
23. On the balance of probabilities, which is the test he must use, the Commissioner is satisfied that no further information falling within the scope of the request is held.

#### **EIR regulation 12(4)(d) – material in the course of completion**

24. Regulation 12(4)(d) states that:  
"... a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, unfinished documents, or to incomplete data."
25. The aims of the exception are to:
  - protect work a public authority may have in progress by delaying disclosure until a final or completed version can be made available. This allows it to finish ongoing work without interruption and interference from outside; and
  - provide some protection from having to spend time and resources explaining or justifying ideas that are not, or may never be, final.
26. For regulation 12(4)(d) to be engaged, the requested information must fall within one of the categories specified in the exception. It is not necessary to show that disclosure would have a particular adverse effect but any adverse effects of disclosure may be relevant to the public interest test.
27. The Council withheld one document, document 5, relying on the regulation 12(4)(d) exception. This document was a working draft being discussed by its officers and members and due in final form some 10 days later. The Council disclosed relevant information in the final draft of

the document. The Commissioner therefore decided that this exception had been applied correctly.

### **EIR regulation 12(4)(e) – internal communications**

28. Regulation 12(4)(e) provides an exception for information which constitutes an 'internal communication'. In order for the exception to be engaged the information must constitute a communication within one public authority, specifically, the authority to which the request is made.
29. The exception for internal communications is class-based, meaning that there is no need to consider the sensitivity of the information in order to engage the exception. However, other factors might be relevant when considering the balance of the public interest.

### **Is the exception engaged?**

30. The withheld information in this case consisted of emails between council officers for the purpose of obtaining observations, comments and recommendations about a potential development. The emails had been sent with the purpose of obtaining/ providing pre-planning advice in respect of the proposed development.
31. The Commissioner reviewed the withheld information and was satisfied that it comprises communications that were properly "internal" to the Council. It consists of emails exchanged between Council officers with each other or with members. The EIR regulation 12(4)(e) exception is therefore engaged and the Commissioner considered the public interest balancing test.

### **The public interest test**

32. EIR regulation 12(1)(b) requires that where the EIR regulation 12(4)(e) and 12(4)(d) exceptions are engaged, a public interest test must be carried out to ascertain whether or not the public interest in maintaining both exceptions outweighs the public interest in disclosing the information. In his determination, the Commissioner had regard for the presumption in favour of disclosure in EIR regulation 12(2).

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

33. The Council recognised that there is a public interest in transparency and openness in its decision making and that planning decisions and the planning process should be as open and transparent as possible. The Council considered that this requirement is served at the formal planning application stage when relevant information is made publicly available and the application is open for comments and objections by members of the public.

34. The Council confirmed that it had taken into account the presumption in favour of disclose under EIR regulation 12(2) when deciding where the public interest lay in this case.

**Public interest in maintaining the exception**

35. The Commissioner recognises that there are considerable benefits to planning applicants in early discussions which can help to address potential issues prior to any formal application being submitted.
36. The Council told the Commissioner that it had considered the public interest test required by EIR regulation 12(1)(b) and the presumption in favour of disclosure. It said it had also had regard to ICO decision notice IC-47841-D5D0 and ICO guidance but had decided that the public interest in maintaining the exception outweighed the public interest in disclosing the information.
37. The Council said it needed to protect its internal deliberations and decision making processes. The application for development had been complex and had required free and frank discussions between officers and members. The Council felt the need for a safe space for internal deliberations; there had been 14 separate planning applications relating to the site with a further planning application expected. Disclosure of the information now would damage its safe space to think, and discuss internally, this and any future applications.
38. The Council added that it needed to avoid any 'chilling effect' there might be on future decisions inhibiting officers and members from having free and frank discussions. Such discussions by Council officers informed its decision making. Disclosure could damage the quality of future discussions on what it regarded as a contentious application. If members and senior officers felt unable to have free and frank conversations on future applications because of the prospect of future disclosure then more junior officers and members would be likely to feel inhibited from seeking appropriate advice. This would lead to poorer decision making and a lack of confidence in the planning application system. The ability of members to engage in the planning process, in the expectation that their communications with officers would be protected, was critical to local democracy.
39. The Council added that it believed the matter was still live. The EIR request had been submitted on the date that an application was refused and the period for an appeal had then to expire. There had been a subsequent application since the 2020 information request and planning officers considered the matter to be live.

40. The Council said that the withheld information contained free and frank discussion between officers and a member. The public interest balance was against disclosure.

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

41. 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 protecting internal deliberation and decision-making processes. This reflects the underlying rationale for the exception of protecting a public authority's need for the 'safe space' needed to develop ideas, debate live issues, and reach decisions away from external pressures. This may carry significant weight in some cases. The Commissioner considers that the need for a safe space is strongest when, as here, the issue is still live.
42. The Commissioner accepts that disclosure of the withheld information would provide the public with an insight into the options that were being considered for the site. Whilst the withheld information might be of interest to other parties, its disclosure would not necessarily enhance understanding of the actual scope or character of the development or enable informed decisions to be made as to whether to support or object to it. Any future planning application submitted would be likely to be different and Council planning decisions on the development then would be made on its merits as part of the formal planning process and not on any initial proposals.
43. The Commissioner noted that, at the time of the request, the proposed development was still live and remains so. He therefore accepted that the Council required a safe space in order to deliberate issues around the potential development. The need to maintain the safe space gives more weight to the argument for maintaining the exception. He also recognised the danger of a 'chilling effect' on future internal deliberations of planning matters being caused through disclosure of the withheld information.
44. The Commissioner considers that the public's right to challenge a planning application during the formal planning process would not be affected by withholding the requested information. The EIRs do not circumvent existing planning procedures and the processes for public scrutiny which already exist. Facilitating public engagement with

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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>

environmental issues is one of the principles behind the EIR. The Commissioner considered that the need for a safe space for internal communications carries significant weight in this case. The detrimental impact that disclosure could have on the quality of decision making strengthens the public interest in withholding the information.

45. The Commissioner therefore decided that the balance of the public interest favoured maintaining the EIR regulation 12(4)(d) and 12(4)(e) exceptions despite the disclosure presumption in EIR regulation 12(2).



## Right of appeal

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46. 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@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)

47. 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.
48. 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 .....**

**Dr R Wernham**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**