

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

### **Decision notice**

**Date:** 4 July 2023

**Public Authority:** Swansea Council  
**Address:** Civic Centre  
Oystermouth Road  
Swansea  
SA1 3SN

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

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1. The complainant requested information relating to a specific historic planning application including internal and external communications between Swansea Council ("the Council") and third parties. The Council disclosed some information within scope of the request after the redaction of third-party data; however, it withheld some information under regulations 12(4)(e), 12(5)(b), 12(5)(c) and 12(5)(e) of the EIR.
2. The Commissioner's decision is that the Council was entitled to rely on regulations 12(4)(e), 12(5)(b), and 12(5)(f) of the EIR to withhold the requested information. In the circumstances of this case, the Commissioner has pro-actively applied regulation 12(5)(f) in place of regulation 12(5)(e) to one document as he considers it is more appropriate. He has also disregarded 12(5)(c) as the Council stated that it had disclosed the information in its original response.
3. The Commissioner does not require any steps to be taken as a result of this decision.

## Request and response

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4. On 25 January 2023, the complainant wrote to the Council and requested information in the following terms:

“RE: 2021/2874/ELD | Material operations undertaken on site within the lifetime of the permission comprising the construction of part of a road pursuant to planning permission 2008/0912 granted 21st March 2016 for construction of 67 dwellings with associated access, roads, parking, open space, and demolition of existing buildings (Application for a Certificate of Lawfulness). | Former Walters Yard Pontlliw Swansea SA4 9DS

Please provide all information relating to the above Planning Application under the Freedom of Information Act. This information should include all internal and external correspondence. Specifically, all communication involving:

- Head of Planning
- Team Leader
- Case Officer
- Applicant
- Agent
- Internal Departments, e.g., Highways, Drainage, Ecology
- Any external third parties/consultees, National Rail, NRW, etc.
- All Submitted documents

IT IS IMPORTANT THAT ALL CORRESPONDENCE THAT TOOK PLACE BETWEEN THE COUNCIL'S PLANNING AND LEGAL DEPARTMENT IS DISCLOSED WITH REGARDS TO THIS APPLICATION.”

5. On 21 March 2023, the Council disclosed some information within scope of the request with suitable redactions for personal data. However, it withheld information under regulations 12(4)(e), 12(5)(b), 12(5)(c) and 12(5)(e) of the EIR.
6. The Council maintained its reliance on the exceptions at internal review on 14 April 2023 and apologised for its delayed response to the initial request.

## Reasons for decision

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7. The following analysis sets out why the Commissioner has concluded that the Council was entitled to rely on regulation 12(4)(e), 12(5)(b), and why 12(5)(f) of the EIR is applicable in this case.

### **Regulation 12(4)(e) - Disclosure of internal communications**

8. Regulation 12(4)(e) is a class-based exception. There is no need to consider the sensitivity of the information to engage the exception. However, the exception is subject to the public interest test.
9. The withheld information in this case comprises emails between council staff and between council departments and attachments to those emails. The Commissioner is satisfied that the withheld information falls within the definition of internal communications, therefore the exception is engaged.

### **Public interest test**

10. The Council has considered the following:

"The public interest test for withholding this material relies primarily on the 'safe space' argument, the planning application which it concerns is one that is hotly contested by the requester, and it is one where officers need to be able to develop their understanding of the issue within the context of a free and frank exchange of views. While this argument has been balanced against the need for transparency in public affairs, however the Council considers that Planning officers would be unable to carry out their function efficiently if all their internal discussion was subject to public disclosure. The Council maintains that officers must be able to communicate freely internally to discuss matters, including obtaining legal advice, without fear of external interference. This enables Officers to carefully weigh-up matters in the planning balance to reach an informed and reasoned decision."

11. After considering the above factors, and having applied the presumption in favour of disclosure, the Council determined that the public interest favoured maintaining the exception.
12. The Commissioner acknowledges the public interest in transparency regarding decision making about the planning processes, however, his view is that the 'safe space' and 'chilling affect' arguments made by the Council are weighty factors in favour of maintaining the exception in this case. He is satisfied that disclosure would be likely to prevent council

officers corresponding internally with frankness and candour, which could damage the quality of advice and may lead to poorer decision-making about the future planning processes. This would not be in the public interest.

13. Having considered the Council's submissions, the Commissioner's decision is that the public interest in maintaining the exception outweighs that in disclosure, therefore the Council was entitled to rely on regulation 12(4)(e) to withhold some of the requested information.

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

14. Regulation 12(5)(b) provides an exception to the extent that disclosure of the information in question 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.
15. "Would adversely affect" means that it is more probable than not, i.e., a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.
16. The exception at regulation 12(5)(b) is broad and encompasses any adverse effect on the course of justice; as such, the Commissioner accepts that 'an inquiry of a criminal or disciplinary nature' is likely to include information about investigations into potential breaches of legislation, for example, planning law or environmental law.
17. In its submissions to the Commissioner, the Council stated: "This exception has been applied to the communication between the Council's Planning and Legal departments and relates to legal advice privilege. The communications were made between a professional legal adviser and the Planning department, in their professional capacity and for the sole or dominant purpose of obtaining legal advice. The use of this exception is complementary to the use of 12(4)(e) above and subject to the public interest test."

"With regard to the PIT, the Council believes that, while the same factors apply as with 12(4)(e) in favour of disclosure, there is a strong public interest in maintaining legal privilege so that public bodies are not deterred from freely discussing emerging issues with their legal professionals and taking formal advice. In this instance, disclosure of the withheld information would more likely than not adversely affect the course of justice. This is because it would involve public access to legally privileged information."

### **Public interest test**

18. The Commissioner has carefully considered the arguments put forward by the Council. He recognises the legitimate public interest in disclosing information that would inform the public about decisions concerning activities that may have an impact (whether positive or negative) on the environment. In this case, the Commissioner accepts that the information was obtained by the Council to help make informed decisions about whether there had been any breach of planning laws.
19. It is the Commissioner's view that the public disclosure of such information at the time of the request, would not only inhibit the Council's ability to effectively conduct an inquiry, but would damage public confidence in such inquiries being undertaken appropriately and with due regard to the rights and expectations of involved parties.
20. The Commissioner notes that the public interest inherent in this exception will always be strong due to the fundamental importance of the general principle of upholding the administration of justice, including not prejudicing legal proceedings. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, such as clear evidence of unlawful activity or negligence on the part of the Council, or the absence of any alternative means of accessing evidence pertinent to a claim. However, no such arguments appear to be present.
21. The Commissioner's decision is, therefore, that the balance of the public interests favours the exception being maintained. This means that the Council was not obliged to disclose the requested information.
22. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated above, in this case, the Commissioner's view is that the balance of the public interests favours the maintenance of 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(5)(b) was applied correctly.

### **Regulation 12(5)(f)**

23. The Council initially considered regulation 12(5)(e) was applicable to one document where the applicant had provided the Council with a copy of their own independent legal advice. Having considered the circumstances by which the Council came to hold this information, the Commissioner pro-actively applied regulation 12(5)(f) to this document.

24. Information can be withheld under regulation 12(5)(f) if disclosure would adversely affect the interests of the person who provided the information, where that person was under no legal obligation to supply it, did not supply it in circumstances which would entitle the council to disclose it (apart from the EIR) and has not consented to disclosure.
25. The Council has explained that the exception covers one document, which is third party legal advice given to the planning applicant. The applicant submitted this legal advice as part of their application. Although the Council approached the applicant for their permission to disclose the document, no response was received, in the absence of which the Council concluded that third party permission had not been granted. The Council also confirmed that the applicant in question, was under no legal duty to provide the requested information.
26. The Commissioner recognises that, whilst they would have a reasonable expectation that information, they were required to provide could be the subject of an EIR request, the applicant would equally have a reasonable expectation of confidentiality in respect of information relating to their business affairs.
27. The Commissioner has reviewed the withheld information and can confirm that it is information provided to the Council by the applicant. The Commissioner is satisfied that, given the nature of the information, its disclosure would adversely affect the interests of the applicant. As such, the Commissioner is satisfied that regulation 12(5)(f) is engaged.

### **Public interest test**

28. When considering whether the public interest favours maintaining the exception or disclosing the requested information, the Commissioner has taken into account that there is a public interest in openness and transparency by the Council. Disclosure of the information would provide transparency about the information that had been provided by the applicant to the Council.
29. The complainant has suggested that the planning application to which the information relates was mishandled by the Council.
30. However, in the Commissioner's view, the public's right to challenge a planning application is not affected by the non-disclosure of the requested information. That right can be properly exercised during the formal planning process. Where there are concerns about the conduct of a public authority there are, similarly, other remedies for addressing this which do not necessitate the global disclosure of the information.

31. The Commissioner does not consider that the purpose of the EIR is to circumvent existing procedures within planning law and the mechanisms for public scrutiny which already exist. Whilst he acknowledges that facilitating public engagement with environmental issues is one of the general principles behind the EIR, he does not consider that, in this case, disclosure of the withheld information would assist in furthering this principle, at least not to the extent that any public benefit would outweigh the public interest in protecting the interests of the information provider.
32. Having considered the public interest arguments, the Commissioner finds the public interest in protecting the information provided by the applicant to be the stronger argument.
33. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of 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(5)(f) is appropriately applied in this case.

### **Procedural matters**

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34. The public authority breached regulation 14 of the EIR as it failed to issue its refusal notice within 20 working days of receiving the request.

### **Other matters**

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35. The Council sought advice regarding the use of regulation 12(5)(c) for a document which was subject to Crown Copyright (Ordnance Survey map). Crown Copyright material is subject to the Open Government License (OGL) and is therefore available to be published subject to certain conditions. The Council were advised that if there was any information contained within the map that they had concerns about disclosing, they such check with The National Archives (TNA) in the first instance as the body responsible for the publication.

## Right of appeal

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36. 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)

37. 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.
38. 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 .....**

**Susan Duffy**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**