

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

**Decision notice**

**Date:** 26 October 2017

**Public Authority:** Wiltshire Council  
**Address:** Bythesea Road  
Trowbridge  
BA14 8JN

**Decision (including any steps ordered)**

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1. The complainant has requested recorded information from Wiltshire Council which concerns a number of planning applications. Some of the information requested by the complainant, in particular section 106 agreements, was subsequently published on the Council's website, whilst other information within the scope of her request was withheld in reliance on Regulations 12(4)(e) and 12(5)(d) of the EIR.
2. The Commissioner's decision is that Wiltshire Council has properly applied Regulations 12(4)(e) and 12(5)(d) of the EIR to 10 emails which it held at the time the complainant made her request. She has also decided that the Council breached Regulation 5(2) of the EIR by failing to respond to the complainant's request within twenty working days.
3. The Commissioner requires the public authority to take no further action in this matter.

**Request and response**

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4. On 28 September 2016, the complainant wrote to the Council and asked to be provided with the following recorded information:
  - "1. A list of all planning obligations entered into on or after 6 April 2010 to deliver or fund the provision or improvement of educational facilities;
  2. A list of all planning obligations entered into on or after 6 April 2010

to deliver or fund the provision or improvement of educational facilities within Calne;

3. A copy of any planning obligations entered into or after 6 April 2010 to deliver or fund the provision of any educational facilities at Priestly Primary School on or after 6 April 2010;

4. A copy of any notes of conversations, meetings, correspondence or documents regarding the negotiation of education related planning obligations in connection with the following planning applications and appeals:

- a. 14/11179/OUT and the related planning appeal relating to land at Prince Charles Drive, Calne, Wiltshire, SN11 8NX.
- b. 14/03053/OUT relating to land at Sandpit Road, Calne, SN118JT.
- c. 15/11230/OUT relating to land east of Oxford Road (site B), Calne, SN11 8RS
- d. 15/12431/OUT relating to land at Oxford Road, Calne.

Details of:

- a. The works to be carried out to increase capacity at Priestly Primary School (including both Phase 1 and Phase 2 expansion works);
  - b. The estimated cost of such works; and
  - c. The contributions received from both the planning obligations and Community Infrastructure Levy (including any contributions secured by planning obligations or any CIL funds allocated to the work but not yet received) towards the cost of such works together with the detail of any other funding which has been received or is anticipated to be received towards the cost of the works."
5. The Council responded to the complainant's request on 7 November 2016. In response to parts 1 and 2 of the request, the Council provided a spreadsheet which listed the relevant planning obligations. It answered part 3 of the request by advising the complainant that she could access copies of the relevant planning obligations on its website by searching the application numbers N/08/02438, N/11/03524, N/11/03628 12/04038 and 13/02833.
6. The Council answered the part 4 of the complainant's request by stating, "The Council is required by the Town and Country Planning Act to make

information relating to planning applications available to the public which it does via the Council website. Any records as described in this part of your request which are not published are excepted from disclosure by Regulation 12(4)(e) – internal communications, 12(5)(d) – confidentiality of proceedings and 12(4)(d) – where the information is in the course of completion”.

7. The Council answered part 5a of the complainant’s request by providing her with an explanation of its proposals to increase the capacity at Priestly Primary school and it answered part 5b by advising the complainant that it had no costed design at present. To assist the complainant, the Council advised her that its latest cost estimate would be £3.8m but that it did not have sufficient information at this stage to separately cost phases 1 and 2.
8. The Council’s response to part 5c of the request was to provide actual and anticipated contribution amounts together with appropriate explanation of these amounts.
9. On 14 November 2016, the complainant wrote to the Council to make representations about its response and to ask it to carry out an internal review. The complainant asserted that the spreadsheet provided in answer to parts 1 and 2 of her request was incomplete. She noted that the section 106 Agreements referred to by the Council in its answer to part 3 of her request do not appear on the spreadsheet and, given that she was not aware of any other omissions, the complainant asked the Council to double check the spreadsheet.
10. The complainant disputed the Council’s response to part 3 of her request, asserting that the planning obligations in respect of applications N/1103524, N/12/03628 and N/13/02833 were not available on the Council’s website. She also challenged the Council’s response to part 4 of her request on the grounds that, “...no one’s commercial interest will be harmed should the information be disclosed, the public interest in transparency when planning obligations are negotiated and the public interest in ensuring that a local authority is seen to act fairly, it is difficult to see how the Council can come to the conclusion that the presumption in favour of disclosure is outweighed by the Council’s desire to keep its s 106 negotiations secret”.
11. The Council conducted a review of its handling of the complainant’s request and on 13 January 2017 it advised her of its outcome. The Council informed the complainant that its spreadsheet (parts 1 and 2 of the request) is complete and therefore the information she seeks is available on its website. The Council made clear that its response concerned applications N/08/02438, N/11/035324, N/11/03628,

12/04038, and 13/02833 and not to N/12/03628 or N/13/02833 as the complainant had suggested.

12. The Council advised the complainant that she had referred to incorrect application references in respect of the Council's response to part 3 of her request.
13. Finally the Council pointed out to the complainant that, although she had referred to commercial interests in her complaint of 14 November, the Council had not relied on any exception where this is relevant and instead had relied on the exceptions which concern internal communications, confidentiality of proceedings and information not yet completed.

### **Scope of the case**

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14. The complainant contacted the Commissioner on 4 November 2016 to complain about the way her request for information had been handled. The complainant referred to a number of instances where information had not been made available on the Council's website, such as section 106 agreements and planning obligations. She also complained about the Council's refusal to disclose copies of any notes of conversations, meetings, correspondence or documents regarding the negotiation of education related planning obligations in connection with the various planning applications and appeals listed in her letter.
15. The complainant disputes the Council's position that "Disclosure of the withheld information would inhibit the Council from engaging in free and frank discussions in the future which would damage the quality of advice leading to poorer decision making." Instead she argued that the Council's conclusion is inadequate and that it has not argued that such harm would occur should the excepted information be disclosed.
16. Having considered the complainant's representations, the Commissioner determined that she should investigate what information had been uploaded to the Council's website at the time of the complainant submitted her request and at the time it had completed its internal review and then make a determination of whether the Council is entitled to withhold information relevant to part 4 of the request in reliance on the exceptions to disclosure cited by the Council.

### **Background information**

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17. The Council has informed the Commissioner that the information which the complainant seeks concerns planning applications which have been previously decided and it is information which is directly related to a current planning application – 16/04124/FUL, concerning a development proposal for the same location.
18. The applicant is currently in the process of negotiations with the Council in respect of the education and other requirements for this application. The Commissioner understands that a viability appraisal has not yet been agreed.
19. The Council has advised the Commissioner that the requested email correspondence is directly relevant to the determination of the current application (16/04124/FUL) and in particular to discussions as to contribution requirements which are taking place at this moment.

### **Reasons for decision**

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20. The Council has given the Commissioner its assurance that all of the information it routinely publishes in respect of planning applications was on the Council's website at the time the complainant submitted her request, although at that time the request was made none of the sites specified by the complainant contained a copy of the section 106 agreement.
21. The Council has advised the Commissioner that each of the sites has now been updated to include a copy of the section 106 agreement, except for application N/12/03628/OUT.
22. According to the Council's records, application N/12/03628/OUT does not have a section 106 agreement. This application concerns a permission for a B1 (Business) and B8 (Storage and Distribution) Premises and not a residential development. As such, the Council has advised the Commissioner that it would not expect there to be a section 106 agreement for this type of approval.
23. The Council has provided the Commissioner with the internet addresses for each of the planning applications relevant to the complainant's request. These are:

N/08/02438

<http://unidoc.wiltshire.gov.uk/UniDoc/Document/Search/DSA,733450>

N/11/03524

<http://unidoc.wiltshire.gov.uk/UniDoc/Document/Search/DSA,744732>

N/12/03628

<http://unidoc.wiltshire.gov.uk/UniDoc/Document/Search/DSA,747950>

12/04038

<http://unidoc.wiltshire.gov.uk/UniDoc/Document/Search/DSA,749508>

13/02833

<http://unidoc.wiltshire.gov.uk/UniDoc/Document/Search/DSA,520485>

24. On the grounds that the complainant did not mention section 106 agreements in her request, the Council did not check its website to determine whether they had been published, either at the time it responded to the request or at the time it conducted its internal review. The Council has advised the Commissioner that its reviewer was concerned that the complainant had been provided with incorrect reference numbers or they had been incorrectly transcribed when making her searches.
25. Despite the complainant mentioning the section 106 agreements in her internal review request, the Council's reviewer did not address their absence in the review.
26. Since receiving the complainant's request, the Council has added information to four of the five planning applications. The additional information includes copies of the section 106 agreements – with the exception of application N/12/03628/OUT.
27. The Council's Planning Department had progressively added more information to all of the applications pages.

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

28. 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.
29. The Council has advised the Commissioner that 10 emails were identified as falling within the scope of the complainant's request at the time the request was processed. Of these 10 emails, 8 were identified as being internal communications, being exclusively sent and received by council officers.
30. The Council has provided the Commissioner with copies of the emails it has withheld in reliance on Regulation 12(4)(e). Having examined these emails, the Commissioner is satisfied that the exception is engaged.
31. Where Regulation 12(4)(e) is engaged, it is subject to a public interest test required by Regulation 12(1). 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).

32. In essence the public interest considerations relating to the Regulation 12(4)(e) relate to the protection of thinking space and the ability to have full and frank discussions without fear that the information will be disclosed.
33. In this case the Council accepts that there is a genuine public interest favouring the disclosure publicly held information where this would demonstrate the openness and transparency of planning decisions which affect local communities.
34. Nevertheless, the Council asserts that disclosure of the withheld emails would inhibit its officers when they engage in free and frank discussions in the future and consequently this would lead to poorer quality of advice and ultimately to poorer decision making within the Council.
35. The Council asserts that there is a real risk that the content of the emails could be taken out of context and be easily misinterpreted, particularly where the contents of the emails do not include contextual clarification or explanation.
36. Despite the fact that the withheld emails relate to now determined planning applications, they also have a direct relevance to an on-going application. The Council fears that the disclosure of the emails at this juncture could mean that their contents could be misinterpreted and used to erroneously inform current and on-going discussions.
37. It is the Council's belief that the withheld emails are being sought in order to influence the on-going discussions in favour of the complainant's client. The Council considers these discussions would be undermined by the disclosure of the withheld emails and that the proper weight of the public interest lies firmly with the Council being able to achieve the best outcome for the wider community.
38. In the Commissioner's opinion, the central public interest in the information being disclosed relates to maintaining the openness and transparency of planning decisions which will ultimately affect the wider community.
39. The Commissioner notes that there is a strong argument that planning decisions and the process leading to those decisions should be as open and transparent as possible. Ideally all parties should be fully informed about the issues considered by the Council and the public should be satisfied that the final decisions have been made openly and are fully explained.



40. The public who are affected by planning decisions should know all the facts and reasoning which lies behind them and consequently, being better informed, the public would be more inclined to actively participate in the decision making process.
41. Many of the arguments supporting greater openness rest in the decisions themselves and in the general openness of the planning process. This is generally provided by the availability of documents associated that process.
42. The decisions are to some extent distanced from the public interest favouring the disclosure of the withheld information and this weakens the public interest arguments in favour of disclosure in a case where the withheld information does not affect the Council's final decision.
43. The Commissioner recognises the merit of the 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 one.
44. By virtue of the planning process, there is a large amount of publically available information concerning the planning applications. This, in the Commissioner's opinion, is sufficient to satisfy the public interest in there being a transparent planning process.
45. The Commissioner accepts that 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. If that information was to be disclosed prematurely, it could be used, as in this case, to challenge or influence an on-going planning application.
46. The Commissioner notes that the withheld information relates to planning applications which have already been decided and also to an undecided application. The Commissioner considers that disclosure of the withheld emails could detrimentally affect the quality of the Council's decision making and potentially lead to less full and frank advice being provided by council officers.
47. 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 arguments concerning the need for council officers to have a 'safe space' in which to deliberate potentially controversial issues and she recognises the real danger of the 'chilling effect' which disclosure could have in respect of future planning issues and decisions.



48. 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 8 of the ten emails it has identified as being relevant to the complainant's request.

### **Regulation 12(5)(d) – confidentiality of proceedings**

49. 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.
50. 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.
51. In this case the proceedings identified by the Council concern its role as the planning authority with statutory decision making powers.
52. The Commissioner accepts that the 2 emails where the Council has applied Regulation 12(5)(d) relates to the proceedings of the Council.
53. Regulation 12(5)(d) can only apply to proceedings where confidentiality is provided by law. This can be by virtue of common law or by virtue of a specific statutory provision.
54. In this case the Council asserts that the withheld emails are protected by a common law duty of confidence. This is because they were obtained by the Council from Agents acting on its behalf in the progress of planning applications and they were provided with the understanding that their contents would remain private between the Council and its Agent.
55. In the Commissioner's opinion the common law of confidence will apply where the information has a necessary quality of confidence and where the information was imparted in circumstances which import an obligation of confidence.
56. Having examined the withheld emails, the Commissioner is satisfied that their contents can properly be described as 'more than trivial' and characterised as being confidential in nature. She is content that the information was provided to the Council on the understanding that it is confidential.
57. The Commissioner asked the Council to identify the 'adverse affects' which would flow from disclosure of the withheld emails.

58. The Council informed the Commissioner that the contents of the two emails directly address the basis for financial contributions arising from developments in the same locality as that which concerns the on-going and undecided application submitted by the complainant's client. In the Council's opinion, disclosure of the emails would adversely affect the on-going negotiations associated with that application and would result in direct negative consequences for Council Tax payers with increased costs to the Council's education and housing budgets.
59. Having considered the Council's representations, the Commissioner has decided that the information withheld in reliance on Regulation 12(5)(d) is confidential and the 'adverse affect' identified by the Council is both realistic and possible. This being the case, the Commissioner's decision is that Regulation 12(5)(d) is properly engaged. It therefore falls to the Commissioner to consider the public interest test.
60. 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. Disclosure of information can assist the public in understanding how public authorities make their decisions. This in turn fosters trust in public authorities and may allow greater public participation in the decision making process.
61. It is clear that disclosure of the requested information would help the public to understand the issues considered by the Council in respect of the planning applications specified by the complainant.
62. In this case however the Commissioner believes that greater weight must be given to those arguments which favour maintaining the exception: She must give weight to the Council's position that the on-going application needs to be considered on its own merits, based on the current material circumstances and considerations.
63. The Council believes that it has presented its position to the complainant in full and has justified its position with relevant information and evidence. The Council contends that the complainant is attempting to secure material which she believes would undermine and invalidate the planning process. In the Council's opinion, the complainant's actions are directly aimed at reducing and minimising the financial contributions her client is required to make in consequence of their development proposals.
64. The Commissioner has decided that, in terms of the public interest, the greatest weight has to be given to the detrimental effects disclosure of the two emails would have on the undecided planning application.

65. In the Commissioner's opinion, the planning process is open and transparent: It is not in the public interest for her to order disclosure of information which would potentially result in increased costs to Council Tax payers by delaying the planning process and providing confidential information which might be used by individuals in the pursuit of their own particular interests.
66. The Commissioner's decision is that Wiltshire Council is entitled to withhold two emails in reliance on Regulation 12(5)(d).
67. The Commissioner has also decided that the Council has breached Regulation 5(2) of the EIR by failing to provide the complainant with a substantive response to her request within the twenty day compliance period.
68. In respect of those planning applications where the Council held a section 106 agreement at the time the complainant made her request and also when she requested an internal review, it is apparent to the Commissioner that the focus of the Council's attention was not on checking to ensure that those agreements were published on its website.
69. The Council's representations indicate that the information was held at the time the complainant submitted her request. That being the case, and based on the fact that the Council did not make the section 106 agreements available to the complainant within the statutory 20 working day compliance period, the Commissioner considers that this failure has added to the Council's breach of Regulation 5(2).

## Right of appeal

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70. 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)

71. 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.
72. 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**  
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