

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

Date: 24 June 2025

Public Authority: Tonbridge and Malling Borough Council
Address: Gibson Building
Gibson Drive
Kings Hill
West Malling
ME14 4LZ

Decision (including any steps ordered)

1. The complainant requested information relating to the protection of badgers and compensation measures linked to a particular planning application. Tonbridge and Malling Borough Council (the 'Council') initially refused the request in its entirety, citing Regulation 12(4)(d) of the EIR – the exception for material in the course of completion. At internal review, the Council revised its position and provided a URL to some of the requested information on its planning portal. It also said it had provided all the remaining information it held in scope of the request in response to an earlier request made by the complainant. The complainant disputed this position. Finally, the Council stated that no EIR exception should have been cited in response to the request under consideration here as it claimed no information had been created since the complainant's earlier request.
2. During the latter stages of the Commissioner's investigation, the Council disclosed the information it said was held in scope of the current request. This disclosure was in response to a related decision notice which is explained in this notice. The Council confirmed it was not relying on any EIR exception and said it had provided all the information held.
3. The Commissioner's decision is that the Council correctly handled the request under the EIR. He has also determined that further recorded information existed that was not provided by the Council in response to the request, breaching Regulations 5(1) and 5(2) of the EIR. He has

concluded, on the balance of probabilities, that the Council does not hold any further information in scope of the request beyond that provided to the complainant on 7 April 2025.

4. Given the Commissioner's findings, and given that the complainant has since been provided with the requested information, no further steps are required as a result of this notice.

Background

5. The request relates to issues connected with the proposed development of land for up to 52 houses, with access via a particular road. At the time of the request, the planning application submitted was for outline planning permission.
6. According to the Council's online planning portal, the decision was made on 9 April 2025 (ie postdating the request), with planning permission refused.

Request and response

7. On 14 July 2024, the complainant wrote to the Council and requested information in the following terms (emphasis in bold text is as written by the complainant):

'...I would like to submit a request under the Freedom of Information Act 2000 for all information Tonbridge and Malling Borough Council (TMBC) holds with regards to **TMBC's assessment of the adequacy of the badger protection mitigation and compensation measures being proposed by the planning applicant in regards to the above planning application**. This request additionally relates to all protected species and habitats on the development site (not only badgers).

This request covers all forms of written communications to internal and external parties and held council internal records on the requested information. Where the term "TMBC's assessment/consideration" is used below and information is requested on this, the information sought relates to inputs to the council's assessment, records of the decision process made by the council, records of all alternatives considered and the corresponding information outputs recording the decision made and justifications for that decision.

The preference would be for this information to be provided in electronic form if available, please advise what options there are available for delivering this information.

For the avoidance of doubt this request covers all held information on the above matter of ensuring that badgers sett and foraging habitat are being sufficiently protected in line with UK law with regards to planning application **22/01570/OA** and covers any communication with any party on this matter, but specifically the following information is sought:

1. Please provide all recorded information with regards to **TMBC's consideration/assessment** of whether the planning applicant's proposed mitigation and compensation measures are sufficient to address any negative effects on the badgers.
2. Given that the main access road that is proposed by the planning applicant is in such close proximity to the badger sett, is NOT a reserved planning matter and is significantly less than the 30 metre buffer required by Natural England, please provide all information with regards to **TMBC's consideration/assessment** of alternative site layouts to ensure the badger's protection are being met and prevent the need for a licence from Natural England.
3. Please provide copies of ALL ecology reports and badger survey information submitted by the planning applicant to TMBC related to the application.
4. Please provide copies of all communication (including emails and meeting notes) with the planning applicant related to this application on the topic of badgers.
5. Please provide copies of communication with Kent County Council Ecology Advice Service (KCC EAS) and records of communications with this 3rd party. This should include all reports that KCC EAS has provided to TMBC on Ecology and badgers related to this application, emails and other communication records.
6. Please provide all recorded information with regards to **TMBC's assessment/consideration** of the planning applicants 'net-gain calculations' and whether these calculations are an accurate assessment of the impact to biodiversity of this planning proposal'.

8. The Council responded, late, on 4 September 2024 as follows:

“The information that you request is not available under Regulation 12(4)(d) of the Environmental Information Regulations (EIR) 2004 as it relates to material which is still in the course of completion.”
9. The complainant requested an internal review on 5 September 2024, which was reiterated on 27 September 2024.
10. Following its internal review, the Council wrote to the complainant on 11 October 2024 and revised its position. It said that some of the information requested was available via the Council's planning portal, and provided the URL. The Council also stated it had provided copies of the surveys, submissions and relevant correspondence in response to a previous FOIA request made by the complainant in April 2023. In addition, the Council advised the complainant that an EIR exception should not have been applied when it responded to the current request, as it said there was no new information to add to that previously provided.

Scope of the case

11. The 'Scope' section is, by necessity, lengthy; however, the Commissioner has endeavoured to break it up into relevant sections to aid understanding of this case.

Original grounds of complaint

12. The complainant contacted the Commissioner on 21 November 2024 to complain about the way her request for information had been handled.
13. She disputed the Council's claim (at internal review) that all the information was available on the Council's planning portal, explaining her view of Natural England's advice is that protected species information (which includes badgers) should be treated as being confidential and should not be published. In addition, she stated that none of the information requested in the current request had been received by her previously, as claimed by the Council.

Associated earlier FOIA request – April 2023

14. The Commissioner understands that the complainant had also made an earlier related FOIA request in April 2023, which the Council had responded to in May 2023. The complainant said that the Council had not sent her the requested badger survey in response to that earlier request. However, the Commissioner can only consider the current

request and how that has been handled. The complainant is now out of time to raise a complaint about her April 2023 request.

Additional explanations provided by the Council (to the current request) as part of its submissions to the Commissioner

15. As part of its investigation response of 31 March 2025, the Council explained that:

"The case consists of the original e-mail with 5 attachments plus a further 12 emails with attachments requested under questions 3, 4 and 5 [and 6].

At the time of the response back to [the complainant] in September 2024 the request for information under EIR fell under Regulation 12(4)[d of the EIR] as the consideration and assessment that [the complainant] was requesting was still under the course of completion. The request was therefore refused under Regulation 12(4)(d)."

16. The Council also provided some additional explanations for each part of the current request, which the Commissioner subsequently relayed to the complainant:

"Part 1

All consideration/assessment of the planning applicant's proposed mitigation and compensation measures sufficient to address any negative effects on the badgers is recorded in the Council's committee reports. These reports were still being formulated as of response of 4 September 2024 and were therefore not available for [the complainant] at that particular time. The reports are now all public, with the application being reported to committee on 3 occasions. The reports are the consideration/assessment of all issues including the presence of badgers on the site.

The reports can be found here:

Report of 18 September 2024

<https://democracy.tmbc.gov.uk//ieListDocuments.aspx?CIId=148&MIId=5666&Ver=4>

Report of 15 January 2025

<https://democracy.tmbc.gov.uk//ieListDocuments.aspx?CIId=148&MIId=5696&Ver=4>

Report of 19 February 2025

<https://democracy.tmbc.gov.uk//ieListDocuments.aspx?CId=148&MId=5704&Ver=4>

Part 2

This statement is factually incorrect as the access road itself is a reserved matter, the only area for consideration at this stage is the access from the highway onto the site. It is also incorrect to state that Natural England require a 30m buffer as this is not stated in any published documentation nor in any consultation responses received from either Natural England or KCC Ecology. This is set out in the consideration/assessment in the committee reports. As the application is in outline form only no layout has been considered so it would not be possible to consider alternative layouts at this stage. Layout will be a consideration for the reserved matters stage.

Part 3

Ecology reports and badger survey information from the applicant are provided as an attachment.

Part 4

Communication with applicant re badgers is provided as an attachment.

Part 5

Communication with KCC ecology and responses is provided as an attachment.

Part 6

The application was submitted prior to the need for mandatory biodiversity net gain from planning developments. The information on biodiversity has though been assessed and responses on this point are within the responses to and from KCC Ecology that are provided as an attachment."

17. The Commissioner notes that the Council has explained at **part 1** that the reports were not publicly available at the time of responding to the complainant's request on 4 September 2024, but that they have since been published.
18. The Commissioner has also reviewed all the email attachments sent to him by the Council in response to **parts 3 to 6** of the request. On 31 March 2025 the Council told the Commissioner:

"For clarity, due to the nature of the complainants [sic] EIR request of 14 July 2024 no further correspondence between parties was shared following the original FOI request made in May 2023. There is email correspondence between the Council, Applicant and KCC Ecology which has now been forwarded to the ICO but which has not been shared with [the complainant] as her EIR request only related to **TMBC's assessment of the adequacy of the badger protection mitigation and compensation measures being proposed by the planning applicant in regards to the above application.**"

The complainant's response to the additional explanations & the Commissioner's view

19. The Commissioner sought the complainant's view of the Council's further responses (as set out above), which she provided on 27 April 2025. The Commissioner subsequently sought the Council's position of the complainant's comments, but it said it had nothing further to add.
20. The Commissioner has not reproduced the complainant's response in full given all parties have had sight of it. In summary, the complainant's concerns, and her view, are as follows:

Part 1 – the complainant disputes that the badger related information provided/available online constitutes the full amount of information held by the Council. She recognises that a redacted version of the Proposed Badger Mitigation Strategy was published online in November 2024.

The Commissioner's response

The Commissioner will consider below whether, on the balance of probabilities, all the information held by the Council was provided to the complainant in response to **part 1** of the request.

Part 2 – the complainant disputes that the proximity of the main access road to the badger sett is a reserved planning matter. She has also said that the proximity should not be less than 30 metres from the sett. The Council has argued that the complainant is incorrect on both points.

The Commissioner's response

This is not a matter for the Commissioner to determine as it is not one of information rights and therefore falls outside his remit. He has therefore not considered **part 2** of the request any further.

Parts 3, 4, 5 and 6 – the complainant confirmed she had received this information recently and only in response to a decision notice issued against Kent County Council on 12 March 2025 ([Kent County Council | ICO](#)). In that case, the complainant had requested very similar

information from Kent County Council to that being requested in the current case. Kent County Council was ordered to issue a fresh response to the request. The complainant's concern is that she did not receive the information for **parts 3, 4, 5 and 6** in response to her current request made to the Council (ie from Tonbridge and Malling Borough Council) until after this decision notice had been issued.

The Commissioner's response /information disclosed on 7 April 2025

21. Following further enquiries with the Council, the Commissioner understands that, following the Kent County Council decision referenced above, the Council released the information to the complainant on 7 April 2025, in order to comply with the step in that notice. The Council explained that:

"As this information was produced on behalf of the Council, TMBC took the decision to release it.

Information was released to [the complainant] on 7 April 2025 following the receipt from KCC [Kent County Council] of a copy of their letter from the ICO."

22. The complainant has argued that additional information existed at the time she made her current request, which she was not provided with (although she now has it as a result of the outcome of her related Kent County Council request, and subsequent complaint to the Commissioner). As a result of her already having the information, the Commissioner asked the complainant whether she wished to continue with this aspect of her complaint; on 2 June 2025 the complainant confirmed she did.
23. The Commissioner has therefore considered whether the Council has provided the information it held for **parts 3 to 6** of the current request.

Complainant's view of documents held, but not provided, that existed at the time of the current request

24. In response to the Commissioner's enquiry, and in support of her view that additional information existed at the time of the current request which the Council did not provide in response to that request, the complainant produced a list of 13 documents (which included emails, attachments and badger related correspondence), most of which postdated her earlier request of April 2023.
25. The complainant has explained that all of the documents listed in the table were provided to her by the Council on 7 April 2025 as a result of the decision notice referenced above.

26. The Commissioner notes that two entries, namely Aspect Ecology Phase 2 survey results dated October 2022, and Confidential Appendix Badger Survey Results and Assessment – Aspect Ecology (Redacted) existed at the time of the complainant's previous FOIA request of April 2023 which she states were not provided to her by the Council in response to either the earlier or the current request.
27. In addition, the Commissioner notes that the complainant has said that one entry labelled 'Emails from KCC [Kent County Council] Ecologist' "may have been provided" to her in response to her earlier request of April 2023. As the complainant herself is unsure, and as the Council has provided no explanatory response and given the complainant is in now in possession of this document, the Commissioner has excluded this from any further consideration.
28. On 3 June 2025, the Commissioner asked the Council for its comments on the list of 13 documents, a request he reiterated several times. No response was received from the Council. The Commissioner has commented on this, together the protracted nature of the investigation of the current case, under the 'Other matters' section of this notice.
29. Given the disclosures made to the complainant on 7 April 2025, the Council confirmed it was no longer relying on any EIR exception for any part of the current request.

Scope of the Commissioner's investigation

30. The Commissioner has first considered whether the request should have been handled under the EIR.
31. He notes that whilst the Council initially relied on Regulation 12(4)(d) of the EIR – material in the course of completion, to withhold all the requested information, it subsequently revised that position at internal review. At that point (and as set out in paragraph 10) the Council said that some of the information requested was available via its planning portal, and provided the URL. The Council also stated it had provided copies of the surveys, submissions and relevant correspondence in response to the previous FOIA request made by the complainant in April 2023. In addition, the Council advised the complainant that an EIR exception should not have been applied when it responded to the current request, as it said there was no new information to add to that previously provided in May 2023.
32. However, the Commissioner accepts that 12 of the 13 documents listed by the complainant (which were not provided by the Council until 7 April 2025) existed, according to the dates on those documents, at the time of the current request of July 2024. The complainant has stated she did not receive this information until the much more recent disclosure made by the Council on 7 April 2025, in response to the Kent County Council

decision notice. He also notes the complainant's view that this information was purposely withheld from her until the day before the relevant planning meeting.

33. The Commissioner is mindful of both the Council's internal review outcome, and its subsequent investigation response, in which it claimed no further information was held in scope of the current request that had not been already been provided to the complainant (in response to her earlier request of April 2023). The Council also said no further information had been created (in scope of the current request) since it had responded to the earlier request.
34. The Commissioner has therefore considered whether, on the balance of probabilities, the Council held any further information at the time of the request other than had already been provided to the complainant.

Reasons for decision

Is the requested information environmental?

35. Regulation 2(1) of the EIR defines environmental information as being 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, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment 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)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life,

cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

36. As the information relates to a planning application, the Commissioner believes that the requested information is likely to be information on Regulation 2(1)(a) (land, landscapes), the elements of the environment and a measure under Regulation 2(1)(c) of the EIR. This reflects an approach taken by the Commissioner in numerous decision notices relating to information about the planning and application process. For procedural reasons, he agrees that the Council correctly assessed this case under the EIR.
37. The Commissioner will next consider whether any further information is held beyond that already identified as being in scope of the request.
38. The EIR are concerned with transparency of information held by public authorities and give an individual the right to access recorded information (other than their own personal data) held by public authorities. The EIR do not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

Regulation 5 – Duty to make environmental information available on request

39. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request.
40. Regulation 5(2) requires a public authority to make information it holds under 5(1) available no later than 20 working days after the date of receipt of the request.
41. The Commissioner is mindful that, when he receives a complaint alleging that a public authority has stated incorrectly that it does not hold any further requested information, it is seldom possible to prove with absolute certainty whether the requested information is held. In such cases, the Commissioner will apply the normal civil standard of proof in determining the case and will decide on the 'balance of probabilities' whether any recorded information is held.
42. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether any further information is held and any other reasons offered by the public authority to explain why no information is held. He will also consider any reason why it is inherently likely or unlikely that the requested information is not held. For clarity, the Commissioner is not expected to prove categorically whether any

information is held; he is only required to make a judgement on whether any information is held on the civil standard of proof of the balance of probabilities.

43. In applying this test the Commissioner will consider the results of the searches undertaken by the public authority and/or other explanations offered as to why no further information is held.
44. In respect of the searches undertaken in order to respond to the request, the Council said it had searched for all emails held on all devices, both personal and networked. The Council advised that information would only be held electronically and that it had used the following search terms: planning application number, site address, the applicants email address, KCC Ecology contact details and Natural England contacts.
45. The Council said no information relevant to the scope of this request had been deleted. It explained that the business purpose for holding the requested information is that of determining planning applications. It has a statutory requirement to maintain a record of planning applications.
46. In terms of its Regulation 9 of the EIR requirement to provide the complainant with appropriate advice and assistance, the Council said:

"Planning applications may contain similar information but it is site specific."
47. In this case, the Commissioner asked the complainant to produce a list of the documents she received from the Council on 7 April 2025, that existed prior to her request of July 2024, that she had not been provided with previously.
48. It is evident from the dates of the documentation provided by the complainant that further information existed at the time of the current request of July 2024 which was not provided to her. Specifically, this concerns the table of 12 of the 13 documents which the complainant helpfully provided (one document has been excluded as set out in the 'Scope' section above).
49. In the absence of any explanation or response by the Council to the table of documents compiled by the complainant, the Commissioner can only conclude that further information existed at the time of the current request that was not provided to her in response to that request.

Conclusion

50. By failing to provide all the information it held in scope in response to that request within 20 working days following receipt, the Council had breached both Regulations 5(1) and 5(2) of the EIR.
51. However, given that the information held was provided to the complainant subsequently on 7 April 2025, the Commissioner has not ordered a step as part of his decision.
52. He is mindful that a further search for the information will have been undertaken by the Council in order to issue the fresh response ordered in the Kent County Council decision notice.
53. Based on the evidence available to him, and in particular the searches undertaken and the other explanations provided by the Council as set out above, the Commissioner finds that, on the civil standard of the balance of probabilities, the Council does not hold any further recorded information relevant to the request beyond that now provided.
54. He has made some further comments in the 'Other matters' section below.

Other matters

Poor handling of the request

55. The Commissioner considers that the Council has handled this request poorly. It is evident that further information existed at the time of the request which was not provided to the complainant. The Council cannot claim that this information was excepted under the EIR given its amended stance at internal review, where it said no EIR exception should have been cited in its substantive response.
56. The complainant has only secured this additional information because she had made a similar request to Kent County Council, which led to Tonbridge and Malling Council disclosing the information to her on 7 April 2025, in very close proximity to the planning meeting the complainant required it for.
57. The Commissioner is unable to definitively determine whether the Council deliberately withheld this additional information until April 2025. However, in the absence of any explanation to the contrary from the Council, he recognises the complainant's suspicions.
58. He has made a record of the Council's poor handling of this request.

Engagement with Commissioner's investigation

59. The Commissioner has been hampered by the Council's lack of engagement with the latter stages of his investigation of this complaint. Whilst the Council initially responded, its replies were often vague and unclear, necessitating further follow-up enquiries. These then went unanswered, despite the Commissioner's reminder emails. Unfortunately, the Council ignored the Commissioner's repeated requests to provide a contact telephone number with a view to talking through the remaining queries.
60. The Commissioner has made a record of the Council's poor engagement in this case. He would remind the Council of the need to respond to his enquiries in a timely and clear manner.

Right of appeal

61. 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)
General Regulatory Chamber
PO Box 11230
Leicester
LE1 8FQ

Tel: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

62. 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.
63. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Carol Scott
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF