

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

Decision notice

Date: 22 November 2012

Public Authority: East Staffordshire Borough Council

Address: The Maltsters
Wetmore Road
Burton-upon-Trent
DE14 1LA

Decision (including any steps ordered)

1. The complainant requested copies of all internal correspondence regarding Longcroft Farm from East Staffordshire Borough Council (ESBC). ESBC provided some information in September 2010 and February 2011 however withheld other information on the basis of regulation 12(4)(e) and regulation 13(1). During the course of the Commissioner's investigation, ESBC provided additional information falling within the scope of the request but withheld some information on the basis of regulation 12(5)(b) of the EIR. The complainant was not satisfied that all information falling within the scope of the request had been identified or with ESBC's reliance on regulation 12(5)(b) and regulation 13(1) for some information.
2. The Commissioner's decision is that ESBC has now identified all relevant information falling within the scope the request and has therefore complied with regulation 5 of the EIR. The Commissioner also considers that ESBC correctly relied on regulation 12(5)(b) and regulation 13(1) in respect of the remaining withheld information.

Request and response

3. In early September 2010 the complainant made a verbal request to ESBC for the following information:

"All internal correspondence / information in relation to Longcroft Farm."

4. ESBC responded on 13 September 2010 providing some information to the complainant but withholding other information on the basis that it contained personal information which could not be redacted. It did not however cite an exemption or exception.
5. Following an internal review, ESBC wrote to the complainant on 11 February 2011. It enclosed a further bundle of information, some of which had not previously been disclosed to the complainant. The review upheld its original decision regarding its refusal to disclose the information it considered to be personal information. It also refused to provide other information of the basis of regulation 12(4)(e).
6. The complainant contacted the Commissioner to complain about ESBC's handling of her request for information. She was particularly concerned that ESBC had not identified all information falling within the scope of her request and with its reliance on regulation 12(4)(e) and regulation 13(1) of the EIR for some information.
7. During the course of the Commissioner's investigation, ESBC disputed that the verbal request made in September 2010 was a separate request to the complainant's linked request made in July 2009 for all correspondence between ESBC and Staffordshire County Council, (investigated under complaint reference FER0280929). This ultimately necessitated the Commissioner using his powers under section 51 of The Freedom of Information Act 2000 ('the Act') to issue an Information Notice which ESBC appealed to the First-tier Tribunal (Information Rights).
8. Following the Tribunal's dismissal of the appeal, ESBC forwarded some additional information to the Commissioner in January and February 2012. However, as the Commissioner was not satisfied that ESBC had identified all information falling within the scope of the request, he considered the most appropriate way forward was to issue a decision notice instructing ESBC to either provide all information falling within the scope of the request or issue a valid refusal notice under regulation 14 of the EIR. The notice was duly issued on 5 March 2012 under case reference FER0365518.
9. In response to the steps stipulated in the decision notice, ESBC contacted the complainant on 3 April 2012 providing additional information falling within the scope of her request but withholding

some information on the basis of regulation 12(5)(b) and regulation 13(1) of the EIR.

Scope of the case

10. The complainant was not satisfied with ESBC's response and in particular, she was not satisfied that all information falling within the scope of the request had been identified or with the Council's reliance on regulations 12(5)(b) or 13(1).
11. Various correspondences between the Commissioner and ESBC subsequently took place regarding the extent of its search for all relevant information and ESBC's application of the exceptions. All information which had previously been withheld on the basis of regulation 12(5)(e) has now been disclosed with the exception of one document which has also been withheld by virtue of regulation 12(5)(b). As the Commissioner has concluded that regulation 12(5)(b) is engaged for this information he has not gone on to consider regulation 12(5)(e). ESBC has also disclosed information (including photographs) it had previously withheld under regulation 13(1) of the EIR and the complainant has confirmed that she does not wish to challenge the redaction of names and contact details of individuals. This information does not therefore form part of the Commissioner's investigation of regulation 13(1).
12. The Commissioner considers that ESBC has now complied with its obligations under regulation 5(1) of the EIR and that it correctly withheld information by virtue of regulation 12(5)(b) and regulation 13(1) of the EIR.

Reasons for decision

Regulation 5(1) – what recorded information is held?

13. Regulation 5(1) of the EIR provides a general right of access to environmental information held by public authorities. In cases where a dispute arises over the extent of the recorded information held by a public authority at the time of the request, the Commissioner is mindful of the former Information Tribunal's ruling in EA/2006/0072 (Bromley) that there can seldom be absolute certainty that information relevant to the request does not remain undiscovered somewhere within the public authority's records.

14. Therefore, when considering whether a public authority does hold any additional relevant information, the normal standard of proof to apply is the civil standard of the balance of probabilities. As part of this, the Commissioner will consider the complainant's evidence and arguments and the actions taken by the authority in its search to identify all information falling within the scope of the request.
15. For clarity, the Commissioner is not expected to provide categorically whether or not further relevant information is held. He is only required to make a judgement based on the civil standard of the balance of probabilities as to the likelihood of whether additional information is held.
16. The complainant has argued that the biggest proportion of the bundle of information she received in April 2012 was either planning applications or copies of her correspondence with ESBC in relation to Longcroft Farm. She believes there are huge gaps in the information provided and is also concerned that there was nothing in the bundle pre-dating 2009.
17. The Commissioner has considered these concerns and whilst the Commissioner would agree that the bulk of the information is dated 2009 or after, the various bundles of information do contain some information ranging from 2005 to 2008.
18. On 16 April 2012 the Commissioner contacted ESBC outlining the complainant's concerns and asking it to undertake a thorough search of its records. The Commissioner confirmed that he would need details of all departments and individuals contacted and evidence of each response. The Commissioner asked for a response by 15 May 2012.
19. ESBC contacted the Commissioner on 15 May 2012 and stated that it had already conducted a search in January 2012 following the Tribunal's decision that it had to comply with the Commissioner's Information Notice. The Council added that subsequent to the Commissioner's confirmation that the scope of the request covered more than planning applications, an email was circulated to all employees of ESBC stating:

"The Council has been required by the Information Commissioners [sic] Office to provide them with copies of all internal correspondence and information the Council holds regarding Longcroft Farm up to and including early September 2012" [sic – should read 2010]

20. ESBC also confirmed that it received documents from the following departments:
 - The Chief Executive's Office
 - The Office of the Democratic Services and Resilience Planning Manager.
 - Land Charges
 - Building Control
 - Environmental Health
21. Additionally, information was also obtained from a colleague within the Legal Team and documents were requested from the Head of Legal and Democratic Services and ESBC's ICT Manager was asked to conduct a Council-wide search of all files. On the basis of this search and the information previously provided to the complaint, ESBC concluded that it had accounted for all information it holds regarding Longcroft Farm up to and including early September 2010.
22. However, the complainant remained of the opinion that ESBC had not provided all information falling within the scope of her requests. The Commissioner therefore viewed the structure of ESBC on its website to determine whether there might be other departments that might reasonably be considered to hold relevant information.
23. On 31 May 2012 the Commissioner subsequently queried whether ESBC had consulted all areas within the Regulatory Services Department, the Built Environment with its responsibility for transport, the Financial Services Department and the Service Commissioning department whose duties include Council Tax, Recovery and Communications.
24. He added that from a lay perspective, based on the strength of local feeling against the alleged activities at Longcroft Farm, he would have anticipated a considerable amount of information falling within the scope of the request would have been generated not only within the various departments but also between the different departments of ESBC.
25. The Commissioner also queried whether all information from Environmental Health had been identified, made reference to specific houses on Longcroft Farm that had been the subject of local concern and may have generated information in addition to two other properties specifically referred to by ESBC to the Commissioner on 14 February 2012.

26. The Commissioner also raised the possibility of internal correspondence being held in relation to external agencies that have been involved in the issues at Longcroft Farm such as the Planning Inspectorate and the Environment Agency.
27. ESBC responded on 18 June 2012 and confirmed that there were no other planning files to disclose over and above those already disclosed and over and above the individual documents located as a result of the IT search conducted earlier this year. It also confirmed that Bundle 5 of the documents sent to the Commissioner on 17 February 2012 were from Building Consultancy and confirmed that Building Control has been rebranded as Building Consultancy. It further confirmed that it has provided all information from Environmental Health and any internal and cross-departmental correspondence it holds.
28. ESBC informed the Commissioner that it had raised additional queries with the Head of Financial Services who in turn had consulted members of each of the teams within his service area. It confirmed that none of those teams has information relating to Longcroft Farm. In respect of any Audit information, ESBC confirmed that all reports can be seen on its website under 'Minutes and Meetings'.
29. ESBC added that it has been in correspondence with the complainant on the subject of two of the properties on Longcroft Farm independently of her request for information under the EIR. Whilst the investigation post-dated mid-September 2010 and was therefore outside of the scope of the complainant's request, the complainant has received notification of the Council's findings as well as the findings of the Audit Commission to whom the matter had been referred.
30. In respect of the Commissioner's query regarding Transport, ESBC confirmed that it does not have a Highways function as this resides with Staffordshire County Council therefore any such information would be held by that body.
31. ESBC also confirmed that the other named property is an entirely separate property and not situated on Longcroft Farm. Nevertheless, documents concerning this property have already been disclosed in Bundle 3 of the documents sent to the Commissioner on 17 February 2012.
32. Whilst the Commissioner acknowledges the complainant's concerns that there should be a more extensive volume of information falling within the scope of her request, particularly

given the local strength of feeling against the activities on Longcroft Farm, ESBC has confirmed that it has conducted a reasonable search of its records and has responded to the Commissioner's queries as far as potential gaps in the information are concerned. The Commissioner has therefore concluded that based on the balance of probabilities, ESBC has now complied with its duties under regulation 5(1) of the EIR.

Regulation 12(5)(b)

33. Regulation 12(5)(b) provides an exception for information the disclosure of which 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. Regulation 12(5)(b) is a broad exception with the course of justice including but not restricted to information attracting Legal Professional Privilege (LPP). The purpose of the exception is to ensure that there should be no disruption to the administration of justice.
34. In this case, ESBC has withheld information by virtue of regulation 12(5)(b) on the basis that it attracts LPP.
35. The Tribunal in *Woodford v IC* (EA/2009/0098) confirmed that the test for adversely affect in relation to LPP would be met by the general harm which would be caused to the principle of LPP, without needing to demonstrate that specific harm would be caused in relation to the matter covered by the information.

"There can be no doubt that disclosure of information otherwise subject to legal professional privilege would have an adverse effect on the course of justice."
36. Consideration of the specific circumstances is however required when addressing the public interest test.
37. As with section 42 of the FOIA, for public authorities establishing who the legal advisor is will be key to them identifying when a communication is legally privileged. The Commissioner generally considers that the term 'lawyer' means a legal advisor acting in a professional capacity and includes legal executives.
38. In *Calland v IC & the Financial Services Authority* (EA/2007/0136) the former Information Tribunal confirmed that legal advice and communications between in-house lawyers and external solicitors or barristers also attract LPP.

39. In this case, the withheld information consists of email chains and attachments and a memorandum from one of ESBC's solicitors. The email chains are to/from ESBC's external solicitor and its internal legal department whilst the advice is from the external solicitor to ESBC's internal legal department. The memorandum was legal advice written by one of ESBC's internal solicitors to the planning department. The Commissioner is therefore satisfied that the information constitutes legal advice from a legitimate legal advisor.
40. ESBC has confirmed to the Commissioner it does not consider that the privilege attached to the information has been lost as there has not been a partial disclosure of the information.
41. The Commissioner has considered the information withheld by virtue of regulation 12(5)(b) of the EIR and he is satisfied that it does constitute legally privileged information. He has therefore gone on to consider the public interest test.

Public interest test factors in favour of disclosure

42. The EIR state clearly under section 12(2) that when considering exceptions to the duty to disclose environmental information, a public authority must apply a presumption in favour of disclosure and only where there is an overriding public interest in maintaining the exception should information not be released in response to a request.
43. The Commissioner would also refer to the generic public interest in accountability for the quality of public authorities' decision making and that this may be facilitated by transparency in the decision-making process and access to the information on which decisions were made.
44. The Commissioner also acknowledges the generic public interest factor that public authorities should be accountable and transparent in relation to the expenditure of public money.
45. The complainant considers that there is a strong public interest in favour of disclosure of the information as she has concerns regarding the legality of ESBC's decisions in relation to planning matters at Longcroft Farm. She would therefore like to ascertain whether the relevant Council's decisions regarding these matters are based on legally defensible advice.

Public interest factors in favour of maintaining the exception

46. ESBC has argued that it is important for it to be able to seek comprehensive legal advice based upon a full examination of the strengths and weaknesses of any given case. This enables it to make fully informed decisions secure in the knowledge that it has received the best possible legal advice. It has further argued that its ability to make decisions in this manner is in the wider public interest.
47. The Commissioner accepts the former Information Tribunal's ruling in the case of *Bellamy v the IC* (EA/2005/0023) that there is a strong element of public interest inbuilt into the privilege itself. Indeed, it is worth noting that the Tribunal considers that there should be at least equally strong countervailing considerations to override that inbuilt interest.
48. This was further reinforced in the case of *DCLG v Information Commissioner & WR* [2012] UKUT (AAC) (28 March 2012) which concluded that the risk of the disclosure of legally privileged information leading to a weakening of confidence in the general principle of legal professional privilege is a public interest factor of very considerable weight in favour of maintaining the exception and there would have to be special or unusual factors in a particular case to justify not giving it this weight.
49. ESBC has also argued that at the time of the request, the advice in question was both relatively recent and live. The request was submitted in early September 2010 and the legal advice in question dated up until only four months prior to that date, with the Council continuing to rely on that advice at the time of the request. ESBC has further argued that the purpose of the advice was to enable it to deal with a potential legal challenge and that the disclosure of the advice would have adversely affected its ability to defend any proceedings issued against it.
50. ESBC has also confirmed that there were no special or unusual factors in this particular case to justify not giving the inbuilt weight attached to LPP itself. For example, it has also argued that the issues at Longcroft Farm did not involve a large amount of public money as any issues arising were, in the main, issues of planning procedure and law and as such did not concern the expenditure of public money.
51. ESBC has also argued that Longcroft Farm is situated in a very small rural settlement and any issues arising at the property would have been capable of impacting only on a handful of households.

The issues did not affect wider Council policy and as such would not therefore be in the wider public interest. ESBC maintains that there is no suspicion of misrepresentation or unlawful behaviour by the Council or a lack of transparency in the rationale for its actions.

52. Additionally, the decisions of ESBC in its role as Local Planning Authority would have been publicised in the usual manner on the Council's website therefore ESBC has argued that there is no lack of transparency in the rationale of its actions.

The balance of public interest test

53. The Commissioner has considered the arguments both in favour of disclosure and maintaining the exception and accepts the generic arguments in favour of accountability and transparency.
54. The Commissioner also acknowledges the specific argument in favour of demonstrating that the Council's decisions are based on legally defensible advice. However, he would also point out the EIR is not necessarily the most appropriate avenue via which to pursue any such concerns.
55. The Commissioner is also mindful of the strong inbuilt argument in favour of maintaining the exception to protect the general principle of LPP combined with the more specific factors that the issue was still both relatively recent and live at the time of the request. The Commissioner also acknowledges ESBC's arguments that the issues in relation to the advice do not affect a large amount of public money or a significant number of people.
56. The Commissioner therefore considers that the balance of public interest test is weighted in favour of maintaining the exception and has concluded that ESBC was correct to rely on regulation 12(5)(b) in relation to the information it withheld on that basis.

Regulation 13(1)

57. Regulation 13 of the EIR states that a public authority shall not disclose information which is the personal data of a third party where its disclosure would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').
58. In order to rely on regulation 13, the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

“personal data means data which relate to a living individual who can be identified-

(a) from those data,

(b) from those data and other information which is in the possession of, or likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”

59. When considering whether the information is personal data, the Commissioner has taken into consideration his published guidance: *“Determining what is personal data”*. On the basis of this guidance, there are two questions he has considered when deciding whether disclosure of the information into the public domain would constitute the *disclosure of personal data*:

(i) “Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, the members of the public?”

(ii) “Does the data ‘relate to’ the identifiable living individual, whether in personal or family life, business or profession?”

60. The withheld information consists of the names of the individual subject to the issues at Longcroft Farm, correspondence from members of the public living within ESBC’s boundaries and an internal file note containing details of various individuals associated with Longcroft Farm.

61. The Commissioner is satisfied that the above information constitutes personal data as defined by section 1 of the DPA. It is therefore necessary to consider whether disclosure of the information would breach any of the principles of the DPA.

62. The Commissioner considers that the first principle of the DPA is the most relevant and has therefore considered the withheld information in relation to principle 1 of the DPA.

Would disclosure contravene the first data protection principle?

63. The first data protection principle requires that the processing of personal data be fair and lawful and,

(b) at least one of the conditions in schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.

64. In the case of personal data, both requirements (fair and lawful processing, and a schedule 2 condition) must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.

Would disclosure be fair?

65. In considering whether disclosure of the information would be fair, the Commissioner has taken into account the following factors:
- The reasonable expectations of the data subjects
 - The consequences of disclosure
 - The legitimate interests of the public

The reasonable expectations of the data subjects

66. The Commissioner's awareness guidance regarding regulation 13 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life.¹ Although the guidance acknowledges that there are no hard and fast rules it states that:

"Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."

67. The Commissioner's guidance therefore makes it clear that where the information relates to the individual's private life (i.e. their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (i.e. their public life).
68. As stated in paragraph 60 of this notice, the redactions and withheld documents consist of correspondence from members of the public and ESBC living within its boundaries and the name of

¹http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_speci alist_guides/PERSONAL_INFORMATION.ashx

the individual subject to the issues at Longcroft Farm. The members of the public have corresponded with ESBC in relation to their private life and the Commissioner is satisfied that these individuals would have had an expectation that their personal information would not be disclosed into the public domain.

69. Additionally, although the name of the individual subject to the issues at Longcroft Farm was known locally and related to his business life, disclosure under the EIR is considered to be to the world at large and the Commissioner considers that he would also have a reasonable expectation that his personal information would not be disclosed in this way by ESBC.

Consequences of disclosure

70. The Commissioner has therefore considered the consequences of disclosure of the personal information of the data subjects into the public domain and considers that disclosure of the personal information of the members of the public living within the boundaries of ESBC is likely to cause unwarranted and unnecessary distress to the data subjects.
71. In respect of the disclosure of the personal information of the individual at the centre of the issues at Longcroft Farm, the Commissioner is mindful of the fact that it is not always possible to quantify or prove the impact that disclosure may have on the data subject. In this particular case, the Commissioner considers that disclosure could cause distress to the data subject.

The legitimate public interest in disclosure

72. Notwithstanding the data subjects reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure. For example, in the case involving the MP's expenses the former Information Tribunal commented that:

79. ...in relation to the general principle application of fairness under the first data protection principle, we find:

(..) the interests of data subjects, namely MPs in these appeals, are not necessarily the first and paramount consideration where the personal data being processed relate to their public lives'.

73. In considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subjects, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.
74. In this particular case, the Commissioner accepts that in addition to the broad general principles of accountability and transparency there is a legitimate interest in knowing the names of the individuals whose identities have been redacted and details of their correspondence with ESBC in relation to Longcroft Farm.
75. However, in balancing the reasonable expectations of the data subjects and the consequences of disclosure of the information against the legitimate public interest in disclosure, whilst the Commissioner accepts that there is a legitimate interest in disclosure he considers that it has been partially met by the disclosure of other information falling within the scope of the request and that it is outweighed by the reasonable expectations of the data subjects and the potential consequences of disclosure.
76. The Commissioner has therefore determined that it would not be fair to disclose the requested information and in his view, disclosure would breach the first data protection principle. He has therefore concluded that ESBC was correct to withhold this information on the basis of regulation 13(1) of the EIR.

Other matters

77. The FOIA section 46 Code of Practice deals with the recommended standards of record keeping for public authorities. It recognises that for public authorities to deal effectively with requests for information under both the FOIA and the EIR, that an effective records management system is essential.
78. However, the Commissioner does not consider that the level of records management evidenced by ESBC during the course of the complainant's request and the Commissioner's investigation of this complaint is indicative of good practice as outlined in the section 46 Code of Practice. In addition to concerns regarding the record keeping of the complainant's verbal request made in September 2010, the Commissioner notes that additional information falling

within the scope of the request continued to be identified as late as August 2012 as a direct result of his queries.

79. Indeed, the Commissioner considers that the standard of record keeping associated with the complainant's request and the Commissioner's investigation partly contributed to the complainant's concerns that ESBC has failed to identify all information falling within the scope of the request.

Right of appeal

80. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

81. 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.
82. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF