

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

Decision notice

Date: 31 July 2012

Public Authority: Staffordshire County Council
Address: 1 Staffordshire Place
Stafford
ST16 2LP

Decision (including any steps ordered)

1. The complainant requested information from Staffordshire County Council ("the council") relating to a prosecution following a failure to comply with an enforcement notice. The council disclosed some information but withheld other information using the exceptions under regulation 13(1) and 12(5)(b) of the Environmental Information Regulations 2004 ("the EIR"), the exceptions relating to third party personal data and legal professional privilege.
2. The Commissioner's decision is that the council correctly withheld some information using regulation 12(5)(b) and where that exception did not apply, the information was excepted under regulation 13(1). He also found that the council had breached section 5(1) and 5(2) of the EIR for failing to identify, within 20 working days, all the information it held that was relevant to the request.
3. The Commissioner does not require any steps to be taken.

Background

4. The Commissioner understands that in December 2008, the council served an enforcement notice on the landowners of a particular site regarding the removal of some waste material from the land. Following an appeal to the Planning Inspectorate, the enforcement notices were upheld in July 2009. The landowners were given until 24 April 2010 to

comply. The landowners failed to comply with the notice and proceedings were therefore instigated at the Magistrates Court on 2 March 2011. That prosecution was in the council's favour. The request that is the subject of this notice was made on 12 May 2011 and concerns the landowners' prosecution.

Request and response

5. On 12 May 2011, the complainant requested information in the following terms:

"I would like a copy of all correspondence sent to or from [name] in relation to the prosecution of [name] and [name] of [address]. I would like to see correspondence relating to their prosecution at Stafford Magistrates Court on 3 March 2011 and their appeal against sentence, due at Stafford on 13 May".
6. The council responded to the request on 10 June 2011 and said that it had disclosed the requested information, with some "third party redaction".
7. The complainant requested an internal review on 15 June 2011 as she believed that the council had not identified all the information that was relevant to her request.
8. The council completed an internal review and said that it wished to maintain its position.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way her request for information had been handled. She specifically asked the Commissioner to consider whether the council had identified all the information it held relevant to her request and where any information was withheld, whether it had been appropriately withheld.
10. During the Commissioner's investigation, there was some ambiguity about the interpretation of the request. The council identified that it held two lever arch files about the prosecution however it told the Commissioner that it had interpreted the request to cover only the items of correspondence sent to or by the officer named in the request. In the Commissioner's view, there were two objectively reasonable interpretations of this particular request; the first is as stated by the council and the second is wider and covers all the correspondence on

the files relating to the prosecution. In such a scenario, the Commissioner would expect consultation to take place between the authority and the complainant to establish which interpretation is correct. The Commissioner consulted the complainant and clarified that the complainant did require access to all of the information in the files.

11. Some of the information from the files was disclosed to the complainant during the Commissioner's investigation and that information has therefore been scoped out of the Commissioner's investigation.
12. For the avoidance of any doubt, when the council presented a schedule to the Commissioner listing all the documents on the file, it claimed that a number of the documents were "not relevant". No attempt was made to explain that statement and it was not apparent on the face of the documents themselves why they would not be relevant. The Commissioner has therefore treated that information as continuing to fall within the scope of the request.

Reasons for decision

Environmental information

13. The prosecution in this case relates to materials on a land site and enforcement notices issued by the council regarding the removal of that material. According to regulation 2(1)(c) of the EIR, any information on activities affecting or likely to affect the land fall within the definition of "environmental information". The Commissioner was satisfied that this request should be handled under the terms of the EIR.

Regulation 5(1) – Duty to provide environmental information

14. During the Commissioner's investigation, a significant amount of additional information falling within the scope of the request was identified. Following the Commissioner's involvement, it was identified that the council held two lever arch files known as the "Regulation Case file" which contained information relating to the prosecution. The council disclosed some of this information but still wished to withhold a significant amount of information using the exceptions under regulation 13(1) and 12(5)(b). Those exceptions have been considered further below.
15. As the complainant continued to express concerns about whether all of the information relevant to her request had been identified, the Commissioner also asked the council to respond to enquiries to help him to determine whether any more information was held on the balance of probabilities.

16. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. He will also consider the actions taken by the authority to check that the information was not held and he will consider if the authority is able to explain why the information was not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held. He is only required to make a judgement on whether the information was held "on the balance of probabilities".¹
17. The council explained to the Commissioner that all of the information relating to the prosecution was held in the two lever arch files it had identified. It said that it had consulted the named individual about the request as well as the legal services department and was satisfied that there was no other information.
18. The complainant specifically queried the lack of email communication in connection with this matter. She queried how the press office would know about the case and have sufficient detail to complete a press release. She said that she would expect to see more internal email communication in general. The Commissioner notes that he has been provided with a good deal of internal email communication, some of which he understands concerns the press release the complainant is referring to. The Commissioner has found this information was covered by the exceptions discussed in more detail below.
19. Based on the above, the Commissioner accepts that on the balance of probabilities, no further information was held falling within the scope of the request.

Exceptions

Regulation 12(5)(b) – Legal Professional Privilege

20. Under this exception, a public authority can refuse to disclose information to the extent that disclosure 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". The Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege.

¹ This approach is supported by the Information Tribunal's findings in *Linda Bromley and Others / Environment Agency* (31 August 2007) EA/2006/0072

21. There are two types of legal professional privilege; litigation privilege and advice privilege.
22. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect of litigation, rather than just a fear or a possibility. For information to be covered by litigation privilege, it must have been created for the main purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of litigation. Litigation privilege can apply to a wide variety of information, including advice, correspondence, notices, evidence or reports.
23. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the main purpose of seeking or giving legal advice. The legal advisor must have given the advice as part of a relevant legal context.
24. The council claimed that the material it had withheld using this exception was covered by legal professional privilege. It did not, unfortunately, specify which branch of legal professional privilege it was seeking to rely on. The Commissioner notes that some of the information predates the litigation, i.e. it concerns the issuing of the enforcement notices and the subsequent appeal to the Planning Inspectorate. The Commissioner has therefore considered both branches of legal professional privilege where relevant.
25. For clarity, the Commissioner has seen a copy of the relevant information. Given the volume of information being withheld, the Commissioner has not attempted to set out his analysis of each withheld document in this notice. However, having considered the documents withheld by the council using this exception, he was satisfied that the majority of documents withheld using this exception were covered by legal professional privilege. They include the following types of information:
 - A report used in the course of authorising the enforcement action
 - Emails between the council and their internal and external legal advisors
 - Correspondence between the council's solicitor and opposing counsel
 - case notes and attendance notes

- Witness statements that were not read out in open court
26. There were some exceptions where the Commissioner was not persuaded that legal professional privilege had been correctly applied. In relation to those communications which did not obviously attract litigation privilege (such as internal emails between council officers prior to litigation) it was not apparent to the Commissioner that the communications were between the council and a qualified legal advisor.
 27. As the Commissioner had asked the council to disclose all the information that had been made public from the files (which the council did), the Commissioner was satisfied that on the balance of probabilities the remaining withheld information should be regarded as confidential.
 28. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the Information Tribunal highlighted the requirement needed for this exception to be engaged. It has explained that there must be an "adverse" effect resulting from disclosure of the information as indicated by the wording of the exception.
 29. In accordance with another Tribunal decision *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word "would" is "more probable than not".
 30. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023), the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests". The Commissioner accepts that disclosure of legally privileged information would undermine this important common law principle. This would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice and may affect the nature of future legal exchanges. He also considers that disclosure of the information would adversely affect the Council's ability to defend itself if it ever faced a future legal challenge in connection with this issue.
 31. In view of the above, the Commissioner is satisfied that it was more probable than not that disclosure of the information would adversely affect the course of justice and he is therefore satisfied that regulation 12(5)(b) was engaged in respect of the relevant information.

Public interest arguments in favour of disclosing the requested information

32. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.

33. In this case, the Commissioner appreciates that disclosure of the information would help the public to understand more about the way in which the council handled the situation.

Public interest arguments in favour of maintaining the exemption

34. As already indicated, the Commissioner and the Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal professional privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023), the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".
35. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice. The Commissioner's published guidance on legal professional privilege states the following:
- "Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice".
36. It is also important that if an authority is faced with a legal challenge to its position, it can defend its position properly and fairly without the other side being put at an advantage by not having to disclose its own information in advance.
37. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the *Bellamy* case when it stated that:
- "...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."

38. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.

Balance of the public interest arguments

39. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the authority's right to participate in confidential legal exchanges.
40. The Commissioner observes that the public interest in maintaining this exemption is a particularly strong one and to equal or outweigh that inherently strong public interest usually involves factors such as circumstances where substantial amounts of money are involved, where a decision will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the information, the Commissioner could see no obvious sign of unlawful activity, evidence that the council had misrepresented any legal advice it had received or evidence of a significant lack of transparency where it would have been appropriate. The Commissioner has also had regard to the fact that the case was heard in open court and there has been a lot of material made available as part of the usual processes. The council has also provided the complainant with some additional information from the files in question.
41. The Commissioner had regard to the timing of the request. He notes that by the date of the request, although the outcome of the Planning Inspectorate appeal and the court case had been determined, the council explained to the Commissioner that it was still awaiting confirmation of compliance with the enforcement notice and therefore further legal action was a distinct possibility.
42. Having taken all of the above circumstances into account, the Commissioner was of the view that the public interest favoured maintaining the exception in this case.

Regulation 13(1) – Third party personal data

43. This exemption provides that third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the DPA. For clarity, the Commissioner's considerations relate to the information that is not covered by legal professional privilege.

Is the withheld information personal data?

44. Personal data is defined by the DPA as any information relating to a living and identifiable individual. Again, because of the volume of information being withheld in this case, the Commissioner has not attempted to set out an analysis of each document. He is satisfied from his review of the information that it relates to the landowners in question. The information is about an enforcement notice that was issued against them, a subsequent appeal to the Planning Inspectorate and a prosecution. Much of the information refers to the appellants by name and/or address (or their legal advisor) and largely consists of information detailing the nature of their contact with the council.

Would disclosure breach the Data Protection Principles?

45. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations

46. In this case, information has been released at various stages in the process in line with the typical amount of transparency concerning these issues i.e. the enforcement notice itself once it is served, the Planning Inspectorate's decision once this is made and details of the court action. Although the Commissioner notes that some information is released into the public domain about cases such as this one, he does not consider that the appellants would have had any reasonable expectation that all the correspondence and internal deliberations exchanged during the council's enquiries would be put into the public domain.

Consequences of disclosure

47. As the Commissioner does not consider that disclosure of all the information relating to this matter would have been within the reasonable expectations of the individuals concerned, he considers that the disclosure could cause distress.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

48. There is always some public interest in the disclosure of information held by public authorities. This helps to promote transparency and accountability.
49. The Commissioner notes in this case that there is a strong legitimate public interest in knowing what planning infringements have occurred, what action has been taken against those concerned and whether the matter has been put right. However, those interests have already been met through the transparency that already exists surrounding the case.
50. The information that is at issue in this notice is information that led to these forms of action being taken i.e. information such as correspondence exchanged with the appellants and their legal representative and some details of the council's internal investigation at various stages as it progressed. There is a legitimate interest in disclosure of information that would reveal more about the council's decision-making process however the Commissioner considers that disclosure of this level of detail would be a disproportionate intrusion into the private lives of the individuals who were prosecuted in this case. There are no particular circumstances that would justify that in the Commissioner's view and he was therefore satisfied that the disclosure would be unwarranted and unfair.

Right of appeal

51. 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

52. 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.
53. 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

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