

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

Decision notice

Date: 15 May 2013

Public Authority: West Sussex County Council
Address: County Hall
Chichester
West Sussex
PO19 1RQ

Decision (including any steps ordered)

1. The complainant requested information from West Sussex County Council ("the council") relating to rights of way issues. The council withheld some information using regulation 12(4)(e), 12(5)(b) and 13(1) of the Environmental Information Regulations 2004 ("the EIR"). The complainant did not accept that the information had been correctly withheld.
2. The Commissioner's decision is that the council correctly withheld information using regulation 13(1) and 12(5)(b) of the EIR, however it incorrectly withheld information that it sought to withhold using regulation 12(4)(e) only. The Commissioner therefore found a breach of the council's duties to make environmental information available within 20 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The council should disclose the information that it sought to withhold using regulation 12(4)(e) only, specifically:- The email labelled "H" dated 6 February 2009 and the email labelled "L" dated 15 July 2009.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 26 July 2012, the complainant requested information from the council in the following terms:

"In March and April 2009 I had a correspondence with the then CE [name] about the correspondence/contact he had had with [names of owners and location] about the forthcoming DMMO PI at [location]. I made an FOI request 11th March for complete disclosure of all the correspondence between WSCC and the landowners, their agents and supporters from the point at which the current application was submitted up to the present date

It transpired that there was an email correspondence between [four names] in January/February 2009. Part of this was copied to me but certain documents were withheld...

I am now making a formal request under the Act for all documents to be released in particular the emails from [name] to [name] replied to by [name] 4th February 2009 and 9th February 2009".

6. The council replied on 17 August 2012. It said that the request was substantially similar to the previous request made by the complainant. The council said that information had been withheld using regulation 12(4)(e), 12(5)(d), and 13(1) of the EIR.
7. The complainant expressed dissatisfaction with the council's response on 27 September 2012.
8. The council did not complete an internal review because it considered that the review it had already provided in respect of the complainant's earlier request had addressed the same issues. The previous internal review was dated 1 June 2009 and referred to the same exceptions above.

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 correctly withheld information using the exceptions cited.

10. For clarity, during the Commissioner's investigation the council said that it had meant to rely on regulation 12(5)(b) rather than 12(4)(d). The Commissioner therefore considered the use of regulation 12(5)(b) rather than 12(4)(d).

Reasons for decision

Regulation 12(5)(b) – Course of justice

11. 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. Privilege is a common law concept which is designed to protect the confidential exchanges between lawyers and clients.
12. The council provided a copy of the withheld information to the Commissioner. It consisted of emails sent to the council's legal assistant and her responses. It also included one email sent from the leader's personal assistant to the leader which set out the contents of advice provided by the legal assistant.
13. The Commissioner notes that the withheld information represents requests for advice from a legal assistant and her responses. The council explained that all the advice provided by the legal assistant had been given under the supervision of her line manager, who is a qualified solicitor. The legal assistant had also been authorised by the council's Head of Legal and Democratic Services to provide internal legal advice and this was noted in the council's Scheme of Delegation. The advice was sought in a relevant legal context to assist the council in dealing with the issues that arose as a result of the rights of way applications. The Commissioner was satisfied that there was no evidence to indicate that the advice had been shared with third parties to the extent that it had lost its confidential character. In view of the facts of the case, the Commissioner was satisfied that the information is covered by legal professional privilege.
14. 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. 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".

15. 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 the legal advice would undermine the important common law principle of legal professional privilege. This would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice. He also considers that disclosure of the legal advice would adversely affect the council's ability to defend itself if it ever faced a legal challenge in connection with this issue. The council should be able to defend its position and any claim made against it without having to reveal its position in advance, particularly as challenges may be made by persons not bound by the legislation. This situation would be unfair.
16. 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 legal advice.

Public interest arguments in favour of disclosing the requested information

17. 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. This is even more relevant given the concerns raised over the leader's involvement in these matters. There is also specific public interest in understanding the council's actions with respect to promoting and protecting public rights of way. Disclosure of the withheld information would also help the public to understand more about the decision-making process in the council relating to this matter and consider the quality of the advice provided.

Public interest arguments in favour of maintaining the exemption

18. 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 advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege.

19. 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".

20. 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 legal advice in advance.

21. 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..."

22. 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

23. To provide some background to this matter, in March 2006, the council received two identical applications under the Wildlife and Countryside Act 1981 for a modification order to add a bridleway to the definitive map and statement of public rights of way along the West Drive at [location] owned by two individuals named in the request. These applications followed a previous unsuccessful application.

24. The council decided to consider the new applications on the basis that additional evidence was presented. At its meeting on 4 June 2007, the Rights of Way Committee approved the applications. However, several objections were received and these were referred to the Secretary of

State. A public local inquiry into the order was held in June 2009. The inquiry Inspector's decision was that the order should not be confirmed on the grounds that the evidence provided to support the applications was insufficient.

25. The complainant considers that the council should be completely transparent about its interactions in what she has called a "quasi-judicial process of rights of way". She expressed particular concerns about the involvement of the council's leader at the time, which she alleged was improper. She alleged that a large payment had been made by the landowners to the political party and that this meant the leader should not have become involved. She was also not persuaded by the suggestion that the leader's involvement had been in a personal capacity only.
26. 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 council's right to obtain legal advice in confidence.
27. The Commissioner observes that the public interest in maintaining this exception 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 substantial amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the withheld information and consideration of all the circumstances, the Commissioner did not consider that there were any factors that would equal or outweigh the particularly strong public interest inherent in this exception.
28. The Commissioner appreciates that the complainant believes that the council's leader became improperly involved. However, it was not the Commissioner's view that the disclosure of the withheld information would add much to the debate about this to the extent that the disclosure would be justified given the nature of the information in question. It does not concern any core decisions made by the council relating to the rights of way issue. The complainant does not need to obtain the withheld information to be able to pursue a complaint about the actions of the leader either. Furthermore, the Commissioner notes that the decision about the rights of way was the subject of an independent public inquiry so it was not apparent to the Commissioner that the leader's involvement, in whatever capacity, unfairly prejudiced the process. The information was also not so old that it could not be

regarded as sufficiently prejudicial to the council's interests and the course of justice in general.

29. In view of the above, the Commissioner did not consider that a convincing case had been made that would justify the disclosure of the withheld information despite the strong public interest in protecting the council's right to obtain legal advice in confidence. The Commissioner therefore considers that the council had correctly withheld the information.

Regulation 13(1) – Third party personal data

30. This exception 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 Data Protection Act 1998 ("the DPA").

Is the withheld information personal data?

31. Personal data is defined by the DPA as any information relating to a living and identifiable individual. The council applied this exception to withhold emails between the leader and the owner as well as a letter attached to one of the emails from the landowner. The Commissioner was satisfied that this information clearly relates to an individual who can be identified from that information (the landowner) and it is therefore personal data.

Would disclosure breach the Data Protection Principles?

32. 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

33. The council explained that as a result of a previous request made by the complainant in 2009 covering the same information, the council had consulted the landowner concerned. He had confirmed that he did not wish the information to be disclosed and that he had expected it to remain private. The council said that there was no reason to suppose that this view had changed.

Consequences of disclosure

34. The council did not refer to any particular consequences of disclosing the information however the Commissioner considers that the disclosure could be distressing to the landowner if it was outside his reasonable expectations. The disclosure may also impact upon his future engagement with the council, or that of other members of the public, if there was concern that correspondence would not be kept confidential.

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

35. As already noted, there is always some weight to 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. This is more pressing in the circumstances of this particular case because of the concerns raised over the leader's involvement in these matters. There is also specific public interest in understanding the council's actions with respect to promoting and protecting public rights of way. However, having regard to all the circumstances, it was not the Commissioner's view that the legitimate public interest in disclosure of this particular information was sufficiently strong to outweigh the legitimate interests of the landowner.
36. When considering reasonable expectations, it is useful to consider whether the individual objects to the disclosure if appropriate. While a lack of consent can never be the sole determining factor as the council wrongly suggested in its correspondence to the Commissioner, it is often a useful starting point in considering what the individual's expectations were. Whether that was a reasonable expectation to have had depends on the wider circumstances of the case. The Commissioner notes that correspondence sent to public authorities by members of the public is generally regarded as confidential unless there are other specific factors that would suggest otherwise. There was no evidence available to the Commissioner that would suggest that disclosure of the withheld information ought to have been withheld the reasonable expectations of the landowner and given the nature of the correspondence, the Commissioner was satisfied that the landowner would have expected the correspondence to be kept confidential. In view of this, the Commissioner accepts that the landowner could find the disclosure distressing and it could affect his future engagement with the council.

37. As already mentioned, the Commissioner appreciates that the complainant believes that the council's leader became improperly involved. However, it was not the Commissioner's view that the disclosure of the withheld information would add much to the debate about this to the extent that the disclosure would be justified given the nature of the information in question. It does not concern any core decisions made by the council relating to the rights of way issue. The complainant does not need to obtain the withheld information to be able to pursue a complaint about the actions of the leader. Furthermore, the Commissioner notes that the decision about the rights of way was the subject of an independent public inquiry so it was not apparent to the Commissioner that the leader's involvement, in whatever capacity, unfairly prejudiced the process.
38. The Commissioner was not satisfied that disclosure would have been within the reasonable expectations of the landowner, and could therefore have a distressing impact on him. He was also not persuaded that any legitimate interest in the disclosure outweighed to the legitimate interests of the individual. Disclosure would therefore be unfair and breach the first Data Protection Principle. The Commissioner therefore accepts that the council correctly applied regulation 13(1).

Regulation 12(4)(e) – Internal communications

39. This exception relates to internal communications. For clarity, the council relied on this exception as well as regulation 12(5)(b) in relation to some information. As the Commissioner was satisfied that this information had been correctly withheld using regulation 12(5)(b), he did not consider that it was also necessary to consider the application of regulation 12(4)(e) to the same information. However, the council sought to withhold two emails using only regulation 12(4)(e) and the Commissioner's considerations in respect of this information have therefore been set out below.
40. This exception is often fairly easily engaged since it will usually be apparent whether or not the information represents an internal communication. One of the emails is between the council's legal assistant and the leader's personal assistant. The other email is between the leader and his personal assistant. The Commissioner accepts that the emails clearly represent internal communications and the exception is therefore engaged.

Public interest arguments in favour of disclosing the requested information

41. As already mentioned, there is always some weight to 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. This is more pressing in the circumstances of this particular case because of the concerns raised over the leader's involvement in these matters. There is also specific public interest in understanding the council's actions with respect to promoting and protecting public rights of way.

Public interest in maintaining the exception

42. In some ways, the exception under regulation 12(4)(e) is similar to the exemption under section 36 of the Freedom of Information Act 2000 ("the FOIA"). Arguments relating to this exception usually focus on the notion of "chilling effect" and "safe space" which have become well-known in the context of this exception and section 36 under the FOIA. Safe space arguments are about the need for a safe space to formulate policy, debate "live" issues, and reach decisions without being hindered by external comment or media involvement. Such arguments are related to, but not the same as chilling effect arguments. Chilling effect arguments are directly concerned with the argued loss of frankness and candour in debate or advice which it is said would result from disclosure under the FOIA or the EIR.
43. In the Commissioner's past experience, general arguments about these concepts do not carry significant weight with the Information Tribunal where those arguments are not supported by specific reference to the harm of disclosing the actual information in question. Public authorities should therefore ensure that they consider how sensitive the information is and the wider circumstances of the case. The need for a safe space will be strongest when the issue is still live. Once a public authority has made a decision, a safe space for deliberation will no longer be required and the argument will carry little weight. The timing of the request is often an important factor.
44. The Commissioner explained the above to the council and he asked it to justify its reliance on this exception. The council did not provide any arguments that could be linked specifically to the public interest in maintaining this particular exception in line with the above and its response did not provide any evidence that it had engaged properly with the points raised by the Commissioner. The arguments it did provide focused on the information it had withheld using regulation 12(5)(b).

Balance of the public interest arguments

45. As noted above, this exception is fairly easily engaged. However, in practice it is limited by the application of the public interest test. Public authorities relying on this exception must be able to demonstrate, with

reference to the specific information in question, why and how prejudice would or would be likely to occur and why it would be sufficiently severe in the circumstances to outweigh the public interest in disclosure. The council did not make a case.

46. In the Commissioner's view, the public interest in disclosure is fairly limited since the information in question is not particularly revealing. However, as acknowledged, there is a public interest in transparency for its own sake and there is a presumption in favour of disclosure under regulation 12(2) of the EIR. The council did not present any evidence to the Commissioner to indicate that disclosure of the two emails would or would be likely to cause any particular harm. As noted, the emails in question do not appear to be particularly revealing or sensitive. The Commissioner also notes that by the time of the request, the public inquiry had reported its findings and the issue was not in that sense still on-going. The need to continue to withhold this information by the time of the request had therefore been substantially diminished by the passage of time.
47. In light of the above and the lack of appropriate rationale presented for withholding the two emails, the Commissioner was left with no alternative but to order the disclosure of the emails.

Procedural issues

48. The council did not persuade the Commissioner that it had correctly withheld two emails using regulation 12(4)(e). The Commissioner has therefore found a breach of the council's duties under regulation 5(1) and 5(2) to make environmental information available within 20 working days of a request.

Right of appeal

49. 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

50. 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.
51. 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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