

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

Decision notice

Date: 7 January 2014

Public Authority: The Environment Agency
Address: Ergon House
Horseferry Road
London
SW1P 2AL

Decision (including any steps ordered)

1. The complainant has requested a report written by a particular individual relating to the Environment Agency's (EA) Handling of the Determination Process. The EA refused to disclose the document requested under regulation 12(4)(e), 12(5)(b), 13(1) and 5(3) EIR.
2. The Commissioner's decision is that much of the withheld information is the complainant's own personal data and is not therefore covered by the EIRs due to regulation 5(3) EIR. In terms of the withheld information which is not the complainant's own personal data, the EA has correctly applied regulation 12(5)(b) EIR.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 12 March 2013, the complainant wrote to the EA and requested information in the following terms:

"Following the Consent Order dated February 2012 we are aware that [named individual] prepared a report on the EA's Handling of the Determination Process. We have asked to see the report in previous emails but this request has never been made under the FOI EIA regulations. We do not believe the report is exempt under the Acts as it is a report. It is not legal thinking. It is not internal advice. It is a report on the actions of various EA officers and the failings associated with the

determination process surrounding our only application which has never as yet been determined by the EA."

5. On 20 March 2013 the EA responded. It refused to provide the requested information under section 31, 40(2) and 42 FOIA and regulation 12(4)(e), 12(5)(b) and 13 EIR.
6. The complainant requested an internal review on 25 March 2013. The EA sent the outcome of its internal review on 24 April 2013. It explained that as it had confirmed in response to a previous request no final report was ever created. It said that no such report had been created during the time between the previous request and this request. It explained that an investigation was conducted which resulted in a final letter setting out its findings. This letter had been provided to the complainant's clients as part of a legal process but this would not be disclosed under FOIA or EIR for the reasons given in its initial response. It said that all documents relevant to the investigation along with the final letter were exempt from disclosure under section 31, 40(2) and 42 FOIA and regulation 12(5)(b) and 13 EIR.
7. During the course of the Commissioner's investigation it became clear that much of the withheld information did not fall within the scope of the request. The complainant and EA agreed that one document fell within the scope of the request, which is a draft internal document written by the individual named in the complainant's request. The EA also cited regulation 5(3) EIR as it considers much of it would be the complainant's own personal data.

Scope of the case

8. The complainant contacted the Commissioner on 25 April 2013 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether any information contained in the withheld document is the complainant's own personal data and whether the EA has correctly applied regulation 12(4)(e), 12(5)(b) or 13(1) EIR to any information which is not the complainant's own personal data.

Reasons for decision

Regulation 5(3)

10. Regulation 5(1) EIR states that, "Subject to paragraph (3) ...a public authority that holds environmental information shall make it available on request." Regulation 5(3) states that, "To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.
11. Upon viewing the withheld information the Commissioner considers that the information marked as the complainant's own personal data by the EA cannot be dealt with under EIR due to regulation 5(3). This is because it is information from which the complainant would be identifiable.

Regulation 12(5)(b) – Course of justice and inquiries of a disciplinary nature.

12. Regulation 12(5)(b) states that a public authority may refuse to disclose information to the extent that its 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.
13. The EA has applied the exception on the grounds that the report is subject to legal professional privilege (LPP) and that therefore its disclosure would adversely affect the course of justice.

Legal professional privilege

14. It has been established at Tribunal that regulation 12(5)(b) EIR can be used to prevent the disclosure of documents that are covered by legal professional privilege. It is understood that the EA considers that the report as a whole is covered by legal professional privilege.
15. In brief legal professional privilege is the principle that clients should be able to seek advice from their legal advisers and that to do so they must be able to speak freely and frankly with that adviser. It is therefore important that the communications between a client and a legal adviser remains confidential. The Tribunal has accepted that to disclose any documents covered by privilege would erode this concept and would therefore have the potential to adversely affect the course of justice by undermining individuals' ability to obtain the best legal advice.

16. Legal professional privilege can only protect communications made between a client and their legal adviser for the dominant purpose of obtaining legal advice.
17. In this case the withheld document is a draft report sent to the EA's legal adviser to obtain legal advice relating to allegations of a criminal, civil and disciplinary nature made by the complainant against EA members of staff. Within the document the EA sets out the facts of the complaint and investigation and makes specific requests for legal advice on particular points or issues. As this is clearly a communication between the EA and its legal adviser this would be covered by LPP and regulation 12(5)(b) EIR was correctly engaged. The Commissioner has therefore gone on to consider the public interest test in this case.

Public interest in favour of disclosing the requested information

18. 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.

Public interest arguments in favour of maintaining the exemption

19. The Commissioner has taken into account the inbuilt public interest in the concept of legal professional privilege, as well as what the particular factors in this case suggest about the balance of public interest. This includes what harm may result, and what benefit to the public interest may result, through disclosure of the information in question. The inbuilt public interest in legal professional privilege was noted by the Information Tribunal in the case *Bellamy and Secretary of State for Trade and Industry* (EA/2005/0023):

"...there is a strong element of public interest inbuilt in to the 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..." (paragraph 35).

20. It is very important that public authorities should be able to consult with their lawyers in confidence and 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 advisers 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”.

21. However, in *DBERR v Dermot O'Brien* (EWHC 164 (QB)) the High Court noted that the inbuilt public interest in legal professional privilege should not mean that section 42(1) is in effect, elevated to an absolute exemption.

Balancing the public interest arguments

22. The Commissioner accepts that there is a public interest in disclosing information which will lead to greater openness and accountability.
23. However in balancing the opposing public interest arguments in this case, the Commissioner is mindful of the Information Tribunal's decision in *Bellamy*. The Commissioner recognises that the general public interest inherent in the exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.
24. The Commissioner considers that there is a very strong public interest in public authorities being able to consult with their lawyers in confidence and without fear that this information may be disclosed into the public domain.
25. On balance the Commissioner considers that the public interest in disclosure is outweighed by the public interest in favour of maintaining the exception.
26. As the Commissioner considers that regulation 12(5)(b) EIR was correctly applied to the withheld information which is not the complainant's own personal data, he has not gone on to consider the application of the other exceptions. However the Commissioner acknowledges that the withheld information does also contain some third party personal data.

Right of appeal

27. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

28. 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.
29. 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

Pamela Clements
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