

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

Decision notice

Date: 14 April 2014

Public Authority: City and County of Swansea
Address: Civic Centre
Oystermouth Road
Swansea
SA1 3SN

Decision (including any steps ordered)

1. The complainant requested information about a particular property that he purchased from the City and County of Swansea ('the Council') in 2012. The Council withheld some information under section 42 of the FOIA and other information under regulation 12(4)(e) of the EIR. The Council also stated that other information was available to the complainant as a subject access request (subject to a fee of £10.00). In its internal review, the Council stated that it considered the request to fall under the scope of the EIR and refused to disclose the information under regulations 12(4)(e) and 12(5)(b). During the Commissioner's investigation the Council disclosed some information relevant to the request, and it disclosed copies of the complainant's own personal data. However, the Council redacted some information from the documents it disclosed under regulation 13 and maintained that the remaining information held was exempt under regulations 12(4)(e) and 12(5)(b). The Commissioner's decision is that the Council has correctly applied regulations 12(4)(e) and 12(5)(b) to the remaining withheld information. The Commissioner does not require any steps to be taken.

Request and response

2. On 30 May 2013, the complainant wrote to the Council in connection with his purchase of a particular property from the Council, his ongoing appeal to the planning inspector and requested information in the following terms:

- "1- All documents relating to the sale of Depot before the Auction. This should include all documents from:
- a. The department that was using the Depot and no longer needed
 - b. The department that handled the sale of the Depot as an asset
 - c. The legal department
 - d. The planning department

Can you please provide internal documents within each department and cross communication between these departments concerning the sale of Depot.

- 2- All written communication relating to the Depot &/or myself [name redacted] after the sale of the depot between any of the departments mention above.
- 3- Any other communication from any other department relating to Depot, the surrounding land and myself.
- 4- All email communications concerning the Depot and land surrounding it that I own now. I request (a) all emails within individual departments and b) between different departments. Can you please make sure that emails full headers for auditing purpose are included in the information provided.

Please feel free to exclude any information you have already provided last year (16/11/12)".

3. The Council responded on 27 June 2013 and stated that the planning file had previously been provided so, in line with the complainant's wishes, the information would not be re-sent. However, the Council advised that some information within the planning file and information contained within the file held by its legal department was considered exempt under section 42 of the FOIA, and the Council considered the public interest to favour non-disclosure. The Council also confirmed that it held other information within its Estates department which was considered exempt under regulation 12(4)(e) of the EIR, and again it considered that the public interest favoured non-disclosure.

4. On 19 August 2013 the complainant requested an internal review into the Council's refusal to disclose the information requested.
5. The Council provided the outcome of its internal review on 27 September 2013. The Council stated that the entire request should have been handled under the provisions of the EIR as opposed to the FOIA. However, the Council maintained that the information requested was exempt under regulations 12(4)(e) and 12(5)(b) of the EIR.

Scope of the case

6. The complainant contacted the Commissioner initially on 13 August 2013 to complain about the way his request for information had been handled. The complainant was advised that, before accepting complaints, the Commissioner required complainants to have exhausted a public authority's complaint process. The complainant was directed to ask the Council to review its handling of the request and was advised to contact the Commissioner if he remained dissatisfied on receipt of the Council's internal review response.
7. The complainant contacted the Commissioner again on 14 October 2013 stating that he was dissatisfied with the Council's continued refusal to disclose the information he had requested.
8. During the course of the Commissioner's investigation the Council disclosed some information relevant to the request and it also disclosed the information considered to be the complainant's own personal data. The Council redacted some third party personal data from the information it disclosed under regulation 13 of the EIR and maintained that the remaining information held was exempt under regulations 12(4)(e) and 12(5)(b).
9. The scope of the Commissioner's investigation is therefore to determine whether the Council should disclose the remaining withheld information, or whether it was correct in relying on the exceptions claimed.

Reasons for decision

Background

10. The request in this case relates to the sale by auction of a property by the Council to the complainant in March 2012.
11. The complainant advised that, prior to the purchase, the Council confirmed there were no planning restrictions on the property and that

he would be able to use the property as long as there was no change of use. The complainant purchased the property on this basis, but later encountered difficulties in respect of planning use conditions attached to the property. He applied to the Council for removal of the planning condition but the application was refused by the Council.

12. The subject of planning conditions at the property was subsequently referred by the complainant to the Planning Inspectorate who held an Inquiry on 11 September 2013 and issued their appeal decision on 2 October 2013.

Regulation 12(4)(e) – internal communications

13. Regulation 12(4)(e) provides that a public authority may refuse a request for environmental information if the request involves the disclosure of internal communications. Consideration of this exception is a two-stage process; first it must be considered whether the request would involve the disclosure of internal communications. Secondly, this exception is qualified by the public interest. This means that the information must be disclosed if the public interest in maintaining the exception does not outweigh the public interest in disclosure.
14. Regulation 12(4)(e) is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. It is only necessary to demonstrate that the information falls within the category defined by the exception.

Internal Communications

15. The Commissioner considers that the concept of a communication in this context is broad and will encompass any information someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it. An internal communication is also a communication that stays within one public authority.
16. The information which the Council has withheld under this exception consists of communications between various sections within the Council relating to the sale of the property in question. Having considered the Council's submissions and the withheld information the Commissioner is satisfied that all of the withheld information constitutes internal communications and therefore the exception is engaged. He has gone on to consider the relevant public interest arguments.

Public Interest arguments in favour of disclosure

17. The Council acknowledges that there is a general public interest in openness, transparency and accountability by the Council to promote public understanding and good decision making.
18. The complainant considers that the Council has a duty to disclose all information relating to the sale of the property in question "to be able to present an accurate representation to the public inquire [sic]". The complainant believes that the information requested should have been disclosed at the time of his request ie before the Planning Inquiry took place in September 2013. He contends that the Council's refusal to disclose the information prior to the Inquiry is a "clear and intentional misrepresentation" on the part of the Council which could only result in "further complication of the whole situation and will cost all parties involved more time and effort".

Public interest arguments in favour of maintaining the exception

19. The Council considers that there is a significant weight and public interest in protecting the internal deliberations of its officers and the decision making process. At the time of the request the issue of planning conditions at the property was in contest and subject to an appeal to the Planning Inspectorate.
20. The Council advised the withheld information relates primarily to a private dispute between itself and the complainant. Whilst the Council therefore acknowledges that the complainant has an interest in obtaining the withheld information, it does not consider this extends to a wider public interest in disclosure into the public domain.
21. The Council also referred to the fact that there has been an appeal to the Planning Inspectorate in relation to planning matters associated with the site. It considers that the public interest in disclosure of the withheld information is lessened by this public scrutiny of the planning process.

Balance of the public interest test

22. The Commissioner recognises that inherent in the exception provided by regulation 12(4)(e) is the argument that a public authority should be afforded private space for staff in which issues can be considered and debated, advice from colleagues be sought and freely given and ideas tested and explored to protect the integrity of the deliberation process. The Commissioner also recognises that public authorities often require a safe space in which to debate issues without the hindrance of external comment and to develop their policies or opinions free from outside interference. However the Commissioner has to consider the specific

information in dispute in this case in order to determine whether this safe space is still relevant and important.

23. Turning to the circumstances of this case, in the Commissioner's opinion, the Council's arguments regarding safe space deserve to be given significant and notable weight. This is because at the time of the request, the matter was still live as planning matters associated with the property were the subject of an appeal to the Planning Inspectorate. As a result the Commissioner accepts that the decision making process in respect of planning matters associated with this particular site remained live at the time of the request. Therefore, the Commissioner accepts that disclosure of the withheld information at the time of the request would, in the circumstances of this case, have been likely to result in an infringement into the Council's safe space to develop ideas and reach decisions in relation to the outstanding planning matters away from external interference and distraction.
24. The Commissioner acknowledges that there is a general public interest in public authorities being as accountable and transparent as possible regarding their decision-making processes. He appreciates that the planning dispute in this case appears somewhat complex. Whilst the Commissioner acknowledges that the complainant has a private interest in disclosure of the requested information as he owns the property in question, he has seen little evidence of any significant wider public interest in disclosure of the information requested, for example, any interest in the subject matter by other local residents or other interested parties.
25. In reaching a decision on where the balance of the public interest lies in this case, the Commissioner has attached particular weight to the fact that there was an ongoing appeal relating to planning conditions at the property in question at the time of the request, the need to avoid any fettering of the decision making process by premature disclosure of the requested information, and the fact that the planning process allows for any formal decision, once made by the Planning Inspectorate, to be challenged via appeal to the High Court. For the reasons set out above, the Commissioner considers that, in all the circumstances of the case, the public interest in maintaining the exception set out in regulation 12(4)(e) outweighs the public interest in disclosure.

Regulation 12(5)(b) – Legal professional privilege

26. 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 ('LPP').

27. The success or otherwise of an application of regulation 12(5)(b) in terms of LPP will turn on three principal questions:-
- (i) Is the information covered by LPP?
 - (ii) Would a disclosure of the information adversely affect the course of justice?
 - (iii) In all the circumstances, does the public interest favour the maintenance of the exception?

Is the information covered by LPP?

28. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated.
29. The information which the Council has withheld under regulation 12(5)(b) in this case consists of legal advice requests and responses between the Council and its in house legal advisers, and other documents or parts of documents which reveal or record discussions between the Council and its legal advisers. The Council believe that the information is covered by legal advice privilege
30. The Commissioner is satisfied that the withheld information consists of communications that, at the time they were made, were confidential; were made between a client and professional legal advisers acting in their professional capacity; and were made for the sole or dominant purpose of obtaining legal advice to assist with litigation. The Commissioner is therefore satisfied that the withheld information is subject to LPP.
31. Information will only be privileged so long as it is held confidentially. As far as the Commissioner has been able to establish, the information was not publicly known at the time of the request, and there is therefore no suggestion that privilege has been lost.

Would disclosure have an adverse effect on the course of justice?

32. 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.

33. In consideration of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the withheld information would adversely affect the course of justice and he is therefore satisfied that regulation 12(5)(b) is engaged in respect of the withheld information. He has therefore gone on to consider the public interest test.

Public interest arguments in favour of disclosing the information

34. The Council acknowledges that there is an inherent public interest in openness, transparency and accountability in its decisions and decision making process.
35. The Council also acknowledges that disclosure of the withheld information would provide an additional layer of public scrutiny and enhance understanding of the reasons for decision or actions taken by a public authority and to assist in challenging the decisions, where appropriate.
36. The complainant considers that the Council had a duty to disclose all information relating to the sale of the property in question at the time of the request, and before the Planning Inquiry in September 2013.

Public interest arguments in favour of maintaining the exception

37. In this case, in relation to the public interest in favour of maintaining the exception, the Council put forward the following arguments:
- The importance of maintaining the principle behind LPP in safeguarding the openness of communications between a client and his or her lawyer to ensure access to full and frank legal advice.
 - There is a strong element of public interest inbuilt in the privilege itself and this has long been recognised by the courts, in light of which the Council is of the view that there would need to be strong considerations to override this public interest against disclosure.
 - It is in the public interest that decisions taken by the Council are made in a fully informed legal context.
 - The legal advice needs to be comprehensive and point out the counterarguments. Without comprehensive legal advice, the quality of the Council's decision making would be undermined as the Council would not be fully informed.

- Disclosure could lead to reluctance in the future to seek legal advice or make a permanent record of legal advice. This could lead to poor decision making and unnecessary expenditure in having to defend legal challenges.

Balance of the public interest arguments

38. The Commissioner has carefully considered the arguments presented in favour of maintaining the exception against the arguments favouring disclosure and, in doing so, he has taken account of the presumption in favour of disclosure as set down by regulation 12(2). Even in cases where an exception applies, the information must still be disclosed unless 'in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information'. The threshold to justify non-disclosure is consequently high.
39. The Commissioner appreciates that there is a strong public interest in public authorities being as accountable as possible in relation to planning matters. The Commissioner also believes there is a strong public interest in disclosing information that allows scrutiny of a public authority's decisions. A disclosure of the legal advice in this case would provide a degree of transparency and reassurance in relation to the Council's decisions and actions regarding the property in question and may assist the public in understanding the legal basis for such.
40. The Commissioner considers that another factor in favour of disclosing information is the number of people who may be affected by the subject matter. In the case of *Mersey Tunnel Users Association v ICO & Mersey Travel (EA/2007/0052)* the Tribunal confirmed this point. In that case the Tribunal's decision was that the public interest favoured disclosing legal advice obtained by Mersey Travel and it ordered disclosure of the information requested. The Tribunal placed particular weight on the fact that the legal advice related to issues which affected a substantial number of people, approximately 80,000 people per weekday. In this case, the Commissioner understands that the subject of this request (planning matters associated with the property in question) does not have the potential to affect a significant number of people and will primarily only have an effect on the complainant as he owns the property in question.
41. In reaching a view on the balance of the public interest in this case and deciding the weight to attribute to the factors on either side of the scale, the Commissioner has considered the circumstances of this case and the content of the withheld information. The Commissioner believes it is important that the Council should be able to consult freely and frankly with its legal advisors and that its ability to defend itself fairly in the

future is not compromised. In the Commissioner's view, this weighs heavily in the balance of the public interest test in this case.

42. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the Council and its legal advisers and that this could lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of comprehensive legal advice.
43. The Commissioner is satisfied that, in this case, the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. He has therefore concluded that the public interest in maintaining the exception at regulation 12(5)(b) outweighs the public interest in disclosure of the information.

Regulation 13 – the exemption for third party personal data

44. This exception provides that third party personal data is excepted from public disclosure under the EIR 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?

45. Personal data is defined by the DPA as any information relating to a living and identifiable individual. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
46. The withheld information comprises the names and associated email addresses of other third parties who expressed an interest in purchasing the property in question at the time it was marketed. The Commissioner is satisfied that such information is personal data as defined in the DPA.

Would disclosure breach one of the Data Protection principles?

47. Having accepted that the information requested constitutes the personal data of living individuals other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles. He considers the most relevant principle in this case is the first principle.

The first data protection principle

48. In determining whether a disclosure is fair under the first principle of the DPA for the purposes of regulation 13 of the EIR, the Commissioner considers it appropriate to balance the consequences of any disclosure and the reasonable expectations of the data subject with general principles of accountability and transparency, as well as any legitimate interests which arise in the specific circumstances of the case.

Reasonable expectations

49. When considering what information third parties should expect to have disclosed about them, the Commissioner considers that a distinction should be drawn as to whether the information relates to the third party's public or private life. The Commissioner's view is that information which relates to an individual's private life (i.e. their home, family, social life or finances) will deserve more protection than information about them acting in an official or work capacity (i.e. their public life). In this case, it is clear that the withheld information relates to the individuals' private lives.

50. The Commissioner considers that individuals who express an interest in purchasing a property, albeit from a public authority, would have a reasonable expectation that their personal data would not be put into the public domain.

Consequences of disclosure

51. The Council has not submitted any specific representations in relation to the consequences of disclosure of the information withheld under regulation 13. Whilst the information is not of a particularly sensitive nature, the Commissioner considers that the release of the individuals' personal data would represent an invasion of privacy through confirming that those individuals had expressed an interest in purchasing the property in question.

General principles of accountability and transparency

52. The Commissioner recognises that there is always some legitimate public interest in the disclosure of any information held by public authorities. This is because disclosure of information helps to promote transparency and accountability amongst public authorities. This in turn may assist members of the public in understanding decisions taken by public authorities and perhaps even to participate more in decision-making processes.

53. However, having considered the circumstances of this case the Commissioner does not believe that any legitimate public interest in

accessing the withheld information would outweigh the individuals' reasonable expectations and right to privacy.

54. In view of the above, the Commissioner is satisfied that the withheld information is personal data and that disclosure of any of it would breach the first data protection principle as it would be unfair to the individuals concerned. As the Commissioner has determined that it would be unfair to disclose the requested information, it has not been necessary to go on to consider whether disclosure is lawful or whether one of the conditions in Schedule 2 of the DPA is met. The Commissioner therefore upholds the Council's application of the exception provided at regulation 13 of the EIR.

Right of appeal

55. 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

56. 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.
57. 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

Anne Jones
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