

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 March 2014

Public Authority: Hertfordshire County Council
Address: County Hall
Pegs Lane
Hertford
Hertfordshire
SG13 8DQ

Decision (including any steps ordered)

1. The complainant has requested information relating to the proposed construction of a waste disposal facility at New Barnfield, Hatfield. The council provided some of the requested information but withheld other information under the exceptions for personal data (regulation 13), internal communications (regulation 12(4)(e)) and the course of justice (regulation 12(5)(b)).
2. The Commissioner's decision is that Hertfordshire County Council:
 - correctly applied the exceptions in regulation 12(4)(e) and regulation 12(5)(b) to the requested information and that the public interest favours maintaining the exceptions;
 - correctly withheld information under regulation 13;
 - in respect of the officer carrying out the internal review did not breach regulation 11;
 - failed to provide information within 20 working days and breached regulation 5(2).
3. The Commissioner does not require the public authority to take any steps.

Background

4. The request relates to a planning application, which was submitted on 15 November 2011 by Veolia Environmental Services Ltd, seeking planning permission for the demolition of existing library and training buildings and the construction and operation of a recycling and energy recovery facility for the treatment of municipal, commercial and industrial wastes on land at New Barnfield, Travellers Lane, Hatfield, Hertfordshire.¹
5. The proposed development would be built on a former secondary school site which is owned by the council. The planning application was originally considered by the council's Development Control Committee in October 2012 but was called in by the Secretary of State who referred it to a planning inquiry in January 2013.
6. The council has argued that the development is needed for both financial and ecological reasons but there is local opposition because of the environmental impact of its proposed citing on green belt land. At the time of the request the call-in inquiry was still live. At the time of writing a decision has yet to be made.

Request and response

7. On 16 January 2013, the complainant wrote to Hertfordshire County Council (the "council") and requested information in the following terms:

"under the provisions of The Environmental Information Regulations 2004, will you please provide copies of all emails and associated attachments (with commercially sensitive information redacted where necessary) sent by or received by the following:

- John Wood, Chief Executive and Director of Environment
- Richard Brown, Assistant Director, Strategic Planning and Environmental Management
- Derrick Ashley, Chairman, Waste Management Cabinet Panel
- Terry Hone, Vice-Chairman, Waste Management Cabinet

¹ <http://www.hertsdirect.org/services/envplan/plan/planningapps/nbplanapp/>

Panel

- Terry Douris, Waste Management Cabinet Panel member
- Teresa Heritage, Waste Management Cabinet Panel member
- Stuart Pile, councillor for Hatfield South
- Richard Smith, Chairman, Development Control Committee
- Bryan Hammond, Vice-Chairman, Development Control Committee

between 1st January 2008 and 20th December (inclusive), which contain any or all of the following (irrespective of capitalisation) in the subject or body of the email: Emails containing (irrespective of capitalisation):

- a) *TWO OR MORE of the specified words or phrases in the subject of the email; or*
- b) *TWO OR MORE or more of the specified words or phrases in the body of the email; or*
- c) *ONE of the specified words or phrases in the subject AND a DIFFERENT specified word or phrase in the body.*

Where the specified words and phrases are:

- *The phrase "Central Resources Library";*
- *The phrase "Energy Recovery Facility";*
- *The phrase "New Barnfield";*
- *The phrase "Southfield School";*
- *The word "Incinerator";*
- *The word "Veolia";*

Please make this information available in an appropriate electronic format, either by a link for direct download, email, or if necessary due to the volume of information, on data DVD."

8. The council responded on 11 February 2013. It stated that it was refusing the request under the exception for "manifestly unreasonable" (regulation 12(4)(b)), explaining that, given the volume of information involved, it would take in excess of 60 hours to comply with the request. The council invited the complainant to refine the scope of their request.
9. On 15 February the complainant submitted a revised version of their request which limited the search period thus:

"All emails matching the search criteria that were sent between 1st January 2008 and 31st December 2009;

All emails matching the search criteria that were sent on or after 1st July 2012"

10. On 25 February 2013 the council confirmed that it was withdrawing its reliance on regulation 12(4)(b) and agreed that the request was now in

a manageable form. Information was subsequently provided to the complainant in a piecemeal fashion over a period spanning 7 June 2013 to 12 September 2013.

11. During the course of responding to the request, the council withheld some information under the exceptions for internal communications (regulation 12(4)(e), the course of justice (regulation 12(5)(b)) and personal data (regulation 13).
12. Following an internal review the council wrote to the complainant on 15 October 2013. It stated that it was maintaining its position.

Scope of the case

13. On 20 September 2013 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
14. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld information under exceptions and whether it had provided information in accordance with the statutory time limits.

Reasons for decision

Regulation 5(2) – duty to provide environmental information on request

15. Under regulation 5(2) of the EIR public authorities have a duty to provide requested information within 20 working days.
16. In this case, the council treated the complainant's revised request of 15 February 2013 as a new request; however it did not provide information until 7 June 2013. Further information was subsequently provided by the council in a piecemeal fashion in a number of emails spanning from 7 June 2013 to 12 September 2013.
17. The Commissioner notes that, in this case, in attempting to be helpful, the council made efforts to comply with the request in spite of the voluminous information falling within scope and the attendant burden on its time.
18. Whilst the Commissioner acknowledges the council's efforts, there is no scope within the EIR for extending the time for compliance in this manner. He has, therefore, found that, in its handling of the request, the council breached regulation 5(2) of the EIR.

Regulation 14 – refusal to disclose information

19. In the circumstances of this case the Commissioner has found that the council failed to respond to the request in 20 working days. He believes that it is, therefore, also appropriate for him to find that the council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying.

Regulation 12(4)(e) – internal communications

20. The council has identified the following as being withheld under this exception:

"1. JW 20. 11 .09 chain of 3 emails and their attachment dated 19th to 20th November 009

JW 23. 11 .09 chain of 5 emails and their attachment dated 19th to 23rd November 2009

2. JW 04.12.12 chain of 3 emails dated 29/11/12 to 4/12/12

JW 07.12.12 chain of 5 emails dated 29/11/12 to 7/12/12

3. RB 26 10 12 chain of two emails with two attachments withheld sent by Richard Brown between May 2012 and 26th October 2012 + 2 attachments

4. RB 23 11 12 chain of 5 emails withheld sent to and by Richard Brown between 21st November and 23rd November 2012

5. RB 04 12 12 chain of 4 emails sent between 29th November and 4th December 2012"

21. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. The Commissioner has published guidance on regulation 12(4)(e), which includes a description of the types of information that may be classified as 'internal communications.'²

22. The first factor that must be considered is whether the information in question can reasonably be described as a 'communication'. In his guidance on the exception, the Commissioner acknowledges that the

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_internal_communications.ashx

concept of a 'communication' is broad and will encompass any information someone intends to communicate to others, or places on file so that others may read it.

23. In this case, the withheld information consists of emails and attachments sent internally which relate to discussions regarding the proposals for the New Barton site. The Commissioner is satisfied that the withheld information constitutes communications as defined by the exception.
24. There is no definition of what is meant by 'internal' contained in the EIR. In the absence of one, a judgment on what is an internal communication must be made by considering the relationship between a sender and recipient, the particular circumstances of the case and the nature of the information in question.
25. Typically, however, communications sent between officials within a single organisation are the clearest example of records that will be covered by the exception. For this reason the Commissioner is satisfied that the withheld information would constitute 'internal' communications. In view of this he is satisfied that regulation 12(4)(e) is engaged. He has next gone on to consider the relevant public interest arguments.

Public interest in disclosure

26. The council has submitted that there is a general public interest in transparency in the way in which authorities conduct their public functions.
27. In this specific case, the council acknowledges that there is a specific public interest in the public understanding its decision making processes. In addition, it has noted that the proposed energy from waste procurement is a significant and high profile local issue.
28. In relation to the council's ownership of the land in question, the Commissioner notes that, in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012, 24 May 2010), the Tribunal considered that the fact that the council itself owned the site to be developed "gave rise to a need for 'particular scrupulousness' on the part of the Council" and added substantial weight in favour of disclosure.
29. The Commissioner further considers that the scale of the proposed development, the fact that it is in green belt land and the impact on the local environment and community are also factors which increase the need for public scrutiny. The Commissioner considers that the council

must have been aware that such a vast scheme, with the attendant repercussions for the local community would attract public interest and would be subject to enhanced levels of scrutiny.

30. The Commissioner notes that there is considerable local opposition to the development and disclosure would ensure that sufficient information has been placed in the public domain to facilitate proportionate local engagement.
31. The complainant has argued that the council's argument that it has provided a substantial quantity of information in respect of the request is spurious and irrelevant when considering whether the withholding of any specific communication or chain of communication is justified. The complainant considers that such a decision can be made only on the content of the communication under consideration and on that basis alone.
32. The complainant has also argued that, as the call-in inquiry is ongoing, if any of the requested information is being withheld incorrectly, especially if it has potential material bearing on the legality, correctness or fundamental outcome of any planning decision, its immediate release is now even more crucial.

Public interest in maintaining the exception

33. The Commissioner's guidance acknowledges that a significant factor in determining whether internal communications should be disclosed is whether they relate to "live", undecided issues. He accepts that public authorities need a safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction.
34. In this case, the council has confirmed that, as the call-in inquiry was ongoing at the time of the request, the issue was live and that this provides a significant weighting in favour of protecting information which populates the safe space.
35. The council has explained that, as a Waste Disposal Authority, it is subject to Landfill Tax. It provided the Commissioner with the following details of the projected financial impact of this tax on its resources:

"As a Waste Disposal Authority, Hertfordshire County Council is obliged, by statute, to arrange for the disposal of the residual Local Authority Collected Waste (LACW) arising in its area. Since October 1996, the proportion of residual LACW that is disposed to landfill has been subject to a landfill tax which has risen to its current level of £72 per tonne and is set to rise to £80 per tonne in April 2014. The coalition Government's Emergency Budget 2010 provided an indication that the level of tax will not fall below this level until at least 2020, something that has been

borne out in the most recent March 2014 statement, with an intention to increase the level, from April 2015, in line with inflation."

36. The council has explained that it has limited remaining landfill provision within its boundaries so any decisions relating to waste disposal will have an impact on the whole of the county, including factors affecting effective use of public money and on communities outside the county. In relation to this latter point, the council confirmed that it already exports approximately 80% of residual LACW for disposal by a variety of methods in other local authority areas. It has also explained that over 50% of the county's land lies in the green belt so it is difficult to make planning decisions in which this is not a factor.
37. In relation to public concerns about the impact on green belt land the council has confirmed that special circumstances have to be demonstrated to allow such developments to go ahead. The council has argued that need for internal discussions about the suitability of the New Barnfield site in relation to this and other factors is heightened because the land is council owned and it has a responsibility to dispose of it in a way which will serve the public interest.
38. The council has argued that the rising cost of landfill places a considerable strain on its finances which, in turn, has an impact on its ability to provide other services. It has argued that there is both a financial and ecological public interest in allowing the council to find other methods of waste disposal and to explore these options free from the interference which would result from disclosure.
39. The Commissioner notes that the council has disclosed a considerable amount of information to the complainant and has placed a lot of other information in the public domain. He acknowledges that both the planning application process and the call-in inquiry have resulted in a lot of information being made available and that, via these mechanisms, the public has been given an opportunity to engage with these matters.

Balance of the public interest

40. The Commissioner recognises that there will always be a public interest in the disclosure of information which promote transparency, accountability and greater awareness of and understanding of environmental issues. In this case, the proposed development involves the use of publicly owned land and would clearly have an environmental impact. The use of green belt land is always contentious and, in this case, the Commissioner recognises that there is significant local opposition to the citing of the facility on the New Barnfield site.

41. The severity and extent of the environmental impact of the development are clearly relevant factors. Whilst there is a public interest in preserving the integrity of green belt land this has to be weighed against other relevant factors. The council has explained the financial reasons and the local land constraints which have informed the consideration of the New Barnfield site. It is certainly not the role of the Commissioner to comment on the rights and wrongs of the proposed development, however, it is clear that, as a Waste Disposal Authority, the council is restricted both fiscally and in terms of site options and it seems unlikely that any option in this regard will satisfy local residents and meet the council's wider obligations. The Commissioner considers that some weighting must be given to the council's need to deliver a financially viable solution to waste disposal and the attendant need for it to be able to consider this free from interference.
42. The Commissioner acknowledges that significant weighting should be given to the public interest in maintaining the exception by the fact that the decision-making process is ongoing, with many factors still yet to be decided. In undermining the safe space within which the council discussed the possible options, distraction and disruption to the process of reaching a decision might be caused and the mechanisms and checks and balances inherent in planning law might also be interfered with.
43. In relation to the public interest in facilitating public engagement with and scrutiny of significant planning decisions the Commissioner notes that this has been to some extent served by the disclosure of information in response to the request and the wider publication of a significant volume of information via the planning application and the Inquiry website³.
44. Although the complainant has argued this is not a relevant factor in weighing the public interest in disclosure, the Commissioner would dispute this as the public interest, which includes the public interest in allowing authorities to effectively perform functions in the broader public interest, is not always best served by the disclosure of additional information. In terms of public scrutiny of the council's decision making, the planning application procedure provides for input to be given and the call-in inquiry provides another level of scrutiny. There are also other legal remedies available for challenging planning decisions.

³ <http://www.persona.uk.com/barnfield/>

45. In relation to the complainant's contention that the withheld information might have a bearing on the outcome of the inquiry, the Commissioner recognises that in certain cases disclosure of all relevant information might address concerns that a decision has been subject to "spin" or other misrepresentation. However, the Commissioner has not been provided with any evidence that such assurances are needed in this specific case nor is it apparent from the withheld information that this is a relevant factor.
46. Having weighed the relevant public factors and the withheld information itself, the Commissioner acknowledges that the information relates to an issue in which the public has a legitimate interest. The environmental impact of the proposed development, the use of public land and local opposition to the plan all provide weightings in favour of disclosure.
47. However, in this case, the Commissioner considers that the live nature of the issue, the broader public interest in allowing the council to discuss its restricted options free from disruption and the disclosure and proactive publication of other relevant information provide compelling, counterweighing arguments in favour of maintaining the exception.
48. On the facts of this case the Commissioner has concluded that the public interest favours maintaining the exception

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

49. The council has identified the following information as being withheld under this exception:

1. *Email chain - 2 emails including one from the Chief Legal Officer to Bryan Hammond and one email from Bryan Hammond to Terry Douris.*

2. *BH4 08 08 12 2 emails dated 7th and 9th August 2012 from the chief Legal Officer to Bryan Hammond and from Bryan Hammond to Terry Douris (as described above)*

3. *BH 09 08 12 4 emails beginning with the same two described above and two further emails received and sent by Bryan Hammond on 9th August 2012.*

4. *JW 30 11 12 one email dated 30th November 2012 .*

JW 03 12 12 chain of 4 emails dated 30th November to 3rd December 2012.

5. *RB 30.10.12 chain of 10 emails sent to and by Richard Brown between 25.10.12 and 30.10.12."*

50. Regulation 12(5)(b) provides an exception from the duty to disclose information where the 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”.

51. The Commissioner considers that the ‘course of justice’ exception can be applied broadly to a number of circumstances where disclosure of the requested information would result in some prejudicial effect.
52. The Commissioner has also noted the views of the Tribunal in *Rudd v ICO & The Verderers of the New Forest* [EA/2008/0020], which stated that:

“...the Regulations refer to ‘the course of justice’ and not ‘a course of justice’. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to ‘the smooth running of the wheels of justice’...Legal professional privilege has long been an important cog in the legal system. The ability of both parties to obtain frank and comprehensive advice (without showing the strengths or weaknesses of their situation to others) to help them decide whether to litigate, or whether to settle; and when to leave well alone has long been recognised as an integral part of our adversarial system”.
53. Legal professional privilege (“LPP”) protects the confidentiality of communications between a lawyer and a client. It has been described by the Tribunal in *Bellamy v ICO & DTI* [EA/2005/0023] as, “a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation⁴”.
54. There are two types of privilege – legal advice privilege and litigation privilege.
55. In this case, the council has argued that the withheld information is subject to legal advice privilege and that release of the withheld information would adversely affect the course of justice. The council has claimed advice privilege in relation to the withheld information on the basis that it constitutes legal advice provided by its Chief Legal Officer.
56. Having viewed the withheld information the Commissioner is satisfied that it either constitutes communication between a legal advisor and

⁴ EA/2005/0023, para 9

client (the council) for the purposes of legal advice in relation to the New Barnfield proposal or communications which refer to that advice. The information is, therefore subject to LPP and its disclosure would impact on the course of justice.

57. The council has confirmed that the advice has not been disclosed more widely and that the privilege it attracts has not been lost.
58. Having accepted that the information falls within the scope of the exception, the Commissioner has considered whether its disclosure would result in adverse affect to the course of justice.

Adverse affect

59. The Commissioner notes that LPP is an established principle which allows parties to take advice, discuss legal interpretation or discuss matters of litigation freely and frankly in the knowledge that such information will be retained in confidence.
60. The Commissioner accepts that a disclosure of information which is subject to legal professional privilege will have an adverse effect on the course of justice simply through a weakening of the doctrine if information subject to privilege is disclosed on a regular basis under the FOIA or the EIR. Clients and their advisers' confidence that their discussions will remain private will become weaker and their discussions may therefore become inhibited.
61. The Commissioner has therefore borne in mind the fact that ordering a disclosure of this information is likely to have an indirect adverse effect upon the course of justice purely because it is information covered by LPP. However the Commissioner must also consider the specific information caught by the request when making his decision in this case.
62. The Commissioner notes that, at the time of the request, the issues referred to in the withheld information were still "live" and that the call-in inquiry was underway. Disclosure of the information at this time would reveal the legal grounds for the council's decision to proceed with the proposed development, a disclosure outside the normal legal process which could expose it to a legal challenge without having the benefit of reciprocal disclosure by the challenger. In view of this the Commissioner considers that it is more likely than not that disclosure of the information would result in adverse affect to the course of justice.
63. As he has concluded that the exception is engaged the Commissioner has gone on to consider the relevant public interest arguments.

Public interest in disclosure

64. The council has argued that disclosure would serve the general public interest in transparency and accountability around its decision making.
65. The council has suggested that, in this specific instance, disclosure of the information would allow individuals to better understand decisions made by the council in relation to energy for waste procurement and the associated planning application.
66. The council has acknowledged that the New Barnfield proposal is a high profile and locally controversial issue and disclosure would provide public reassurance that it the matter was being handled appropriately.
67. The Commissioner notes that disclosure may also serve the public interest in being reassured that the council has received and acted upon sound legal advice.

Public interest in maintaining the exception

68. The council has argued that LPP is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and to safeguard access to fully informed, realistic and frank advice. It considers that disclosure of such advice would discourage future communications and inhibit future discussions whereby legal guidance is sought and given.
69. The Commissioner and the 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. In the Bellamy case, the Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".⁵
70. The Commissioner considers that 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 fundamental principle of English law. The 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

⁵ Bellamy v ICO & DTI [EA/2005/0023]

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...⁶

71. 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.
72. The council has highlighted that the issue which is the subject of the withheld information was still live at the time of the request and that the call-in inquiry was ongoing.

Balance of the public interest

73. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible and that those involved in dealings with the public authorities may feel they have better understood the process if they know how the public authority reached its decisions and its legal justification for a course of action.
74. In this case the Commissioner acknowledges that there is significant local opposition to the proposed development and an appetite for understanding how the council decided upon its approach. However, he has not been provided with any specific reasons why the disclosure of legal advice would facilitate public understanding and engagement that cannot be achieved via other already published information.
75. Following numerous Tribunal decisions the Commissioner considers 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 misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the information, the Commissioner could see no 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.
76. 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

⁶ Ibid.

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 – personal information

77. Regulation 13 provides that personal data of someone other than the person making the request shall not be disclosed where either one of two conditions are satisfied. The first condition, which is relevant here, is that disclosure would contravene one of the data protection principles in the Data Protection Act 1998 (DPA). In this case, the relevant principle is principle 1, which states that

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

(a) 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 also met".

78. In this case the council has identified one email and a response which, whilst falling within the scope of the request by virtue of containing one of the identified key words, do not have the subject matter of the request as their focus. Instead, the emails refer to a personal matter and identify a specific individual in this regard.

79. Having viewed the information the Commissioner satisfied that the information constitutes the personal data of an identifiable individual.

80. In considering whether disclosure would be unfair, and thus contravene the first data protection principle, the Commissioner takes into account the expectations of the individuals concerned and the possible effects of disclosure. The Commissioner understands that the official in this case would have a reasonable expectation that their information would not be disclosed in this context. The council has confirmed that the official in question was not a senior member of staff and that they do not have a decision making role in this context.

81. From the evidence provided, the Commissioner has no reason to believe that disclosure of the information requested is within the official's reasonable expectations. The Commissioner considers that people have an instinctive expectation that a public authority, in its role as a responsible data controller, will not disclose certain information. This is particularly true in cases such as this, where information does not relate to the official's public function and where disclosure is likely to result in distress.

82. The Commissioner is satisfied that the data subject would have had a reasonable expectation that their personal information would be kept confidential and not passed on to third parties without their consent.
83. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to provide the information if there is an overriding legitimate interest in disclosure to the public. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.
84. In this instance, the Commissioner considers that, beyond the general interest in transparency, there is no specific legitimate public interest in disclosing the information.
85. When balanced against protecting the rights and freedoms of data subjects the Commissioner finds that it would not be fair to disclose the withheld emails and that to do so would contravene the first data protection principle.
86. The Commissioner finds that regulation 13 is engaged. There is no public interest test to apply.

Aggregated public interest test

87. Further to the ruling from the European Court of Justice, in the case of Office of Communications (Ofcom) v the Information Commissioner (C-71/10) , for the information which engages both 12(4)(e) and 12(5)(b) the Commissioner has gone on to consider whether the aggregated public interest in maintaining both these exceptions outweighs the public interest in disclosure.
88. Whilst the Commissioner does not repeat all the public interest arguments here, he has concluded that, for the information which engages both exceptions, whilst the aggregated public interest in disclosing the information withheld under regulations 12(4)(e) and 12(5)(b) is significant it does not outweigh the public interest in maintaining the exceptions in this case.

Regulation 11 – internal review

89. Regulation 11 of the EIR provides that, where a requester makes representations to a public authority regarding its compliance with a request, the authority must consider these and decide if it has complied with its obligations. The outcome of this consideration, usually referred to as an "internal review", should be communicated to a requester within 40 working days of receipt.

90. In this case the complainant has argued that the council's internal review was not sufficiently independent because it was conducted by a solicitor of the council.
91. The EIR does not specify who at an authority should appoint to conduct an internal review. In the absence of any specific statutory obligations in this regard, the Commissioner finds that the council's internal review did not breach regulation 11.

Right of appeal

92. 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

93. 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.
94. 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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