

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 July 2014

Public Authority: Cornwall Council
Address: County Hall
Truro
TR1 3AY

Decision (including any steps ordered)

1. The complainant has requested information in relation to advice given on a planning application for an incinerator. Cornwall Council (the council) provided some information but refused the remaining, relying on section 12(5)(b) and 12(4)(d) of the EIR.
2. The Commissioner's decision is that the council has correctly relied on 12(5)(b) for the information it withheld under this exception, but has found that regulation 12(4)(d) of the EIR is not engaged for the information withheld under this exception.
3. The Commissioner has also found that the council has breached regulation 5(2) of the EIR, as it did not respond within the required 20 working days of the request, and regulation 11(4) of the EIR for not providing an internal review within the required time limits.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a copy of the information it withheld under regulation 12(4)(d) of the EIR.
5. The public authority must take this step 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

6. On 20 October 2011 the complainant made the following information request to the council:

"It would be appreciated if I could be supplied under the Freedom of Information request with all hard and electronic copies of documentation which was exchanged between Cornwall County council's planning team, SITA and Cornwall County Council's Waste Disposal Authority in 2006 on the subject of an Appropriate Assessment for the SITA planning application for the Incinerator at St.Dennis."

7. This was acknowledged by the council on the 23 December 2011.
8. The complainant has stated that in early 2012, the original wording of his request was amended by mutual agreement to reduce the period of time covering the information he was seeking.
9. The council supplied the Commissioner with an email dated 15 January 2012, which was sent by [name redacted] to the complainant, stating the refined request following their meeting of 10 January 2012 as being agreed as:

"The FOI request submitted by you for information about the advice given to Cornwall Council at the time of the CERC Planning Application is limited to the substantive advice provided on the need for an Appropriate Assessment and you do not require copies of 3 years worth of emails which might be linked or connected to that subject."

10. The complainant has confirmed that this is the refined request, which was verbally agreed at the 10 January 2013 meeting.
11. Under the EIR a request, or in this case, a refined request can be made verbally. So the Commissioner accepts, as both parties have agreed, this to be a valid refined request.
12. On the 24 April 2013 the council provided its response. It provided some of the information it held but withheld the remaining information relying on regulation 12(5)(b) of the EIR as it considered disclosing the information 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. On 8 May 2013 the complainant asked the council to conduct an internal review as he was not satisfied with the response to his request.

14. The complainant contacted the Commissioner on 27 May 2013 as he had not received a response from the council.
15. Following contact from the Commissioner, the council provided its internal review dated 14 February 2014. The council maintained its position not to provide the withheld information.

Scope of the case

16. The complainant has advised the Commissioner that he is not satisfied that the council has withheld the remaining information under regulation 12(5)(b) of the EIR.
17. During the Commissioner's initial investigations the council considered that as well as relying on regulation 12(5)(b) of the EIR to withhold some of the information, it was now also relying on regulation 12(4)(d) of the EIR to withhold another piece of information, as it considers it to fall under material in the course of completion, unfinished documents and incomplete data.
18. The council advised the complainant of this further exception on the 31 March 2014. The complainant has advised the Commissioner that he is not satisfied that the council are withholding information with this further exception, or with the time in which the council has taken to deal with the request.
19. The Commissioner considers the scope of the case is to determine whether the council is correct to rely on regulation 12(5)(b) and 12(4)(d) to withhold the information it has, and whether it has breached any time limits in the EIR to respond to the request.

Reasons for decision

Regulation 12(5)(b) of the EIR

20. Regulation 12(5)(b) of EIR states that a public authority can refuse to disclose information if 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 enquiry of a criminal or disciplinary nature.
21. The council argued that the exception was relevant because the withheld information is subject to legal professional privilege (LPP).

22. The Commissioner accepts that LPP is a central component in the administration of justice, and that advice on the rights, obligations and liabilities of a public authority is a key feature of the issues that constitutes the phase 'course of justice'. For this reason the Commissioner has found in previous cases that regulation 12(5)(b) will be relevant to information which attracts LPP.
23. In order to reach a view as to whether or not the exception is engaged, the Commissioner must first consider whether the withheld information is subject to LPP. He must then decide whether the disclosure of that information into the public domain would have an adverse effect on the course of justice as claimed by the council.
24. The Commissioner has inspected the withheld information in this case and is satisfied that it constitutes confidential communications between a client (i.e. the council) and its legal adviser (an internal and external solicitor) providing advice in a professional legal capacity. It therefore attracts LPP.

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

25. The council argues that disclosure would have an adverse effect on the course of justice because it would undermine the general principles of legal professional privilege and the administration of justice. Disclosure of legal advice would undermine a lawyers capacity to give full and frank legal advice, which in turn would have negative implications on the quality of the council's decision making process.
26. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry (ES/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 LPP. This would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice.
27. In consideration of the above, the Commissioner is satisfied that it is more probable than not that disclosure of information would adversely affect the course of justice and is therefore satisfied that regulation 12(5)(b) is engaged in respect of the withheld information as the council has advised the Commissioner that the incinerator is still an ongoing project that has still not been completed and so would expect such advice to remain confidential. Attracting legal advice privilege.

The public interest test

28. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out his assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosure

29. The council acknowledge that the incinerator plan is a high profile case in Cornwall for which it states that there has been an immense amount of scrutiny and strong arguments for and against the incinerator scheme. This and the relevant planning implications have been regularly reported by the local media.
30. The council recognises that releasing the information would allow the public and local taxpayers to be kept informed about how decisions are made and how taxpayer's money is spent. It would also help to ensure that the council is adhering to its commitments in terms of openness and transparency in relation to this scheme.

Public interest arguments in favour of maintaining the exception

31. As already discussed, the Commissioner and Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice would have an adverse effect on the course of justice through weakening of the general principle behind LPP.
32. 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 LPP, the course of justice and inquiries exception 12(5)(b)¹ states the following:

" In relation to LPP, the strength of the public interest favouring maintenance of the exception lies in safeguarding openness in all

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

communications between client and lawyer to ensure access to full and frank legal advice."

33. 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.
34. In light of the above, there will always be a strong argument in favour of maintaining LPP because of its very nature and the importance 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..."

35. This 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.
36. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions. He also accepts that there is a strong public interest where those decisions concern activities that could have significant impacts on the environment, such as this case, regarding the incinerator scheme. 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 in this case.
37. 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 made by the council because it would not have the benefit of thorough legal advice. As the incinerator is such a big project, potentially affecting many people, there would be considerable public interest in ensuring the council is able to receive unreserved informed legal advice.
38. The Commissioner is therefore satisfied; in this case, the inherent public interest in protecting the established convention of LPP is not countered by at least equally strong arguments on 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.

Regulation 12(4)(d) of the EIR

39. Regulation 12(4) of the EIR states that for the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that – (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
40. The council has explained that the withheld document is a third party's initial view on a report prepared by Entrec for the council (in its capacity as the waste planning authority). The report advised whether, in Entrec's view, an appropriate assessment would be required pursuant to the Regulations in respect of the proposed Energy from Waste (EfW) development. The council has advised the Commissioner that this report, by Entrec, has been disclosed to the public.
41. The third party is SITA, a company that the council entered into an Integrated Waste Management (IWM) Contract with. The council state that the withheld document in question is a draft of what SITA would have stated publically if it were to respond to Entrec's report. However the council is unaware of a final version of this draft response being produced or any proposal to produce one.
42. The council has stated that SITA's formal representations on the application of the regulations have been made throughout the planning process and the subsequent court proceedings, all of which occurred in the public domain.
43. The council consider that any relevance of this draft document, which was 5 years old at the time of the request, is superseded by events of the planning permission being declined and the appeal process that has taken place.
44. The Commissioner has issued guidance on regulation 12(4)(d).² In it, it states:

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

"A document may be unfinished because it the authority is still working on it at the time of the request or because work on it ceased before it was finalised and there is no intention to finalise it."

45. The council has advised the Commissioner that it did not ask SITA to produce a response or ask what its response would be to the finished report from Entrec. SITA provided the response to the council on its own accord.
46. On viewing the document, it appears, to the Commissioner, that SITA volunteered a preliminary view to the council on Entrec's finished report with no settled intention to produce a finalised view.
47. The Commissioner considers that a preliminary view could be seen as a finished document, as nothing more than a preliminary view on a subject may be required. For instance, the Commissioner may give a public authority or complainant his preliminary view on whether information has been withheld correctly or not. This view may satisfy both parties and conclude a case without the need for further work.
48. The Commissioner does not see that giving an opinion or view of what a response might be if it were to be required, as being an incomplete document in this case. Especially as there does not appear there was any expectation for it to be re-worked or re-drafted in any way.
49. After viewing the withheld information and taking into account the council's submissions as set out above, the Commissioner does not consider that this document relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
50. The Commissioner sees that this document is a third party response, albeit a preliminary view, to a finalised report that is in the public domain.
51. The Commissioner therefore does not consider 12(4)(d) of the EIR is engaged and so this withheld information should be provided to the complainant.
52. As the Commissioner has found that regulation 12(4)(d) is not engaged, he has not gone on to consider the public interest test.

Regulation 5(2) of the EIR

53. Regulation 5(2) of the EIR states:

"Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."

The refined request was made on the 10 January 2013 and the council did not provide its response until 24 April 2013. This is outside the required 20 working days, therefore the Commissioner finds that the council has breached regulation 5(2) of the EIR.

Regulation 11(4) of the EIR

54. Regulation 11 deals with representations made by requesters for public authorities to reconsider the initial response. Regulation 11(4) of the EIR states:

"A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations."

55. The complainant requested the council to reconsider its initial response on the 8 May 2013, and the council did not provide its response until 14 February 2014. This is outside the required 40 working days, therefore the Commissioner finds that the council breached regulation 11(4) of the EIR.

Right of appeal

1. 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

2. 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.
3. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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