

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 March 2015

Public Authority: Lincolnshire County Council
Address: County Offices
Newland
Lincoln
LN1 1YL

Decision (including any steps ordered)

1. The complainant requested various types of information in relation to a school building such as its design, works carried out, the impact as a result of a tidal surge and discussions between the school and Lincolnshire County Council (the council).
2. The council refused part of the request under regulation 12(5)(b) of the EIR, part under section 21 of the FOIA and regulation 6 of the EIR, it advised it did not hold some of the information and applied regulation 12(4)(b) of the EIR to the remaining information as it considered that to provide the remaining information would be manifestly unreasonable.
3. Following an internal review, the council withdrew its reliance of regulation 12(4)(b) and instead applied regulation 12(5)(b) of the EIR to this part of the request. The council also provided a small amount of information but redacted third party details under regulation 13 of the EIR.
4. During the Commissioner's investigations the council also sought to rely on regulation 12(5)(d) of the EIR for the information withheld under regulation 12(5)(b). It also no longer relied on regulation 21 of the FOIA or regulation 6 of the EIR, advising it did not actually hold the information.
5. The complainant was not satisfied that the council had withheld the information it had under regulation 12(5)(b) and (d) of the EIR, nor that it stated it did not hold any of the other requested information.

6. The Commissioner's decision is that the council correctly relied on regulation 12(5)(b) of the EIR and that, on the balance of probabilities, no further information is held by it.
7. As the Commissioner found that regulation 12(5)(b) was engaged, he did not go on to consider regulation 12(5)(d) of the EIR.
8. The Commissioner does not require the council to take any steps.

Request and response

9. On 7 April 2014, the complainant wrote to the council and requested information in the following terms:

"...please provide the following information held for or on behalf of LCC:

The Design

1. *Information relating to any design of the Building carried out by the LCC's in house property (or other) team Hyder Business Services Limited*
2. *Information concerning any transfer of LCC's in-house property team, in particular the architectural members of that team, to Hyder Business Services Limited, including, without limitation:*
 - 2.1 *the date of any such transfer; and*
 - 2.2 *the members of staff that transferred.*
3. *Information concerning the production of design of the Building by Hyder Business Services Limited, including whether they (or anyone else) produced an architectural specification.*

The Site

4. *Information as to the details of the owner of the land upon which the Building is situate including any leases granted from 2000 to date.*

The Works

5. *Information comprising details of all building, refurbishment and/or redecoration works (including maintenance) carried out to the Building, other than the Works, since March 2002.*

The Building

6. *Information as to the use of the Building since completion of the Works in March 2002 to the present, including, without limitation, any vacant periods.*

The Commercial Transfer Agreement

7. *Information concerning all discussions between the LCC and [redacted school name] concerning the Building during the negotiations of the Commercial Transfer Agreement.*

Tidal Surge on 5 December 2013

8. *All information held regarding the nature, effect and consequences of the tidal surge that occurred on 5 December 2013 to the Building including, without limitation:*
 - 8.1 *the extent of flooding and/or damage at the Building;*
 - 8.2 *the consequences of the tidal surge of 5 December 2013 to the Building, including any process of decanting from the Building that has taken place and the relocation of lessons, including the hire of any temporary accommodation;*
 - 8.3 *the works carried out or proposed to be carried out to the Building as a result of the tidal surge event, including a breakdown of the costs incurred or estimated to be incurred, together with any supporting documentation;*
 - 8.4 *any policy of insurance relating to [redacted school name] either held by LCC or on which LCC's interest is noted;*
 - 8.5 *details of any claim made by LCC or any third party on any such policy of insurance as referred to in paragraph 4.4.*

Water ingress at the Building

9. *Information comprising details of any remedial works that have been carried out and/or which are proposed to be carried out due to alleged water ingress at the Building, including a breakdown of the costs incurred or estimated to be incurred, together with any supporting documentation.*
10. *Information concerning the need or intention to carry out the remedial works allegedly required due to water ingress referred to in paragraph 5 at the same time as any remedial works required due to the tidal surge event referred to in paragraph 4 above.*
11. *Any invitation to tender submitted and any responses received in relation to remedial works to the Building.*
12. *Information concerning all discussions between LCC and [redacted school name] concerning the alleged water ingress, proposed remedial works, the tidal surge and the court and arbitration proceedings issued.*

The court proceedings

13. *Information regarding all correspondence between the LCC (and its legal advisors) on the one part and Mouchel (and its legal advisors) on the other part from January 2013."*
10. The council responded on 17 April 2014. It refused to provide the information to question 4 under section 21 of the Freedom of Information Act 2000 (FOIA) and Regulation 6 of the EIR – information that is readily accessible by other means. The council advised that this information could be obtained from the Land Registry.
 11. The council refused parts 8 to 8.5 of the request under section 1(1)(a) of the FOIA and Regulation 12(4)(a) of the EIR, stating that it does not hold the requested information and that this request should be made directly to [redacted school name].
 12. For the remaining parts of the request, the council advised that it would require an additional 20 working days to respond as per regulation 7(1) of the EIR, due to the complexity and volume of the information requested.
 13. The complainant wrote to the council on the 23 April 2014 stating that they will wait until the response had been responded to in full, but advised that they were surprised that the council held no information in

relation to part 8 of the request. The complainant also advised the complainant that, prior to making this request, the Land Registry had informed them that the land is unregistered and so no information is available through the Land Registry.

14. On the 10 June 2014, the council provided its response. It refused to respond to the remaining part of the request, relying on regulation 12(4)(b) as it considered the request to be manifestly unreasonable, determining that it would take in excess of 50 hours of office time to locate the information sought.
15. The complainant requested an internal review on the 12 June 2014. The council provided its internal review response on the 25 July 2014. It stated that it was no longer relying on regulation 12(4)(b) of the EIR. The council instead sought to rely on regulation 12(5)(b) of the EIR to refuse parts 1, 3, 5, 7, 12 and 13 of the request. It considered that to release the information would adversely affect the course of justice.
16. It maintained its original response to part 4 of the request. For parts 6, 8, 9, 10 and 11 the council stated that it does not hold this information as it is held by *[redacted school name]* and that the complainant would need to contact the school for this information.
17. Lastly, for part 2 of the request, the council provided a schedule of members but redacted some information under regulation 13 of the EIR – third party personal data – and confirmed that the transfer date was 1 April 2000.

Background

The complainant has provided a brief summary to the background of this case. He told the Commissioner that he entered into a building contract in 2002 for the construction of a science block at a school. The council has brought arbitration proceedings against the complainant with regards to water ingress at the premises. However the complainant believes that it was a tidal surge that caused the flooding at the school.

Scope of the case

18. The complainant contacted the Commissioner on 15 August 2014 to complain that he was not satisfied that the council has refused his request under regulation 12(5)(b) for parts 1, 3, 5, 7, 12 and 13 of the request.

19. Nor is he satisfied that the council has stated it does not hold the information to parts 6, 8, 9, 10 and 11. And that for part 4 he was not satisfied that he was still being referred to the Land Registry for this information.
20. During the Commissioner's initial investigations the council advised the Commissioner that with regards to the information requested for part 4 of the request it should have directed the complainant to obtain the information from *[redacted school name]* not the Land Registry.
21. The council also considered that regulation 12(5)(d) of the EIR – the confidentiality of proceedings - was also engaged to the information being withheld under regulation 12(5)(b) and it wrote to the complainant on the 8 December 2014 to advise this.
22. It also advised the Commissioner that for part 8 of the request, it holds some information – the building contracts - but they are being held in trust by the council on behalf of the school and fall within 12(5)(b) and 12(5)(d) of the EIR. The reason it is being held in trust by the council is because the council is acting as the agent for the school in enforcing the terms of the contracts in the arbitration proceedings.
23. The Commissioner considers that the scope of the case is to determine whether the council is correct to withhold the information under 12(5)(b) of the EIR for parts 1, 3, 5, 7, 8, 12, 13. He will only go on to consider if the council can rely on regulation 12(5)(d) of the EIR to any of the information he finds is not engaged by regulation 12(5)(b).
24. Lastly, the Commissioner will determine whether or not the council holds the information to parts 4, 6, 9, 10, 11 and any other information other than the contracts for part 8 of the request.

Reasons for decision

Regulation 12(5)(b) of the EIR

25. Regulation 12(5)(b) of the EIR states that a public authority can refuse to disclose information if its disclosure would adversely affect the course of justice, the ability to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature.

Is the exception engaged?

26. The council has advised the Commissioner that its application of this exception was not intended to be restricted only to information that

attract Legal Professional Privilege (LPP) and it considers that the scope for this exception is much wider than that.

27. The council has stated that it considers the following information falling within the scope of the request engages regulation 12(5)(b) of the EIR:
- Information relating to any design of the Building carried out by the LCC's in house property (or other) team Hyder Business Services Limited
 - Information concerning the production of design of the Building by Hyder Business Services Limited, including whether they (or anyone else) produced an architectural specification
 - Information concerning all discussions between the LCC and *[redacted school name]* concerning the Building during the negotiations of the Commercial Transfer Agreement.
 - Information concerning all discussions between the LCC and *[redacted school name]* concerning the court and arbitration proceedings issued
 - Information concerning all discussions between the LCC (and its legal advisors) on the one part and Mouchel (and its legal advisors) on the other part from January 2013
28. The council stated that in *Rudd v Information Commissioner & the Verderers of the New Forest (EA/2008/0020)* the Information Tribunal commented that *"the course of justice' does not refer to a specific course of action but is a more generic concept somewhat akin to the 'smooth wheels of justice'"* and in *Kirkaldie v Information Commissioner & Thanet District Council (EA/2006/0001)* it was determined that *"the purpose of this exception is reasonably clear, it exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the rights of individual or organisations to receive a fair trial"*.
29. It is in this context that the Council has informed the Commissioner it initially considered the application of this exception as being relevant to the request.
30. The course of justice at regulation 12(5)(b) is a broad exception which encompasses any adverse effect on the course of justice and the Commissioner considers that it is not limited to only information that is subject to LPP. This allows for documents that are not subject to LPP to still be covered by the exception, as long as 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 Tribunal affirmed this view in the case of *Surrey Heath Borough Council v Kevin McCullen and the ICO (EA/2010/0034)* when they acknowledged that the regulation covered more than just LPP.

31. The council has explained to the Commissioner that it is currently in confidential arbitration and it is the council's position that the information to which the request relates is relevant to those proceedings and to release the information under the EIR rather than under the arbitration proceedings has the potential to undermine the general confidence in the legal system and will place the council at a disadvantage if it had to disclose its position in the case outside of this legal proceeding.
32. In review of the above, the Commissioner is satisfied that the information falls within the scope of the exception. He must now consider whether disclosure of the information would result in adverse effect to the course of justice.

Adverse effect

33. The council has told the Commissioner that placing the withheld information into the public domain would cause an adverse effect in that due to the current proceedings, the council would be placed in an unfair position should it be required to disclose the withheld information.
34. The council has advised the Commissioner that it is not possible for it to determine, at this stage, how much of the withheld information will be relied on within the proceedings as they have not yet reached a stage where standard disclosure has been made. However, it does consider that all the withheld information is relevant at this stage and if disclosed, would allow the complainant to make use of it at the arbitration at the council's disadvantage.
35. If the council were required to disclose this information into the public domain, that would allow the complainant access to information outside of the court proceedings, then the council are of the view that it would be placed into a position whereby it would not be able to fairly present or defend its position because it would not have the same right of access to information in the possession of the complainant.
36. The council has explained to the Commissioner that the procedural rules governing disclosure in arbitration are clear and it is the council's position that disclosure of the information into the public domain outside of this would enable the complainant and others to be able to bypass this established legal process, without having to do the same with the information they hold.

37. On this basis the council considers that disclosure of the requested information would more than likely result in disruption to the administration of justice creating an adverse effect not only on its ability to defend and present its position but also on the general confidence of the established arbitration process. It is the council's view that disclosure under the EIR would remove the level playing field on which both parties sit.
38. The Commissioner, on considering the above, is satisfied that there is a real potential for disclosure under the EIR to result in an adverse effect on the council's ability to be able to present and defend its position putting it at a disadvantage in the case and proceedings. Therefore the Commissioner has concluded that it is more likely than not that disclosure of the withheld information would result in an adverse effect to the course of justice.

Public interest test

39. Regulation 12(1)(b) requires that, where the exception under the 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

40. The council has stated to the Commissioner that it is also mindful of regulation 12(2) in applying a presumption in favour of disclosure and that only when there is an overriding public interest in maintaining the exception should the information be withheld.
41. The withheld information relates to a defective building on the site of *[redacted school name]* and has been the subject to previous and current legal proceedings and the council acknowledges that there is a legitimate public interest in the disclosure of this type of information. As it would build confidence in the council by demonstrating that it is acting accordingly with its powers and ensure an appropriate solution is put in place for the school, and as a result the wider community, and that those accountable for the defect are held responsible.
42. The complainant is also of the opinion that the public authorities should be properly subject to challenges and scrutiny.
43. The complainant also considers that the council has been wrongly influenced by the identity and possible motive of the requestor, resulting in the council erring in its application of the exception to prevent

disclosure through an overly protracted basis, on a purely strategic basis.

44. With this the Commissioner notes that requests for information should be treated as applicant blind and motive blind, and because disclosure of information under the EIR is essentially a disclosure to the public as a whole, not just the requester, then the council would still have needed to consider all possible consequences of disclosing this information no matter who requested it.

Public interest arguments in maintaining the exception

45. The council has told the Commissioner that inherent in regulation 12(5)(b) is the argument which says that the course of justice should be allowed to play out away from the hindrance of outside comment and interference.
46. It considers that there is strong public interest in ensuring a resolution of the current proceedings is carried out in a timely manner and minimal cost to the public purse. Releasing information outside of this process may serve to make the proceedings more time consuming and therefore costly.
47. Although the above may be considered generic, the council consider that it is nonetheless a valid in that maintaining the fundamental principles of litigation, in relation to both legal professional privilege and the course of justice in proceedings cannot be disregarded. The procedural rules that govern the disclosure of information into proceedings serve a vital purpose in the effective administration of justice and the public interest in maintaining a level playing field within those proceedings is significant.
48. The council also state that the arbitration process does not require public participation or engagement and although there is public interest in furthering the understanding of the council's actions, the council considers that this would not contribute to the resolution of the dispute in a timely and effective manner. In fact, the council considers that the release of the information would only serve the complainant's interests in the context of the current proceedings.
49. The council has referred the Commissioner to a previous decision notice¹ at paragraph 46, which states:

¹ FS50494992

"The Commissioner does not consider that the purpose of the EIR is provide a remedy for disputes between individuals and public authorities or, where they are available, to bypass other channels, such as courts disclosure rules, which might be more appropriate".

50. The council has told the Commissioner that the complainant's client will of course receive any information that falls within the scope of this request that is covered by standard disclosure within the confidential proceedings.
51. The Commissioner, in weighing the balance of the public interest has given consideration to the fact that the outcome would have some local public interest in that it is in relation to a school building, and that there would be interest in knowing the council is taking appropriate actions in this case. But the Commissioner does not consider, in this case, that the weighting in favour of disclosure counterbalances the public interest in preventing adverse effect to the course of justice.
52. The Commissioner considers that the weighting is further shifted towards maintaining the exception by the fact that the requested information is still 'live'. The disclosure of the information, outside of the arbitration process, would be likely to disadvantage the council's position in the overall case and he accepts that it would weaken the general confidence in the ability to conduct proceedings.
53. On this balance the Commissioner does not consider that there is enough compelling justification for disclosing the information and has therefore concluded that the public interest in maintaining the exception at regulation 12(5)(b) of the EIR outweighs the public interest in disclosure.
54. As the Commissioner has found that all of the information that was withheld under regulation 12(5)(b) of the EIR is engaged, that being for parts 1, 3, 5, 7, 8, 12, 13 of the request, he has not gone on to consider the application of regulation 12(5)(d) of the EIR.
55. The Commissioner will now go on to consider whether the council holds information in relation to parts 4, 6, 9, 10 and 11 of the request. And if any other information is held for parts 8 to 8.5 of the request other than the contracts withheld under regulation 12(5)(b) of the EIR.

Regulation 5(1) of the FOIA – Information held/ not held

56. Regulation 5(1) of the EIR states:

"Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part

and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request."

57. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request).
58. The Commissioner has asked the council how it has determined that it does not hold the information to 4, 6, 8, 9, 10 and 11 of the request.
59. For part 4 of the request the council originally considered that the information was available from the Land Registry under section 21 of the FOIA and regulation 6 of the EIR.
60. On further considerations it has advised that the information is in fact held by *[redacted school name]* and should have advised the complainant of this. The council has explained to the Commissioner that although it owned the land on which the school is built. This ownership was transferred to the Governing Body of *[redacted school name]* of 1 September 1994. But the land on which the building in question was constructed on has now and always been owned by the Foundation of Trustees of the School, as far as the council is aware, and it has never owned this particular piece of land.
61. So part 4 of the request is in relation to the building that the council has never owned the land of, which is separate to the land on which the school is built and owned by the council, up until 1 September 1994.
62. The council has advised the Commissioner that it is only aware that on 20 December 2012 the Foundation of Trustees, the Academy Trust and the Secretary of State for Education entered into a Supplemental Agreement under which the Academy trust agreed to meet the cost of repairs and maintenance to, amongst other things, the building that is subject to this request and under which the Foundation of Trustees continue to hold the freehold interest in the relevant land. Therefore the council states it can only advise that the complainant should seek to obtain any further information as to the ownership and use of the land from the school.
63. With regards to parts 6, 8, 9, 10 and 11 of the request the council has explained to the Commissioner that *[redacted school name]* became an Academy in December 2012 and was no longer maintained by the council in any capacity. The tidal surge incident occurred after the school

had converted into an Academy and this is why it would not hold the requested information for those parts of the request.

64. The council also explained to the Commissioner that prior to the school becoming an Academy, although it was maintained by the council who are the Local Education Authority, the school was a foundation school as opposed to a community school.
65. The council has informed the Commissioner that community schools are controlled by the council, but foundation schools have much more freedom to change the way they do things without having to consult or involve the Local Education Authority. And with that the council states that it would have no need to hold the information requested for these parts of the request due to the type of school it is.
66. So with regards to part 6 of the request, the council has told the Commissioner that it is aware the purpose of the building was for use as a science block, but does not hold any recorded information that details the actual use of the building since its construction.
67. For part 8 to 8.5 of the request, the council has advised that it does hold some information that falls within the scope of this part of the request, but considers it is holding it on behalf of the school in connection with the current legal proceedings. That being the building contracts, being held in trust on behalf of the school. This is because the council is taking the legal action to enforce the contract with the complainant. However the contracts are part of the information being withheld under 12(5)(b). The remaining information, as explained above about the schools status, would if held be held by the school itself.
68. For parts 9 and 10 of the request the council has confirmed to the Commissioner that no remedial works have taken place and there are no current plans to undertake any remedial work, as it is pending the outcome of the current legal proceedings.
69. For part 11 the council has stated to the Commissioner that there has been no invitation to tender for the remedial works and, if there was, the information would not be held by the council as the school is able to enter into its own contracts independently.
70. The council has advised the Commissioner that searches were carried out by its Property and Legal Services and both manual and electronic searches were carried out. Keywords can be used to search the electronic case management system, but the lawyer who conducted the search is the lawyer acting in the proceedings and as such, no specific search terms were used as he has sufficient knowledge and familiarity with the file to identify any information that would be held.

71. The Commissioner has considered the council's responses to his investigation as to whether any further information is held by the council. He sees that there is an arbitration taking place, so understands why the complainant considers that the information would be held. However the council has, in the Commissioner's view, provided valid reasons as to why it does not hold the information for parts 4, 6, 9, 10 and 11 of the request. And does not hold any other information for parts 8 - 8.5 of the request other than the contracts.
72. Therefore, on the balance of probabilities, the Commissioner's decision is that the council does not hold the information requested for those specific parts of the complainant's request.

Right of appeal

73. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

74. 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.

75. 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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