

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 22 July 2015

Public Authority: Cumbria County Council
Address: The Lonsdale Building
The Courts
Carlisle
Cumbria
CA3 8NA

Decision (including any steps ordered)

1. The complainant has requested recorded information which concerns an oak tree sited at Brompton Primary School.
2. The Commissioner finds that Cumbria County Council holds recorded information which is relevant to the terms of the complainant's request. The information held by the Council is contained in its Visual Files electronic file management system and concerns the School's request for legal advice. The Council has withheld the contents of its 'file' in reliance on Regulation 12(5)(b) of the EIR.
3. The Commissioner has considered the nature of the information held by the Council. He is satisfied that the information is held solely for the purpose of providing the School with legal advice. He has decided that the Council has properly applied Regulation 12(5)(b) to the contents of its electronic file and that it is entitled to withhold that information.
4. The Commissioner has also decided that the Council has contravened the requirements of Regulation 5(2) of the EIR by failing to respond to the complainant's request within twenty working days and also Regulation 11 for failing to review its initial decision.
5. The Commissioner does not require the Council to take any further action in respect of this matter.

Request and response

6. On 30 July 2014 the complainant wrote to Cumbria County Council and requested information in the following terms:

"2007 – Records in the form of letters and emails sent or received, minutes, notes, invoices, diary entries and written instructions relating to the ownership and lopping of the oak tree at the southern end of the school grounds, adjacent to Ridley Gardens as dealt with by the then head teacher, [a named person].

Records in the form of letters and emails sent or received, minutes, notes, diary entries and written instructions relating to the ownership and management of the hedge and any tree at the southern boundary of the grounds between 2006 and 2014."

7. The complainant asserted that an officer in the Council's Children's Services Department had received information relevant to the first part of his request on 18 December 2013.
8. The Council responded to the complainant's request on 16 September by advising him that no information was held in respect of the first part of his request.
9. The Council also advised the complainant that it held letters, emails, notes and land registry documents from February 2014, which had been created for the purpose of advising the School. This information was withheld by the Council in reliance of the exception to disclosure provided by Regulation 12(5)(b) of the EIR. The Council had determined that the information is subject to legal professional privilege.
10. Having received the Council's response, the complainant wrote to the Council on 16 September to ask for its decision to be reconsidered. The complainant asserted that the Council had taken 32 working days to make its response and asserted that the Council had failed to explain why it had dealt with his request under the provisions of the EIR.
11. At the start of the Commissioner's investigation of this complaint – 27 March 2014, the Council had not carried out an internal review.

Scope of the case

12. The complainant contacted the Commissioner on 23 February 2014 to complain about the way his request for information had been handled. The complainant expressed his concern about the failure of the Council

to respond to his request within the statutory time period and he asserted that the Council had deliberately avoided providing him with documents which he is entitled to receive and had used 'nefarious' reasons for this.

13. The Commissioner has investigated this complaint to determine whether the Council holds any information relevant to the complainant's request, and if it does hold information whether the Council is obliged to disclose this to the complainant.

Reasons for decision

14. The Commissioner wrote to the Council on 27 March 2015 to make his enquiries about the complainant's complaint. The Commissioner's email prompted the Council to review its handling of the complainant's request.
15. Having conducted its internal review the Council wrote to the complainant on 29 April to advise him of its conclusions. The Council's review confirmed that it does not hold information relevant to the complainant's request. It advised the complainant that it had searched the relevant Legal Services files for the period 2006 to 2014 and had found no information relating to the subject of his request.
16. However, in its responses to the Commissioner's enquiries, the Council has confirmed that it does hold some information relevant to the complainant's request. This information is contained in the Council's 'Visual Files' Electronic case management system. The 'file' containing the information was created on 4 February 2014 when the School approached the Council for the purpose of obtaining legal advice. The Council consider that this information attracts the exception to disclosure provided by Regulation 12(5)(b) and that it should be withheld.

Environmental Information

17. Information is 'environmental information' if it meets the definition set out in regulation 2 of the EIR. If the information satisfies this definition the request must be considered under the terms of the EIR rather than the FOIA.
18. Under regulation 2(1)(c) of the EIR, any information on activities affecting or likely to affect the elements or factors of the environment listed in regulation 2 will be environmental information. One of the elements listed is land.

19. The Commissioner has considered the nature of the information sought by the complainant. He has determined that the information is environmental information on the basis that it relates to arboricultural work and therefore it concerns an element of the environment.

Regulation 5 – the duty to make environmental information available on request

20. Under Regulation 5(1) of the EIR, a public authority holding environmental information is obliged to make that information available on request.
21. Under Regulation 5(2) the Council is required to provide the information as soon as possible and no later than twenty working days from the receipt of the request.

What recorded information is held by the Council?

22. Having received a copy of the Council's internal review, the Commissioner wrote to the Council again in order to determine whether it holds information, relevant to the complainant's request, which is not contained in the Visual Files file.
23. The Council responded to the Commissioner's enquiry by confirming that it does not hold any information other than that contained in the Visual Files file. The Council informed the Commissioner that the information was created on 4 February 2014 following a request made by the School for legal advice.
24. The Commissioner asked the Council a number of questions to determine the extent of the information it holds. He asked these questions to enable him to determine whether the information is limited solely to the contents of the legal file on the Visual Files system or whether the Council holds information covering the period specified by the complainant in his request.
25. The Council informed the Commissioner that it had searched for relevant information within its Capital Programmes/Property Services Department and its Legal Services Department.
26. The Council advised the Commissioner that all of its electronic data is held within network-based database file structures. Searches were made of these using search terms relating to the property name, names referenced by the complainant, tree survey names, the name and location of the School and the complainant himself.
27. A search was made of Atrium Property Management Database used by the Council's Capital Programmes/Property Services Department. This

search was carried out to determine whether any documents or notes that were held in relation to the complainant's request. A paper-based property file was also reviewed.

28. A search was also made of the Council's Legal Department's Visual Files system. This search was based on the specific property and on the specific complaint. Paper-based files were retrieved from the Council's Records Management Service and reviewed to find any reference to the complaint.
29. Having made its searches, the Council determined that the only information it holds is the Visual Files information dating from 4 February 2014. The Council advised the Commissioner that it holds no further recorded information relevant to the complainant's request and advised him that it has no record of any relevant information being deleted or destroyed.
30. Given the assurance given by the Council and the information it has provided regarding its searches and records retention policy, the Commissioner's decision is that, on the balance of probabilities, the Council does not hold any information beyond that contained in the Council's Visual Files system which was created after 4 February 2014.
31. The Council has confirmed to the Commissioner that the information it holds concerns the complainant's on-going dispute between two named individuals and the Primary School, and to his complaints made to the Department for Education and the Information Commissioner's Office. The Council asserts that this information attracts Regulation 12(5)(b) of the EIR.
32. The Council's position is predicated by the circumstances which gave rise to the Visual Files records being created: The Council has advised the Commissioner that the file comprises information which concerns the Primary School's defence of a simultaneous complaint raised by the complainant with the Commissioner's Office about the same issue. The Council holds this information solely by virtue of its role in providing the School with legal advice about that complaint.
33. The Council has confirmed to the Commissioner that the School is its client: The School has requested legal advice and the Council's property solicitor has provided that advice.
34. The Council asserts that the information held by the Council is subject to advice privilege and litigation privilege and therefore it is excepted from the duty to disclose environmental information by virtue of Regulation 12(5)(b) of the EIR.

Regulation 12(5)(b) – where disclosure could prejudice the course of justice

35. 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”. The Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege.
36. The Council has made clear to the Commissioner that the information dating from 4 February 2014 is subject to both advice and litigation privilege. It considers that disclosure of this information would likely prejudice the School’s ability to rebut any legal claim made against it which the complainant may make.
37. The Commissioner has not seen the contents of the legal file held by the Council. In this case he considers it is sufficient to consider the circumstances in which the file was created and why it is held, to determine whether Regulation 12(5)(b) is engaged.
38. In his view, based on the assurances given him by the Council, the legal file contains information which constitutes requests for legal advice or the provision of legal advice from a properly qualified person – the Council’s property solicitor, or communications which discuss issues associated with that legal advice.
39. The Council has informed the Commissioner that it has not disclosed the withheld information to date and this information is not available outside of the Council.
40. In the Commissioner’s opinion, the Council’s reliance on Regulation 12(5)(b) clearly relates to the School’s ability to defend itself against any action which the complainant may take.
41. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the Information Tribunal highlighted the requirement needed for this exception to be engaged. It explained that there must be an “adverse” effect that would result from the disclosure of the requested information. Another Tribunal decision – *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the Tribunal interpreted the word “would” as being “more probable than not”.
42. 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 legal advice would undermine this important common law principle. He further accepts that disclosure would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice.

43. In this case, the Commissioner considers that disclosure of the contents of the Council's legal file would adversely affect the School's ability to defend itself should it be faced with a legal challenge. The Council has advised the Commissioner that, at the time the complainant made his request, the complainant's complaint about the School was an on-going and live matter.
44. The Commissioner considers that the council should be able to defend its position against any claim made against it without having to reveal its position in advance, particularly as challenges may be made by persons who themselves are not required to disclose their positions. That situation would be unfair.
45. In view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the requested information would adversely affect the course of justice and he is therefore satisfied that regulation 12(5)(b) is engaged in respect of the information the council has withheld.

The public interest

Arguments in favour of disclosing the requested information

46. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis and how public authorities make their decisions. This in turn fosters trust in public authorities and may allow greater public participation in the decision making process.
47. In this case, disclosure of the requested information would help the public to understand some of the issues considered by the council in respect of the arboreal work on a tree at Brompton Primary School. It would also allow the public to consider the quality of the legal advice which was sought and received by the council.

Arguments in favour of maintaining the exception

48. In his previous decisions the Commissioner has expressed the view that disclosure of information relating to legal advice would have an adverse effect on the course of justice through a weakening of the general

principle behind the concept of legal professional privilege. This view has also been supported by the Information Tribunal.

49. It is very important that public authorities are able to consult with their lawyers in confidence and be able to obtain confidential legal advice. Should such legal advice be subject to routine or even occasional public disclosure without compelling reasons, this could affect the free and frank nature of future legal exchanges and/or may deter the public authority from seeking legal advice in situations where it would be in the public interest for it to do so. The Commissioner's published guidance on legal professional privilege states the following:

"Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice."

50. Where a public authority is faced with a legal challenge, or a potential legal challenge, it is important that the authority can defend its position properly and fairly. Should the public authority be required to disclose its legal advice, its opponent, or in this case its client's opponent, would potentially be put at an advantage by not having to disclose its own position or legal advice beforehand.
51. The Commissioner considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a long-standing, well established and important common law principle. The Information Tribunal affirmed this in the *Bellamy* case when it stated:

"...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..."

52. This does not mean that the counter arguments favour public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect.

Balance of the public interest arguments

53. The Commissioner appreciates that there is a general public interest in public authorities being as accountable as possible for the decisions they make.

54. However, having considered the circumstances which brought about the creation of the withheld file, the Commissioner has decided that the public interest arguments which favour withholding the requested information are greater than those which favour disclosure. He is satisfied that the public interest is best served in this case by maintaining the School's right to obtain legal advice and the Council's right to provide legal advice in confidence. It is for this reason the Commissioner has decided that the Visual Files information should be withheld.
55. The public interest in maintaining legal professional privilege is a particularly strong one. To outweigh the inherent strength of legal professional privilege would normally require circumstances where there are substantial amounts of public money are at stake, where the decision would significantly affect large numbers of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate authority.
56. Having considered the purpose and the circumstances in which the Visual Files information was created, the Commissioner does not consider that there are any factors that would equal or would outweigh the particularly strong public interest inherent in this exception.
57. The Commissioner has decided that the council has properly applied regulation 12(5)(d) to the information sought by the complainant.
58. The Commissioner has noted the time taken for the Council to respond to the complainant's request: The Council has clearly exceeded the compliance period required by the EIR and he therefore finds that the Council has breached Regulation 5(2).
59. The Commissioner has also determined that the Council has breached Regulation 11 by failing to respond to the complainant's request for a review within the 40 working day period which this regulation requires.

Right of appeal

60. 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

61. 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.
62. 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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