

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

Decision notice

Date: 18 April 2016

Public Authority: Office for Nuclear Regulation
Address: Building 4 Redgrave Court
Merton Road
Bootle
L20 7HS

Decision (including any steps ordered)

1. The complainant has requested correspondence relating a report commissioned by the Office for Nuclear Regulation (ONR) on evidence submitted by an action group opposed to the expansion of Lydd Airport. The request was initially dealt with under the FOIA and whilst some information was disclosed other information was withheld under sections 40 – personal data, and section 42 – legal professional privilege. During the course of the Commissioner's investigation he advised the ONR that the request should have been handled under the EIR and the ONR subsequently applied the exceptions provided by regulation 13 – personal data and regulations 12(5)(b) – course of justice and 12(5)(d) – confidentiality of proceedings to the same information.
2. The Commissioner's decision is that the ONR is entitled to rely on these exceptions to withhold the disputed information.
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. On 2 January 2015 the complainant requested information of the following description:

"Under the Freedom of Information Act, I would like to request all correspondence related to the report by Eddowes Aviation Ltd entitled

'Notes on Review of LAAG Post – Enquiry Submissions' (dated 30th November 2012) for the period 2 April 2012 to February 28th 2014."

5. On 29 January 2015 the ONR contacted the complainant and advised her that some of the requested information was exempt from disclosure by virtue of sections 40(2) – third party personal data, and 42 – legal professional privilege. Section 42 is subject to the public interest test and the ONR advised the complainant that it required additional time to consider the public interest. The complainant objected to this delay and asked the ONR to carry out an internal review of its decision to extend the time for complying with her request.
6. On the 27 February 2015 the ONR provided the complainant with its substantive response to the request. It listed the documents containing information captured by the request. The ONR provided the complainant with some of the information it had listed, but again explained that other information was exempt under sections 40(2) and 42. In respect of section 42 the ONR informed the complainant that having now completed its consideration of the public interest test it found that the public interest favoured withholding that information. It also explained that some of the documents contained information that was not covered by the request and where this was the case the information had been removed.
7. Finally the ONR advised her that in addition to the listed information there was other information which fell within the scope of the request and explained that it could not make a decision on whether to release this information until it had sought the views of a third party. This constituted one document and was released on 9 March 2015 with the authors name redacted from it under section 40(2) on the basis that it was personal data.
8. On 7 April 2015 the complainant asked the ONR to carry out an internal review of its decision to withhold information under section 40(2) and 42. The ONR informed the complainant of the outcome of that review on 6 May 2015. It found that some information previously withheld under section 42 should now be released and identified other information which, although prepared for release, had not actually been sent to her. The information was subsequently released in two parts on 18 June and 2 July 2015.
9. During the course of his investigation the Commissioner advised the ONR that he considered the request related to environmental information and so should have been handled under the EIR. He provided the ONR with the opportunity to apply relevant exceptions from the Regulations. As a consequence the ONR applied regulation 13 - third party personal data in place of section 40 of FOIA. It also applied and

regulations 12(4)(e) – internal communications and 12(5)(d) – confidential proceedings, explaining that these exceptions were being applied to the information which it considered attracted legal professional privilege and which had been previously withheld under section 42 of FOIA. Following an exchange of correspondence with the Commissioner, the ONR also applied regulation 12(5)(b) – adverse affect to the course of justice, to the legally privileged information.

10. Towards the end of the investigation the ONR also disclosed some additional information.

Scope of the case

11. The complainant contacted the Commissioner on 30 September 2015 to complain about the way her request for information had been handled. At that time she raised concerns about both the ONR's grounds for refusing to provide the withheld information and its decision to extend the time for complying with the request in order to properly consider the public interest. However she later agreed to focus solely on the substantive issue of whether the ONR was entitled to withhold some of the information on the basis that it was either third party personal data or that it was protected by legal professional privilege.
12. The Commissioner considers that the matter to be decided is whether the third party personal data contained in the disputed information can be withheld under regulation 13 and whether the remaining information, which the ONR considers to be protected by legal professional privilege can be withheld under any of three regulation 12 exceptions cited.
13. As noted earlier, ONR has also explained to both the complainant and the Commissioner that information has been removed from a number of documents on the basis that it does not relate to the Eddowes report and therefore is not caught by the request. As part of his investigation the Commissioner has also confirmed for himself whether this is the case.

Background

14. The request relates to planning applications for the expansion of Lydd Airport in Kent. The application generated both support and opposition locally. The planning applications were decided jointly by the Secretary of State for Communities and Local Government and the Secretary of State for Transport. The applications were called in for decision by the Secretaries of State in June 2010. A planning inspector was appointed

who carried out a public inquiry into the proposal between February and September 2011.

15. The decision of the Secretaries of State was issued on 10 April 2013. That decision granted planning permission for the expansion, subject to conditions. An appeal against that decision was heard in January 2014. The High Court's decision, that the appeal had failed, was announced on 16 May 2014.
16. The airport is close to the Dungeness Nuclear Power Station and the ONR were consulted over whether the proposed expansion posed any risks to the nuclear site. After carrying out an assessment of the risks, the ONR decided not to object to the proposals. A local action group commissioned its own report on the methodology used in the ONR's assessment. At the planning appeal hearing the action group argued, in broad terms, that the ONR had failed to properly consider the group's report and that, in effect, the Secretaries of State had delegated their responsibility in respect to decisions on nuclear safety to the ONR. Therefore in defending the planning appeal it was necessary for Secretaries of State to liaise with the ONR on issues around its risk assessment. However although the ONR's role in the planning decision was a major element of the appeal, the ONR was not joined as a party to the proceedings.
17. During the planning appeal proceedings it was revealed that the ONR had in fact commissioned an independent report (the Eddowes report) examining the points raised by the action group's report. The Eddowes report was disclosed to the action group during the planning appeal and it is this report which is referred to in the request. It is also noted that although the report was disclosed to the action group, it was not formally submitted to the court as evidence.

Environmental Information

18. The request was originally handled under FOIA. The Commissioner notes that when making her request the complainant specifically referred to FOIA. The ONR's initial view was that the requested information related to correspondence about a report concerning the risk of an accidental aircraft crash hazard to a nuclear site. In particular it is a report on the validity of the arguments presented to the ONR that its methodology in assessing the risk was flawed. On that basis, the ONR did not consider that the report itself related directly to the environment.
19. However the report was produced in order to assist the ONR when considering whether to object to a planning application for the expansion

of an airport. Seen in this context the Commissioner is satisfied that the report is information on a measure (ie the proposed airport expansion) which is likely to effect the environment. As such it falls within the definition of environmental information provided by regulation 2(1)(c).

Reasons for decision

Regulation 13 – third party personal data

20. All the documents have had names and/or contact details redacted under regulation 13. So far as is relevant, regulation 13 states that a public authority shall not disclose the personal data of someone other than the applicant, if its disclosure would breach any of the principles of the Data Protection Act 1998 (DPA). In this case the ONR has argued that disclosing the names and contact details of the individuals in question would breach the first data protection principle which provides that the processing of personal data shall be fair and lawful.
21. The withheld information comprises of the names and contact details of a range of individuals. These include those of the ONR's own staff, its legal adviser from what was then the Treasury Solicitors' Department, her colleagues who were representing the Secretaries of State in the planning appeal, and on occasion the names of officials from other departments who had an interest in the appeal, and the author of the Eddowes report. Personal data is defined in the DPA as being information which both identifies and relates to a living individual. As names and contact details clearly identify and relate to these individuals the Commissioner is satisfied the information constitutes their personal data.
22. The ONR considers that disclosing this information would breach the first data protection principle which states that personal data shall be processed fairly and lawfully and in particular shall not be processed unless one of the conditions of Schedule 2 of the DPA can be satisfied. The processing of personal data includes its disclosure.

The first data protection principle and Fairness

23. The Commissioner's approach when considering the first principle is to start by looking at whether the disclosure would be fair. Only if the Commissioner finds that it would be fair will he go on to look at lawfulness or whether a Schedule 2 condition can be satisfied.
24. 'Fairness' is a difficult concept to define. It involves consideration of:
 - The possible consequences of disclosure to the individual.

- The reasonable expectations of the individual regarding how their personal data will be used.
- The legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the particular individual.

Often these factors are interrelated.

25. The ONR has argued that disclosing the names, telephone numbers and email addresses of the individuals concerned would allow members of the public to contact them directly. The plans to expand Lydd Airport proved very controversial and the ONR is concerned that the release of the contact details may lead to members of the public contacting the staff involved and taking issue with the part they played in the process, for example any advice that they provided. The ONR has referred to the risk of staff being "harassed". The Commissioner accepts that the disclosure of the contact details may lead to staff being contacted about the role they played in the proceedings. Although the Commissioner is not necessarily convinced such contact would amount to harassment he does recognise that it could prove very disruptive to their working lives.
26. In light of this and in line with the ONR's policy of not disclosing the details of staff below Deputy Chief Inspector level on its website, the Commissioner is satisfied that the staff in question would have a reasonable expectation that their names and contact details would not be released to the general public. The ONR has described the staff involved as junior staff with non-public facing roles. Furthermore at the time those involved wrote the emails, they did so in the expectation that they were participating in purely internal or otherwise confidential discussions of sensitive issues. They would not have expected their involvement to be revealed by the disclosure of their names. The ONR has contacted the individuals in question and they have not consented to the release of their information, which goes some way to support the ONR's argument as to their expectations.
27. In terms of the legitimate interests of the public in having access to the names and contact details the ONR has argued that there is none. This is because, it argues, the public debate around the expansion of Lydd Airport would not be furthered by the disclosure of the personal details of such staff.
28. The complainant has argued that the way in which the Eddowes report was introduced to the appeal proceedings prevented its proper consideration and therefore prejudiced the action group's chances of successfully overturning the decision.

29. The Commissioner notes that where possible the ONR has left the details of the organisation for which the authors and recipients of the email worked. For example the last part of email addresses have been disclosed showing whether the recipient was part the Treasury Solicitors' Department or from the ONR (which at that time was part of the Health & Safety Executive). Similarly the authors' area of work is often revealed, for example "ONR Policy". The Commissioner considers this is sufficient for a member of the public to get of sense of which parties were contributing to the discussion and the roles played by the different public authorities. The Commissioner considers this satisfies the legitimate interests of the public.
30. Having considered the potential consequences to the individuals concerned, their expectations as established by normal working practices and in light of the consequences of disclosure, weighed against the value to the public in disclosing this information, the Commissioner is satisfied that the disclosure of the personal data would be unfair. This would breach the first data protection principle. The ONR is entitled to withhold the names and contact details under regulation 13.

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

31. So far as is relevant, regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information if to do so would adversely affect the course of justice. The Commissioner has issued guidance on the application of this exception, 'The course of justice and inquiries exception (regulation 12(5)(b))', which is available from his website at www.ico.org.uk . That guidance sets out the Commissioner's view that the exception is wide enough to be applied to information protected by legal professional privilege.
32. In broad terms legal professional privilege protects the confidentiality of communications between a client and their legal adviser. The privilege belongs to the client and allows them to explain the issues on which they require advice as fully as possible and the legal adviser to provide full and frank advice on those issues. A client's ability to speak freely and frankly with his legal adviser in order to obtain appropriate legal advice is a fundamental requirement of the English legal system. It helps to ensure fairness in legal proceedings. Therefore disclosing such communication would adversely affect the course of justice.
33. The parties defending the appeal were the Secretary of State for Communities and Local Government and the Secretary of State for Transport. As their decision was based, in part, on the ONR's view that the expansion posed no risk to Dungeness Nuclear Power Station, the ONR was cited in the proceedings. It was therefore necessary for the legal team representing the two Secretaries of State to liaise with the

ONR in order, for example, so that they could explain to the court how the ONR had considered the action group's report and to provide further clarification and explanations of the ONR's analysis of the risks involved. When responding to such queries the ONR wished to ensure that it protected its own position, including consideration of any issues around disclosing the Eddowes report. It therefore had its own legal adviser. Both the legal team representing the Secretaries of State, and the ONR's adviser were from the Treasury Solicitors' Department, which was then a non-ministerial government department providing legal services to the majority of central government. It is now known as the Government Legal Department.

34. The first condition that needs to be satisfied for information to attract legal professional privilege is that the communications are between a lawyer and his or her client. The Commissioner has viewed the information withheld under regulation 12(5)(b). It consists of chains of emails. Some of those chains begin with queries raised by the legal team representing the Secretaries of State who are responding to the planning appeal. However the majority of these culminate in communications between the ONR and its own adviser from the Treasury Solicitor's Department in which legal advice is sought or provided. There are a small number of emails in which the Secretaries of States' legal team is directly seeking clarification of technical issues from the ONR. The information in these email chains (identified by the ONR when corresponding with the complainant as Message 11 and 12) will be considered separately. However in respect of the remaining communications the Commissioner will continue with his consideration of whether the information satisfies the other conditions required for it to attract legal professional privilege.
35. There are two types of legal professional privilege. Litigation privilege will apply where litigation or other adversarial proceedings are in prospect, or contemplated. Legal advice privilege will apply where no litigation is in prospect or contemplated. The Commissioner is satisfied that the advice was sought at a time when the ONR was cited in a planning appeal. However the ONR was not itself a party to those proceedings and therefore he does not accept that the advice is capable of attracting litigation privilege belonging to the ONR. Therefore the Commissioner will go onto consider whether information can attract advice privilege.
36. For the information to be capable of attracting either form of legal professional privilege the information must form a communication which was made for the dominant purpose of seeking or providing legal advice. The term 'dominant' is taken to mean the 'main' purpose for which the information was created, as opposed to the sole purpose.

37. Some of the email chains consist of exchanges where the ONR is asking its legal adviser for advice on the disclosure of the Eddowes report and the extent to which it would be appropriate to redact any information from it before doing so. These can include an element of internal discussion before queries are raised with the legal adviser. Such communications are clearly made for the dominant purpose of obtaining legal advice. Other email chains start with messages from the legal team representing the Secretaries of State to the ONR's adviser and these are then forwarded to the ONR, together with advice on how the ONR should respond. The Commissioner is satisfied that the emails containing the advice from the ONR's legal adviser attract privilege belonging to the ONR. The initial emails from the Secretaries of State legal team will be dealt with later together with the information contained in Messages 11 and 12.
38. The final condition which needs to be satisfied is that the communications have remained confidential. The ONR has assured the Commissioner that the information has remained confidential and has not been disclosed to the public. The Commissioner also notes that a number of the emails are marked "NOT FOR CIRCULATION BEYOND TSols and ONR", 'TSols' being Treasury Solicitors. The Commissioner is satisfied that the information remains confidential.
39. In light of the above the Commissioner finds that the direct communications between the ONR and its Treasury Solicitor legal adviser do attract legal professional privilege as do any internal discussion of the issues which are necessary to either inform the request for advice or disseminate the advice once provided.

Public interest test

40. Regulation 12(5)(b) is subject to the public interest test which states that even where information is protected by an exception, a public authority may only refuse a request if in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosure.
41. The ONR recognises that there is a public interest in disclosing information to ensure that public authorities are accountable for, and transparent about their actions and the decisions that they have taken, and to further public debate.
42. It also accepts that the disclosure of legal discussions would help people understand how decisions are made.
43. The complainant has argued that the fact that Eddowes report was not disclosed in advance of the appeal hearing unfairly disadvantaged the

action group's claim to have the planning decision overturned. Ultimately its appeal failed and, the complainant argues, this has resulted in, essentially, an unsafe planning decision which has the potential to cause a serious nuclear accident.

44. The Commissioner accepts that the controversy around the planned expansion of Lydd Airport increases the public interest in disclosing information around how the appeal process was handled. However it is not for the Commissioner to comment on the difference of opinion between the action group, and its expert, and the ONR regarding the level of risk posed by the airport's expansion.
45. Clearly the Commissioner cannot disclose the contents of the disputed information, but having viewed it, he is satisfied that there is nothing within it to suggest the ONR adopted any deliberate tactic to prejudice the action group's position. The Commissioner also notes that the complainant accepts that during the appeal there was the opportunity for the report to be submitted in evidence, which would have provided the action group with more of an opportunity to examine the report. However the Judge's offer to consider the report was declined.
46. The report itself is now in the public domain, having been disclosed during the appeal process and through the disclosures made in response to this request. Therefore information which would allow consideration of the substantive issue ie, the robustness of the ONR's assessment of the risk of an accidental aircraft crash, is now public.
47. In respect of the arguments in favour of maintaining the exception, there is a weighty public interest in preserving the principle that a client can consult with their legal adviser in a full and frank manner. It is important that the client can lay out all the issues relevant to the legal issue they require advice on and that the lawyer can respond in full to those issues. This may include explaining any weaknesses in their client's position. Without being able to have such frank exchanges it would not be possible for clients to obtain the best legal advice possible and so defend their legal rights. That is why legal professional privilege is considered to be a cornerstone of the English legal system.
48. The Commissioner also notes that the communications in question are, for the main part, focussed on the very short period of time during which the actual appeal was heard. The legal advice was needed quickly in order to respond appropriately to the enquiries from the Secretaries of State's legal team. The Commissioner considers that the need to be able to speak in a full and frank manner when seeking or providing sensitive legal advice is all the greater in such a pressurised environment. This adds weight to the more general public interest in preserving the principle of legal professional privilege.

49. The request was made in January 2015, only seven months after the decision on the matter to which the advice related had been announced, and just less than twelve months after the legal advice itself had been provided. This adds some weight to the public interest in preserving the principle of legal professional privilege as the advice was relatively fresh at the time of the request. However the ONR has acknowledged that the advice was not still live as there was no realistic prospect of the High Court's decision being further appealed. The ONR has also acknowledged that the circumstances in which this legal advice was provided arise very seldom; as a very rough estimate the ONR suggested that it is only cited in a planning appeal once a decade.
50. The Commissioner accepts that there is a public interest in understanding the ONR's decision not to object to the planning application. This has been largely met with the disclosure of the Eddowes report. The withheld information itself does not suggest the ONR acted inappropriately in respect of the report's disclosure. Nevertheless, publishing the withheld information in full would serve to reassure the public that this was the case. There is therefore some public interest in disclosure. However the Commissioner considers that the public interest in preserving the principle that a client can seek confidential legal advice, particularly when there are significant time constraints, is sufficient to outweigh that public interest. The Commissioner finds that the public interest favours withholding the information. The ONR are entitled to rely on regulation 12(5)(b) to withhold this information.

Regulation 12(5)(d) – confidentiality of proceedings

51. As discussed at paragraph 34 and 37 some of the email chains contain either information between the legal team for the Secretaries of State and the ONR's legal adviser, or directly with the ONR. This includes the information withheld from messages 11 and 12. These communications were initiated by the Secretaries of State's legal team for their own purposes ie, to seek clarity on particular technical issues, or when seeking the disclosure of the Eddowes report in order to defend the appeal against the planning decision. There are strong arguments that this information could be protected by legal professional privilege belonging to the Secretaries of State. As the Secretaries of State were parties to appeal proceedings they could claim litigation privilege. Under litigation privilege communications between a legal adviser, or their client and a third party for the purposes of answering queries to assist in the conduct of the litigation would be capable of attracting privilege. Such communications could include the seeking of expert technical advice. It is therefore conceivable that the communications seeking access to the Eddowes report and clarification of technical details from the ONR could attract litigation privilege belonging to the Secretaries of

State. However the Commissioner does not understand the ONR to have presented this argument.

52. Nevertheless when first considering the withheld information under the EIR, the ONR did apply regulation 12(5)(d) to this information. Therefore the Commissioner has gone on to consider whether this exception applies to these communications.
53. Regulation 12(5)(d) states that a public authority may refuse to disclose information if to do so would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.
54. It is noted that the exception covers not just the proceedings of the public authority holding the information but those of other public authorities too. In this case the Commissioner has considered whether the proceedings of the two Government Departments, the Department for Communities and Local Government, and the Department for Transport. The term 'proceedings' is not defined in the Regulations but the Commissioner considers it would cover formal processes such as the legal proceedings which the Secretaries of State leading those Departments were involved in.
55. The second condition that has to be satisfied when applying regulation 12(5)(d) is that those proceedings are protected by confidentiality provided by law. The Commissioner is not aware of any statutory duty of confidence that would apply in this case. Therefore he has considered whether the information is protected by a common law duty of confidence. The Commissioner finds that the communications were sent from the Secretaries of State's legal team in the clear expectation that they would remain confidential between itself, the ONR and a small number of other parties who had an interest in the proceedings. Having viewed the information the Commissioner is satisfied that it is not trivial and based on assurances provided by the ONR, he is also satisfied that it is not in the public domain. Disclosing the information, even at the time of the request when the proceedings had concluded, would be detrimental to the Secretaries of State in that it would undermine their ability to seek the technical expertise and cooperation required when defending appeals against planning decisions. The Commissioner is therefore satisfied that the proceedings to which the information relates were protected by a confidentiality provided by common law.
56. Clearly it follows that to release these communications to the world at large would have an adverse effect on that confidentiality. The Commissioner is therefore satisfied the exception is engaged.

Public interest test

57. Regulation 12(5)(d) is subject to the public interest test in the same way as 12(5)(b). The public interest factors in favour of disclosure are also the same as those considered under that exception.
58. There is also some similarity between the public interest arguments in favour of maintaining the two exceptions. Although when considering regulation 12(5)(d) it cannot be argued that there is an inherent public interest in protecting the principle of legal professional privilege, there is still a significant public interest in protecting the Departments' ability to defend their planning decisions at appeal and this includes the freedom to consult with expert third parties on a confidential basis. Again the need to be able to rely on such confidentiality is heightened by the time constraints imposed on the Departments and ONR, by the court proceedings.
59. There is also a more general public interest in preserving confidences. The need to be able to trust third parties with confidences is important to many aspects of society including public administration and commercial activities. It should not be undermined lightly.
60. On balance the Commissioner finds that there is some public interest in releasing information that would shed light on the ONR's involvement in the appeal hearing and the decision to release the Eddowes report. However there is a weightier public interest in the two Departments having the ability to properly marshal their arguments when defending their positions in litigation generally, and planning appeals in particular. In order to do so, it is necessary to maintain the confidentiality of such proceedings. The Commissioner finds that the exception provided by regulation 12(5)(d) can be maintained in the public interest.

Redactions made for information not falling within the scope of the request

61. Much of the information captured by the request is contained in email chains. Some of the discussion in those emails relate to issues other than the Eddowes report. Where this has occurred the ONR removed the information. Sometimes the copies provided to the complainant show the number of the paragraphs containing the irrelevant information, but the actual paragraphs are then left blank. In other documents the information has been blacked out. The Commissioner has been provided with full copies of the emails in question and he is satisfied that the information in question does not fall within the scope of the request and that the ONR therefore had no obligation to consider its release.

Right of appeal

62. 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

63. 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.
64. 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

Rob Mehan
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF