

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 20014 (EIR)**

Decision notice

Date: 13 June 2016

Public Authority: Stoke-on-Trent City Council

Address: Civic Centre
Glebe Street
Stoke-on-Trent
ST4 1RN

Decision (including any steps ordered)

1. The complainant submitted a request to the public authority for information in relation to the safety of two buildings which had developed some noticeable structural defects following construction. The public authority disclosed most of the information requested and withheld a small amount of information on the basis of the exceptions at regulations 12(4)(d) (material in the course of completion), 12(5)(b) (adverse effect on the course of justice) and 12(3) (personal data) of the EIR.
2. The Commissioner's decision is that the public authority was entitled to rely on the exceptions at regulations 12(5)(b) and 12(3) to withhold the remaining information within the scope of the request. He has however found the authority in breach of the procedural requirement in regulation 11(4) of the EIR.
3. No steps are required.

Background, request and response

4. As part of the new Stoke Central Business District masterplan; following the completion of a tendering process, two new buildings known as the Smithfield buildings were designed and built by a developer. It was found subsequently that some of the aggregate used for the precast

concrete Lattice panels and Twin-wall panels were contaminated with pieces of calcined dolomite, a product used in the steelmaking industry and not normally incorporated in concrete. Calcined dolomite is classed as an unsound aggregate that should not be used in concrete because it expands when wetted.

5. Professor Peter Robery, who is a known expert on infrastructure assets and materials, and a specialist in concrete durability, asset management and repair strategies, was appointed in January 2015 by solicitors acting on behalf of the Council to investigate the consequences of calcined dolomite inclusions in the buildings' structures, in contemplation of possible legal proceedings. His reports are considered confidential and legally privileged. However, in view of the public interest in the issue, he published a report earlier in the year which summarised the technical matters and the final position agreed between the stakeholders.
6. On 29 July 2015 the complainant wrote to the public authority in connection with the Smithfield development and requested information in the following terms:

"..... How much has the services of concrete experts cost to address concerns about the Smithfield development?"

How much has Professor Peter Robery cost the city council?

Please provide any reports or correspondence from Prof Robery (or any org/ company for which he works) to the city council regarding the Smithfield buildings.

I would like to receive the information via email in pdf format.

If my request is denied in whole or part, I ask that you justify all your deletions by reference to specific exemptions of the act....."

7. The public authority provided its response on 26 August 2015. With regard to the first part of the request, the authority explained that it only held information on the costs of the concrete expert it had employed, namely Professor Robery. It consequently informed the complainant with regard to the second part of his request that it had cost the authority £22,601.30 to employ Professor Robery but this and other costs would be recouped under the terms of the settlement agreement between the public authority and the developer.
8. With regard to the third part of the request, the public authority informed the complainant that it considered the information held exempt from disclosure on the basis of the exception at regulation 12(5)(e) of the EIR (confidentiality of commercial or industrial information).

9. On 26 August 2015 the complainant requested an internal review. He disagreed with the application of regulation 12(5)(e) to the third part of his request. He argued that it was in the public interest to disclose the information so that the public could have confidence in the safety of the buildings, including the evidence *"used to come to the conclusion that they have."*
10. The public authority did not provide the complainant with details of the outcome of its internal review until 16 February 2016 after he had complained to the Commissioner. The review upheld the original decision. The public authority however supplied the complainant with a copy of Professor Robery's summary report of his investigation which had recently concluded.

Scope of the case

11. The complainant initially contacted the Commissioner on 11 January 2016 to complain about the public authority's handling of his request. He noted that the public authority had not issued a substantive response to his request for an internal review and requested that the Commissioner proceed to an investigation and issue his decision. As mentioned above, the public authority subsequently supplied the complainant with details of the outcome of its internal review.
12. During the course of the Commissioner's investigation, the public authority withdrew its reliance on regulation 12(5)(e) and subsequently disclosed a substantial part of the information held within the scope of the third part of the request to the complainant. In terms of the remaining information in scope, the authority considered this information exempt on the basis of the exceptions at regulations 12(4)(d) (material in the course of completion), 12(5)(b) (adverse effect on the course of justice) and 12(3)/13 (personal data).
13. The substantive scope of the investigation therefore was to consider whether the public authority was entitled to rely on regulations 12(4)(d), 12(5)(b) and 12(3)/13 to withhold the remaining information held within the scope of the third part of the request.

Reasons for decision

Regulation 12(5)(b)

14. Most of the remaining information in scope (including some of the information redacted from the documents disclosed to the complainant) has been withheld by the public authority in reliance on this exception.
15. Regulation 12(5)(b) states:

".....a public authority may refuse to disclose information to the extent that 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 inquiry of a criminal or disciplinary nature."
16. The public authority considers that disclosing the information withheld on the basis of this exception would adversely affect the course of justice, specifically on the basis that the information is subject to legal professional privilege (LPP). It considers that the information is subject to litigation privilege because it was created for the dominant purpose of litigation.
17. The public authority explained that Professor Robery was appointed by solicitors acting on behalf of the authority to advise it on a remediation strategy/repair programme with regard to the design and construction of the Smithfield buildings. Prior to his appointment, the public authority had issued a letter before judicial action to the developer in charge of the construction. It has therefore argued that the correspondence from Professor Robery to the authority (ie the withheld information), in which the authority's solicitors were fully involved, are subject to LPP, specifically, litigation privilege.
18. The Commissioner considers that the "*course of justice*" element of the exception at regulation 12(5)(b) is very wide in coverage and includes material covered by LPP. His interpretation of LPP is guided by the Information Tribunal's (now First-Tier Tribunal) description of the meaning of the concept in *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry (EA/2005/0023)*. The Tribunal described LPP as:

"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if

such communications or exchanges come into being for the purposes of preparing for litigation.”

19. The Commissioner also shares the view that there are two types of privilege within the concept of LPP; litigation privilege and advice privilege. Advice privilege will generally apply where no litigation is in progress or contemplated. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation. It can apply to a wide variety of information, including advice, correspondence, notes, evidence or reports.
20. The Commissioner has inspected the information the public authority considers is legally privileged and is satisfied that it is information in respect of which a claim to LPP could be maintained in legal proceedings. He is satisfied that the information is subject to litigation privilege because the relevant correspondence from Professor Robery to the public authority in which solicitors acting on behalf of the authority were fully involved, was created pre-dominantly in order for the authority to litigate against the developer for an alleged breach of contract. Professor Robery, in conjunction with the solicitors and the public authority sought to establish the extent of the developer's liability in relation to the structural defects emanating from the inclusion of calcined dolomite in the aggregate for the precast concrete used in the construction of the Smithfield buildings. Although a confidential out of court settlement was eventually reached between the parties, there is certainly no doubt that the correspondence (including reports) from Professor Robery was going to be integral to the litigation in contemplation against the developer.
21. The Commissioner has consequently concluded that the public authority was entitled to engage the exception at regulation 12(5)(b) in respect of the information withheld on that basis.

Public interest test

22. In common with all EIR exceptions, the exception at regulation 12(5)(b) is subject to a public interest test. Therefore, the Commissioner has considered whether in all the circumstances of the case the public

interest in maintaining the exception outweighs the public interest in disclosing the information withheld on that basis.

23. As mentioned, the complainant has argued that it is in the public interest to disclose the withheld information so that the public can have confidence in the safety of the buildings, including the evidence which led to that conclusion.
24. The public authority has also acknowledged that disclosure would promote openness, transparency and accountability with regard to decisions taken in relation to the Smithfield buildings. It has however argued that there is a strong public interest in maintaining the exception because the withheld information contains free and frank discussions and opinions of contractors and third parties, including legal professionals during the course of reaching a resolution to the dispute regarding the structural defects to the Smithfield buildings. It considers that in future third parties would be less willing to enter into an open discussion with the authority in relation to similar matters should the withheld information be disclosed. It argued that the public interest would not be best served if open negotiations were negatively impacted in this manner.
25. The public authority further explained that disclosure would breach the terms of the settlement agreement which are still live, and that such a breach would have a large negative impact on the public purse.

Balance of the public interest

26. The Commissioner shares the view expressed by the Tribunal in the *Bellamy* case that there is a strong element of public interest inbuilt to LPP and at least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest.
27. With regard to the public interest in disclosure, he shares the view that it is in the public interest to disclose information in order that the public can have confidence in the safety of the buildings. He is mindful of the public interest in ensuring that the public authority has relied on the right advice and taken the appropriate steps in remedying structural defects to the Smithfield buildings, and that the public would still get value for money for the buildings in spite of the alleged breach of contract.
28. With regard to the public interest in maintaining the exception, the Commissioner considers that there is a significant public interest in maintaining LPP due to the importance in safeguarding openness in all communications between client and lawyer to ensure access to full and

frank advice, which in turn is fundamental to the administration of justice. Consequently, he considers that there is a significant public interest in ensuring that the public authority is able to access full and frank advice to inform its preparation to litigate against a developer for an alleged breach of contract likely to have serious financial ramifications for the authority. Given that the withheld information is still quite recent, disclosure is likely to severely restrict the public authority's ability to do that in future in relation to similar matters. Disclosure at this relatively early stage following the settlement agreement is likely to have a negative impact on the quality of advice that the authority might receive in future in relation to similar matters.

29. Furthermore, there is clearly a significant public interest in not breaching the terms of the settlement agreement because that would be counter-productive to the strong public interest in ensuring that tax payers do not have to bear the huge cost of remedying the structural defects to the Smithfield buildings. Revealing information in breach of the settlement agreement would constitute grounds for the developer to commence legal proceedings against the public authority which is likely to be successful, and that would not be in the public interest.
30. The Commissioners considers that the summary report published by the public authority along with the substantial information it subsequently released during the course of his investigation should reassure the public in relation to the safety of the Smithfield buildings. It should also reassure the public that the public authority has taken reasonable steps to remedy the situation.
31. He has therefore concluded that on balance, the public interest in maintaining the exception outweighs the public interest in disclosing the information withheld on that basis.

Regulations 12(3)/13

32. The public authority redacted personal contact details from some of the information disclosed to the complainant on the basis of this exception.
33. Regulation 12(3) states:

".....a public authority may refuse to disclose environmental information requested if.....the information includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13."

34. Regulation 13(1) states:

"To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below [in section 13(2)] is satisfied, a public authority shall not disclose the personal data."

35. Personal data is described in section 1 of the Data Protection Act 1998 (DPA) as:

".....data which relate to a living individual who can be identified from those data or from those data and other information which is likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual."

36. The Commissioner is satisfied that the redacted personal contact details constitute personal data because they constitute information from which the data subjects could be identified.

37. As mentioned, personal data cannot be disclosed under the EIR if either of the conditions in regulation 13(2) is met. The first condition in regulation 13(2) is that the disclosure of personal data would contravene any of the data protection principles or section 10 of the DPA. The public authority considers that disclosure of the information requested would contravene the first data protection principle.

38. The first data protection principle states:

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

(a) at least one of the conditions in Schedule 2 [DPA] is met..."

39. In considering whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual (ie the data subject) in terms of what would happen to their personal data and the consequences of disclosing personal data, ie what damage or distress would the data subjects suffer?
- Furthermore, notwithstanding the data subjects' reasonable expectations or any damage caused to them, it may still be fair to

disclose their personal data if it can be argued that there is an overriding legitimate interest to the public in doing so.

40. The Commissioner has concluded that while the data subjects would expect that contact details linked to their business could be disclosed to the public, they would not have a similar expectation in relation to their personal contact details. He is satisfied that disclosing their personal contact details publicly is likely to cause them some distress, and in the wrong hands, could potentially lead to damaging consequences.
41. The Commissioner does not consider that there is an overriding legitimate interest to the public in disclosing the personal contact details in the circumstances of this case. He considers that on balance the data subjects' right to keep their personal contact details private is stronger.
42. He has consequently concluded that disclosure would be unfair in the circumstances of this case in contravention of the first data protection principle. The public authority was therefore entitled to rely on the exception at regulation 12(3).

Procedural matters

43. A public authority is required by virtue of regulation 11(4) of the EIR to complete a request for an internal review as soon as possible, and no later than 40 working days after the complainant has requested the review.
44. The Commissioner finds the public authority in breach of regulation 11(4) for failing to complete its internal review within 40 working days.

Right of appeal

45. 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

46. 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.
47. 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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